CHAPTER II

SENIORITY AND ABILITY

Workshop No. 1

Introductory Statement by

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In our modern industrial civilization, it is inevitable that most people who labor be paid workers. It is, of course, of tremendous importance to the vitality of our economic system that their jobs be meaningful to them. Quite apart from spiritual or psychological or moral terms, but wholly in the context of our deliberations today, we are to view man, therefore, as an "economic being." People belong to quite a number of different groups; they differ from each other in the degree to which they have identified their own yearnings for fulfillment with the well-being of their various groups. Stable and successful groupings enable their members to experience social satisfactions in the present while working for their future.

I would suggest to you that seniority is job security. Thus, as generally understood, can it not be said, at least provocatively and to stimulate discussion and analysis, that seniority rights are the wage earner's equivalent of the right which we all call the right to private property? But private property is not an absolute right. It is limited in various ways, and so, too, with seniority rights. If seniority is, then, the wage earner's "private property," as the term is generally understood, is it then unrestricted, unqualified, and unendangered? Does it really mean job security? Is length of service the equivalent of money in the bank or an ownership in fee simple? Hardly so; and just as the private property of real estate may be subject to zoning restrictions, so seniority too is generally zoned off in depart-

mental, occupational, or other groupings less than company-wide.

Just as our private property may be large at one moment and then subject to contraction or diminution by governmental taxation, so too is seniority a mountain of support for "layoff" purposes and a mere hillock of protection as against "bumping." In the law of private property rights, differentiation between males and females will customarily run afoul of the "equal protection of the law"; in the realm of job seniority or job security, however, differentiation between the sexes, while not common, is perfectly lawful. Private property may be lessened in capital gains fashion or by the greater inroads of ordinary income tax, dependent upon the nature of the transaction involved. So also with seniority. It may be greater in retaining one's job and mean much less if promotion is involved and "ability" or "adaptability" or "competence" come into play. Finally, just as the non-wage earner's private property or, if you will, the wage earner's private property in his "non-industrial life" is subject to elimination by "eminent domain" and "condemnation" or business failure, so too may seniority be eliminated by merger or technological displacement—both factors hardly within the control of the individual wage earner. Indeed, the union shop steward's greater seniority is terminable in the same way as the jurist who is elected for a stated term.

It is therefore hardly inaccurate to say that, while collective bargaining strives to make jobs meaningful and satisfying through seniority rights or, if you will, job security, seniority may, under differing circumstances, mean either more or less than the possession of private property, outside the wage-earning group; although to the worker seniority rights, it is submitted, is normally viewed by him as an absolute private property right.

The interplay of "seniority and ability" has many facets, and our industrial literature is rich with narration and description. Layoffs, rehirings, bumpings, promotions, choice of shifts or routes are all affected by seniority. You recall the problems of

seniority in defense production where the paths of solution were so difficult and varied so widely from company to company that the Wage Stabilization Board, in the Basic Steel Industry case (15 LRRM 1707) remanded the issues to the parties for solution. In its remand, the parties were told to accept the following as guides for proper administration:

> (1) That seniority is always a weighty factor for consideration; (2) that exact measurement of relative ability and fitness is difficult and frequently impossible; (3) that, though ability may outweigh greater seniority, it should not necessarily do so in all cases; (4) that seniority may outweigh even conceded superior ability if the superior ability is not of significant importance on the job involved; (5) that when ability is the governing factor it should be fairly demonstrable; (6) that the situations of promotion and demotion are not the same, layoffs and demotion being commonly made on basis of seniority without inquiry into ability except in rare cases; and (7) that consultation with appropriate union representative before deviating from seniority will frequently avoid protest and dissatisfaction.

You also recall, I am sure, the controlled transfers and the certificates of availability in World War II; also the problems of job security there involved and the protection afforded to our service men by the reinstatement and seniority or escalator provisions of our Selective Service Acts.

Various commentators have pointed out the nexus between flexibility and stability and the ever continuing search for methods of accommodation of these divergent ends. Underlying seniority is the employee's search for stability of employment and the employer's search for sufficient flexibility to choose and maintain the work force best suited to his needs.

As we go forward into a period of accelerated business mergers, of vast changes in our economic structure, of massive technological improvements, of guaranteed annual wages or supplementary unemployment compensation systems, of pension and welfare improvements beyond the ken of workers of a

generation ago, it is not too farfetched to say that one of the grave industrial problems will be the one we are discussing today. Seniority and ability provisions in their negotiation, drafting, and administration constitute a problem both for management and labor. We may anticipate dissension among workers, chronic internal union problems, the cry, occasionally raised in the past and more likely to be heard in the future, that "We are going to protect the elder workers' seniority rights whether they want them or not." The never ending and currently accelerating series of pressures emanating from all sides will provide a great deal of scope for this particular field of collective bargaining and arbitral decision.

It will be good, therefore, to know where we stand on this subject of seniority and ability, but I predict to you that most of us will react like Zekle in James Russell Lowell's "The Courtin":

"He stood a spell on one foot
fust,
Then stood a spell on
t'other.
An' on which one he felt the
wust,
He couldn't ha' told ye
nuther."

To discuss where they stand and their divergent views, in the tradition of last year's excellent papers of Jim Healy and George Taylor (*Arbitration Today*, pp. 45 ff. and pp. 127 ff.), we rely on those who are present this afternoon.

Summary

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The point was made that seniority is a *grant;* it is not a common law right. Hence the definition of seniority rights must

depend on the language of the particular agreement. A great many arbitration problems arise because of inadequate and ambiguous contract provisions. This reference to *arbitration problems,* the discussion revealed, relates both to the difficulties of the arbitrator and to the contractual problems of the parties leading to the necessity for arbitration in the first place. Several causes of inept drafting of agreements were noted, including the failure to anticipate problems which are likely to arise, conflicting basic assumptions of management and labor concerning the meaning and weight to be given to the ability factor, the accretion of small, piecemeal changes in seniority clauses over the years, and, as one participant noted, the unions' problems in encompassing conflicting interests of old and young employees. It was also suggested that the greatest problems of this sort are to be found in the contracts of small employers. One participant complained of the tendency of specialists to speak and write in the framework of the more sophisticated agreements of large companies and unions, and bemoaned the tendency of small companies and local unions to draft poor seniority clauses, as well as their complete lack, in many instances, of production records or job analyses which are the stock-in-trade of the larger companies—and, perhaps, the larger arbitrators.

The discussion dealt almost entirely with the ability factor. No one addressed himself to the questions of the meaning or measurement of seniority itself. The first points went to the question of how to determine—and who should determine—the matter of ability of employees. A fairly basic proposition was made, which seemed to command general support. This was that the determination of ability must be made by the management, and the issue should not be one of the arbitrator's judgment versus that of the management but whether the company's determination was arbitrary, capricious (the proponent's adjective was "whimsical"), or discriminatory. If not, this should end the matter. While each side must seek to persuade the arbitrator of his position, it was recognized that it

is a managerial responsibility to make the determination and initiate the action, that there is an area of latitude for judgment and discretion, and that within this area, bound as it were by the adjectives suggested, the employer's decision should not be overruled on grounds that the arbitrator might have reached a different conclusion.

Turning to the criteria for judging ability, an immediate distinction was offered between the concepts of competitive or comparative ability, on the one hand, and competence or capacity, on the other. The first involves the choice among individuals on the basis of superior or inferior ability; the second meaning invokes a different test—whether the employee is capable of performing the job in question. In applying these distinctions, the question immediately arose as to whether one were dealing with promotions, demotions, or lateral transfers. It was a general viewpoint and experience that the competitive standard applies to promotions, while capacity to do the work applies in down-grading and transfers associated with layoff. This distinction appeared to be widely accepted in practice, but again the caution was made that it all depends on the particular agreement at issue. There was a strong suggestion, however, that, in the absence of either qualifying language or evidence of contrary intent, the ability factor should be applied differently to movements up and down the scale.

A qualification was suggested to the effect that these distinctions might depend on the nature of the job. Comparative ability plays a greater role in the higher skills. In the case of an unskilled job, such as sweeper, the test of capacity alone might reasonably hold in upgrading as well as downgrading. In a highly skilled classification, the question of comparative ability would normally be given much greater weight.

In the application of the comparative ability criterion, it was stated that factors of skill and ability cannot be held to precise measurement and must be taken to mean "relatively" or "substantially" equal, even where the contract is simply worded to provide that seniority shall govern where skill and ability are

equal. Conversely, where the claim is that superior ability should outweigh seniority in a given case, the difference should be pertinent, significant, and demonstrable. The word "demonstrable," it was suggested, was most useful as a practical criterion.

The discussion ranged over a number of recurring problem situations. The question was raised whether the standard of ability to do the job requires competence for immediate performance or whether, and to what extent, it should allow for a break-in period. Several persons were concerned about situations involving promotions in which an employee might be able to perform the tasks of the immediately higher job but in which the employer views the advancement as part of a line of progression in a complex of job duties and skills, and holds, perhaps with convincing evidence, that the given employee lacks the capacity to move up more than one or two rungs of this integrated ladder. The question of trial periods came up several times in the discussion. Many of the comments were critical or cautionary with respect to the requirement by the arbitrator of trial on a contested job. It was argued that there must be a pretty strong presumptive case to warrant a trial period. The process of multiple transfers incident to layoff under plant-wide seniority systems was noted as possibly very costly. The requirement of trial periods, outside of contractual provision or established practice, was seriously questioned by one participant who suggested that this is one of the areas in which arbitrators may be subject to justifiable criticism for departing from their role and attempting to act as "industrial doctors."

Considerable interest and discussion were aroused by a question concerning the use of objective testing methods by employers to determine aptitude and relative ability. (Particular tests were not defined; the reference was chiefly to "objective," "scientific," or "sophisticated" tests, especially those prepared or administered by specialists and consultant firms.) Several of the participants had experienced problems of this sort in particular cases in which employers had relied on results of such

tests as important or exclusive determinants of ability and in which the unions raised strong objections to the weight given to such test results, or to their use at all. It was noted that few cases have been reported involving this issue, but the impression was that, in virtually all of the published decisions, the employers had been upheld in the reliance placed on objective testing. If this meant exclusive reliance on such tests, a strong dissenting note was registered in this discussion. It appeared to be a general viewpoint that objective tests may be valuable, but they should not be accepted as necessarily conclusive in contested issues of ability. They may be accepted as one factor among many which the arbitrator may take into account, including experience, production records, judgment of superiors, etc., which are not supplanted by the institution of objectvie testing.

A number of possible objections were registered to the assignment of too great weight to many of these tests. It was argued that testing methods sometimes entailed unrealistic assumptions of literacy or sophistication, that results can be unduly influenced by fears and inhibitions on the part of the manual worker. It was argued that factors tested sometimes relate to the "fringes" of job content, that they measure factors of personality rather than ability, and that it is important to give careful, and sometimes cautious, scrutiny to the nature of the tests. It seemed to be agreed that test results should not prevail over demonstrated manual ability in performing the job. One participant noted that distinguished members of the bar have been known to fare quite poorly in tests of legal aptitude, and there were murmured comments and a faint tremor reflecting a feeling, perhaps, that the jurisdiction and authority of the Psychological Institute of America should be severely limited.

The question of appropriate weight to be given to various testing procedures and results posed interesting problems of consistency in the minds of some. While unions, and arbitrators too, have challenged management judgments of capacity and

relative ability for want of objectivity, the arbitrators seemed to share a bit of the alarm with which many unions have viewed the tendency of sophisticated personnel administrators to become too "objective." There was also a serious question in the minds of some participants as to whether an employer may unilaterally introduce new and quite different testing methods in the absence of contractual agreement or past practice.

There was no attempt to formulate conclusions or to arrive at a consensus of views, and it would belie the nature and purpose of this all-too-brief discussion to summarize it in such terms. The most that might be done is to note certain comments and viewpoints which, to this reporter, seemed to stand out by virtue of the frequency, firmness, or artistic flair with which they were expressed. They are: (1) it all depends on how the contract is written; (2) the arbitrator is concerned, not only with the correctness of the conclusions of the employer or the union, but whether the answers given by either were addressed to the proper questions; (3) the determination of relative skill and ability should be based on evidence and standards which are reasonable, demonstrable, and objective—but with a suggestion here and there, "let's not carry this objectivity too far"; and (4) in determining questions of skill and ability, the judgments of management should not be set aside where they have not been shown by the evidence to be arbitrary, capricious, whimsical, or discriminatory—or different from our own.