CHAPTER VIII

EMPLOYEE JOB RIGHTS VERSUS EMPLOYER JOB CONTROL: THE ARBITRATOR'S CHOICE

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Perhaps the useful point of departure is to examine the implications of the correlative concepts of job rights and job control, as these terms will be used in this paper. Increasingly it seems the incumbent of a job—encouraged and supported by his union—believes the incumbency confers on him a set of prerogatives. Not the least of these is a sense of title. This feeling is hardly perceptible when he first goes on the job, but as year follows year and his seniority cup gets fuller and fuller, he drinks deeply of this heady wine of possession and his consciousness of job entitlement grows ever stronger.

In a time of layoffs his overriding job right is the right to remain in it while his juniors are being separated from their jobs. If, despite this protection, ill luck still overtakes him, forcing him out on the street, he takes his protective right with him to enable him to return to the job to which he has title as against all possible usurpers.

From this major prerogative there is a major derivative. The basic right of seniority carries with it, in the eye of the job holder, the right to prevent any watering down of seniority. If the industrial community in which he holds his seniority claim is governed by a complex set of seniority rules operating within larger and smaller seniority jurisdictions, the job incumbent strongly asserts the right to halt all job structure changes that might dilute his seniority tenure.

The incumbent believes that other ancillary rights flow from his seniority ownership. His title to the job is title to the work

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normally performed within the scope of the job category. And if he is a maintenance mechanic, he will have none of the company's taking maintenance work away from him and assigning it to a production worker—permanently by rearranging job content, or temporarily as when supervision fails to call him in on an overtime assignment giving the work instead to a production employee who already happens to be on the premises.

It is but an enlargement and collective application of this sense of job and work entitlement when the bargaining agent objects to the contracting out of work previously done by job owners within the bargaining unit, or objects to supervision performing nonsupervisory duties.

The incumbent's ancillary job seniority rights tend to expand beyond his own job and attach themselves to the plant job structure. When a more desirable job becomes vacant, he seeks to acquire the new job title on the same broad and unqualified basis he had retention rights to his own job—simply length of continuous service. All movement within the job structure—up, down, or lateral—he would bring under the influence of the outward extension of his tenure rights in his own job. This extension becomes notable when wide ranging bumping rights in time of force reduction are acquired. And the extension has an interesting inverse consequence when it is applied successfully to force layoffs of junior employees who would otherwise have remained at work under a reduced work week schedule.

Without attempting an exhaustive catalogue of the ramifications of the job rights concept, it seems essential to notice one other major variety of its manifestation. Not only does the job incumbent move to defend his right of occupancy but he resists what he regards as encroachments on the value of his job possession. This he thinks can happen as a result of a change in job content which makes his job more hazardous or changes its economic value. The job holder's rights are thus conceived to encompass maintenance of the integrity of his job which he finds impaired if his personal risk is increased or his effort output stepped up without any commensurate increase in his job rate. Out of this cluster of job rights comes resistance to claimed speed ups, to changes in work rules or local working conditions, to man power reductions growing out of new technology and production rationalizations, to creating, combining, and changing

job classifications once the job structure has been reduced to written descriptions and the individual jobs evaluated and priced.

That there are no imaginable boundaries to the expression of the job rights concept became clear to me some months ago when I was confronted with a grievance protesting the transfer of a worker from the second to the third floor of a manufacturing building. This was a female employee who also happened to be the union steward. Her transfer upstairs left her job classification, her rate, her seniority unaffected. Indeed, it accomplished an improvement in her general working conditions. It brought about no real impairment in her capacity to function as a steward. There was no doubt that the union would have been willing to forget the whole matter if only she had been, particularly since it was hard put to say how the employer had violated the contract. She wasn't willing to forget; her job rights had been violated. For a good many years on the second floor she had enjoyed a very pleasant relationship with the foreman. And I do not mean a collective bargaining relationship. Then one day all this collapsed. After displaying remarkable patience for several months, the company decided it could not any longer take the bitter aftermath of this deteriorated relationship and she was transferred. She reacted vigorously and insisted she had a right to continue being floored where she had been floored all these years; where she could walk past the foreman's desk and pointedly swing her hips in a gesture of anatomical derision. My award left her upstairs.

Seriously, I would like to suggest that the concept of employee job rights has two main configurations which in their detailed expressions are to some degree overlapping. One configuration is focused on job security; the other is focused on job integrity. These focuses represent completely legitimate interests of wage earners and the labor organizations that represent them. Who is to say they are values our industrial society should question or repudiate?

To recognize the legitimacy of the objectives of job security and job integrity is of course not to approve all that takes place in their names. And it takes no divination to know that the management community tolerates with reluctance a good deal that takes place in their names.

It is in the nature of a truism that the design and operative control of a plant job structure are essential functions of the management of an enterprise. In their pristine state at the emergence of an industrial economy, these functions are totally unencumbered. Or to put it conversely, rightless job holders, in an era prior to the recognition of employee prerogatives, work in a job structure completely under management control. At such a time, the power to direct the working force—a phrase that has become familiar to the point that its impact on the mind has been blunted —actually meant the ability to direct the working force in every particular.

The concept of employer job control, absent diminution of that control through the development of employee job rights, is a concept of sovereign power. This is a power adequate to accomplish the design of the job structure, the definition of all jobs within the structure, the addition of new jobs, the modification or combination of existing jobs, the elimination of jobs for reasons of technology or subcontracting, the pricing of jobs, the scheduling of work performance in the jobs in all time aspects such as normal and overtime hours, holidays, vacations, etc., and the quantity and quality standards of work performance demanded of each job. And it goes without saying, of course, that the employer's control encompassed the absolute power to separate the particular incumbent from his job no matter what the reason. This is a vast domain of sovereignty which is increasingly subject to challenge and curtailment as the concept of employee job rights appears and is expanded.

Need For A Conceptual Framework

It seems desirable at the outset to find a suitable conceptual matrix in which to place this juxtaposition of job rights and job control in order to facilitate an insightful understanding of what has happened when arbitrators have been called upon to deal with these matters. Obviously available is the traditional collective bargaining framework. While historically significant, it provides little in the way of useful insight into the arbitration function of drawing the line between job rights and job control. As an adjunct to the collective bargaining relation, the parties for the most part grudgingly concede the necessity of arbitration, and it is always

clear to the loser in an important case that the process is deficient if not evil and is often inscrutable.

This traditional framework does not seem to be the best ideological background against which to view arbitrational balancing of job rights and job control. Language employed earlier in this paper implies another context. The use of terms like "title to the job," "usurper," "claim," "ownership" suggests the legal concept of property rights. You may have suspected I was embracing the notion of the employee's full-blown property right in his job. This I do not intend but it seems clearly necessary to explore the implications of this idea.

Professor William Gomberg has suggested that a rational approach to such job rights—job control problems as featherbedding and work rules—involves recognition of the property rights in a job. As he puts it, "The conflict between labor and management in this area may be interpreted as a conflict in property rights." [1] According to Professor Gomberg's analysis, many of the work rules define an emerging property right of the worker in his job which "the rituals of our society are not yet ready to accommodate." Hence, the argument runs, it is irrational to think of the problems of work rules and alleged featherbedding in the emotional and moralistic terms usually employed.

In a recent unpublished paper entitled "The Evolving Concept of Employee Vested 'Property Rights' in Their Jobs as Manifested in Recent Arbitration and Court Decisions," written by a past President of the National Academy of Arbitrators, G. Allan Dash, Jr., there is an examination of the impact of arbitration awards in industry generally, but with particular reference to the railroad and steel industries, suggesting that the decisions reflect "the development of the concept of employee job rights as property rights." Although his words may be capable of this construction, I am not sure that Allan Dash was intending to imply that the arbitrators reached the results they did because of any conscious reading of the legal connotations of property rights into the notion of employee job rights when they were interpreting a collective bargaining contract.

While its vogue seems to have increased lately, the notion that

[1] William Gomberg, "Featherbedding: An Assertion of Property Rights," *The Annals*, January 1961.

an employee may have something equivalent to a property right in his job is not at all novel. It has been broached before from the rostrum of these annual Academy meetings. Jay Kramer, in the 1956 meeting, suggested the analogy between the right to private property and seniority rights in a job. He pursued this in terms of a comparison of the limitations imposed on the owner of private property—by zoning, taxation, eminent domain, and condemnation—with certain limits on the right of seniority; but he did not go on to analogize the power of government, under a constitution, in restricting private property with the function of management, under a labor contract, in operating to make seniority much less than an absolute right.[2]

Arthur R. Porter, Jr. about a decade ago undertook to make a case study of the job restrictions imposed on employers by the International Typographical Union. He came to the interesting conclusion that the Laws of the I. T. U. are predicated on the Union's assumption that its authority over jobs held by its members stems from a property right. This control over jobs as though they belonged to the Union began to be articulated and exercised as far back as the 1890's.[3]

While the job property right idea is not new, it is newly popularized, in part by current writers but I suspect in considerable part by certain decisions of the courts. A striking example is the *Glidden* case decided by the United States Court of Appeals for the Second Circuit.[4] You may be familiar with the holding that seniority, pension, and other rights of employees survive both the termination of the contract and the removal of the work to a distant plant site, a conclusion which rather upset Arthur Krock of the New York Times and others in the American management community. The language in the Court's Opinion is strongly suggestive of the property rights concept. Rights to retired pay and valuable unemployment insurance are referred to as "vested" and not subject to being "unilaterally annulled." And the Court talks about "the employee *owning* the right" which he or his union is capable of bargaining away (emphasis supplied). It's almost like his automobile.

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[2] For Kramer's analysis see "Seniority and Ability," *Management Rights and the Arbitration Process* (Washington: BNA Incorporated, 1956), pp. 41, 42.

[3] Arthur R. Porter, Jr., *Job Property Rights—A Study of the Job Controls of the International Typographical Union* (1954).

[4] *Zdanok* v. *The Glidden Company,* 288 F. 2d 99 (1961).

Property Rights Concept Unsuitable

Conceding, as I should hasten to do before an audience with so many lawyers in it, and with two commentators both of whom are attorneys waiting to tear this paper into small pieces, that as a legal layman I am skating on precarious ice, I nonetheless suggest that there are good grounds for rejecting the legal concept of property rights as the most useful approach to the issues in employee job rights versus employer job control.

I doubt that what we as arbitrators are dealing with here, even in an emerging sense, is the adjudication of conflicting property rights. I doubt it in the first place because I see very little evidence in the arbitration decisions that views derived from the legal institution of private property have significantly influenced the awards. True there is much talk of "rights" and one could do a Procrustean bed job of putting a lot of the cases to rest—albeit a bit uncomfortably—in this framework. But the rights talked about are contract rights and they do not arise out of elaboration of the law of workers' rights as part of the legal institution of private property but out of the socio-economic institution of collective bargaining.

Many decisions no doubt could be rationalized in terms of the nexus of a property rights conflict but these judgments are not the consequence of applying considerations growing out of the recognition of such a conflict. This is most significantly seen in the contracting-out cases. Here, if anywhere, an arbitrator could talk about deprivation of job property rights and could, as Professor Gomberg suggests,[5] regard the employer's pursuit of economies involving the contracting away of jobs as a form of trespass. But Donald A. Crawford in his definitive study of the contracting-out cases makes no mention of this ideology.[6]

In the second place, the job property rights idea, while it may tend to clothe certain job perquisites with greater respectability and promote social acceptability for them, does not satisfy the logic of the situation nor provide the most useful image of the arbitrator's role for either the parties or the arbitrator himself.

In Anglo-American jurisprudence the institution of private

[5] William Gomberg, "The Work Rules and Work Practices Problems," *Proceedings of the 1961 Spring Meeting*, Industrial Relations Research Association, p. 643.
[6] Donald A. Crawford, "The Arbitration of Disputes over Subcontracting," in *Challenges to Arbitration* (Washington: BNA Incorporated, 1960), p. 51.

property had its roots in the law of real property—ownership of land with its attendant rights and uses. While this influence has never been lost, any such containment as it suggests is long since gone. The institution has become very complex, so much so as to be available, according to one court, to define a woman's right to her husband's affections as property.[7] (Parenthetically, one might be forgiven for wondering what arbitrators might be able to do with the property concept.)

It is quite difficult—as would be evident to anyone reading C. Reinold Noyes' work "The Institution of Property"—to sift out of this complexity those attributes of private property which have logical relevance to the notion of employee job rights. The task of constructing a job property right conception is a little dismaying. Should it include specific possession in a legal sense? And how does the possessor acquire the right of ownership in a given job? By appreciable passage of time, since probationers obviously wouldn't acquire it? How much time? And is the job part of the concept to be generalized to an entire plant or company so as to avoid the troubles attendant on workers changing particular jobs? Is the right of ownership sole, in the employee, or is it shared with the union? How is the value of a job property right to be measured and weighed when balanced against the employer's property right? Does ownership contemplate the capacity to dispose of a job property in any sense at all, as other kinds of property are transferred?

It is not clear to me exactly what you put into a job when you find in it a property right, other than the idea that society has ordained that jobs confer on their holders certain values, wholly apart from any collective bargaining agreement, which the employer can't take away and which he must respect because society is prepared, one way or another, to enforce the right by remedying its violation. Perhaps our industrial folkways and mores, aided by our industrial jurisprudence, are moving in this direction. If this is so, it seems to me the development falls far short of providing a viable logic for dealing with the wide range of labor relations problems encountered in the area under discussion in this paper.

Under the aegis of the conflicting property rights notion, the

[7] *Eliason* v. *Draper*, 2 Boyce 1 (Delaware Superior Court, 1910).

image of the arbitrator's role is that of a judge accommodating established rights. In reality, however, the arbitrator is engaged much more basically in defining and elaborating the rights of both parties, with their guidance and help to be sure. Such a role is connoted by a quite different conceptual context.

Arbitrator Resembles the Supreme Court

An industrial plant resembles in many significant ways a political community. A society has been organized to accomplish some purpose of production. It is made up of people—often a good many—who must live together in a cooperative relationship over substantial time periods, measured both by hours in the day and by longer time units. This proximity and multiple relationship produces a host of practical difficulties and problems. If the general purpose is to be realized, there must be a minimum orderliness and an effective means of resolving problems, something attainable only by a system of government. Rules of conduct are required. These are laid down in part by a code of behavior embodied in a labor contract. They are imposed in part by management directives. And in part they arise as do the folkways of all societies, through habit and custom, eventually becoming dignified as controlling past practices.

This industrial community, like the political community, has need of functions which have been traditionally denoted executive, legislative, and judicial. This, functionally, is an inexact trichotomy but it fits the industrial community institutionally about as well as it fits the political community. The executive power is vested in the management of the enterprise, variously clothed. The legislative power is shared; more largely in a more highly democratized industrial plant society—more limitedly where the workers' participation in rule-making through their chosen representatives is narrowly confined. In the latter case there is a considerable combination of the legislative and executive prerogatives in the management hierarchy, as in a political dictatorship. And in any case a residual but fundamental legislative function is located outside the collective relationship in an arbitrator.

The judicial function of dealing with violations and controversies and making interpretive elaborations and applications of the rules is shared by the management and the workers and

carried out by means of a hearing and decisional device known as the grievance procedure. This is the lower judiciary. There is also a court of last resort—the arbitrator.

Several of these qualities of the plant industrial society were noted by Archibald Cox when he discussed the implications of Lincoln Mills at the Academy's 1959 meeting. He discussed them, however, in a different reference: the special characteristics of the collective bargaining agreement. He mentioned as "unique" the number of people affected. He drew attention to the "wide range of conduct" and the "enormous variety of problems" to be dealt with by the agreement which operated over substantial time periods. He stressed the "degree of mutual interdependence," something not associated with simple contracts. He then pointed out that as a consequence of these characteristics "the provisions of the labor agreement must be expressed in general and flexible terms." [8]

I submit that the labor agreement is fully the equivalent, for the plant industrial community, of the constitution for the political community, and that the fruitful image of the arbitrator's role is that of the interpreter of the constitution in the political community—the Supreme Court. This, as I shall shortly emphasize, is different indeed from that of a judge merely adjudicating conflicting rights. The degree of generality and flexibility in the collective agreement inevitably assign to the arbitrator responsibility for the same kind of judicial statesmanship as is required of the Supreme Court in interpreting the United States Constitution.

Later in his paper Cox describes the labor contract as "essentially an instrument of government" and quotes with approval the following language of the Federal Court in *NLRB* v. *Highland Park Manufacturing Company* (110 F. 2d 638, 1940): "The trade agreement becomes, as it were, the industrial constitution of the enterprise setting forth the broad general principles upon which the relationship of employer and employee is to be conducted." I would eliminate the words "as it were."

I need hardly remind you that these general views of the nature of the plant community, of the function of the labor agreement

[8] Archibald Cox, "Reflections Upon Labor Arbitration in the Light of the Lincoln Mills Case," *Arbitration and the Law* (Washington: BNA Incorporated, 1959), pp. 33-36.

in defining a system of industrial self-government, and of arbitration in the role of creating a jurisprudence of private plant law were embraced by the Supreme Court in *Warrior and Gulf Navigation.* But in that case the Court expressed an opinion with which I am here disagreeing in part. It declared "the labor arbitrator performs functions which are not normal to the Courts." [9] Not normal to the lower courts, but entirely normal to the Supreme Court, it appears to me.

So far you have been in the vestibule; I now invite you into the building proper. But first a caveat. The number of reported cases in the rather large territory bounded by the subject of this paper is nearly legion. No statistical classification of these cases has been attempted. A short life doesn't provide sufficient time for that. Anyhow, I would have little confidence in the results.

A statistical study would permit me to tell you what the majority and minority views are on the right of the employer to combine jobs, and on other aspects of job control. And it would permit measuring the preponderance of the opinion so that judgments, such as "the overwhelming majority of arbitrators hold . . ." or "the division of opinion is fairly even," could be announced. These would doubtless be interesting and perhaps of some value. But the value would be limited, and the figures and inferences might be misleading.

The statistics would tend to be used as though the reported cases were representative and as though all the arbitrators involved were equally entitled to have their opinions counted as one unit. Reading a large number of these cases can leave the impression that the quality of the arbitrators whose awards are published is uneven. To regard each as constituting a statistical unit equivalent to all the rest would be undiscriminating. Further, the vast majority of awards are unpublished and the process of selecting those that are published is not only not planned to achieve some design of representativeness but is actually distorting in the selective role it gives the arbitrator's desire either to remain unpublished or to be published. The simple fact is that a number of the ablest and most experienced arbitrators are relatively unrepresented in the reported cases.

The cases I am using are frankly selective, some of them un-

[9] *United Steelworkers of America* v. *Warrior and Gulf Navigation Company,* 34 LA 561, 363 U.S. 574 (1960).

published, and all chosen because they epitomize certain important viewpoints or type situations on which it seems fruitful to comment. None are taken from certain subject areas. It would indeed be gilding the lily for me to attempt any further analysis of the contracting-out cases after Scotty Crawford's masterful job. And I would be needlessly risking your patience by pursuing the job rights-job control conflict into the discipline cases—an area that has in past annual meetings been worked and reworked. Excluding these groups, many significant areas remain.

The Facts: Not the Contract

A number of approaches, capable of definition or at least characterization, have been adopted by arbitrators deciding issues raised by asserted employee job rights colliding with claimed management job control. Perhaps these approaches might be styled folkways of decision. One of them could be designated *The Facts: Not the Contract.* This is the situation where the arbitrator elects not to come to grips with the contract issue or the basic problem.

In a case decided by Bob Fleming, the question of whether the company under the contract could assign the duty of weighing incoming cars to the train conductor without negotiating the change in job content was raised.[10] The fact that the additional job duties were planned and discussed with the union before the contract was negotiated, although instituted subsequently, and that an appropriate wage for the conductor was bargained into the agreement, was held to be decisive against the company. Regarding an allegedly relevant contract provision making new classifications, created after the signing of the agreement, subject to negotiation, Arbitrator Fleming stated "I am inclined to leave it unresolved because I believe there is another ground on which the case must be decided."

An award by Eli Rock dealing with a claimed misassignment of work to one classification rather than another is also made to hinge on the particular facts of the case, but with the added warrant that this fashion had been established by his predecessor umpires. The opinion notes a "recurring theme" in their decisions that a "general ruling or guidepost" for this type of issue

[10] August 6, 1960, unpublished.

isn't possible and "the ruling in any particular case cannot be regarded as settling the issue for future cases." [11]

In a case where the company claimed the right to assign a certain task to one classification rather than another by virtue of prior arbitration interpretations limiting the effect of a contract clause dealing with "job classification and wage rates, and the related descriptions," Lew Gill resolved the issue in favor of the company on the basis of the factual character of the work in relation to the competing job descriptions.[12] For reasons which I do not question, he left the matter of the company's contractual authority to make such a work assignment in whatever state of certainty or uncertainty it existed before the case arose.

This predeliction to assign a decisive role to the peculiar facts of the case is apparently not uncommon although it does not seem to be a frequent resort in the job rights-job control cases. I am sure the avoidance of the basic question is on occasion fully warranted and many would say should even be applauded on the general principle that arbitrators, like courts, should go no further than they have to, refusing to meet the constitutional issue if other grounds of decision are available. At least this way the wrath of neither party can be incurred as a result of having lost a battle which the arbitrator skillfully turned into a minor skirmish.

There are no doubt situations in which the facts are so skimpy and uncertain, or narrowly structured, or just inappropriate for adequately framing the basic issue, that it would be irresponsible to deal with that issue if there is another way out. And this may be so even if the way out involves a bit of a *tour de force.* In another case decided by Arbitrator Rock, he quite properly declined the general question and dismissed the grievance on no more elaborated grounds than that the situation was of "a sufficiently unique and minor character to require that the grievance be overruled in this instance." [13]

One cannot, I think, rule out the possibility that avoidance of the general problem sometimes is ducking what should not be ducked. It may be difficult in the individual instance, where the decision can be based on "the special facts of this case" formula,

[11] June 22, 1961, unpublished.
[12] June 26, 1961, unpublished.
[13] February 22, 1960, unpublished.

to be sure that the main question should be answered. It does take more courage to thus run the risk of wearing out your welcome. But arbitrators are not in my opinion entitled to follow slavishly the judicial rule of evading the thorny constitutional question if this is possible. This is so in part because the parties are done a disservice when they are forced to go to arbitration several times to get a guiding principle established. But in main part the judicial policy must be rejected because of the difference in the status of the parties in arbitration in contrast to the litigants before a court. The latter did not frame the constitution they are seeking to have interpreted and a great many others have an interest in the constitutional principle involved. If the parties before the arbitrator, having framed their own basic law and being the sole holders of interest in it, indicate they want the basic question answered, the arbitrator assumes a rather grave responsibility in resorting to a decision premised on the peculiar facts of the grievance.

In discussing other approaches arbitrators have used in the job rights-job control cases I will assume the posture of devil's advocate. Positions will be taken in order to develop certain ideas regardless of my own sympathy for those positions.

The Minor Doctrine

The next approach I find represented in the cases I will call *Use of the Minor Doctrine.* This is a doctrine invented by the arbitrator in the case he is deciding and then employed as dispositive of the case. It is called minor because it is usually invoked as a principle subordinate to a major contract rule which then permits the interpretation and application of that rule, and sometimes the ignoring of it. It is minor only in the sense that it becomes a kind of appendage to the provision being interpreted, an adjectival attachment accomplishing a desired modification. It is not minor qua unimportant.

First, some examples. In a case claiming a violation of the seniority clause by removing maintenance work from one subdivision to another, Kendall D'Andrade ruled for the company.[14] Fortunately, each of these subdivisions had maintenance employees doing maintenance work under its own maintenance man

[14] June 6, 1951, unpublished.

job description. The arbitrator employed the minor doctrine that where two job descriptions exist and both cover the work in question, the company is free to assign the work to either subdivision. This doctrine was made an interpretative appendage to the seniority clause.

In an Allegheny Ludlum Steel Corporation case the arbitrator was asked to decide whether the company had to fill a janitor vacancy while the regular incumbent was on vacation. The contract said that such vacancies "shall be filled by the next eligible man in line of promotion on the shift." The union thought the "shall" left the company no choice. The arbitrator agreed with the company that the clause did not impose a duty to fill vacation-vacant jobs. He sustained the grievance, however, on the ground that the janitor's work was there to be done, health and safety dictated doing it, and someone must have taken care of it while the regular job incumbent was on vacation. In other words, he established the minor doctrine that although the contract doesn't require vacancies to be filled they must be if there is work to be done.[15]

Sometimes the minor doctrine is created by implication, as in the preceding case. Sometimes it is established subtly by attaching adjectives to the phrases in the management clause. The right to direct the working force is recognized but it must be exercised in a "proper" or "legitimate" way. The grievance is then looked at and it is found that shortening the hours of a shift in order that there will be no problem of materials supply on the succeeding shift is not a "legitimate" exercise of the power to direct the working force.[16] There thus is created the minor doctrine that the vested management powers can only be exercised "legitimately."

The minor doctrine may be spelled out with some care. If the author is an arbitrator with prestige, it may be adopted by his fellow arbitrators, and indeed adapted by them. In a decision rendered by Harry Platt and Richard Mittenthal, the Company's action in combining the functions of several existing jobs was upheld. The opinion states that the contract clause to the effect that descriptions and classifications "will remain unchanged for

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[15] *Allegheny Ludlum Steel Corporation and United Steelworkers*, 9 SAB 6249, Mitchell M. Shipman (1960).

[16] See *Wheeling Steel Corporation and United Steelworkers*, 9 SAB 6351, Mitchell M. Shipman (1960).

the duration of this Agreement" does not freeze jobs. It then goes on to elaborate a doctrine of balancing stability and flexibility. Referring to the section of the contract dealing with job classifications the arbitrators say:

> "We believe this language represents an attempt to accommodate two conflicting forces—the desire of employees for some measure of *stability* in their work and pay and the desire of Management for enough *flexibility* to realign jobs to best suit operating conditions and thus maximize efficiency. Neither objective can be ignored. Which will prevail must depend on the peculiar facts and circumstances of each case as it comes along. Section 7C(2) speaks of such 'changing conditions and circumstances . . . (as) . . . development of new manufacturing processes, changes in equipment, . . . or improvements brought about by the company in the interest of improved methods and product.' Where no such changed conditions exist, stability should control and jobs should be neither eliminated nor combined. But where these conditions do exist, flexibility is appropriate and jobs can be changed and even combined—provided there is a reasonable relationship between the changed conditions and the Company's action." [17] (Emphasis not supplied.)

This doctrine is restated if not elaborated in a Republic Steel decision by Umpire Platt. In his opinion in that case, he declares:

> "This is not to suggest that the Company is free to combine jobs under any and all circumstances. For while Article V, Section 10 recognizes that Management has enough *flexibility* to realign jobs to best suit operating conditions, it also recognizes that employees are entitled to a real measure of *stability* in their work and pay. The problem is to determine which of these conflicting objectives should prevail in a particular case. The answer, I think, is that job combination may be permissible if it is based on genuine change in operating conditions and if it bears a reasonable relationship to those changes." [18] (Emphasis not supplied.)

The Platt-Mittenthal doctrine was referred to approvingly by Gabe Alexander in an Allegheny Ludlum case where he upheld the company in abolishing two jobs after reassigning some of the job duties. At least their decisions were referred to in support of his own formulation. What he wrote may well amount to a modification of the doctrine. To quote him: ". . . it has been recognized in some cases that management's right to revise existing jobs

[17] *Allegheny Ludlum Steel Corporation and United Steelworkers*, 7 SAB 5029, 5031. Harry H. Platt and Richard Mittenthal (1959).
[18] *Republic Steel Corporation and United Steelworkers*, 8 SAB 5627, 5628 (1959).

or establish new jobs is not unconditional, but rather depends upon the existence of objective changes in circumstances." [19]

I am not entirely clear on the consequences which flow from the use of the minor doctrine. It would appear that this approach makes it possible to give management rather considerable freedom in controlling the job structure while at the same time seeming to limit this control in the interest of employee job rights. I should also suppose it keeps management on the hot seat, squirming with uncertainty about how far it can go in making job structure changes. Is a projected change involving the elimination of say five jobs under a given set of circumstances likely to qualify as meeting the flexibility test or will the arbitrator find it sacrifices too much stability? Is the elimination based on "genuine change in operating conditions," and if it is, does this mean it doesn't matter how much instability it introduces into the workers' way of life?

The minor doctrine often has about it a certain quality of vagueness. A good many things for example could be brought under the rubric of a phrase like "the existence of objective changes in circumstances," or not brought under it, as the state of the arbitrator's liver on the day in question might predispose. A company might readily lie awake in bed at night wondering whether a schedule change it would like to make would be a "legitimate" use of its power to direct the work force.

Use of the minor doctrine is an approach which does seem to have a vice which, rather interestingly and a little coincidentally, was formulated by Dick Mittenthal in his paper on past practices read at the annual meeting of the Academy last year. In commenting on the fact that some decisions enforce just those practices relating to "major" conditions of employment as contrasted to "minor" conditions, he observed:

> "There is no logical basis for distinguishing between major and minor conditions, unless the arbitrator is to concern himself only with serious violations of the agreement.
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> "More important, this kind of test encourages arbitrators 'to commence their thinking with what they consider a desirable decision and then work backward to appropriate premises, devising syllogisms to justify that decision. . . .' That is, if an arbitrator decides

[19] *Allegheny Ludlum Steel Corporation and United Steelworkers*, 9 SAB 6147, 6148, Gabriel N. Alexander (1960).

to enforce the practice he calls it a major condition, and if he decides otherwise he calls it a minor condition. To this extent, the test provides us with a rationalization rather than a reason for our ruling.

"The Elkouris have suggested a comparable test. They would enforce only those practices which involve 'employee benefits'; they would not prohibit changes in practices which involve 'basic management functions.' This test, however, is no more convincing than the major-minor test. It suffers from the same defects. It too encourages the arbitrator to work backwards from his decision, thus providing him with a rationalization rather than a reason for his ruling." [20]

My own view, which could be wrong, is that the degree of intrinsic logic available to apply the "stability-flexibility" doctrine is just about as great as that available for applying the "major-minor" concept or "the employee benefits versus basic management functions" test. But then, we arbitrators need some scope in which to exercise gamesmanship and black magic. Still, in all, one may be forced to choose between the Platt-Mittenthal doctrine and the Mittenthal admonition to eschew rationalization. Arbitrators probably do need to expose their reasons more and lean on their rationalizations less.

The Contract Is Crucial

A third grouping of cases might be labeled *The Contract Is Crucial.* This would be a relatively small category. It would include decisions made under the more elaborate contracts drawn with great care by lawyers in consideration of the kinds of issues that have arisen and will continue to arise, where each word put into a clause is weighed and measured. The decisions result from an interpretative process which emphasizes the refined legal skill that is capable of finding all the meanings in an arrangement of words making up a complex set of interrelated provisions, and sifting the logic of the syntax, against the background of the contract history and the contract negotiations, down to the point of the nearly inevitable construction. This kind of interpretation calls for a high degree of competence and craftsmanship. It leaves the narrowest margin of choice to the interpreter. To the extent it is humanly possible, it make the contract itself truly determinative.

[20] "Past Practices and the Administration of Collective Bargaining Agreements," *Arbitration and Public Policy* (Washington: BNA Incorporated, 1961), p. 53.

I guess the archetype of the approach I am now characterizing is the major case arising under the contract of United States Steel with the Steelworkers and decided under the interpretative genius of a superb legal craftsman like Syl Garrett. I have read several such decisions dealing with job rights-job control issues which seem to me illustrative of this expertly technical legal approach.[21]

Whatever the value of this approach it is unavailable to most parties and most arbitrators. It requires a special set of legal factors, a large degree of continuity in both the development of the contract language and its interpretation by the same legal high priest, and the institutionalizing effects of time. It is described here primarily in order to sharpen and emphasize, through contrast, the last and most important of these arbitration folkways being classified, which I have chosen to designate *The Contract Seems Crucial.*

The Contract Seems Crucial

What is really crucial in this final category is the arbitrator. The significant conclusion, I submit, is that this fact tends too much to be hidden and unrecognized, even by the arbitrator himself. This is in considerable measure the result of the arbitrator's penchant, perhaps compulsion, to clothe his decision in language strongly attributing the result to the contract and implying he simply had no choice. Given the contract, given the particular facts of the case, putting these two elements into proper juxtaposition, and the outcome, like the solution to a problem in algebra, has about it an aura of inexorability. The arbitrator talks about "the clear and unmistakable implication" of the provision he is interpreting. He refers to "the necessity" of construing the clause the way he construes it. He finds what the company did, or the union thinks should be done, is "inconsistent and incompatible" with a part of the agreement, or more strongly, that it is "unquestionably forbidden." It seems to me greater acuity or greater humility, or both, might lead him more often to recognize, in writing, that an alternative interpretation was

[21] Examples are: *United States Steel Corporation, National Tube Division, Lorain Works,* 2 SAB 1187 (1953); *United States Steel Corporation, Fairless Works,* 8 SAB 5315 (1959).

quite possible. He would then be compelled more realistically to disclose why he chose the construction he did.

Suppose we canvass some of the choices available to the arbitrator on some of the major issues that have confronted him in the field of employee job rights pitted against employer job control. One battle-scarred sector of this front involves management alteration of job content in the situation where a contract provision lists job classifications and rates, or by incorporation makes such a list a part of the Agreement. In its simplest form, the provision on its face does nothing more than put the classifications and rates into the contract. It says nothing about the intended effect of this.

In an Esso Standard Oil case the contract provided that "Rates of pay, in the respective classifications, shall be set forth on Exhibit A which is hereto attached and by this reference made a part hereof." By the syntax of this wording, what was set forth was rates of pay, and the job classifications were listed as a necessary incident of setting them forth. Whitley P. McCoy held that this contract provision "freezes the classifications as well as the rates." [22] He buttressed his conclusion, and I am not disposed to say that this was superfluous, by citing several distinguished arbitrators who reached similar results.

Charles H. Livengood found the power to transfer duties across job lines or to work men out of classification "incompatible" with a contract section which simply specified the job classifications and rates, and a second section which required the negotiation of wages and working conditions for "new operations." He concluded that these two sections of the Agreement "clearly imply that changes in job content are normally a matter for collective bargaining rather than unilateral action." [23]

Such interpretative restrictions on managerial functions may seem to many arbitrators to have a good deal of cogency but they are hardly foreordained. Nor is this so even when the contract clause refers not only to the job classifications but also to the job descriptions, and then goes on to state that they shall remain in effect during the term of the Agreement. Under a provision of this

[22] *Esso Standard Oil Company and Industrial Workers Association,* 19 LA 569, 571 (1952).
[23] *Pilot Freight Carriers and International Brotherhood of Teamsters, Local 391,* 23 LA 520, 521 (1954).

type, restrictions on job control were found not to exist by the Board of Arbitration for United States Steel and the Steelworkers in a "General Precedent" decision handed down in 1953.[24]

In his opinion the Chairman emphasizes the function of the description to make possible an intelligent classification of the job for rate purposes and rejects the notion that "the job description, instead of merely reflecting what duties and responsibilities management has assigned a given job, is actually an agreement as to how the job will be performed over the future." Describing the result of this view that the job description is a binding agreement, as "far reaching," when considered in the light of general industry experience, the opinion goes on to say that if it had been intended, the parties would have made this clear by unequivocal language.

This point of view is expressed even more forcefully by Ralph T. Seward in a Kaiser Aluminum and Chemical Corporation decision. In one of his findings he stated:

> *"An agreement on a job description, under Section 4C, is not an agreement as to the manner in which job duties shall be assigned.* It is an agreement solely that the combination of duties that then make up the job have been satisfactorily described and identified. The job description itself, therefore, does not have the effect of 'freezing' any particular combination of duties or of barring the reassignment or recombination of such duties." [25] (Emphasis not supplied.)

The great contrast between the decisions which find that job content is frozen merely because the agreement lists the classifications by job title and nothing more, and the decisions which find that changes in the job structure are not even precluded by negotiated descriptions and contract clauses stating that the descriptions shall remain in effect for the duration of the agreement —this striking contrast is eloquent of the fact that the arbitrator really has a choice.

Let's examine the matter of scheduling. Arthur M. Ross had occasion to review the decisions in connection with a Kennecott Copper Corporation case where the Company's right to shorten the work week in lieu of laying people off was being questioned. He discusses an International Harvester decision by David Cole

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[24] *United States Steel Corporation and United Steelworkers,* 2 SAB 1217 (1953).
[25] *Kaiser Aluminum and Chemical Corporation,* 8 SAB 5195, 5196 (1959).

(which I shall comment on later) and refers to a number of other awards, published and unpublished. His reference to all these decisions is introduced with the statement that they are cited "only for the limited purpose of showing that everything depends upon the language of the Contract and the specified factual situation." This stress on contract language is repeated in the use by Ross of such phrases as "based on specific agreement language along with other indications of contractual intent" and ". . . in each instance the Arbitrator placed primary emphasis on specific contractual language. . . ." [26]

I thus quote Arthur Ross's opinion in order to underline this point: it is indeed the impression one gets from reading many of the job rights-job control decisions, that the contract *compels* the conclusion reached. This I think is more apparent than actual.

In the International Harvester case decided by Arbitrator Cole and referred to above, the contract provided that "Present practices with respect to starting times of shifts and work schedules shall remain in effect for the duration of the Contract unless changed by mutual agreement between the Company and the Local Union." The seniority article said "Seniority shall be used, in accordance with the terms of this Contract, to determine the order of layoff due to reduced manpower requirements and recall after such layoffs."

These provisions were held to prevent the company from introducing a four-day week instead of laying employees off. The opinion asks what substance would there be in the "present practices" clause if the company could go to a four-day week. And the seniority provision was read as giving "a clear indication that such curtailed needs will be met by the use of the layoff procedures." [27]

With appropriate respect to a very able arbitrator, I ask whether this contract language isn't equally susceptible of a different construction. Of course, the requirement that present practices with respect to work schedules are to remain in effect *can* be read to bar the four-day week. But *must* it be read as imposing such an absolute freeze? If so, the company could not institute a six-day week or totally shut down operations. Dave Cole him-

[26] *Kennecott Copper Corporation*, 7 SAB 5127, 5128 (1959).
[27] *International Harvester Company and U.A.W., Local 57*, 24 LA 311 (1955).

self recognized in his opinion that the contract elsewhere implies the possibility of certain schedule changes. If the company can go from five days a week to zero days, why can't it go to four days? What is there about the interpretation of the management clause in relation to the "present practices" clause which makes one possible and the other impossible?

I don't think an adequate answer to this question is to be found in the related effect of the seniority clause. The mandate that seniority shall be used "to determine the order of layoff due to reduced manpower requirements" is hardly a direction to lay workers off and to resort to no other method of meeting a drop in needed man-hours. It simply prescribes the order in which individuals will be laid off, *if* they are laid off.

The power to direct the work force was held not to extend to reducing the weekly hours from forty to thirty-two for a group of clerical workers in a Florence Pipe, Foundry and Machine Company case because the contract defined the employee's weekly salary as "the established weekly rate of pay for an employee scheduled for forty hours of work," and also stated that "no change in existing rates shall be put into effect unless the parties mutually agree." [28]

This interpretation by Edward A. Lynch found a reduction in pay for a reduced work week to be a reduction in rate, and resulted in erecting a weekly pay guarantee. There would appear to be a possible alternative. One wonders whether the arbitrator would have held that the quoted clause forbids the company from changing the "weekly rate of pay" by paying more than the established rate for forty hours where the employees work, say, forty-four hours, or would he instead have preferred to find that the weekly rate remains unchanged so long as the increased pay is commensurate with the increased hours. The union of course wouldn't have objected to this change in "existing rates."

A case decided by Lew Gill construed a provision in the Alan Wood Steel Company Agreement dealing with vacation scheduling.[29] The provision read "Vacations shall be scheduled between April 15 and December 31. . . ." The union wanted certain employees to be allowed to take their vacations during Christmas

[28] *Florence Pipe, Foundry and Machine Company,* 7 SAB 5057 (1959).
[29] *Alan Wood Steel Company,* 9 SAB 6485, 6486, Lewis M. Gill (1961).

week, plus a cease and desist order against management to stop deletion of particular weeks from the vacation period "unless they can be justified." This they got.

The arbitrator said the company's view that Christmas week wasn't appropriate for vacations because of special manning problems characteristic of this period "collides with the specific language of the Contract providing that Christmas week *is* included in the vacation period" (emphasis not supplied). With reasonable deference to Lew's perspicacity, I suggest the possibility that the language could as readily have been construed as meaning no more than that the company could not schedule vacations in January, February, March, and the first half of April. They had to schedule them *within* the prescribed dates and as long as they did, they lived up to the contract.

I hasten to make clear that I fully approve the result in this case because another paragraph in the vacation section of the contract put on the company the obligation to make "every effort" to give vacations at the time they were wanted and seemed to imply that this would be done unless "requirements of operations" precluded it, which the arbitrator found they didn't in this instance. What is of interest here is this matter of the reported collision with "the specific language" of the contract, which it seems to me could have as easily been a wide miss.

The way seniority provisions are interpreted to limit management's control of the job structure provides some of the most instructive illustrations of my thesis. Before noticing a few of the decisions, it should be emphasized that the seniority principle is clearly basic and its importance in the employee's hierarchy of values can hardly be exaggerated. Seniority systems, as Wayne Howard has pointed out, developed in the railroads at the turn of the century, gained general acceptance in the 1920's as a means of preventing discrimination, and became firmly established in American industry as a result of the combined influences of the great depression in the 1930's and the organizing successes made possible by the Wagner Act.[30] These systems today play a major role in industrial relations and all arbitrators, possibly without exception, recognize the fundamental importance of pro-

[30] See Wayne E. Howard, *The Arbitration of the Ability Qualification to the Exercise of Contractual Seniority Rights*, Ph.D. Dissertation, University of Pennsylvania, 1957, Chapter II.

tecting seniority against unjustified impairment. But it is, as will soon be evident, an interesting and certainly an open question as to whether arbitrators have been so impressed with the need to protect seniority rights that they have leaned over a little backwards.

The Gnat-Camel Formula

Broadly, general seniority provisions have sometimes been found to impose severe restrictions on the management powers set forth in the contract by what might, with admitted hyperbole, be called the gnat-camel formula. Under this formula of interpretation, you close the door on the minimal gnat in order to keep out the improbable camel.

This interpretative procedure is most aptly illustrated in an early decision of Bill Simkin's, one dealing, however, with protecting the integrity of the bargaining unit rather than the seniority unit. He found the contractual definition of the bargaining unit an indirect limitation on a very broad management clause. The gnat-camel formula appears in the following language of his opinion:

> "Let us assume an extreme and most unlikely situation. Suppose the Company decided to set up a new salary scale with new salaried workers at lower rates and with the expressed intent of having all the work done in the yard by employees outside the bargaining unit. Under the Company's general argument that it can assign productive work to an employee outside the unit regardless of the circumstances, it could by that device nullify the entire agreement and completely disenfranchise the Union." [31]

As appears from the quotation, the elements in this formula are to hypothecate an abnormal situation—here recognized by the Arbitrator himself as "extreme and most unlikely" although usually this isn't pointed out, impute the necessary motivation to management in bringing about this very unusual situation, and then recoil from the disastrous consequences so as to shut out both the improbable camel and the minimal gnat.

In dealing with the question of the power of the United States Steel Corporation to transfer the job duty of operating a new fork lift truck across lines fixed by seniority units, where the con-

[31] *Bethlehem Steel Company and Industrial Union of Marine and Shipbuilding Workers, Local No. 12,* 8 Impartial Umpires' Decisions 685, 691, 693, William E. Simkin (1949).

tract froze the unit, Whitley McCoy applied the formula. He observed:

> "If the Company could, without violating the Contract, transfer this work to the Expeditor, then it could later transfer another portion of the lift truck work to another department, and still later transfer still another portion to still another department. At what point could this gradual abolition of the lift truck seniority unit be stopped? To my mind, the logical place to stop it is at the beginning. A failure to do so would be to create a precedent which could only make the next act of whittling-away easier." [32]

The company *could* whittle away the whole seniority unit. Maybe it *would* if not stopped on the first nibble. It's just possible, however, that the significant matter is not whether it could but whether it was at all likely to do it. Why isn't the logical place to stop just as reasonably put at the point where the transfer of duties or jobs unmistakably shows the camel's nose in the aperture, and impairment of seniority rights is being significantly threatened?

The alternative view of the effect of a seniority provision on a company's power to alter job content was adopted by Paul Prasow in a Reynolds Metal Company case. He thought seniority provided protection for jobs while they existed but didn't guarantee that a job would either be continued or maintained unchanged. In his own formulation, "Seniority can only stand as a bar to changes in job content if the contract so expressly provides, or if it can be shown that the changes are motivated on the part of management by a desire to evade the seniority clause." [33]

Arbitrators have held that because workers have a contractual right to be recalled in the order of their seniority, they therefore have a right to the job per se, and in the absence of a specific provision forbidding supervisors from working on jobs in the bargaining unit, such a prohibition can be implied from the seniority clause, and this, apparently, even though no laid off employee in fact had his job taken by a supervisor. This was just a possibility; [34] and I presume under this interpretation the seniority restriction on supervisors working would operate even though

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[32] *United States Steel Corporation*, 31 LA 466, 468, Whitley P. McCoy (1958).
[33] *Reynolds Metal Company and United Steelworkers, Local 3937*, 25 LA 44, 49 (1955).
[34] See for example, *American Bemberg and United Textile Workers, Local 2207*, 19 LA 372, Whitley P. McCoy (1952).

no bargaining unit employees were on layoff. If it is permitted once even though no one is hurt the dangerous precedent—the minimal gnat—is established and the company might transfer so much work to supervisors that jobs would permanently disappear, and with them, seniority rights—the improbable camel.

What are the logical limits to the no-watering-down principle? If assigning the operation of a new piece of equipment outside the seniority unit is a dilution of the job rights of the unit even though no fewer whole jobs result, and no employee outside the unit gets a job at the expense of a worker in the unit, what about a technological change that really waters down the seniority unit by cutting the number of jobs in half? If seniority amounts to the right to a job, *as such,* and is not merely the right to a preference over somebody else with a more junior status, shouldn't it operate to preclude any reduction in the job population of a seniority unit no matter how caused? Somehow the job right-seniority concept doesn't seem entirely appropriate in this context.

The Basic Issue of Primacy

In bringing to a close this analysis of the problem confronting arbitrators in accommodating employee job rights and employer job control, I would like to raise a rather basic issue of primacy. Still staying in this last category termed *The Contract Seems Crucial,* and in the seniority sector, I have selected one of Saul Wallen's Bethlehem Steel decisions as the point of departure.[35] He regarded the case as involving "in its essence the resolving of a conflict" between the management clause and the seniority article, which article he described as setting up criteria to govern layoff and recall, and making such criteria applicable within seniority units. What is of interest is Arbitrator Wallen's conclusion as to which of these conflicting provisions is primary in resolving the conflict. I quote him:

> "Article XIII is specific in conferring seniority rights. The specific right to be assigned to available work to be done by Company employees in accordance with the seniority rules must be deemed superior to the general right of the Company to make work assignments. In other words Article XIII is a specific limitation on the general powers reserved to management by Article XVII."

[35] *Bethlehem Steel Company and Industrial Union of Marine and Shipbuilding Workers,* 10 Impartial Umpires' Decisions 51, 57 (1950).

Without stopping to ask what makes the principle that employees will be laid off and recalled in accordance with their seniority any more specific than the principle that the company shall have the power to make work assignments, I pass to the more important matter: on what basis can it be concluded that rights derived from the seniority rules "*must* be deemed superior to the . . . right . . . to make work assignments"? (My emphasis.) Just because one is specific and the other general? Perhaps they *should* be, for reasons good and sufficient. But is this a necessary result of the contract language? Or have arbitrators reaching this conclusion been exercising a fundamental and far-reaching choice?

The question, it seems to me, isn't answered by pointing to the sentence in the management clause which says the powers conferred must be exercised within the four walls of the agreement. Isn't it begging the question to say that provision X limits provision Y, simply because Y says the power granted is subject to the rest of the contract and X is in the contract? The real question is: does X impose a restriction, and if so, why does it?

I suggest that the sentence in the management clause making it subject to the other parts of the contract doesn't really make any difference, and that arbitrators are sometimes guilty of using it as an excuse to avoid coming to grips with the real issue which is whether those other parts of the contract do or don't generate restrictions. Does anyone suppose that without this sentence the same arbitrators who find the seniority section operating to limit the management section would find no limitations? Wouldn't they then invoke the well established principle of construction that no clause is to be interpreted in a vacuum, but the contract must be given effect in its entirety?

First reminding you that I am still assaying the role of devil's advocate, I now put forth with a good deal of trepidation the revolutionary notion that the management clause *could* be read as a limit on the seniority provision, and the familiar primacy reversed. I also remind you of the parallel drawn earlier between arbitrators and Supreme Court justices before commenting on the striking similarity of this situation with that of interpreting the federal commerce clause in Article I of the U. S. Constitution in relation to the reserved rights of the states under the Tenth Amendment. Just as employee seniority rights have collided with

the managerial power to operate an enterprise, so the reserved rights of the states have collided with the Congressional power to regulate interstate commerce.

For a long time in certain areas the Court read the rights set forth in the Tenth Amendment as a limitation on the power to regulate commerce and thereby considerably foreshortened the reach of that power. It was Holmes in his dissent in the child labor case of *Hammer* v. *Dagenhart*,[36] who pressed upon his brethren on the bench the opposite position that the federal power to regulate should not be cut down or qualified by the fact that its exercise might seem to interfere with a state's rights within its own borders. He wanted the primacy reversed. He appreciated that there was no compulsion in the language of the Constitution to define the powers of the central government by giving the fullest scope to the reserved powers of the state governments. In the *Darby* case[37] some twenty-three years later, the Court reversed the primacy by overruling *Dagenhart* and thereby defined and limited the rights of the states by giving full scope to the plenary power of Congress to regulate commerce.

When the Constitution provides in Article I, Section 9, that "no preference shall be given by any regulation of commerce . . . to the ports of one state over those of another . . . ," the Court is bound to find this is a limitation on the power to control interstate commerce. But in the absence of such explicit restrictions, as when construing the effect of a reserved rights clause upon a definite grant of power, the Court has a choice.

The analogy being suggested should be clear enough. The ordinary seniority clause contains no explicit restriction on assigning job duties within seniority units, or scheduling hours of work, or modifying the job structure by combining jobs. Whether such restrictions flow from the seniority clause, it is submitted, depends upon the arbitrator's choice in the assignment of primacy. If seniority is consistently read to limit managerial powers, the restrictions may be many and great. If the power to control the job structure is interpreted as a limitation on seniority rights there will be no restrictions short of using that power deliberately to discriminate, or to impair seniority, i.e., for non-managerial

[36] 247 U.S. 251 (1918).
[37] *United States* v. *Darby*, 312 U.S. 100 (1941).

reasons. Arbitrators have had this choice in the assignment of primacy, whether they have been fully conscious of it or not.

The Arbitrator's Considerable Discretion

A major purpose of this paper is to emphasize the appreciable discretion necessarily lodged in arbitrators in interpreting the broad constitutional provisions which govern the plant industrial community, at least in so far as employee rights and employer control in the job structure are concerned. There are at least two reasons for making this emphasis. Greater consciousness of the extent of the discretion may induce greater disclosure of the effective grounds of the decision and relate them more realistically to the kinds of considerations which are relevant to developing basic rules for the government of a modern industrial community.

I presume I have an obligation to spell this out more. In a case, for example, in which a job or job task is moved across a seniority unit line, shouldn't the arbitrator reveal what he thinks the fundamental implication of the seniority clause is? Does it create something akin to a property right in the job so that a decrease in work opportunity or in job security is simply barred? And is this so no matter what the effect is on management's ability to control the job structure? Since this result isn't automatically compelled by the contract language, what reasons lead the arbitrator to make this choice? Alternatively, is the basic implication of the seniority clause that priority rights are established to the available work and available job opportunities without the further right to prevent diminution of these opportunities short of abuse of the managerial function? If he elects this view, why does the arbitrator prefer it over the other one?

A second fundamental consideration in such a case is the power of management to manage. Is the arbitrator's underlying viewpoint toward the management clause that it should be primary, free of restrictions except for specific limitations, and conveying power to act which is not subject to the arbitrator's judgment of whether the operating decision was appropriate and really necessary? If this is his conclusion, shouldn't he disclose and defend it? And if on the other hand, he regards the management function as a vested power to be *equally* balanced against seniority as a vested right, attempting an equation of the two clauses

so as to read the fullest meaning into both instead of making a judgment of primacy, shouldn't this be made clear, along with the grounds which warrant such equality and the methods by which such an ambivalent approach to interpreting the agreement can be applied to varying fact situations? Or if on the third hand he finds seniority outweighs managerial freedom and the latter is to be defined in terms of giving seniority the fullest scope, the company having "bargained away" its unlimited discretion when it recognized the validity of the seniority principle, shouldn't this too be made explicit together with the basis for reaching such a result?

Perhaps if arbitrators were thus to make themselves as naked as these observations imply, they would be driven out of the profession by the parties whose oxen were gored. Unfortunately, arbitrators generally are not in so happy a position when making unpalatable awards with, as here proposed, the full disclosure of the unpalatable reasons, as the Secretary of Labor. Arbitrator Arthur Goldberg could offset his Metropolitan Opera award for increased compensation by promising to seek the help of the government to subsidize the cost. What can we do?

But we are in the position where it seems essential that our true function be better understood. While collective bargaining agreements are not written in the idiom of Aesop's fables, neither are they written in the rigidities of a commercial or real property contract. I think we must choose to admit we have a choice.

Disclosure of the effective grounds of the decision implies a greater rejection of two common reliances of arbitrators. One, much the less common, is the rather uncritical use of reported awards to support a position taken. The citing of cases often turns out to obviate the need for painfully thinking the issue through and disclosing your own basis of choice. The other reliance, quite common, is riding with the popular tide of yielding to the almost neurotic compulsion we arbitrators seem to have to clothe our awards in the garb of "the contract is crucial" verbiage. This may be an "excessive legalism" worse than the procedural tendencies that are usually connoted by that term.

The second reason for stressing the breadth of the arbitrator's discretion is the belief that recognizing this will enhance his sense of responsibility for the very important constitutional function he has as the Supreme Court of the industrial government

of the plant. To behave as though we were just technicians applying the quite unambiguous and definitive agreement to the facts of the case before us, and coming out where perforce the contract dictates we must, is to denigrate the serious trust of our profession. To be sure there are many instances in which we are just contract-interpreting technicians, but we are also much more.

I earnestly hope none of you have gotten the impression, because of the use of the conceptual framework of a plant "political" community in which the arbitrator functions as the highest court with genuine constitutional responsibilities, that I have been carried away by an exaggerated notion of the arbitrator's function and am assigning him the role of playing God. If in dealing with basic issues of employee job rights versus employer job control, the arbitrator is called upon to undertake a task demanding judicial statesmanship in the industrial community, he of course will also spend a good deal of his time on the cats and dogs that get into the arbitration process. In reality, he is a peculiar combination of the police magistrate who handles the Saturday night drunks and the Supreme Court justice who accommodates powers and rights under a constitution.

I doubt the arbitrator has any inflated image of himself. Surely all the members of this Academy are cognizant of their clay feet. My own have been pitilessly exposed this afternoon. And I ought to confess that if you had access to all of my awards you probably would find excellent examples of everything about which I have raised a question. The real danger, it seems to me, is that the arbitrator's image of himself will be in proportions that are too small for the magnitude of the responsibility that is his.

Discussion——

BENJAMIN C. SIGAL *

I want to say that I consider Professor Horlacher's paper a very penetrating one, and the fact that I am in agreement with most of it does not make it more difficult for me to come to that conclusion.

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In Perry Horlacher's view, the labor contract is equivalent, for the plant industrial community, to the constitution of the political community, and the Arbitrator is the Supreme Court for that constitution just as the Supreme Court is the Arbitrator of the Federal Constitution.

I agree with him that the arbitrator should use judicial statesmanship in difficult situations of the type discussed in his paper. But what criteria of judgment are to be used in applying that statesmanship? Professor Horlacher gives no light on that point.

Essentially, the difference between the collective bargaining agreement, considered on the one hand as a commercial agreement, and, on the other hand, as a constitution, would be the difference between considering only what you find within the four walls of the agreement, as you do in the case of the commercial agreement, or the entire context, historical and otherwise, as you do in the case of a constitution.

The most authoritative discussion of the nature of a collective bargaining agreement by the highest authority, namely, the Supreme Court, is to be found in a case which I know you don't have to have recalled to you again, the *Warrior and Gulf* case.[1]

In that case, as you remember, the Supreme Court through Justice Douglas said, without calling the labor agreement a constitution, that it is more than a contract, it is a generalized code to govern a myriad of cases which a craftsman cannot wholly anticipate. It is an effort to erect a system of industrial government.

What does the Court suggest as a means of effectuating that approach? Justice Douglas says it calls into being a new common law, the common law of a particular industry or of a particular plant.

Historically, common law is judge-made law. The applicable rule may be enunciated for the first time on the occasion when the court makes its decision; the situation may be such that the judge has to create the law to decide the case.

Justice Douglas says arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise, and to provide for their solution in

[1] *United Steelworkers of America* v. *Warrior and Gulf Navigation Company*, 34 LA 561, 363 U.S. 574 (1960).

a way which will generally accord with the variant needs and desires of the parties. And, he says, "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the agreement although not expressed in it."

It seems to me that this is an extremely strong authority for the proposition that there is need for the arbitrator to exercise judicial statesmanship.

The difficulty arises in seeking to define what constitutes judicial statesmanship.

Let us confine overselves to the particular problem here, namely, employee job rights as against management control. One of the conceptions advanced as a criterion is the management's rights clause usually found in a labor agreement. In my view, this clause in the agreement, generally speaking, creates no rights, and preserves no rights. It does not, in itself, enhance the validity of management's interpretation of its rights, nor does the absence thereof weaken management's position.

In my view, the contract must be interpreted, in terms of its specific provisions, in the context in which it arises. It is not valid to say that the statement of reserved rights in the management rights clause creates rights which must be considered in interpreting other contractual provisions. Professor Horlacher refers to how the Supreme Court handled the Tenth Amendment which reserved to the states or to the people powers not delegated to the federal government nor prohibited to the states. After a long development, the Supreme Court finally said, in *United States* v. *Darby*,[2] in which it upheld the constitutionality of the Fair Labor Standards Act, that the Tenth Amendment does not give any rights to the States, and does not take any rights away from the Federal Government or the plenary powers of Congress.

It says that the "amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between national and state government, as it had been established by the Constitution before the amendment. . . ."

[2] *United States* v. *Darby*, 312 U.S. 100 (1941).

And it goes on to say that "From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."

In this analogy, the management is in the place of the states, and the union is in the place of the national government. The statement of the management's reserved rights in a management rights clause does not in any way add to its rights under other sections of the labor agreement or subtract from those of the union.

The contract must be interpreted in light of specific rights and duties set forth in it, in the light of the context of the relationship which existed at the time that the contract was negotiated.

I take the same position with respect to what might be called employee job rights. I do not consider its use to imply a concept of inherent property rights in a job. In my view, the idea of property rights in a job, just the same as management's reserved rights, is a terminal idea. It is the conclusion at which you arrive after you consider the facts in a particular case. It is not a germinal idea which becomes the basis for consideration of the merits of the case.

I don't think that the use of the phrase "inherent job rights" or "property rights" in a job helps in the analysis of the problem. It is only a way of expressing what you have found to be the rights, privileges, and duties established by the agreement.

As I see it, to consider management's rights and employee property rights as being independent factors, in addition to what appears in the labor agreement, tends to obfuscate rather than illuminate the problem of resolving the conflict between management and the employee in respect to this particular problem.

I am not clear from this paper which of the decisions referred to in it would be considered examples of judicial statesmanship. I am not prepared to suggest any examples myself, but what I am talking about here is an approach, and it is the approach that Professor Horlacher has proposed.

Finally, I want to add my support for the plea he makes, namely, that arbitrators not avoid hard decisions for tactical reasons. If the case fairly provides the groundwork for a decision, it is not fair to the parties to make them go through arbitration

over again to get a decision on the interpretation of a disputed provision of a contract. In this respect the function of the arbitrator differs from that of the Supreme Court. The latter decides questions of constitutionality only if a case cannot be decided otherwise. But if the parties to a collective bargaining agreement want an interpretation, and the facts fairly present the question, it would be an avoidance of his responsibility for the arbitrator to decide the case without meeting the issue which is of major concern to the parties.

Discussion——

DAVID L. BENETAR *

I came prepared to comment on Dr. Horlacher's paper, but I cannot resist a comment on my good friend Ben Sigal's remarks about the management prerogative clause and its complete and total lack of meaning in a contract. I want, publicly, to express a sense of futility and regret at the long hours that I have spent over the bargaining table trying to get clauses like that included, and succeeding oftentimes in doing so. I want publicly to express, too, even more regret at the amount of energy my friends on the union side of the table have put forth in opposing clauses of this kind which, we now hear, are without any meaning or significance whatever.

I regret it for both of us, but I am not convinced, as I believe that those clauses, like every other clause in the contract, are entitled to the careful and measured consideration of anybody who is called upon to interpret the contract in which they appear.

I can just hear in my mind's ear the argument being made, and re-made at arbitration after arbitration, "why, there isn't a management prerogative clause in this contract"—that is, when you don't have one. When you do have one, I think it is the obligation of everyone who is called on to assess the true meaning of that contract to give it fair weight in the total interpretation, and this ties in with some of the remarks that I would like to make now about the main paper of the afternoon.

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When I read Professor Horlacher's paper (Ben and I were given advance copies), I experienced alternating chills and fever —the chills of strong disagreement and the fever of enthusiastic approval—and when I finished the paper I thought perhaps I ought to take an over-all reading on my condition.

I found out that I was only a few degrees above total chills. My No. 1 chill came from the suggestion that there are some inherent property rights in jobs. I am not going to devote too much time to this, but I want to point out, because there has been a lot of loose talk on this subject, not that Dr. Horlacher engaged in loose talk—his remarks were very tightly sewn together as we shall see—but that there has been a great deal of loose talk about these job rights. I want to point out, with your permission, that even in the *Glidden* case,[1] the Court did not act on the basis of supposed inherent job rights, something that grew within the worker or was indigenous to the soil of the plant.

The Court said:

> "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.
>
> "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."

Now, it is true that to those of us who have been practicing for many years, the standards there set forth for interpreting a contract have a sort of "hearts and flowers" tone to them, compared to what we used to consider the standards by which a contract was to be construed—namely a search for the intent of both parties, not for the secret aspirations of one.

The point that I want to stress is that even in the Glidden case the Court did not proceed on the basis of inherent job rights but rather on the basis of interpretation of a contract, and whatever rights were found to exist in that case were predicated upon contract parenthood and not self-propagation.

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[1] *Zdanok* v. *The Glidden Company*, 288 F. 2d 99 (1961).

Now, I was warmed by Dr. Horlacher's rejection of the doctrine of property rights in a job, and I think it is worth while reading his ultimate conclusion:

> "It is not clear to me exactly what you put into a job when you find in it a property right, other than the idea that society has ordained that jobs confer on their holders certain values, wholly apart from any collective bargaining agreement, which the employer can't take away and which he must respect because society is prepared, one way or another, to enforce the right by remedying its violation. Perhaps our industrial folkways and mores, aided by our industrial jurisprudence, are moving in this direction."

And he concludes:

> "If this is so, it seems to me the development falls far short of providing a viable logic for dealing with the wide range of labor relations problems encountered in the area under discussion in this paper."

To that I have but to say "Hear, hear," or "Amen."

After noting this point, I was then cooled by his rejection of the traditional framework of collective bargaining as a "suitable conceptual matrix" in which to weigh job rights and job control.

I think that this traditional framework of collective bargaining is the framework in which this must be approached, and I reacted against its rejection. This chill was intensified a little bit later in the discussion where the place of contract language was relegated to a minor role in the suggested decisional procedure for arbitrators.

I was particularly chilled by the analogy of the industrial community to a political community, because I believe that a private enterprise, privately launched at private risk, should derive its executive leadership from those who launched it, and that the limitations on their powers spring only from statute law or from their own contractual surrenders made in the course of free collective bargaining.

I do not see the owners of a business and their employees as possessing the same equality of rights as do the citizens of a community in this country, and the fact is that almost any union representative will agree with the principles underlying this statement in this sense—he will protest vigorously that neither he nor his union wants to invade the management's right to run its own business. Thus, it is agreed in principle that an employee

is not a citizen of the place in which he works, in the same sense that he is a citizen of his city, town, or village.

The difficulties arise when the employer wants to make a management decision, perhaps to automate part of his plant or contract out part of his work, perchance because of the cost effects of a work week reduced to 35 hours or less or some similar extra costs which make prudence the better part of valor and indicate that for the protection of the remainder of the jobs in the plant, some of the work should be sent out to a place that is able to do it more economically. It is at this point that the principle, so freely acknowledged, of having management manage now comes into conflict with the issue of whether this really constitutes management, on the one hand, or whether it involves an invasion of workers' rights, on the other.

I do not think, in all fairness, that Dr. Horlacher challenges the basic difference between the citizen in a political community and the citizen in an industrial community, but rather that he uses the analogy to advance his theory that a collective bargaining agreement is like a constitution and that an arbitrator is like a Supreme Court Justice.

This view of the collective bargaining agreement chilled me the most because of its implication that all collective bargaining agreements are essentially the same and should be treated identically. This, indeed, is the placing of collective agreements as a whole on a Procrustean bed. Collective agreements are not all the same, and I believe, with all the conviction of which I am capable, that they are not to be regarded identically as broadly drawn charters within the four corners of which the arbitrator is monarch supreme.

It is my belief that when the parties have sat down and bargained out a contract, as indeed through sophistication more and more of them are doing, with care in an effort to meet, foresee, and provide for the happening of contingencies in the operation of a plant, the arbitrator owes it to the parties to make an honest search throughout the four corners of that instrument, not for what his view is as to what is good and right for the parties, but, first and foremost, for what they intended as the meaning of their agreement.

I do not like to think or have an arbitrator think of a collec-

tive bargaining agreement as a drag or impediment to his otherwise fleet and surefooted progress to a wise decision.

I do not deny for an instant that there are contracts—there are many of them—which have left so much unsaid or unclear that they challenge the arbitrator to import into them his own views of what is right, what is fair, and what is viable. But where the parties have set forth their meaning—even if it takes a little effort in a particular case to detect precisely what it is—and if that management prerogative clause has to be taken into account and given some weight along with seniority, I believe it is the duty of the arbitrator to make that effort, and wherever it is possible to do so, to predicate his decision upon the intent of the parties.

I admire resourcefulness, ingenuity, and inventiveness as great qualities, but not where they are brought into play to substitute an arbitrator's personal views of what is wise for a fair interpretation of what the parties intended when they made the agreement.