CHAPTER 8

DO CONTRACT RIGHTS VEST?

I. ROBERT FEINBERG *

Basic in our common law is the principle that when an agreement expressly provides that it is to continue for a particular period of time, the agreement remains in force and terminates in accordance with its terms.[1] Putting aside for discussion elsewhere the basis of the enforceability of collective bargaining agreements, and disregarding the problems raised by the "usage" and "agency" theories, collective bargaining agreements are no longer interpreted with hesitancy, but are accorded the same treatment with regard to enforcement as ordinary contracts.[2] Perhaps one of the most significant aspects of the adoption of Section 301 (a) of the Labor-Management Relations Act of 1947 is the recognition that collective bargaining agreements are bilateral contracts enforceable by both parties.[3] Moreover, in the construction and interpretation of collective bargaining agreements, the courts generally apply the same rules and canons of construction as in the case of other contracts.[4]

As in the case of other contracts, the rights and duties under a collective bargaining agreement have traditionally been said to continue in effect only as long as the agreement remains in force.[5]

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1 17 C. J. S. Contracts, par. 385.

2 Williston, A Treatise on the Law of Contracts (Third Ed., 1959), vol. 2, par. 308A and cases cited.

3 The Labor Management Relations Act, Sec. 301 (a), 29 U.S.C. par. 185 (a) provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

4 Williston, *opus cit.* ft. 2 supra, vol 2, par. 309A.

5 56 C. J. S. Master and Servant, par. 28 (41).

Thus, it has been stated:

> . . . the authorities are uniform to the effect that collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract beyond its life, when it has been terminated in accordance with its provisions.[6]

Even where an employer observes the conditions of employment provided in an agreement with a labor union after expiration of the agreement, as a matter of practice and not of agreement, there is no implied contract to continue observing such conditions.[7]

Until quite recently, it was believed that the law concerning the term or duration of rights created and arising under collective bargaining agreements was controlled by the language quoted above. The question of whether any of the provisions of a collective bargaining agreement survives the termination of the agreement, notwithstanding the principles enunciated in the *System* and *Elder* cases,[8] and if so, the nature of those provisions which do survive, has been forcibly raised by the decision of the United States Court of Appeals, Second Circuit, on March 28, 1961, in the case of *Zdanok* v. *Glidden Company*.[9] It was held in that case that employees in a plant which had been moved to another city were entitled to exercise seniority rights at the new plant under the collective bargaining agreement which covered the old plant, notwithstanding the termination of the agreement. That decision appears to be the latest expression of judicial opinion on the subject, at least in so far as seniority rights are concerned, notwithstanding the subsequent decision of the United States Court of Appeals, Sixth Circuit, in the case of *Oddie* v. *Ross Gear & Tool Co., Inc.*[10] since the latter case is distinguishable on the facts, or at least the facts as the court interpreted them.

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6 *Elder* v. *New York Cent. R. Co.*, 152 F. 2d 361, 364, 17 LRRM 631. To the same effect is *System Federation No. 59, etc.* v. *Louisiana and A. Ry. Co.*, 119 F. 2d 509, 8 LRRM 1038, cert. denied, 314 U.S. 656, 9 LRRM 417.

7 *Procter & Gamble Ind. Union* v. *Procter & Gamble Mfg. Co.*, 51 LRRM 2752, (U.S. Court of Appeals, Second Circuit, Dec. 10, 1962); *Pattersen Parchment Paper Co.* v. *Int'l Brotherhood of Paper Makers*, 191 F. 2d 252, 28 LRRM 2418, cert. denied, 342 U.S. 933, pet. for rehearing denied, 342 U.S. 956, 29 LRRM 2408; 56 C. J. S. Master and Servant, par. 28 (41).

8 *Supra*, ft. 6.

9 288 F. 2d 99, 47 LRRM 2865, aff'd on other gnds, 370 U.S. 530, 50 LRRM 2693.

10 305 F. 2d 143, 50 LRRM 2763.

More will be said below concerning the *Glidden* case and the problem of the survival of seniority rights. It is clear from it, however, that the fact that an agreement has expired does not necessarily divest a party or a beneficiary thereof of rights which would not exist but for the agreement. It is now said that rights which have "accrued" during the term of an agreement continue enforceable after the expiration of the agreement and for the period of any applicable statute of limitations. Such rights which continue are generally referred to as "vested" rights, although the term "vested" is misleading. They might more properly be referred to as "earned" rights, the theory of survival being based upon the claim that the required consideration having been paid, the payor is entitled to his *quid pro quo*. The purpose of this paper is to examine those situations in which it has been held that certain rights created under a collective bargaining agreement "vest," or "survive" the expiration of the agreement, and to ascertain whether any general conclusions may be drawn as to the nature of those rights.

Vacation Pay

Perhaps the first, and certainly one of the cases most often cited for the proposition that certain rights created under a collective bargaining agreement survive the expiration of the agreement, is that of *In re Wil-Low Cafeterias, Inc.*, decided by the United States Court of Appeals in New York in 1940.[11] In the *Wil-Low* case the court allowed claims for vacation pay as an expense of administration against the estate of an employer in bankruptcy. The employer, which had been operating a chain of cafeterias, went out of business on June 7, 1938. The collective bargaining agreement under which the employer, and the subsequent trustee in bankruptcy, operated provided for paid vacations for employees who had concluded certain periods of employment during the months of June, July, August and September. In allowing the claims, the court stated:

> A vacation with pay is in effect additional wages. It involves a reasonable arrangement to secure the well being of employees and the continuance of harmonious relations between employer and employee. The consideration for the contract to pay

[11] 111 F. 2d 429, 6 LRRM 709.

> for a week's vacation had been furnished, that is to say, one year's service had been rendered prior to June 1, so that the week's vacation with pay was completely earned and only the time of receiving it was postponed. If the employer had discharged the employee wrongfully after the latter had done the work necessary to earn a vacation he could not be deprived of the benefits due him . . . It can make no difference whether the discharge is due, as here, to a cessation of business by the employer, or was wrongful. In either event an amount earned would be a valid expense of administration.

The *Wil-Low* case was followed by the case of *In re Public Ledger, Inc.,* decided by the federal Court of Appeals, Third Circuit, in 1947.[12] In that case a claim for vacation pay was also allowed as an expense of administration against a trustee in bankruptcy. The contract between the parties provided that during the year 1942 employees were to be granted vacations with pay based upon their service during the preceding calendar year. The business was shut down on January 5, 1942, and all employment was discontinued before the employees had the opportunity of taking their vacations. Citing the *Wil-Low* case, the court held that the vacation pay was, in effect, additional wages. The principles established in the *Wil-Low* and *Public Ledger* cases to the effect that vacation pay constitutes additional wages, earned during the period of employment, has generally been followed by courts and arbitrators, notwithstanding an occasional opinion denying vacation pay on such grounds as that its purpose is to give rest and relaxation to employees and that it, therefore, is to be granted only if employment continues.[13]

The concept of vacation pay as additional wages does not, however, solve all of the problems of "vesting." Thus, for instance, in the absence of a clause in the collective bargaining agreement providing for *pro rata* vacation pay employees do not receive any *pro rata* vacation pay, that is, they receive no vacation pay until they have completed the full requisite period of service.

In addition, many agreements provide that vacation pay is to be paid only to employees who are on the payroll on a specific date, which frequently is the beginning of the vacation period,

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12 161 F. 2d 762, 20 LRRM 2012.

13 See, for instance, *Bondio* v. *Joseph Binder,* 24 So. 2d 398. See also *Reid & Yeomans, Inc.* v. *Drugstore Employees Union,* 29 N. Y. Supp. 2d 835, 8 LRRM 1154, 11 LRRM 660.

although it may be some other date. Under the concept of vacation pay as additional wages, are those conditions to be disregarded if the agreement has terminated? Also, are any special rules to be applied if the contract terminates because the employer has gone out of business, as distinguished from a failure to renew the contract?

Again, are any different rules to be applied in cases of voluntary separation of employment, such as where the employee has quit, or in cases of discharge for cause, as distinguished from cases of layoffs? If vacation pay is truly additional wages, no distinction should be made among these different kinds of situations. In the *Wil-Low* and *Public Ledger* cases the employees had fully qualified for the vacation pay under the terms of the agreements, that is, they had fulfilled the requisite periods of service and the dates of eligibility or payment had arrived and passed.

Were an employee whose services have been terminated to bring an action for vacation pay even though he has not fully qualified by serving the requisite period of time, it is unlikely he would recover on a *quantum meruit* basis for the portion of the qualifying period which he has worked.[14] In cases of termination of collective bargaining agreements due to plant closings, however, the plant is frequently shut down and the employees' services terminated prior to the date set forth in the collective bargaining agreement as the eligibility or qualifying date.

In the case of *Textile Workers Union of America* v. *Paris Fabric Mills, Inc.*,[15] an action was brought by a union to recover vacation pay allegedly due employees under the terms of an agreement which expired by its terms on April 30, 1951. The agreement provided that vacations would be granted between June 15 and September 15 of the year, and that if an employee quit or was discharged before June 1 he would receive no vacation pay. The employees had gone out on strike, however, on April 30,

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[14] See, for instance, *Division of Labor Law Enforcement* v. *Mayfair Markets*, 102 Cal. App. 2d Supp. 943, 227 P. 2d 463, 27 LRRM 2351. Cf. *Division of Labor Law Enforcement* v. *Ryan Aeronautical Co.*, 106 Cal. App. 2d Supp. 833, 236 P. 2d 236, 29 LRRM 2027, where an employee who had served only five days less than the requisite period before he was laid off was held to have "substantially" complied with the requirement.

[15] 18 N. J. Super. 421, 87 Atl. 2d 458, 30 LRRM 2666, aff'd 22 N. J. Super. 381, 92 Atl. 2d 40, 31 LRRM 2166.

1951, when the agreement expired. While the strike was in progress, the company commenced moving its operations and no further contract was entered into, nor did the striking employees ever return to work.

The lower court had granted vacation pay to all of the employees, notwithstanding the expiration of the contract on April 30, 1951, holding that the vacation pay was payable for work performed prior to April 30, 1951, and that the agreement merely deferred the time for payment to a date subsequent to its own expiration. In justification of this position, it also held that the employment relationship between the parties was not terminated by the strike.

In affirming the decision, the Appellate Division of the Superior Court of New Jersey recognized that a contract may impose conditions which must be met before the employee becomes entitled to vacation pay, even though it may be earned. It held, however, that the vacation benefits earned while the contract was in effect were not conditioned on the existence of the contract on June 1, 1951. Apparently, the higher court also did not consider that the employment relationship had been terminated by the strike and the moving.

Another interesting case is that of *Botany Mills, Inc.* v. *Textile Workers Union of America*[16] which enforced an arbitration award[17] issued by David L. Cole. In that case, the collective bargaining agreement was terminated by the company on March 15, 1956; operations had been completely discontinued by December 31, 1955. Vacations were not due to be given until the April 15-September 15, 1956 period with each employee's eligibility to be determined as of April 15. The agreement granted vacation pay to "each employee in the employ of the Employer on each April 15th hereafter during the life of this agreement" in accordance with certain service requirements. The arbitrator held that since an employee did not lose his seniority until he had been laid off for two years or more, the laid-off employees continued to be employees, and awarded them vacation pay. In support of his decision, however, he referred to the fact that the company had

[16] 50 N. J. Super. 18, 141 Atl. 2d 107, 30 LA 479.
[17] *Botany Mills, Inc.*, 27 LA 1.

previously paid laid-off employees vacation pay. The court, in passing on the award, stated:

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

Where a plant has been shut down or the employer has gone out of business and the collective bargaining agreement has been terminated, courts, as well as arbitrators, tend to grant vacation pay on a *pro rata* basis for the period during which the employees have served notwithstanding the fact that they may not have met the contract requirement that they be in the employer's employ on a specific date.[18] In some of these cases arbitrators have, as in the *Botany Mills* case, rationalized the result by holding that the employees were merely "laid off" and retained their rights as employees,[19] or have interpreted the eligibility date merely as a "calculation date." [20] One of the most interesting cases is that by the present Secretary of Labor involving the newspaper *Brooklyn Eagle*,[21] wherein W. Willard Wirtz, after reviewing the law and cases on the subject, determined that the parties had recognized in their agreement the principle that an employee's vacation benefits were considered as deferred payments for services rendered. Other courts and arbitrators have, however, denied vacation pay where employees were not in the actual employ of the employer on the required date and, therefore, did not meet the condition precedent.[22]

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18 *Leon* v. *Detroit Harvester Co.*, 363 Mich. 366, 109 N. W. 2d 804, 48 LRRM 2883; *Textile Workers Union* v. *Brookside Mills, Inc.*, 326 S.W. 2d 671, 46 LRRM 2753; *Livestock Foods, Inc.* v. *Local Union of C.I.O.*, 73 So. 2d 128, 34 LRRM 2433; U.S. v. *Munro-Van Helms Co.*, 243 F. 2d 10, 39 LRRM 2598; *In re Brooklyn Citizen*, 90 N. Y. Supp. 2d 99, 23 LRRM 2429; *Kleen-Fibre Corp.*, 21 LA 234; *Tobe Deutschmann Corp.*, 35 LA 179; *Border Queen, Inc.*, 35 LA 560; *Brookford Mills*, 28 LA 838; *Monument Mills, Inc.*, 29 LA 400; *Rheem Mfg. Co.*, 29 LA 173.

19 *Border Queen, Inc.*, 35 LA 560; *Monument Mills, Inc.*, 29 LA 400.

20 *Tobe Deutschmann Corp.*, 35 LA 179.

21 *Brooklyn Eagle, Inc.*, 32 LA 156.

22 *Treloar* v. *Steggeman*, 333 Mich. 166, 52 N.W. 2d 647, 29 LRRM 2696; *Reid & Yeomans, Inc.* v. *Drugstore Employees Union*, 29 N.Y. Supp. 2d 835, 8 LRRM 1154; *Division of Labor Enforcement* v. *Standard Coil Products Co.*, 136 Cal. App. 2d

The lack of total endorsement of the theory of additional wages as applied to vacation pay is further evident from the fact that some cases have decided the question of whether vacation pay is due to terminated employees on the basis of the reasons for the termination. Were vacation pay actually additional wages, it would be due in all instances to employees who have been discharged or laid off, regardless of the reason, and on a *pro rata* basis. It has, however, been denied to employees who have been discharged or who have quit [23] even though the employees have qualified for the vacation pay.[24]

On the other hand employees who have been laid off, as distinguished from being discharged or having quit, have been granted vacation pay even though they have not met the condition precedent.[25] Some courts and arbitrators have, however, granted vacation pay to employees who have quit where the vacation pay has been fully earned [26] or where the employee has been discharged after it has been fully earned.[27]

Although vacation pay is said to be additional wages, various factors operating as conditions precedent, express or implied, are thus sometimes held to defeat the payment of such wages. Parenthetically, the concept of vacation pay as additional wages, which is now widely accepted, would seem to require a reconsideration by the parties to a collective bargaining agreement of the value of conditions precedent which they may presently believe have significance, or the value of *pro rata* clauses such as have been used in times past. Nevertheless, it is certain that vacation pay is a right which more often than otherwise survives the expiration of the agreement and "vests" in the employee as he goes about his chores from day to day.

Supp. 919, 288 P. 2d 637; *International Union, U.A.W.* v. *L. T. Pattersen Co.*, 159 N.E. 2d 923, aff'd 159 N.E. 2d 917; *Givhan* v. *Federated Metals Division American S. & R. Co.*, 364 Mich 370, 110 N.W. 2d 763, 48 LRRM 3046; *Southern Chemical Cotton Co.*, 30 LA 406; *Cramet, Inc.*, 30 LA 970.

[23] *Bondio* v. *Joseph Binder*, 24 So. 2d 398.

[24] See also *Edelstein* v. *Duluth M. & I.R.R. Co.*, 225 Minn. 508, 31 N.W. 2d 465, 21 LRRM 2533; *Baugh and Sons Co.*, 23 LA 177.

[25] *G. F. Zeller's Sons, Inc.*, 21 LA 515; see also cases cited in ft. 18.

[26] *Tynan* v. *K.S.T.P. Inc.*, 247 Minn. 168, 77 N.W. 2d 200, 38 LRRM 2147.

[27] *Textile Workers Union* v. *Brookside Mills, Inc.*, 326 S.W. 2d 671, 46 LRRM 2753.

Severance Pay

Severance pay or dismissal pay, as it is sometimes called, is usually associated with the termination of the employment relationship for reasons primarily beyond the control of the employee. Its purpose is to assure the employee whose employment is terminated funds to depend upon while he seeks another job. It is also occasionally said to be intended to indemnify the employee for the final loss of his job.[28] The collective bargaining agreement may also provide for severance pay upon resignation, or upon termination of the employment relationship because of illness or other reasons.

Severance pay is similar to vacation pay only in that it constitutes a lump sum payment, the amount of which is generally based upon the length of service of the employee. However, it is payable only upon termination of the employment relationship and payable only once. Also, unlike vacation pay, whether any employee will be entitled to severance pay is usually not determinable in advance; the termination must occur under the circumstances described in the agreement.

Many cases have recognized a distinction between severance pay and vacation pay. In the case of *Ackerson* v. *Western Union Telegraph Co.*[29] the court questioned whether severance pay actually represented payment for services rendered in the past. It stated:

> It is doubtful if that reasoning is sound. If the employe had been discharged for cause, or had voluntarily resigned, or had died before separation, she would have received nothing. If as the appeal tribunal holds, she had earned this money and it had simply been held back, it is difficult to see how she would lose the right to collect it in case either of the above-mentioned events occurred. Then, too, if she had elected to avail herself of one of the other options mentioned in the contract, she would have received no severance pay. If it had been earned as past wages, it should have been payable in any event. Severance pay was not computed on the basis of the earnings of the employe over her years of service, or a percentage thereof, but was based on the rate of pay prevailing at the time of her separation, with regard to the fact that over the years her rate of pay may have changed from

[28] U. S. Dept. of Labor Bull. No. 686, Union Agreement Provisions, p. 71.

[29] 234 Minn. 271, 48 N.W. 2d 388, 25 A.L.R. 2d 1063, 28 LRRM 89.

> time to time. The contract for severance pay was entered into long after the employe's services began, so it cannot be said that upon the commencement of her employment she began to establish a credit or fund by the withholding of part of her earnings, which was to be paid to her upon separation. . . .

The court went on to state that severance pay is intended not only to ease the employee's burden in looking for a new job but fulfills other functions:

> . . . It is undoubtedly true that one of the objectives of dismissal or severance pay, such as we have to deal with here, is to ease the employe's financial burden while looking for a new job. However, there are other objectives which we must also keep in mind in considering the nature of such payment. Partial compensation for loss of seniority rights; loss of possible pension rights; compensation for retraining or acquiring new skills; and many others could be mentioned. . . .

Likewise, in the case of *In re Port Publishing Co.*,[30] a distinction was drawn between the bases for vacation pay and severance pay. The case involved the question of whether both vacation pay and severance pay constituted a lien on the assets of an employer under a statute which created such a lien in the case of wages earned during the two months next preceding the institution of insolvency proceedings. The court stated:

> It was the intent of the Legislature to create a lien on the assets of an employer in favor of his employees who come within the purview of the statute, for the amount of all wages earned during the two months next preceding the date of the institution of insolvency proceedings. . . . And these petitioners earned one-sixth of their vacation pay during such period. This view is in accord with the interpretation given to priority payments for wages under our Bankruptcy Act, 11 USCA Sec. 104, sub a (2); . . .
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> On the other hand, "severance" pay is in the nature of liquidated damages which was agreed upon in advance, as compensation for any loss that might be sustained by the employees of the Port Publishing Company 'in the event of the consolidation or suspension' of the corporation, and not for wages earned. . . .

It is interesting to note that in the *Port Publishing* case the court stated that severance pay constituted, in effect, liquidated damages for the loss of work. The "liquidated damage" theory was

[30] 231 N. C. 395, 57 S.E. 2d 366, 14 A.L.R. 2d 842.

applied by the New York Supreme Court in the case of *Wanhope* v. *Press Co., Inc.*[31] in which the court denied vacation pay to employees who had been dismissed, on the theory that their severance pay constituted "the liquidated damage for the dismissal." On the other hand, other cases draw no distinction between vacation pay and severance pay. In *Botany Mills, Inc.* v. *Textile Workers Union*,[32] discussed above, although it was not germane to the case the court referred to severance pay in the same context as vacation pay, stating:

> . . . Vacation pay, as well as severance pay, has often been said to be in the nature of deferred compensation, in lieu of wages, earned in part each week the employee works, and payable at some later time. . . . In the case of vacation pay, that future date is usually fixed; with severance pay it is dependent on termination of employment. In this sense such benefits "accrue" during the work year, not merely on the date when they become payable. Thus understood, the rights to vacation pay substantially accrued during the life of the agreement.

Also in the *Public Ledger* case[33] the court reached the same conclusion.

The question with which we are concerned, however, is whether the right to severance pay survives the agreement so that it may be enforced by employees whose status as employees terminate after the expiration of the collective bargaining agreement. A recent case in New Jersey holds quite squarely that the right to severance pay does survive, and may be enforced by employees discharged after the expiration of the agreement. In *Owens* v. *Press Publishing Co.*[34] discharged employees brought suit against an employer to recover severance pay allegedly due under an expired collective bargaining contract. The court held that the severance pay was not conditioned upon the employees' discharge from service within the term of the collective bargaining agreement, although the discharged employees were held not entitled to severance pay for the period intervening between the termination of the collective bargaining agreement and their discharge from

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31 256 A.D. 433, 10 N.Y. Supp. 2d 797, 4 LRRM 821, aff'd 281 N.Y. 607, 4 LRRM 919.
32 50 N. J. Super. 18, 141 Atl. 2d 107, 30 LA 479.
33 Supra. ft. 12. In the *Public Ledger* case, however, the court treated pay in lieu of notice of dismissal as severance pay. See also *Gayner* v. *The New Orleans,* 54 F. Supp. 25.
34 20 N.J. 537, 120 Atl. 442, 36 LRRM 2198, 37 LRRM 2444.

service. The employer argued that the right to severance pay was subject to the happening of an uncertain event, namely, the dismissal of employees without cause, and that this right had not vested when the agreement expired since the employees might die while in the employer's employ, or might resign, or might be discharged for gross misconduct, in which event severance pay would not be payable. The court, however, stated:

> But severance pay has an attribute and purpose that render these considerations inapposite. Considered in the context of the contractual scheme, the relation of the parties, and the object in view, the severance pay here provided for was in essence a form of compensation for the termination of the employment relation for reasons other than the displaced employee's gross misconduct, primarily to alleviate the consequent need for economic readjustment, but also to recompense him for certain losses attributable to the dismissal. It has been said that while one of the objectives of dismissal or severance pay "is to ease the employee's financial burden while looking for a new job," such pay is also "partial compensation for loss of seniority rights; loss of possible pension rights; compensation for retraining or acquiring new skills; and many others * * * ." . . . The reasons may vary in particular cases, but the principle is the same. Severance pay is terminal compensation measured by the service given during the subsistence of the contract, in this case the collective bargaining agreement, payable on discharge from the employment not induced by misconduct, according to the prescribed formula, a means of recompense for the economic exigencies and privations and detriments resulting from the permanent separation of the employee from service for no fault of his own. In a real sense it is remuneration for the service rendered during the period covered by the agreement. . . . It is not unemployment compensation, which has reference merely to the period of unemployment and the actual wage loss. . . .
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> Of course, the right to such pay can 'arise' only during the subsistence of the contract so providing, and not after its termination; but once the right thus comes into being it will survive the termination of the agreement. Discharge from service during the term of the contract is not a condition *sine qua non* to the enforcement of the accrued right.

Secretary Wirtz in his *Brooklyn Eagle* arbitration award[35] reached the same conclusion, that is, that employees who were discharged subsequent to the expiration of a collective bargaining

[35] 32 LA 156.

agreement were entitled to receive severance pay. Mr. Wirtz stated:

> What was agreed here was that by each six months of continuous service each covered employee built up an equity which would be his to use if he was dismissed by the Publisher (except in the specific instances enumerated in the first paragraph of the section). The services the employee performed during the cumulative six month periods were his part of the bargain. The Publisher's reciprocal commitment was to make the stipulated payments in the event of dismissal. The employee claimants in the present case had fulfilled completely their part of this bargain. To hold that the termination of the contract period terminated the Publisher's obligation to make this agreed upon deferred payment for services already rendered would be to deny a payment which had been fully earned, and to let one party escape liability where the other party had fully performed his reciprocal obligation.

Mr. Wirtz cited the *Owens* case, the *Public Ledger* case and several other cases, and concluded:

> So far as can be determined, the developing case law is virtually uniform in its recognition of payment rights arising under a collective bargaining agreement and measured by service already performed as being enforcible even where the event upon which their enforceability depends occurs after the termination of the agreement. Potoker and other cases involving the continuing vitality of the collective bargaining arbitration clauses suggest an even broader, or perhaps an additional area of applicability of this same concept. This is at least in part a reflection of what is involved in the New Jersey Appellate Court's reference in Botany Mills to the fact that "While collective bargaining agreements are normally made for fixed periods of time, they generally contemplate renewals and a subsisting contractual relationship between the employer and the union of indefinite duration." (50 N.J. Super, at p. 29.)

Curiously, in a case arising out of the same situation involved in the *Brooklyn Eagle* award, in which another union requested severance pay for its members, a board of arbitration had previously denied severance pay, although it granted accrued vacation pay to the terminated employees.[36]

Claims for severance pay are enforceable in bankruptcy, or in the courts, as wage claims, or as an administration expense chargeable against the trustees in bankruptcy upon the liquidation of

[36] *Brooklyn Eagle, Inc.*, 26 LA 111.

the business.[37] Severance pay may also be chargeable against an employer who closes down his operation.

On the other hand, the theory of the vacation pay cases, to the effect that vacation pay constitutes additional wages earned by the employee during each and every day of their service, does not equally rationally apply. The right to severance pay springs to life upon the termination of the employment for certain reasons, and does not previously exist, as in the case of vacation pay. It is not payable for all terminations of employment under a contract, but only in a minority of cases. It is subject to many contingencies, which are truly conditions precedent, and not conditions subsequent as has been often said. Whether, therefore, it is the kind of right which may be said to "vest" during the life of the agreement may be questioned. It is difficult to perceive how a right may "vest" which does not exist at the time of "vesting."

The payment of severance pay may, of course, have been required by the equities of many of the situations cited above, including the *Brooklyn Eagle* case. This is not to say, however, that the answer in such cases is completely controlled by the earned rights theory. However, the developing law seems to include within the rights which do survive the right to severance pay, or at least tend in that direction.

Retirement Benefits

The growing pressure felt by organized labor for promoting the economic security of employees has led, in recent years, to the widespread adoption of pension plans under which older or disabled employees receive financial benefits after the termination of their periods of employment. While originally a pension plan unilaterally adopted by an employer was considered a mere gratuity and unenforceable by the employees,[38] where a pension plan is reached as a result of collective bargaining and is embodied in a collective bargaining agreement it is contractual in nature and enforceable according to its terms.[39]

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[37] See *In re Public Ledger, supra,* ft. 12; *McCloskey* v. *Division of Labor Law Enforcement,* 200 F. 2d 402, 31 LRRM 2191; *In re Men's Clothing Code Authority,* 71 F. Supp. 469; *In re Elliott Wholesale Grocery Co.,* 98 F. Supp. 1017, 28 LRRM 2414; *In re Wil-Low Cafeterias, Inc.,* 71 F. Supp. 685, 4 LRRM 798.

[38] See cases cited 42 A.L.R. 2d 461, 464-467.

[39] *Vallejo* v. *American Railroad Company of Puerto Rico,* 188 F. 2d 513, 28 LRRM 2030; *A.F.L.* v. *Western Union Tel. Co.,* 179 F. 2d 535, 25 LRRM 2327.

The customary pension plan provides for contributions by the employer during the employment of the employees covered by the plan toward the creation of a fund which permits the retirement benefits to be paid to the employees after they have qualified. The better pension funds are created on an actuarially sound basis, so that the contributions made by the employer are sufficient, when properly invested, to permit payment of the retirement benefits after retirement and discontinuance of employment. Modern pension plans today generally provide for vesting of benefits when the employee has fully qualified, that is, when he has served a designated number of years and has reached a certain age. It is then immaterial that employment is subsequently discontinued.

Retirement benefit plans present a clear case in which the employee may be said to have earned the benefits of the agreement during the period of employment prior to qualifying for retirement. The fact that the collective bargaining agreement terminates, or that the employee discontinues his employment, should not and properly does not deprive him of his right to the retirement benefit. In fact, the entire concept of retirement benefits embraces the expectation that the employee, having met the conditions required and performed the necessary services, will receive the benefits during the remainder of his natural life.

In the leading case of *Vallejo* v. *American Railroad Company of Puerto Rico*,[40] it was held by the United States Court of Appeals, First Circuit, that claims for pensions for employees who had qualified were allowable against a company in bankruptcy. The court stated that "the company could not on its own accord or by its unilateral act deprive an employee, qualifying as to age and service, of his pension," and that the employees "did everything they could to qualify for the plan. It merely remained for the company to pay for their pensions." The court held that employees qualifying as to age and service could not thereafter be deprived of pensions, and that the resignation or discharge of employees whose pension rights had matured did not deprive the employees of such pensions.

Similarly, in the case of *New York City Omnibus Corporation* v. *Quill*[41] the court affirmed an arbitration award which held that

[40] 188 F. 2d 513, 28 LRRM 2030.
[41] 73 N.Y. Supp. 2d 289, 20 LRRM 2532.

an employer was obligated to provide pension payments for life for all employees becoming entitled thereto during the contract period, and not merely payments to eligible employees during the period of the contract, notwithstanding the expiration of the contract.

The qualifying requirements are strictly construed, unlike the case of vacation pay. Employees who have not completed the requisite years of service and who have lost their employment before thus qualifying are not entitled to pension benefits.[42] The same is true even though loss of employment is due to the fact that the employer has closed its plant.[43]

Arbitrators too have held that employees qualifying during the period of employment and during the duration of the collective bargaining agreement are entitled to retirement pay, although employees who have not qualified during their period of employment are not so entitled.[44] At least one arbitrator has held, however, that employees obtain a vested right in the amount of money paid into the fund.[45]

Also unlike vacation pay, there is no apportionment or gradual accrual of pension benefits. Either the employee has qualified, and has thus obtained vested rights or he has not. Thus, in the case of *Local Lodge 2040* v. *Servel, Inc.*,[46] employees discharged prior to their reaching their 65th birthday were held not entitled to any *pro rata* pension benefits where the agreement made no provision for the accrual or *pro rating* of those benefits.[47]

Seniority

The issue of whether seniority rights survive the expiration of the collective bargaining agreement has assumed importance because of the decision in *Zdanok* v. *Glidden Company*[48] and any contemporary discussion of the subject must commence with that decision. Since 1949, the Glidden Company and Local 852 of

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42 *Wallace* v. *Northern Ohio Traction & Light Co.*, 57 Ohio App. 203, 13 N.E. 2d 139.
43 *Schneider* v. *McKesson & Robbins*, 254 F. 2d 827, 42 LRRM 2316; see cases cited in *Karcz* v. *Luther Mfg. Co.*, 155 N.E. 2d 441, 43 LRRM 2609.
44 *Alexander Smith, Inc.*, 24 LA 165; *Alpha Portland Cement Co.*, 62-3 ARB par. 9027.
45 *John B. Stetson*, 28 LA 514.
46 268 F. 2d 692, 44 LRRM 2340.
47 The court here held the same way with regard to holiday and vacation pay.
48 288 F. 2d 99, 47 LRRM 2865, aff'd on other gnds. 370 U.S. 530, 48 LRRM 3111.

the Teamsters Union had negotiated successive two year collective bargaining agreements, the last agreement running from December 1, 1955 to November 30, 1957. Since 1949 the company had operated a plant at Elmhurst, New York, known as its Durkee Famous Foods Division. Each agreement, including the last, contained a provision establishing seniority and provided that in case of a curtailment of production employees were to be laid off in the reverse order of seniority. If, at the time he was laid off, an employee had had five or more years of continuous employment, his seniority entitled him to be reemployed if an opening for reemployment for one having his seniority occurred within three years after his lay off; if he had less than five years of employment before his lay off, he was entitled to similar reemployment only within two years after his lay off.

The Glidden Company leased a new plant in Bethlehem, Pennsylvania, on May 6, 1957, and on May 16, 1957, notified its employees at Elmhurst that operations would be discontinued at that location in several months. On September 16, 1957, it gave written notice to the union that it would terminate the collective bargaining contract on its expiration date, November 30, 1957. After September 16, 1957, it began to reduce production at Elmhurst and to move its machinery and equipment from Elmhurst to Bethlehem. The company did not offer its employees at Elmhurst employment at the Bethlehem plant, with retention of seniority rights acquired at Elmhurst, but offered to receive applications at the Bethlehem plant from former Elmhurst employees and to give Elmhurst applicants consideration along with other applicants.

The plaintiffs in the case were five former employees of the Elmhurst plant who had been laid off. The employment of four of them had been terminated on November 1, 1957, and that of the fifth on November 18, 1957. The five employees commenced an action in 1958 in the Supreme Court of the State of New York for damages for breach of their seniority rights under the agreement. The union was not a party to the case. The case was removed to the federal court by the company on the basis of diversity of citizenship. The employees, all of whom had more than five years of service at the time of their lay off, claimed that their individual recall rights survived the termination of the collective

bargaining agreement. The company contended that the benefits of the collective bargaining agreement applied only to the plant at Elmhurst and that, upon cessation of operations and lawful termination of the agreement, the seniority rights of the plaintiffs to employment at Elmhurst ceased to exist.

The federal District Court held that the "parties' bargain and understanding was limited to seniority rights at the Elmhurst plant" and that "no policy of New York law or our national labor law requires the employer to preserve for its employees seniority status acquired under an expired agreement covering a closed plant." [49] The language of the agreement, upon which the District Court relied, provided that the agreement was made by the company "for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York."

The federal Court of Appeals, Second Circuit, on March 28, 1961, reversed, however, holding not only that did seniority rights survive the termination of the agreement but that those rights should be applied to the new plant at Bethlehem. The Court of Appeals drew an analogy between retirement pay, unemployment insurance, and severance pay, and stated:

> At the time the Elmhurst employees were discharged, those who had reached the age of 65 had otherwise satisfied the conditions prescribed in the collective bargaining agreement for receiving retired pay, were placed on the defendant's retired list and have been and are currently receiving their retired pay. Similarly, those who had reached the age of 55, or who had become permanently disabled in the service of the defendant, and had had 15 years of employment with the defendant, are receiving their retired pay. Those who had 15 years of service and had reached the age of 45 at the time of their discharge were advised by the defendant that they had vested rights to retirement benefits and would begin to receive payments when they reached the age of 65.
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> These rights to retired pay, though their realization will extend far into the future, and though they arise solely and only out of the terms of the union agreement with the defendant, have been treated as "vested" rights and are being voluntarily honored by the defendant. This was, we suppose, because the employees had earned these rights by compliance with the terms of the contract, and the fact that the contract was not renewed, and that other workmen in the future might not have the opportunity to earn

[49] 185 F. Supp. 441, 46 LRRM 2584.

> similar rights, was irrelevant. We think the plaintiff employees had, by the same token, "earned" their valuable unemployment insurance, and that their rights in it were "vested" and could not be unilaterally annulled.
>
> We think, then, that if the plaintiff had continued to operate the Elmhurst plant, without a renewal of the union contract, or had reopened it after it had been closed for a time, the employees would have been entitled to reemployment, with seniority.

With regard to the language of the contract restricting its application to the Elmhurst plant, the court stated that such language "was nothing more than a reference to the then existing situation, and had none of the vital significance which the defendant would attach to it." It argued that otherwise the "reasonable expectations of the parties are sacrificed to sheer verbalism." It concluded:

> We can see no expense or embarrassment to the defendant which would have resulted from its adopting the more rational, not to say humane, construction of its contract. The plaintiffs were, so far as appears, competent and satisfactory employees. They had long since completed the period of probation prescribed in the union contract. It would seem that they would have been at least as useful employees as newly hired applicants. The defendant's Bethlehem plant was a new plant. There could not have been an existing union representative or a collective bargaining agreement there, at the time the plant was opened.
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> In the circumstances, no detriment to the defendant would have resulted from a recognition by the defendant of rights in its employees corresponding with their reasonable expectations. In that situation, a construction of the contract which would disappoint those expectations would be irrational and destructive.

The decision was by a divided court, Chief Judge Lumbard dissenting. Certiorari was granted by the United States Supreme Court and the decision affirmed, but on an unrelated issue.

A few months later, on July 5, 1961, the United States District Court for the Eastern District of Michigan reached a similar result in a similar case.[50] The court held that the contract was applicable to the new location, citing the holding of the United States Court of Appeals in the *Glidden* case in support of its decision.

This decision was, however, reversed by the United States

[50] *Oddie* v. *Ross Gear & Tool Co., Inc.*, 195 F. Supp. 826, 48 LRRM 2586.

Court of Appeals, Sixth Circuit, on July 16, 1962,[51] and certiorari was denied by the United States Supreme Court on December 17, 1962. The basis of the decision was that the agreement covered only the plant which was in existence at the time the contract was executed and in the area described in the agreement, and did not apply to the new plant. However, although not necessary to the decision, the court commented upon the theory that seniority rights survive, and used language which indicated a divergence of opinion from the *Glidden* case:

> Nor do we think there is merit in the contention that plaintiffs' seniority rights at the Detroit plant are 'vested' rights, which cannot be cut off or defeated by the relocation of the plant in Tennessee. The argument is based upon the theory that through years of employment at the Gemmer plant they have 'earned' such seniority rights in accordance with the terms of the agreement, which cannot be cancelled or taken from them by unilateral action on the part of the defendant, at least during the life of the bargaining agreement. Whether such rights continue in existence beyond the end of the current bargaining agreement is another question, which we are not now considering. Clearly, the word 'vested' is not the correct word to describe these rights, in that there are a number of ways in which such rights may be terminated or lost. Section 31 of the bargaining agreement provides for loss of seniority rights for any one of nine separate reasons, including quitting work or being discharged and not being reinstated through the grievance procedure. If an employee should die, his 'earned' seniority rights become worthless and are not enforceable rights against the employer. If the company discontinues in business and terminated its operations, the employees' seniority rights are terminated. *Local Lodge, 2040, etc.* v. *Servel, Inc.*, 268 F. 2d 692, 697-699, C.A. 7th. It appears to be well settled that such rights of the individual employees can be bargained away by the Union representing them in collective bargaining. *Elder* v. *N.Y. Central R. Co.*, 152 F. 2d 361, C.A. 6th; *System Federation No. 59, etc.* v. *Louisiana & A. Ry. Co.*, 119 F. 2d 509, 515, C.A. 5th. It was so recognized in *Zdanok* v. *Glidden Co.*, supra, 288 F. 2d 99, 103, C.A. 2nd.

It is interesting to note that the Illinois Circuit Court, which had previously followed [52] the decision in the *Oddie* v. *Ross Gear* case in the lower court and the *Glidden Company* decision in the

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[51] 305 F. 2d 143, 50 LRRM 2763.

[52] *Bradley* v. *Sangamo Electric Co.*, 50 LRRM 2828.

higher court, on October 1, 1962, after the reversal of the *Oddie* case, reversed itself.[53]

Prior to the *Glidden* decision, the rule concerning the nature of and survival of seniority rights was generally recognized to be that expressed in the cases of *System Federation* v. *L. & A. Ry. Co.*[54] and *Elder* v. *N. Y. Central Ry. Co.*[55] In the *System* case, an action had been brought by a union of railway employees for loss of wages resulting from a claimed denial of seniority rights under a collective bargaining agreement which had expired in 1931. The agreement was not renewed after its expiration and the relations between the company and its employees were governed by regulations promulgated unilaterally by the employer. It was not until 1937 that the parties entered into a new collective bargaining agreement. The employees involved were laid off in 1929 while the contract was still in effect. They were not subsequently recalled in accordance with the terms of the expired contract. The question, as phrased by the court, was:

> The only question with which we are here concerned is whether the seniority rights claimed, arise out, and exist, because of, the 1929 contract, and persist during and only during its term, or whether they indefinitely continue to exist after it has been abrogated, and the relations of employer and employee are no longer fixed and being carried on, under that contract, but for many years under rules, promulgated by the company, and later under a contract between the company and the union which affirms that it "covers all understandings now in effect."

Answering the question, the court stated:

> On this point the authorities are uniform. They settle it that collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract, beyond its life, when it has been terminated in accordance with its provisions. . . . The rights of the parties to work under the contract are fixed by the contract. They persist during, they end with, its term. After the termination of the 1929 contract, those who remained in the employ of the defendant, or came into it afterwards, held their tenure and such rights as they had, not under the 1929 contract, but at first under the company rules and later under the 1937 contract, and none of them can claim rights contrary thereto.

53 *Bradley* v. *Sangamo Electric Co.*, 51 LRRM 2375.
54 119 F. 2d 509, 8 LRRM 1038, cert. denied, 314 U.S. 656, 9 LRRM 417.
55 152 F. 2d 361, 17 LRRM 631.

> The rights accorded plaintiff and its members under the 1939 contract are clear. Under it, any of the persons named who were furloughed during its continuance had a right, during the life of the contract, to apply for reinstatement under its terms. After its abrogation that right was lost and reinstatement could not be claimed under its terms, but only under the terms of the company rules until 1937, and after 1937, under the terms of the 1937 contract.

Similarly, in the *Elder* case, the court held that a seniority right "is not inherent" and that it is both created and limited by the collective bargaining agreement. Citing the *System* case, it stated that "collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract beyond its life, when it has been terminated in accordance with its provisions." [56]

Seniority rights, of course, do not exist in the absence of the collective bargaining agreement creating them.[57] It is also well-settled that a collective bargaining agent can alter or terminate seniority rights.[58] It has been held that severance pay is a substitute for loss of seniority rights and that severance pay was negotiated on the basis that the lay off or discharge of the employee would result in the loss of seniority.[59] It has also been held that on the sale of a business employees lose their seniority rights [60] and there are no money damages for the loss.

The decision in the *Glidden* case has been the source of much discussion and comment. It has been criticized [61] and supported.[62] A major error in the *Glidden* case would seem to be its unrealistic

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56 See also *Local Lodge 2040* v. *Servel, Inc.*, 268 F. 2d 692, 44 LRRM 2340; cert. denied, 361 U.S. 884, 45 LRRM 2085.

57 *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 19 LRRM 2531; *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521, 24 LRRM 2173; *Alan Wood Steel Co.*, 4 LA 52.

58 *Johnson* v. *Archer-Daniels-Midland Co.*, (U.S. Dist. Ct. E.D. Mich., 1962) 49 LRRM 3026; *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521, 24 LRRM 2173; *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 31 LRRM 2548.

59 Cases cited supra, ft. 30 and 31; *Johnson* v. *Archer-Daniels-Midland Co.*, supra, ft. 58.

60 *Finnegan* v. *Pa. R.R. Co.*, (Super. Ct. N.J., 1962) 50 LRRM 2989.

61 Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Har. L.R. 1532; Note, 61 Col. L. Rev. 1363; Turner, *Plant Removal and Related Problems*, 13 Lab. L.J. 907.

62 Levett, *Treatment of Monetary Fringe Benefits and Post Termination Survival of the Right to Job Security*, 72 Yale L.J. 162.

interpretation of the agreement, to the effect that notwithstanding its specific language it was not limited to the Elmhurst plant but covered employees at the new location many miles away. It is not unusual in labor management relations for collective bargaining agreements to be made to apply only to particular plants, or to particular geographical areas, and the language used in the *Glidden* contract is typical of the language used in such situations; indeed, it is difficult to see what other language could have been used to express such an intent, notwithstanding the cavalier dismissal by the Court of Appeals of such language as "sheer verbalism." There are many arbitration as well as court decisions recognizing that collective bargaining agreements may by their terms apply only to a particular plant or location.[63]

We are not here, however, concerned with the issue of the scope of the agreement, that is, whether an agreement at one plant which has been shut down may be said to apply to another plant. The issue with which we are here concerned is whether seniority rights survive the expiration of the agreement, not where they may be applied if they do survive. Professor Aaron, in his recent article in the Harvard Law Review entitled *Reflections on the Legal Nature and Enforceability of Seniority Rights*,[64] criticizes the holding in the *Glidden* case and reasons that seniority rights are basically different from the rights to vacation pay, severance pay and retirement pay. He states:

> It is apparent . . . that none of these benefits supports the argument by analogy that seniority achieves a status that is independent and survives the termination of the agreement which creates it. Indeed, the very opposite is indicated. As we have seen, seniority is a system of beneficial employment preferences; it is absolutely dependent upon the existence of an employment relationship. For example, workers who are laid off continue to have seniority rights only so long as they are considered to be "employees." The value of a terminated seniority right cannot be converted into money except in an arbitrary way, for the employment preferences which the right represents are constantly changing. To put the point another way, seniority carries with it the right to earn money and, within limitations, to work on preferred jobs at preferred times; but it is not money earned or

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63 See e.g., *Philips Chemical Co.*, 39 LA 82; *American Bakeries Co.*, 62-1 ARB. par. 8016.

64 75 Harv. L. Rev. 1532.

> jobs owned. If the employer goes out of business, the employee with the most seniority is no better off than the one with the least, and neither is entitled by his seniority to a money indemnity for the loss of his job.
>
> Nor can the nature of seniority be changed by calling it a "property right," however one conceives of "property." An employee has no power of disposition over his bundle of beneficial employment preferences except the power to relinquish them; he may not sell or assign them, give them to any person he chooses, or negotiate individually with his employer for changes advantageous to himself. His rights are created and nourished by the collective agreement; when it lapses or is changed, they expire or are changed accordingly.

Professor Aaron then concludes that seniority rights never become "vested" in the absence of statutory command, pointing out also that they are always subject to the union's power to change them, unlike pension rights for which the employee has qualified.

On the other hand, David Levett, in a recent article in the Yale Law Journal [65] entitled *Treatment of Monetary Fringe Benefits and Post Termination Survival of the Right to Job Security,* takes issue with Professor Aaron. He reasons that the basis for the vacation pay, severance pay, and pension pay cases are the reliance of the employee on the benefit, the performance of services by the employee, and the "managerial enrichment" which would follow were the benefits to be eliminated with the termination of the agreement. Applying these principles to the problems of seniority he concludes that seniority rights should likewise survive. Examining the arguments of Professor Aaron, Mr. Levett states that Professor Aaron's attempt to distinguish seniority rights from other benefits are "conclusory or erroneous." He writes:

> Thus, an analysis of the rationale behind the holdings that the right to monetary fringe benefits is not destroyed by termination of the collective contract and an examination of the contingencies which defeat claims to monetary fringe benefits suggest that job security rights should survive both the termination of an agreement and the removal of a plant. These guidelines for deciding whether seniority rights survive termination of the collective agreement, nevertheless, should be regarded as highly tentative. Until studies are undertaken to determine the role played by various seniority provisions at the bargaining table and in the economic calculations and welfare of the employer and employees,

[65] 72 Yale L.J. 162.

> decisions must be based on reasonable, albeit somewhat speculative, inferences. To the extent that the approach of courts and arbitrators in dealing with rights to vacation, severance, and pension pay is sound, however, the conclusion that job security rights are unaffected by the termination of the collective agreement seems warranted.

At least one well-known arbitrator has refused to follow the *Glidden* case. In the case of *United Packers, Inc.*[66] Peter Kelliher refused to apply the seniority rights of employees at one plant, which had been discontinued, to the new plant. Mr. Kelliher stated, categorically:

> This Arbitrator is cognizant of the court decisions cited by the Union and the Company as being controlling in this case. These decisions are not unanimous. Arbitrators are not bound by judicial precedent. What may be the federal substantive law is not controlling in an arbitration proceeding wherein the Arbitrator is required to construe the language of the Contract by application of recognized maxims of contract interpretation and the general understanding of the Parties in the negotiation and administration of Collective Bargaining Agreements.

The approach of the United States Court of Appeals in the *Glidden* case is also subject to criticism on grounds other than interpretation of the coverage of the agreement. Basically, the court termed seniority rights "unemployment insurance," without attempting to distinguish between the two types of rights, which assumption leaves much to be questioned. More important, the rationale for the decision is an apologetic negative one. Instead of determining that the employees affirmatively possessed rights which survive the expiration of the agreement, it proceeded on the basis that there would be "no expense or embarrassment to the defendant" to adopt the more "humane" construction of the contract; that there would be "no detriment to the defendant" from a recognition of the seniority rights in the new plant, and that any other construction of the contract would "disappoint . . . expectations" of the employees. It would seem that the question involves more than a consideration of "detriment to the employer" or the "expectation of employees."

The difficulty with the *Glidden* theory is perceived immediately when an attempt is made to carry it to its conclusion. The case

[66] 38 LA 619.

involved only the question of whether employees were entitled to preference in employment at the new plant. But such preference in employment is an empty thing unless the terms of such employment are also carried over. If there is no contract in effect at the new plant, and the employer is free to discharge employees for any reason, the right to reemployment becomes an empty one. Also, on what terms and conditions is the employment to continue, if it is to continue? Is the employee to be guaranteed the same salary he previously received for the same type of work, the same rights to vacation pay, holiday pay, sick leave, and overtime? If he is, obviously then, all of the provisions of the agreement must be said to survive its expiration, at least as to the old employees. The termination of the agreement then becomes entirely inconsequential.

This dilemma was recognized by Mr. Levett in his article, in which he realized he is forced to conclude that following reemployment the employer should not be free to discharge its transferred employees arbitrarily, or to revise the seniority roster, and that the employer, notwithstanding his managerial prerogative, "should protect the employee . . . to the extent that he would have been protected under the old contract at the former plant." He recommends that the courts devise some appropriate remedies to deal with the ensuing problems.

Moreover, one wonders whether the principle of the *Glidden* case is to be applied to seniority rights applicable other than in the case of recall, such as in promotions or transfers, and surrounded by the myriad restrictions commonly found in collective bargaining agreements, such as the unit within which they are to be applied and the privileges to which they shall relate. The continued application of seniority in such cases perforce likewise requires the continuation of patterns created by the agreement which are no longer in effect.

Arbitration

A right under a collective bargaining agreement which does not involve the payment of "accrued wages" but which nevertheless has been held to survive the expiration of the agreement is the right to arbitrate claims arising under the agreement. The right to arbitration, of course, is not a fringe benefit, or a con-

dition of the employer-employee relationship, as such, but merely a method of determining conflicting claims under the agreement.[67] As long as the claims which are sought to be arbitrated are limited to those arising under the agreement, it is only reasonable that the method which the parties themselves have selected survive its expiration. Since claims under the agreement do not die with the agreement but are enforceable for the period of the applicable statute of limitations, the other alternative would be to have such claims enforced in the courts.

In the case of *General Tire & Rubber Co.* v. *Local No. 512* [68] the court directed arbitration of claims for vacation pay due under the contract even though the grievance was asserted after the termination of the agreement, stating:

> In my judgment the dispute between the parties is "based upon a claimed violation of some right established" by said collective bargaining agreement and involving its interpretation. In agreeing to arbitrate such grievances the parties did not differentiate between grievances arising during or after the termination of said agreement. Plaintiff's obligation to arbitrate grievances was not limited to only those which might arise during the life of said agreement. In the absence of such limitation its obligation must be deemed to include the arbitration of claims for vacation pay which were first asserted and rejected after the termination of said collective bargaining agreement. . . .

Likewise, in the case of *Botany Mills, Inc.* v. *Textile Workers Union* [69] the court stated:

> Initially, the company concedes that the mere fact that the contract may have expired prior to the invocation of the arbitration process does not in itself preclude jurisdiction in that forum. This appears to be well settled. . . .

The right to arbitration which survives applies only to claims arising during the term of the agreement to arbitrate; it is not a right which survives so as to apply to claims arising thereafter. This was made quite clear in the very recent case of *Procter and*

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[67] See *Procter & Gamble Ind. Union* v. *Procter & Gamble Mfg. Co.*, (U.S. Ct. of Appeals, Second Circuit, Dec. 10, 1962) 51 LRRM 2752.

[68] 191 F. Supp. 911, 49 LRRM 2001, aff'd 294 F. 2d 957, 49 LRRM 2004.

[69] 50 N.J. Super. 18, 141 Atl. 2d 107, 30 LA 107. To the same effect are *Matter of Potoker*, 2 N.Y. 2d 553, 141 N.E. 2d 841, 28 LA 344; *Matter of Lane*, 274 A.D. 833, 21 LRRM 2726, aff'd 299 N.Y. 725, 22 LRRM 2527; *In re Int'l Assoc. of Machinists*, 36 LA 117 (N.Y. Sup. Ct., A.D., 4th Dept. 1961).

Gamble Independent Union v. *Procter and Gamble Manufacturing Co.* decided by the United States Court of Appeals, Second Circuit, on December 10, 1962.[70]

Comment

The principle of survival of contract rights beyond the termination of the collective bargaining agreement was established and originally applied in those cases wherein the employees sought and obtained only the cash benefits which they would have received had the contract remained in effect. It arose and was applied in cases where the employer had gone out of business. The analogy drawn by the courts was to the payment of wages actually earned, which the termination of the agreement could not operate to defeat. In the case of vacation pay and retirement pay the application of the principle is obvious.

In the case of severance pay it is less so. The existence of the many conditions or limitations on the payment of severance pay makes questionable its appellation of "additional wages" which the parties intended were to be considered actually earned during each day or year of prior service. The fact that the actual amount of severance pay due is customarily based upon length of service would seem to be responsible in large part for the analogy drawn with vacation pay, but that fact alone should not be conclusive. The circumstances of specific situations may justify the payment of severance pay notwithstanding the prior expiration of the agreement, but this is not to say that it has been "earned" day by day in the same sense as vacation pay or retirement pay.

In any event, it is probable today that monetary rights such as vacation pay, severance pay, and retirement benefits will be uniformly held to survive the expiration of the agreement. This leads to the question of whether other customary monetary rights under the agreement should not also be held to survive, such as holiday pay, or sick leave pay, or bonuses.[71] In the case of holiday pay, it may well be argued, particularly under the "package" doctrine of bargaining, that it too should survive. While holiday

[70] 51 LRRM 2752.

[71] In the case of *Monument Mills, Inc.*, 29 LA 400, Christmas bonuses were awarded to laid-off employees notwithstanding the discontinuance of operations by the employer prior to Christmas.

pay may not be payable for an indefinite period after the expiration of the agreement, it might be payable for holidays occurring immediately after the termination of the agreement, or immediately after the employees' services have been terminated, on the ground that it has been fully earned with regard to those holidays.[72] In the case of sick leave, however, although it too is a monetary benefit, it might reasonably be said that it is truly a condition precedent that the employee be ill during the life of the contract, and that it does not accrue during the life of the contract so as to be payable on illness occurring after its expiration, notwithstanding the fact that the amount of sick leave pay is frequently measured by length of service. In any event all of the problems raised by the vacation pay cases have not yet been solved.[73]

The determination of whether monetary rights exercisable after the expiration of the agreement survive the expiration is a relatively simple matter. The difficult problem arises in the case of non-monetary rights not exercisable during the life of the contract, as exemplified by seniority rights.

The criticisms expressed above with regard to the *Glidden* decision need not be here repeated. It is unfortunate, however, that the court loosely used such terms as "unemployment insurance" and "vesting" as applicable to seniority rights. There is a real difference between cash fringe benefits such as vacation pay, severance pay, retirement pay, and even unemployment insurance, which may have been earned under an agreement, and purely non-monetary rights. If an employer goes out of business, the cash fringe benefits of the nature described which have been earned have to be paid; they do not lapse merely because of the termination of the business and the contract.

On the other hand seniority rights not only do not exist after the employer has discontinued its business but the employee is not entitled to any compensation therefor unless there has been

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[72] See *New York Chain Mfg. Co.*, 62-3 ARB. par. 9066; A.D. *Juilliard & Co.*, 22 LA 266.

[73] In *U.S.* v. *Embassy Restaurant, Inc.*, 359 U.S. 29, 43 LRRM 2631, the Supreme Court held that contributions by an employer to a union welfare fund required by a collective bargaining agreement were not "wages" under the Bankruptcy Act.

a breach of some other term of the agreement.[74] Also, while a collective bargaining representative may modify or terminate seniority rights, it is doubtful whether it may change vacation rights and pension benefits, and other truly accrued rights, so as to deprive an employee of those for which he has already qualified.[75]

If the basis for "vesting," or survival, is to be, as Mr. Levett assumes in his article, reliance, performance, and managerial enrichment, obviously these conditions may be said to apply to any of the provisions of an agreement which has been in effect for any period of time. What, then, about such non-monetary rights as the right not to be discharged except for just cause, or rights relating to work load? Employees may be said to have continued their employment, and to have worked, in consideration of all of those rights and the employer has received the benefit of such work during the life of the contract.

Looking at the other side of the coin, suppose the employer has granted concessions to the union in return for a no-strike clause; does the fact that the union has received the benefit of those concessions during the life of the contract require it to continue to be bound by the no-strike clause after the expiration of the agreement? Obviously not. It is not unusual today for monetary concessions to be exchanged for non-monetary concessions, but to hold that for that reason the non-monetary rights survive the expiration of the agreement would be contrary to established labor relations understanding.

Actually, seniority rights, although earned during the life of the contract, are earned only in the sense that all of the other provisions of the collective bargaining agreement are earned. They are exercisable, nevertheless, only while the contract continues. They are similar to the right to premium pay which, while part of the original "package," is, apart from statute, enforceable only as long as the contract is in effect.

The beginnings of the limitations on the *Glidden* case, and its possible reversal, or future disregard, have already appeared in

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[74] *Local Lodge 2040* v. *Servel, Inc.*, 268 F. 2d 692, 44 LRRM 2340, cert. denied, 361 U. S. 884, 45 LRRM 2085; *Finnegan* v. *Pa. R.R. Co.*, 45 L.C. *par.* 50,610, 50 LRRM 2989.

[75] See *Nichols* v. *Nat'l Tube Co.*, 122 F. Supp. 726, 34 LRRM 2183.

the case of *Procter and Gamble Independent Union* v. *Procter and Gamble Manufacturing Co.*, decided by the same court, the United States Court of Appeals, Second Circuit, on December 10, 1962.[76] In that case, the court apparently was called upon to reconsider the *Glidden* decision, although the same issue was not involved, and refused to do so. However, in referring to the *Glidden* case, Judge Paul Hays, who wrote the opinion, described, and in so doing explained, the *Glidden* case holding on the only ground on which it is tenable, that is, that the collective bargaining agreement expressly provided for the survival of rehiring rights for a period of three years. (It should be noted that the plaintiff employees had been laid off before the contract expired.) The court stated:

> . . . In that case certain seniority provisions of a collective agreement were thought to be prospective in character, that is, they were read to provide for seniority rights which were expected to continue beyond the termination of the collective agreement. Thus, though the agreement involved was for a period of two years, it provided for the survival of rights of rehiring over a period of three years. . . .

More important, however, Judge Hays shed doubt upon the scope of the *Glidden* case. He limited it to its specific facts, and stated that "the case cannot be made to stand in any general way for the survival of contractual obligations during any period beyond the period with which they were expressly undertaken." Thus the opinion reads:

> Since we hold that *Zdanok* is inapplicable to the case at bar, we have no occasion to reexamine the principle on which that decision was based. We believe, however, that we should say that *Zdanok* cannot properly be read to govern situations which are not strictly within the facts there presented. More particularly the case cannot be made to stand in any general way for the survival of contractual obligations during any period beyond the period for which they were expressly undertaken.

It is also interesting that the court referred in a footnote to the *Oddie* v. *Ross Gear and Tool Co.* case as expressing "the position of the Sixth Circuit."

Essentially, it would seem that the real distinction between

[76] 46 L.C. par. 17,975, 51 LRRM 2752.

rights which survive and those which do not is that between monetary rights which have accrued, and have been earned, and of which the employee may not be deprived just as he may not be deprived of his actual wages, and non-monetary rights exercisable only *in futuro*. The latter, in the writer's opinion, may not be said to survive the expiration of the agreement. They are not "additional wages," as described in the early cases establishing the principle of survival. Any theory of unjust enrichment, or reliance, or comparison with vacation pay or retirement benefits, would make duration clauses useless. The parties to an agreement anticipate that after its termination neither will be bound by its provisions, notwithstanding the receipt of its benefits by both sides during its life. In fact, the obligation to bargain collectively anticipates such precise termination. Labor relations not being an exact science, however, the decisions in future cases must await the event.

Discussion—

HAROLD A. KATZ *

On May 19, 1961, Arthur J. Goldberg, then Secretary of Labor, observed in a speech to the American Law Institute that he had "often wondered why the genius which produced a law of property rights or of commercial instruments failed utterly to produce a law of job rights." 45 *Journal of the American Judicature Society* 56, 60 (1961), cited by Glushien, "Plant Removal," in the Proceedings of the New York University Fifteenth Annual Conference on Labor (New York, Matthew Bender & Co., 1962). Mr. Goldberg concluded that through collective bargaining "the parties worked out for themselves—in their security clauses—a concept of job rights which 'the law' could, and should, have developed, just as it did the concept of property rights." *Ibid.* Note also this verse from Carl Sandburg, *The People, Yes,* also cited by Mr. Glushien (Ibid.):

> Stocks are property, yes.
> Bonds are property, yes.

* Attorney; Chicago, Illinois.

Machines, land, buildings are property, yes.
A job is property
No, nix, nah nah.

I understand Mr. Feinberg in his excellent paper to answer the basic questions posed for discussion in this manner: He believes the law to be that employees terminated after the expiration of a collective bargaining agreement are entitled (where the separation is through no fault of their own) to severance pay, though he feels the case for such entitlement to be less strong than that for vacation pay; he does not believe that employees retain any seniority rights after expiration of the collective bargaining agreement; the distinction between monetary rights, such as severance pay, which survive and non-monetary rights is that the former are analogous to wages which have been earned during the life of the contract while the latter are exercisable only *in futuro*.

I.

To the general question posed by our topic—"Do contract rights vest?"—Mr. Feinberg answers affirmatively with reference to severance, vacation and retirement benefits. This conforms not only to the actual decisions so studiously analyzed by Mr. Feinberg, but it is also in accordance with what might be termed the realities of the situation. In collective bargaining negotiations involving so-called economic issues, the allocation of the package on which agreement is customarily reached is left to the union as the employees' bargaining agent. The usual concern of the employer on such issues is confined to his total cost per man hour of work. It would be a curious result, indeed, if the employer should be permitted to derive an unintended windfall from the mere happenstance of the allocation of the package by the union, a matter concerning which the employer professed complete disinterest. If the money had been placed into a direct wage increase, the employee would have received the whole benefit as it accrued; no different result should follow if the same number of cents per hour went into the vacation plan or a severance pay program. Clearly, there was no difference in intent on this point between the two parties; the mutual understanding was an absolute allocation of such funds by the company—for the period of

the contract. If the courts had ruled other than in the manner which Mr. Feinberg describes, unions would in the end accomplish the same result by insisting on trusteed plans covering severance and vacation pay (as in the case of retirement plans) with an irrevocable commitment of the agreed-upon funds to the agreed-upon objective.

While Mr. Feinberg concludes that "monetary rights such as vacation pay, severance pay, and retirement benefits will be uniformly held to survive the expiration of the agreement," he does suggest that the case for vesting is stronger for vacations than for severance pay. While there are more numerous restrictions on qualifying for severance pay, this does not determine whether such benefits vest, but merely selects the cases in which they would vest. I would suggest that it is more important for severance pay to be treated as a vested right than for almost any other fringe benefit. An unvested severance pay plan under which long-service employees could be terminated without benefits on the day after the expiration of the collective bargaining agreement would be about as useful as the insurance policy I recall Groucho Marx once sold under which if you lost your leg, the insurance company became obligated to help you look for it.

II.

The case against the existence of post-contractual seniority transfer rights has been well presented both in the decisions and in the literature. A good case has been made for the other side with the recent appearance of Mr. Levett's excellent article in the November issue of the Yale Law Journal in addition to Judge Madden's opinion in the *Glidden* case.[1] A marked judicial reaction to the *Glidden* doctrine appears in the decision of the Sixth Circuit in the *Ross Gear case* [2] and in the recent Second Circuit opinion in *Procter and Gamble,*[3] all cited by Mr. Feinberg. While both *Ross Gear* and *Procter and Gamble* purport to distinguish *Glidden* rather than to overrule it, there does appear a barely camouflaged hostility to the *Glidden* doctrine.

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1 *Zdanok* v. *Glidden,* 288 F.2d 99, 47 LRRM 2865 (CA. 2).
2 *Oddie* v. *Ross Gear,* 305 F.2d 143, 50 LRRM 2763 (CA. 6).
3 *Procter & Gamble Ind. Union* v. *Procter & Gamble Mfg.,* 312 F.2d 181 (CA. 2), 51 LRRM 2752.

It is interesting that the same courts which will enforce claims to post-contractual severance and vacation pay, and which have recognized that grievance and arbitration clauses survive the contract as to grievances arising during the life of the contract, react against the recognition of post-contractual seniority rights. Our courts have had no trouble in finding that adverse occupancy of land for a certain period of time results in the acquisition of property rights in the land; more recently, that a property owner near an airport is entitled to just compensation for violation of his rights by the noise of passing aircraft; but that a wage earner would acquire an enforceable interest in his job as against a stranger to the relationship was until *Glidden* virtually unknown in our law. Courts have protected lessees and minority shareholders and insurance policy-holders by judicial doctrines, but they shy away from applying humane construction to a contract to protect a laborer who is threatened with the loss of something much more important than the premises he occupies. The decisions in *Glidden, Railroad Telegraphers,*[4] and *Town & Country,*[5] coming as they have within a relatively short period, have a combined impact which should not be overlooked. They are directed toward encouraging the solution of a major problem in our economy—job insecurity due to plant shutdown or removal. It is inevitable that a society which has manifested great concern over other aspects of security of the wage earner would sooner or later come to grips directly with this major element of insecurity.

Mr. Feinberg suggests that the distinction between rights which survive and those which do not "is that between monetary rights which have accrued, and have been earned, and of which the employee may not be deprived just as he may not be deprived of his actual wages, and non-monetary rights exercisable only *in futuro.*" It is difficult to discern what Mr. Feinberg means by seniority rights being exercised "only *in futuro.*" They are certainly extant when the contract is in effect. The right to be recalled within a specified period is not really an *in futuro* right even if it extends beyond the termination date of the contract, any more than the right to arbitration could be said to be an *"in futuro"* right.

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[4] *Railroad Telegraphers* v. *Leighty,* 369 U.S. 885 (1961), 50 LRRM 2232.
[5] *Town & Country,* 136 NLRB 111, 49 LRRM 1918 (CA. 2).

Sound analysis of the question of vesting as such which is the basic issue posed for this section, is somewhat obfuscated by its consideration in the context of a plant transfer situation. Let us assume for the purpose of analysis that an employer has a two-year contract with a union under which employees with seniority have the right to be recalled for a three-year period. Let us further assume that on the day the contract expires the employer closes the plant. The plant being closed down, no new contract is negotiated. Six months later there surprisingly develops a demand for the product, and the employer reopens the plant. He declines to rehire any of his former employees on a ground that would not bring the National Labor Relations Act into play.

I believe that in the case I pose the rights would be held to have survived even though they are seniority rights which are non-monetary in nature. This case suggests to me that the problem of the survival of seniority rights is not so much one of vesting but of contract construction and that the distinction Mr. Feinberg suggests between rights that survive and those that do not may not be entirely valid.

Congress has seen fit to protect the seniority rights of servicemen.[6] The problem under consideration would be most amenable to legislative solution.

III.

In the final analysis the question of the survival of contract rights is a matter of substantive law. The questions posed for our discussion suggest an assumption that there is a common body of law from which the answers would be derived, rather than any suggestion that we will get one answer if the grievance is pursued through the courts, another answer if it is arbitrated. The latter will be the result, however, if arbitrators generally adhere to the philosophy expressed by a distinguished arbitrator and your new President-Elect, Peter Kelliher, in his decision in the *United Packers* case. Mr. Feinberg has quoted the pertinent extract wherein Mr. Kelliher said:

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[6] *Trailmobile* v. *Whirls*, 331 U.S. 40 (1940), 19 LRRM 2531; 54 Stat. 85, 50 U.S.C. App. § 301 et seq.

> Arbitrators are not bound by judicial precedent. What may be the federal substantive law is not controlling in an arbitration proceeding wherein the arbitrator is required to construe the language of the contract on application of recognized maxims of contract interpretation and the general understanding of the parties in the negotiation and administration of collective bargaining agreements.[7]

I believe this raises important questions vital to the survival right problem but having implications going even beyond it. At the time of the *United Packer* decision the arbitrator correctly noted the absence of unanimity among the courts on the transfer right question, but I would suggest that arbitrators should consider themselves bound (or, if you prefer, authoritatively guided) by federal substantive law once it has been established by the federal courts.

The law to be applied to the construction of a collective bargaining agreement is federal law under Section 301. In *Lincoln Mills* the Supreme Court directed the federal courts to fashion a body of law to effectuate the National Labor policy, and the Court observed that "the range of judicial inventiveness will be determined by the nature of the problems." [8] In *Dowd Box* v. *Courtney* [9] the Court held that Section 301 actions could be maintained in state as well as federal courts, but in a subsequent case the Court made clear that regardless of the forum in which the suit is maintained, federal substantive law must be applied. "We hold that in a case such as this incompatible doctrines of local law must give way to principles of federal labor law," the Court said.[10]

> . . . The dimensions of Section 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. . . . Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.[11]

So sweeping is the mandate of Congress: now federal law must be applied even in the face of an explicit provision in the contract

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7 *United Packers*, 38 LA 619.
8 *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457 (1956), 40 LRRM 2113.
9 *Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1961), 49 LRRM 2619.
10 *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 102 (1961), 49 LRRM 2717.
11 *Ibid.*, at 103, 49 LRRM 2717.

that it is to be governed by state law.[12] Nor can a state law be permitted to qualify or undermine these federally-created rights.[13] Nor are the courts ousted of jurisdiction to maintain Section 301 proceedings over matters that might also fall within the NLRB's sphere.[14] Since almost all collective bargaining agreements today contain arbitration clauses, if federal substantive law were not to be the guide in such cases, federal substantive law would be inconsequential in the national labor picture. Parties would have to repeal their arbitration clauses to obtain the benefits of federal substantive law, "which would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." [15] The mere happenstance of the existence or absence of an arbitration clause would determine the substantive law applicable, which is of course wholly inconsistent with the development of a body of a truly national labor policy.

In the *Jackson & Church* arbitration case,[16] Arbitrator Robert Howlett observed, "We are interpreting a Michigan contract in the State of Michigan and must look for guidance to the Supreme Court of Michigan. . . . "

He also drew the following conclusion of importance here: "While arbitrators are not bound by precedents of other arbitrators, they are bound by the law of the jurisdiction." The jurisdiction involved is now federal substantive law which once established should be controlling in an arbitration no less than a judicial proceeding.

Arbitrators, like judges, are clothed with great discretion but their judgment must be exercised within a framework of law. Each arbitrator is not a separate solar system unattached to the national labor policy and its constitutional interpreters; he operates also within the framework of that policy as delineated by law and interpreted and applied by the courts of the United States.

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12 *Carey* v. *General Electric*, 50 LRRM 2119.

13 *Fishbuck and Moore* v. *Operating Engineers*, 198 F. Supp. 911 (1961). 49 LRRM 2631.

14 *Smith* v. *Evening News Assn.*, 371 U.S. 195, 51 LRRM 2646.

15 *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 107, 49 LRRM 2717.

16 Unfortunately unreported.

Any other concept of arbitral power represents basically an unacceptable usurpation of judicial authority and would be essentially a major step toward industrial anarchy. It would be difficult to conceive of a policy more likely to destroy the institution of voluntary arbitration.

The law of the jurisdiction automatically becomes a part of contracts negotiated within that jurisdiction.[17] A more recent statement of this rule is found in the standard text on the law of contracts:

> Where the subject matter of the contract between the parties lies in an area covered by federal law, they naturally adopt as a portion of their agreement the applicable provisions of the particular Act of Congress. . . .
>
> The federal labor laws give special force and effect to collective labor agreements and contracts involving employer-employee relationships.[18]

The law of a jurisdiction embraces both legislative and judicial actions. We cannot ignore the law as it is developed by federal judicial decisions when they are interpreting federal statutory provisions. Mr. Justice Frankfurter once wrote:

> The fact that California's policy is expressed by the judicial article of the State rather than by the legislature we have repeatedly ruled to be immaterial. . . . In charging its courts with evolving law instead of formulating policy by statute, California has availed itself of a variety of law-making sources, and has recognized that in our day as in Coke's "the law hath provided several weapons of remedy." [19]

If federal substantive law is part of the contract, then obviously it must be applied in resolving the grievance. Certainly the federal courts must first determine federal substantive law, but it can be then applied by the arbitrator to the grievance before him.

To say that federal substantive law "is not controlling in an arbitration proceeding," does not dispose of the problem any more than the fact that courts do not vacate arbitration awards

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17 *Van Hoffman* v. *Quincy*, 71 U.S. 535, 550.

18 *Williston on Contracts* (3d ed. 1961) § 615, pp. 621-22.

19 *Hughes* v. *Superior Court*, 339 U.S. 460, 466-67, 26 LRRM 2072.

because of mistakes of law should not result in license to ignore the law. Even if one assumes, *arguendo,* that an arbitrator is not *required* in interpreting collective bargaining agreements to follow substantive law the question still remains as to whether the arbitrator *should* do so as a matter of good conscience and wisdom. An undesirable, potentially dangerous situation results if the parties to a labor contract are made to understand that grievances would be resolved differently, and by a different kind of law, depending on the forum—one result if by arbitration, another if enforced through the courts. Such a result is abhorrent to a well ordered legal system, yet it is the certain effect of the *United Packers* rationale. Does it make any sense for parties to have to abandon arbitration clauses in order to enjoy the benefits of uniform substantive law relating to collective bargaining agreements? Recently, a survey was made by a distinguished scholar, Professor Mentschikoff, of the attitudes of commercial arbitrators as to the role of substantive law in making arbitration awards.[20] Professor Mentschikoff found that 80 percent of the group of arbitrators studied "thought that they ought to reach their decisions within the context of the principles of substantive rules of law. . . ." [21] It is suggested that no different policy should exist in connection with labor arbitration.

Discussion—

LEE C. SHAW *

Mr. Feinberg predicts a bright future for the vesting of the monetary items of vacation and severance pay and retirement benefits, but he sees little or no future for the vesting of nonmonetary items such as seniority.

Regarding certain monetary rights, he reaches this conclusion:

> In any event, it is probable today that monetary rights such as vacation pay, severance pay, and retirement benefits will be uniformly held to survive the expiration of the agreement . . .

[20] Mentschikoff, "Commercial Arbitration," 61 *Colum. L. Rev.* 846.

[21] *Ibid.,* at 861.

* Attorney; Seyfarth, Shaw, Fairweather & Geraldson, Chicago, Ill.

Mr. Feinberg does not believe that nonmonetary rights will survive, because they are exercisable only *in futuro*. As he puts it, they are not "additional wages." He points out some of the practical problems which would arise if nonmonetary rights were held to survive the expiration of the contract.

I agree, and I would like to point out the importance of the negotiators knowing the survivorship potentials of all of the rights and obligations contained in the collective bargaining agreement. In the give and take of bargaining, nothing could be more important than knowing both the scope and duration of the agreement reached. In the bankruptcy cases which I shall discuss in a moment, the bargaining relationship is over, and the only question is the disposition of the remaining assets. In the plant transfer situation, whether or not there is going to be a bargaining relationship depends upon future events. But in the normal situation, where the parties will be negotiating new agreements upon the expiration of old agreements, it is essential they know exactly what rights and obligations survive if no new agreement is reached. The only way they can know this is to be assured by arbitration and court decisions that no right or obligation survives unless the parties have carefully said so in their agreement.

I seriously question the legal justification for holding that any contract rights survive the termination of the contract, unless this is clearly stated in the contract. By this I mean a right should not be held to have vested unless the language of the contract clearly provides that it shall vest, as is done in funded pension agreements, and unless all conditions precedent to vesting have been met prior to the expiration of the contract.

With respect to pension agreements, I would think that both the Second Circuit and Mr. Feinberg should have observed that, if contract negotiators knew how to provide for the vesting of retirement benefits, they also know how to provide for the vesting of vacation benefits and seniority rights.

According to Mr. Feinberg—and I agree with him—this troublesome question of vesting begins with the vacation pay question in the bankruptcy cases.

In the *Botany Mills* [1] case, Arbitrator David L. Cole held employees were entitled to vacation pay under the following circumstances:

1. The agreement was entered into April 14, 1954, and could be terminated upon 60 days' notice on March 15, 1956.

2. On December 29, 1955, the company posted a notice stating certain manufacturing operations were being discontinued on December 31, 1955, and they were discontinued on that date.

3. The company gave the requisite notice and the contract expired on March 15, 1956.

4. The pertinent contract provision reads:

> Each employee in the employ of the employer on each April 15 hereafter during the life of this agreement who has been in its employ at least one year prior thereto . . . shall receive a vacation. . . .

Arbitrator Cole granted vacation pay to laid-off employees, even though the contract *terminated* prior to the April 15 eligibility date. He made no comment about the phrase "during the life of this agreement." Arbitrator Cole relied on the *Paris Fabric Mills* [2] case. He conceded there were rulings in other jurisdictions to the contrary, but stated the law in New Jersey was clear and he subscribed to the reasoning of the New Jersey courts.

The *Paris Fabric Mills* decision relies on language in the *Wil-Low Cafeterias* [3] case decided by the Court of Appeals for the Second Circuit in 1940. The pertinent facts in the *Wil-Low* case are as follows:

1. On May 11, 1938, the company entered into a contract with the union which provided for vacations as follows:

> All full-time employees who will have concluded six months' employment during the months of June, July, August, or September shall be entitled to . . . vacation with pay. . . .

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[1] *Botany Mills, Inc.*, 27 LA 1 (1956).

[2] *Textile Workers Union of America* v. *Paris Fabric Mills, Inc.*, 22 N.J. Super. 381 (1952), 31 LRRM 2166.

[3] *In re Wil-Low Cafeterias, Inc.*, 111 F.2d 429 (2d Cir. 1940), 6 LRRM 709.

2. The company operated under this contract until June 7, 1938, when it was adjudicated a bankrupt and its stores closed.

3. The claimant had worked for the company for nine years prior to his discharge on June 7th.

4. His vacation had been scheduled for the first of August.

5. The court allowed the claim as an expense of administration without determining its priority as against other expenses of administration incurred by the debtor.

6. The court pointed out that *during the term of the contract* all of the conditions precedent to earning the vacation had been met, and therefore the vacation pay was the same as wages which had been earned during the term of the contract.

In the *Wil-Low* case, the claimant had met all the conditions precedent during the term of the agreement, and his vacation had been scheduled prior to the closing of the business. In the *Botany Mills* case, the contract was terminated by its terms one month before the eligibility date, and the agreement clearly provided that the eligibility date had to occur during the life of the agreement.

Permit me to draw a parallel between the majority decision in the *Glidden* [4] case and David Cole's decision in *Botany Mills.* In the *Glidden* case, as Mr. Feinberg clearly points out, the majority of the court ignores the plain meaning of the language which limits the contractual relationship of the plant located in Elmhurst, New York. Mr. Feinberg characterizes this interpretation as being an "unrealistic interpretation," and then states:

> . . . [I]t is difficult to see what other language could have been used to express such an intent, notwithstanding the cavalier dismissal by the Court of Appeals of such language as "sheer verbalism".

In the *Botany Mills* case, David Cole completely ignores the phrase "during the terms of this agreement." The contract involved in this case required an employee to be employed on April

[4] *Zdanok* v. *Glidden Company,* 288 F.2d 99, 47 LRRM 2865 (2d Cir. 1961), *affirmed on other grounds,* 370 U.S. 530, 50 LRRM 2693.

15 during the term of the agreement. Mr. Cole could have dismissed this key phrase by saying it was "sheer verbalism." Instead, he just ignored it.

There are good reasons for limiting rights and obligations to the term of the agreement, and not the least of these is to encourage the parties to make agreements which they have reason to believe they understand. As Mr. Feinberg points out, there would be no point in worrying about a new agreement if all of the rights extended beyond the termination of the agreement. Of course, they do not, and that is why the parties often specifically state that a particular condition precedent, or right, must arise during the term of the agreement.

The decision in the *Glidden* case is simply an extension of the *Botany Mills* rationale. Once you assume or imply that a right survives, contrary to the plain language of the contract, there is no easy stopping place. It appears to me that Arbitrator Cole felt rather strongly the employees of Botany Mills were entitled to their vacation pay because they were out of employment through no fault of their own, and I think the same considerations were obvious in Judge Madden's mind when he defended his decision by saying granting seniority rights at the new plant would be "no expense or embarrassment to the defendant." Judge Madden is mistaken even in this assumption.

The *Glidden* decision is obviously such bad law that I doubt other courts will follow it; and, as Mr. Feinberg points out, there is some question as to whether even the Second Circuit is going to follow it.

In addition to the cases cited by Mr. Feinberg, the following arbitrators have refused to follow the *Glidden* doctrine: *Sivyer Steel Casting Company* [5] (Arb. Robert J. Howlett); *American Bakeries Co.*[6] (Arb. J. W. Sweeney); *H. H. Robertson* [7] (Arb. C. V. Duff; *Phillips Chemical Company* [8] (Arb. Lennart Larson). In the *Sivyer* case, Arbitrator Howlett flatly chose *Ross Gear & Tool* [9] to *Glidden* in these words:

[5] 39 LA 449 (1962).
[6] 62-1 CCH Arb. ¶8016 (1961).
[7] 37 LA 928 (1962).
[8] 39 LA 82 (1962).
[9] *Oddie* v. *Ross Gear & Tool Co., Inc.*, 195 F Supp. 826, 48 LRRM 2586 (E.D. Mich. 1961), *reversed*, 305 F.2d 143, 50 LRRM 2763 (6th Cir. 1962).

> I think Judge Miller in *Ross Gear & Tool* and Judge Lumbard in *Glidden* delivered opinions more consistent with recognized relationships between employers and employees and the unions representing the latter than Judge Madden did. . . .

My optimism concerning the fate of *Glidden* is somewhat shaken by the dictum of District Judge Gourley in *Panza* v. *Armco Steel Corp.*[10] decided August 22, 1962, which reads as follows:

> I heartily endorse the view, which is not contested in this proceeding, that seniority rights of employees . . . are fundamental and vested, and are not to be annulled and obliterated by the simple expedient of moving a plant from one area to another.

In this case, the court was upholding an arbitrator's decision, and it was not a plant removal but a transfer of a small proportion of equipment. Nevertheless, it is perfectly clear that Judge Gourley would follow *Glidden* in a plant removal case.

One can only hope that judges and arbitrators will have more respect for the traditional and time-honored concepts of contract construction, and also that they realize that what may seem to be fireside justice in a particular situation may create a very dangerous precedent.

Stable collective bargaining relationships depend to a large extent upon respect for the labor agreement, which is just as important to the employees and the union as it is to the company.

I have been shocked by the contracting-out cases which are based upon the implied limitation doctrine. If arbitrators and judges are going to ignore contract language or dream up theories to get around the contract, then we must exclude important subjects from arbitration. Recently some contracts have done this by excluding a number of specific subjects from arbitration. Anything as vital to a company as the right to purchase a component part at a cheaper price than it can produce it, has to be protected one way or another. The right of management to decide whether to move a plant from one part of the country to another for good, sound economic reasons also must be protected one way or another.

If the union wants to give employees the right to follow the

[10] 51 LRRM 2016 (W.D. Pa. 1962).

work, let it propose this at the bargaining table, as indeed many unions have done recently, but arbitrators should not interpret a recognition clause (which the law requires both parties to place in the agreement) as a limitation on a reserved right.

There is a definite similarity between the implied vested rights theory and the "implied limitation" on the right to contract out work. Implying vested rights is much the same as implying a limitation on the right to contract out work. In both instances, the judge or the arbitrator is reading into the contract his own notion of social justice. In both instances, he is legislating instead of interpreting, no matter what phrase he coins to justify his decision.