understandable, the time between hearing and award has not been a major contributor to total elapsed time between filing of the grievance and issuance of the award. In cases that do not involve transcripts and briefs, the average time from hearing to award in the AAA cases was 40 days; the median was 28 days. In cases with briefs but without transcripts, the average was 81 days, and the median 73 days, with briefs accounting for 30–35 days. There were only eight cases with transcripts in our sample, which is too small to generate any useful conclusions.

During the 1983–1987 period it took over 70 days for all FMCS cases to go from hearing to award, including about 75 percent in which briefs were submitted and 30 percent with transcripts. Of this total 40 days were required for briefs and 32 days for the arbitrator to render a decision.

One thing that stands out from this study is the need for more and better statistics on elapsed time in grievance arbitration cases. Both AAA and FMCS require arbitrators to complete case reports after every award. It should be relatively simple and inexpensive to collate these data on an annual basis and make them available to the parties, arbitrators, and other interested individuals. FMCS has provided this information more often than AAA, although FMCS has cut back on reports in recent years. These data are essential to an understanding and improvement of the grievance arbitration process. It is hoped that this paper will result in the two major appointing agencies devoting the necessary time and resources to make data on elapsed time in grievance arbitration available on a regular basis.

II. SENIORITY AND POSTREINSTATEMENT PERFORMANCE

I.B. HELBURN*

Since 1957 there have been at least seven studies of the relationship between seniority and postreinstatement performance in the private sector. Most of the authors have been members of this Academy. The studies, taken individually, show conflicting and indeterminate conclusions. This paper presents a reanalysis

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of previous studies, using both a new theoretical framework and a different statistical technique. Results that were conflicting now may be seen as consistent with one another, thus clarifying the relationship between seniority and postreinstatement performance.

Arbitrators generally apply a two-step decision process in determining whether a grievant has been discharged for just cause. First, there is a determination of guilt or innocence. If innocent, the grievant is normally reinstated with full back pay and allowances plus restitution of seniority—the usual make-whole remedy. If guilty, a determination is made as to the fit between disciplinary action and infraction through consideration of various mitigating factors, such as the grievant's work history and seniority. Arbitrators often modify the discharge punishment for more senior grievants, because discharge is viewed as more serious when loss of seniority and related advantages are considered and in anticipation that their performance will be superior to that of similarly situated, less senior grievants.

The merit of this standard decision-making process has been challenged by the results of a study of the performance of workers reinstated by arbitrators. Rodgers, Helburn, and Hunter (RHH)[1] found that where a more senior grievant has been found guilty, postreinstatement performance actually was less acceptable than that of a less senior worker. If innocent, postreinstatement performance was more acceptable. It may be that in anticipation that the performance of less senior workers will be less acceptable than the performance of more senior workers after reinstatement, arbitrators generally treat guilty, junior grievants too harshly relative to the more lenient treatment afforded senior workers or, conversely, may be treating guilty, senior employees too leniently.

What follows is a narrative review of the research that has considered the relationship between seniority and job performance and an explanation of the approach taken in the RHH study.[2] A brief consideration of the arbitral rationale for considering seniority as a mitigating factor in discharge cases precedes a discussion of the quantitative review of the research as reported in the RHH study.

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[1]Rodgers, Helburn, and Hunter, *The Relationship of Seniority to Job Performance Following Reinstatement*, 29 Acad. Mgmt. J. 101 (1986).

[2]*Id.*

Application of Seniority to Discharge Cases

Most collective bargaining agreements include management rights or discipline provisions giving the employer the right to discipline and discharge for "just cause," "proper cause," "reasonable cause," or simply "cause."[3] A number of criteria for determining just cause have been developed,[4] with the two-step decision process inherent in the criteria. When reinstatement is deemed appropriate, factors such as the treatment of the grievant compared with others similarly situated, the grievant's past work history, and the grievant's seniority may be considered. We are concerned only with seniority.

Perhaps the classic explanation of the arbitrator's use of seniority has been provided by Ross:

> Long service creates a presumption that the employee is capable of satisfactory performance, so that stronger evidence is needed before the contrary is established. Moreover, the senior employee has developed a greater equity in his job, which is thought of as a species of property right. He has more to lose when he is terminated and finds it more difficult to get readjusted. We therefore tend to feel that an employer must be willing to put up with more from a long-service employee.[5]

Jennings and Walters have listed seniority as the tenth most used factor by arbitrators ruling on company disciplinary actions.[6]

Previous Research on Seniority and Postreinstatement Performance

Using published arbitration awards and questionnaire responses from both companies and unions, Ross studied 207 grievants in 145 establishments. He concluded that employees with under two years seniority when discharged were more

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[3]These terms have the same meaning. *See* Hill and Sinicropi, Management Rights: A Legal and Arbitral Analysis (Washington: BNA Books, 1986), 99–100.

[4]*See, e.g., Enterprise Wire Co.*, 46 LA 359, 363–64 (Daugherty, 1966).

[5]Ross, *The Criminal Law and Industrial Discipline as Sanctioning Systems: Some Comparative Observations*, in Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1964), 149.

[6]Jennings and Walters, *Discharge Cases Reconsidered*, 31 Arb. J. 171 (1976).

likely to be considered unsatisfactory after reinstatement than those with seniority of two years or more.[7]

McDermott and Newhams also found a positive relationship between seniority and performance in their study of 53 reinstated employees in 24 plants, primarily in manufacturing. Using five years as a critical point, they found that reinstated employees with over five years of seniority performed better than reinstated employees with shorter tenure.[8]

Other studies, however, found an insignificant relationship between seniority and postreinstatement performance. Jones studied 19 reinstated employees, including four women who had been discharged for being married contrary to company policy and six grievants who had been discharged for illegal union activity. No significant relationship was found between postreinstatement performance and seniority,[9] possibly because of the limited nature of the sample studied.

Malinowski reviewed the records of 53 reinstated employees using published arbitration awards and employer responses to questionnaires. No systematic relationship was found between seniority at the time of reinstatement and performance thereafter.[10] Labig, Helburn, and Rodgers (LHR)[11] found a negative but significant correlation between seniority and postreinstatement performance in their study of 25 employees in the petroleum and chemical products industry.

One study found that high seniority workers were significantly more likely to be unacceptable performers after reinstatement. Data on 345 Canadian employees were obtained by Adams from published awards and questionnaire responses from company and union representatives and the reinstated employees. He found that "reinstated employees with greater seniority tended to attract more subsequent discipline and discharges."[12]

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[7]Ross, *The Arbitration of Discharge Cases: What Happens After Reinstatement,* in Critical Issues in Labor Arbitration, Proceedings of the 10th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1957), 35.

[8]McDermott and Newhams, *Discharge-Reinstatement: What Happens Thereafter,* 24 Indus. & Lab. Rel. Rev. 531–33 (1971).

[9]Jones, *Arbitration and Industrial Discipline* (Ann Arbor: Univ. of Mich., 1961), 94.

[10]Malinowski, *An Empirical Analysis of Discharge Cases and the Work History of Employees Reinstated by Labor Arbitrators,* 36 Arb.J. 31 (1981).

[11]Labig, Helburn, and Rodgers, *Discipline History, Seniority and Reason for Discharge as Predictors of Post-Reinstatement Job Performance,* 40 Arb. J. 49 (1985).

[12]Adams, *Grievance Arbitration of Discharge Cases: A Study of the Concepts of Industrial Relations and Their Results* (Kingston: Queens Univ., 1978), 74.

Based on a systematic consideration of the results of each isolated study, results have been indeterminate. Some studies show positive effects, others show no effect, and one study shows a negative effect.

Reconciliation of Results Across Studies

The nature of the data reported in the studies has varied substantially. Some studies, such as Malinowski[13] and Ross,[14] cross-tabulated the number of satisfactory and unsatisfactory employees with seniority. Ross[15] provided a qualitative description of the quality of reinstatement performance, while the LHR study[16] reported a correlation coefficient.

The RHH study used a statistical method which is particularly useful for analyzing the results of small sample studies and for analyzing results across studies reporting data in different forms. The particular method, known as meta analysis, is well suited to systematic analysis of this body of literature for two reasons. First, it requires that the data from each study be converted or transformed so that they are comparable across studies. Second, studies with small sample sizes are less likely to show significance than large sample size studies. Meta analysis thus weights the importance of each study so that small sample studies are awarded less importance than large sample studies. Any of the small sample studies may have found a relationship which was insignificant statistically, but the magnitude of the result could have been quite large. When all the available evidence is considered together, true relationships are easier to detect.

Transformation or conversion of the data reported in each of the six reinstatement studies is summarized in Table 1. When the full set of studies is considered, results remain indeterminate. The proportion of satisfactory employees across four seniority intervals appears to exhibit a trend which is just as indeterminate as in previous studies. Satisfactory ratings across all six studies in Table 1 are as follows: 54 percent with 0–5 years seniority, 68 percent with 6–10 years seniority, 65 percent with

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[13] *Supra* note 10, at 12.
[14] *Supra* note 7, at 51.
[15] *Id.* at 53.
[16] *Supra* note 11 at 51.

Table 1. Performance Following Reinstatement by Seniority

Studies	Years of Seniority at Time of Discharge												Totals
	0–2		3–5		6–10		11–15		16–20		>20		
	S[a]	U[a]	S	U	S	U	S	U	S	U	S	U	
Ross (1957)	7	11	13	5	14	2	6	0	3	0	0	1	62
Jones (1961)	0	0	7	5	2	3	0	0	0	0	0	0	17
McDermott & Newhams (1971)	3	5	7	7	7	1	6	1	4	1	3	2	47
Adams[b] (1978)	n.r.[c]		n.r.		17	12	n.r.		n.r.		2	4	35
Malinowski (1981)	9	6	6	1	7	4	2	4	1	0	2	0	42
Labig et al. (1985)	2	2	1	2	5	3	0	0	0	0	1	0	16
Totals	21	24	34	20	52	25	14	5	8	1	8	7	219
Proportion satisfactory	.47		.63		.68		.74		.89		.53		

	Cumulative Estimates Using Collapsed Intervals								
	0–5		6–10		11–20		>20		Totals
	S	U	S	U	S	U	S	U	
Ross, McDermott & Newhams, and Malinowski[d]	45	35	28	7	22	6	5	3	151
Proportion satisfactory	.56		.80		.79		.63		
Jones, Adams, and Labig, et al.[e]	10	9	24	18	0	0	3	4	68
Proportion satisfactory	.53		.57				.43		
All Studies	79	68	52	25	26	14	8	7	277
Proportion satisfactory	.54		.68		.65		.53		

[a]S = number of satisfactory performers; U = number of unsatisfactory performers.
[b]Adams used a 0.5 and a 11–20 year interval. All of Adams' data are included in the summary at the bottom of the table.
[c]n.r. = not reported for this seniority interval.
[d]These studies mixed exonerated and nonexonerated employees.
[e]These studies included only nonexonerated employees.

11–20 years seniority, and 53 percent with over 20 years seniority. No clear trend is apparent from these estimates.

The differences across studies could be due to the large sampling error associated with small sample studies. The RHH study, however, determined that the differences across the studies are too great to be explained by sampling error alone. Rather, it was determined that the difference in results can be explained by the inclusion or exclusion of exonerated employees.

Ross, McDermott and Newhams, and Malinowski categorized together those employees who were reinstated with full back pay and allowances and those who were reinstated with lesser discipline than discharge. As shown in Table 1, almost one third of the employees in these three studies were reinstated with full back pay. Employees who have been reinstated with full back pay and allowances (in other words, those whose grievances have been sustained in full) in the overwhelming majority of cases were exonerated because the employers were unable to prove the charges to the arbitrator's satisfaction. This finding means that the affected employees must be considered innocent, even though there is a possibility that innocence comes from lack of proof, not lack of wrongdoing, or that the awards reflect a lack of due process afforded the grievants.

Employees who have been discharged and thereafter reinstated with lesser penalties must be considered guilty. Their infractions were proven to the arbitrators' satisfaction, but penalties were viewed as too harsh. Analyses which combined both groups of employees mixed the guilty with the arguably innocent. While it might be interesting, and even instructive, to compare postreinstatement performance of these two groups, it is inappropriate to consider the postreinstatement performance of a group which includes both guilty and innocent with a group which considers only the innocent. Such an analytical approach may mask the true relationship between seniority and performance.

Three of the studies excluded all exonerated employees. In the other three studies approximately one third of the grievants were exonerated. Results were thus reanalyzed. The three studies that excluded all exonerated employees found that the postreinstatement job performance of senior grievants was worse than the job performance of junior grievants. The three studies that included some exonerated employees found that the

postreinstatement job performance of senior grievants was better than the job performance of junior grievants.

Table 1 subsets the data into two groups of studies. In the subset that included some exonerated grievants, more than half the employees in all categories were successful after reinstatement, but the most junior and most senior employees were less successful than employees in the middle two seniority categories. In the subset that included no exonerated employees, less than half of the most senior group of employees was successful after reinstatement.

The RHH study takes the analysis a step further by using the available data to estimate the relationship between seniority and postreinstatement job performance for all nonexonerated employees. This analysis generated a best estimate based on the available evidence between seniority and job performance. The estimate depends on whether the grievant was exonerated. If exonerated, there is a positive relationship between seniority and postreinstatement performance. A predicted relationship shows that over 60 percent of those with under two years of seniority are likely to perform satisfactorily and almost all with ten years or more of seniority will be satisfactory employees. Conversely, for employees who were not exonerated, there is a negative relationship between seniority and postreinstatement performance. The predicted relationship is slightly below 60 percent satisfactory for those with under two years of seniority, and slightly less than 50 percent for those with ten years. For workers with 30 years of seniority, less than 20 percent are satisfactory.

Implications

There may be a systematic difference in the type of case that typically leads to exoneration and the type that leads to reinstatement without exoneration. Nonexonerated cases are more likely to involve repeated minor offenses such as tardiness. Companies may be quick to discharge junior employees with such offenses. If so, senior grievants could be expected to have poorer work records than the junior grievants. With a less acceptable work history, their job performance also should be less acceptable.

Findings for nonexonerated senior employees contradict the "conventional wisdom" that senior employees are better bets for reinstatement than their juniors. We suspect that these senior

employees were discharged after a long series of infractions rather than as a consequence of one misdeed after a clean work history. If so, it appears that once a senior employee has established a pattern of violating work rules, that pattern is unlikely to be changed by the imposition of progressive discipline or by the shock of discharge followed by reinstatement.

Exonerated cases may more likely involve one-shot major offenses such as theft. Upon a finding of innocence, the performance could be expected to be no different than the performance of the general population of employees, that is, the performance of senior workers will be better than that of junior workers simply because of greater years of training and on-the-job experience.

The employer probably has taken seniority into account when reviewing the senior employee's record before deciding to discharge. If arbitrators are faced with a situation where a senior employee has been treated more harshly than similarly situated employees, it is appropriate to modify the discharge so that the ultimate disciplinary action is consistent with past practice. If this is not the case, or if no other unusual circumstances suggest modification as an appropriate arbitral response, our analysis suggests that reliance only on the high seniority status of a nonexonerated worker as justification for a modified penalty is misplaced.

III. THE ARBITRATION OF PLANT-CLOSING DISPUTES

GEORGE R. FLEISCHLI*

Plant-closing disputes, like subcontracting disputes, seem to have a timeless quality. For this reason, you might well ask: Why replow that ground? There are several reasons for doing so at this time, in my opinion.

A review of Academy Proceedings discloses that it has been a long time since plant-closing disputes have been a popular issue. Attention was focused on these disputes in 1963 and 1964 as a result of the controversial decision of the Court of Appeals for the Second Circuit in the *Glidden* case.[1] The court concluded that

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[1]*Zdanok v. Glidden Co.*, 288 F.2d 99, 47 LRRM 2865 (2d Cir. 1961), *aff'd on other grounds*, 370 U.S. 530, 50 LRRM 2693 (1962).