

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

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

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

### III. THE ARBITRATION OF PLANT-CLOSING DISPUTES

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

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

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

seniority rights acquired under an agreement at one plant "vested" and could be exercised at a second plant owned by the same company, even though the agreement had expired and the plant had been closed. This conclusion was in conflict with that reached by other courts<sup>2</sup> and respected arbitrators.<sup>3</sup>

While the theory advanced in *Glidden* did not enjoy longevity, it provoked considerable discussion and debate. It was the subject of scholarly criticism<sup>4</sup> and praise<sup>5</sup> and was the focus of an excellent paper on the vesting of contract rights, presented by Robert Feinberg at the Academy's Annual Meeting in 1963.<sup>6</sup> *Glidden* was followed by a district court in Michigan<sup>7</sup> and other courts,<sup>8</sup> but was effectively rejected by the Court of Appeals for the Sixth Circuit in *Ross Gear & Tool Co.*<sup>9</sup> Thereafter, other courts followed suit.<sup>10</sup> The prospect that courts might become a more significant forum than arbitrators for establishing rights in plant-closing disputes<sup>11</sup> disappeared.

The Second Circuit itself ultimately sided with the critics of *Glidden* and reversed it in *Robertshaw Controls Co.*<sup>12</sup> In doing so, the court acknowledged that "[s]eniority is wholly a creation of the collective agreement and does not exist apart from that

<sup>2</sup>See, e.g., *Machinists Local Lodge 2040 v. Servel, Inc.*, 268 F.2d 692, 44 LRRM 2340 (7th Cir. 1959) (holding that seniority rights are terminated if employer discontinues its business and terminates its operations); *Elder v. New York Cent. R.R.*, 152 F.2d 361, 17 LRRM 631 (6th Cir. 1945) (holding that seniority rights do not survive expiration of agreement); *System Fed'n, Ry. Employees No. 59 v. Louisiana & Ark. Ry.*, 119 F.2d 509, 8 LRRM 1038 (5th Cir. 1941), *cert. denied*, 314 U.S. 656, 9 LRRM 417 (1941).

<sup>3</sup>Peter Kelliher refused to follow the *Glidden* holding in *United Packers*, 38 LA 619 (1962), based on this conflict and his own agreement with the more prevalent view.

<sup>4</sup>Levett, *Treatment of Monetary Fringe Benefits and Post Termination Survival of the Right to Job Security*, 72 Yale L.J. 162 (1962).

<sup>5</sup>Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532 (1962); Turner, *Plant Removal and Related Problems*, 13 Lab. L.J. 907 (1962); Note, 61 Colum. L. Rev. 1363 (1961).

<sup>6</sup>Feinberg, *Do Contract Rights Vest?*, in Labor Arbitration and Industrial Change, Proceedings of the 16th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1963). See also the discussion of the *Glidden* case in Kennedy, *Merging Seniority Lists*, *id.*

<sup>7</sup>*Oddie v. Ross Gear & Tool Co.*, 195 F. Supp. 826, 48 LRRM 2586 (E.D. Mich. 1961).

<sup>8</sup>See, e.g., *Selb Mfg. Co. v. Machinists Dist. 9*, 305 F.2d 177, 50 LRRM 2671 (8th Cir. 1962).

<sup>9</sup>*Oddie v. Ross Gear & Tool Co.*, 305 F.2d 143, 50 LRRM 2763 (6th Cir.), *cert. denied*, 371 U.S. 941, 51 LRRM 2717 (1962).

<sup>10</sup>See *Bradly v. Sangamo Elec. Co.*, 51 LRRM 2375 (Ill. Cir. Ct., Williamson County, 1962), where the court reversed itself after the Sixth Circuit decision in *Oddie v. Ross Gear & Tool Co.*, *supra* note 9. See also Feinberg, *supra* note 6 at 211-12.

<sup>11</sup>This possibility was suggested by Robben W. Fleming in *The Labor Arbitration Process: 1943-1963*, in Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1964), 49.

<sup>12</sup>*Automobile Workers Local 1251 v. Robertshaw Controls Co.*, 405 F.2d 29 68 LRRM 2671 (2d Cir. 1968).

agreement.”<sup>13</sup> While these developments have been the source of occasional comment in Academy Proceedings,<sup>14</sup> there has been little discussion of plant-closing disputes at Academy Annual Meetings since 1964. In the meantime, two parallel developments have occurred, suggesting that a survey of awards in plant-closing cases might be appropriate at this time.

First, there has been a dramatic increase in the frequency and speed of change in corporate operations and ownership. This has resulted in numerous plant closings and related actions, giving rise to a wide variety of disputes. Decisions of the National Labor Relations Board (NLRB) in *Illinois Coil Spring Co. (II)*<sup>15</sup> and *United Technologies*,<sup>16</sup> like the demise of the *Glidden* decision, have given unions little reason to look to the NLRB or the courts for protection from plant closing and their consequences. To a large extent unions have had to rely on bargaining and arbitration for such protection.

Second, and for the same reasons, organized labor has sought legislative protection. It has recently been successful in that effort.<sup>17</sup> At the Academy's Annual Meeting in 1987, Abe Raskin predicted that enactment of such legislation would “broaden the already troublesome area of overlap and potential conflict between the provisions of bargaining compacts and public law, thus creating new complications for arbitrators and increasing the vulnerability of their awards to judicial challenge.”<sup>18</sup>

For these reasons I undertook a survey of awards, most of which can be found in the last 33 volumes of the Bureau of National Affairs, Inc., (BNA) *Labor Arbitration Reports*. While it is

<sup>13</sup>*Id.*, 68 LRRM at 2674.

<sup>14</sup>See Jones and Finkle, *Appendix B: Arbitration and Federal Rights Under Collective Bargaining Agreements in 1968*, in *Arbitration and Social Change*, Proceedings of the 22nd Annual Meeting, National Academy of Arbitrators, ed. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 191–92; and the comments of Herbert L. Marx, Jr., *The Arbitrator and the NLRB: Workshop Sessions*, in *The Arbitrator, the NLRB, and the Courts*, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 184.

<sup>15</sup>*Illinois Coil Spring Co., Milwaukee Spring Div. (II)*, 268 NLRB 601, 115 LRRM 1065 (1984), overruling *Illinois Coil Spring Co., Milwaukee Spring Div. (I)*, 265 NLRB 206, 111 LRRM 1486 (1982) and the NLRB decisions on which it was based.

<sup>16</sup>*United Technologies Co.*, 269 NLRB 891, 115 LRRM 1281 (1984), where the NLRB again reversed itself, citing *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 107 LRRM 2705 (1981).

<sup>17</sup>On February 4, 1989, the provisions of the federal Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §2101 *et seq.*, took effect.

<sup>18</sup>Raskin, *Arbitration and the Courts: Is the Honeymoon Over? III*, in *Arbitration 1987: The Academy at Forty*, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1988), 63.

not possible to discuss every case involving a plant closing<sup>19</sup> that appears in those volumes, the cases that I will discuss are representative of the universe of plant-closing disputes.

While the cases do not always fit neatly into one category or the other, they can be divided into two major groups, each having two subgroups. The first major group consists of disputes over claimed entitlement to specific contractual benefits. Within that group some cases involve benefits intended to be available in the event of a plant closing or related action, and other cases involve benefits that may be available in the event of a plant closing or related action, but were not negotiated for that purpose. The second major group consists of disputes over restrictions on the company's ability to close the plant or take related action. Within that group are restrictions that are specific and restrictions that must be implied or inferred from other contract provisions, if they exist at all.

### **Benefit Disputes**

#### *Closing Benefits*

These cases are the most straightforward in the sense that they present conventional problems of contract interpretation and application. They are numerically significant and most often involve disputes over severance pay. For this reason, and because they are representative of this subgroup of cases, the analysis here will be limited to severance-pay cases.

Severance-pay cases can be divided into two categories: status disputes and disputes over the intent and applicability of the severance-pay provision to particular facts. Status disputes deal with the eligibility of employees on sick leave, leave of absence, layoff, or strike at the time of the plant closure. While it may not appear very helpful to say so, the outcome of these cases turns on the particular facts and the particular wording of the agreement. It is difficult to generalize.<sup>20</sup>

In *Isaly Dairy Co.*,<sup>21</sup> the grievant was on sick leave for a nonoccupational illness and was receiving social security disability

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<sup>19</sup>Unless the context indicates otherwise, the term "plant closings" includes the closing of a department or other subdivision of a company, or the sale of a plant, department, or other subdivision of a company in the form of assets or as an ongoing operation.

<sup>20</sup>*E.g.*, it is not possible to state whether employees who are on leave due to sickness are entitled to severance-pay benefits.

<sup>21</sup>73 LA 84 (Shister, 1979).

benefits, with no prospect of returning to work, when the plant closed. The arbitrator, concluding that she was not entitled to severance pay, noted that the stated purpose of the provision was to assist employees whose employment was permanently terminated for one of the enumerated reasons, including plant closure. The arbitrator indicated that the provision was for "regular full-time employees" and was not available to employees who were on a leave of absence. It should be pointed out that the agreement in this case was very comprehensive and anticipated many of the issues that arise in severance-pay cases.

On the other hand, a union official who was still on a nine-year approved leave of absence at the time of the closing of the distribution center where he had previously worked, and where he still represented employees, was held to be entitled to severance pay.<sup>22</sup> The arbitrator noted that he was still identified as an employee; the contract merely suspended the accrual of benefits during a leave of absence; and severance pay was identified as a "benefit." He rejected an argument that the payment was illegal under the Labor Management Relations Act, because the right to payment was as compensation for his service as an employee.

In a case that focused primarily on procedural arbitrability issues, Arbitrator Al Dybeck saw no contractual impediment to the payment of severance pay to employees who were laid off for more than two years prior to the plant closing. In *United States Steel Corp.*,<sup>23</sup> he found that the employees had not lost their status as employees and had the right to assert individual claims. The wording of the agreement and the logic of the arbitrator in the *Isaly Dairy Co.* case<sup>24</sup> would not have required a different result.

Disputes over eligibility for severance pay by strikers often raise an additional question of whether such benefits survive the expiration of the agreement, that is, whether they should be viewed as vested rights.<sup>25</sup> This was the case in *Fort Pitt Steel*.<sup>26</sup> The company had unsuccessfully resisted arbitration on the theory that the agreement had expired.<sup>27</sup> The arbitrator

<sup>22</sup>*Fleming Foods of Cal.*, 90 LA 1071 (Askin, 1988).

<sup>23</sup>89 LA 300 (Dybeck, 1987).

<sup>24</sup>*Supra* note 21; the agreement precluded payment of severance pay to employees on layoffs of less than six months.

<sup>25</sup>It is possible for a strike and a plant closing to occur during the term of an agreement under a reopener provision.

<sup>26</sup>*Fort Pitt Steel Casting Div.*, 76 LA 909 (Sembower, 1981).

<sup>27</sup>*Steelworkers v. Fort Pitt Steel Casting Div.*, 598 F.2d 1273, 105 LRRM 3232 (3d Cir. 1980). This result was not surprising in light of *Nolde Bros. v. Bakery & Confectionery Workers*, 430 U.S. 243, 94 LRRM 2753 (1977).

acknowledged that severance-pay provisions are distinguishable from vacation benefits in that they are not "earned in the prior year," but reasoned that they should be viewed as a surviving "conditional benefit," conditioned on an event which may occur after the term of the agreement. Otherwise, he concluded, their very purpose would fail. He cited the decisions of Arbitrator Willard Wirtz in *Brooklyn Eagle Co.*<sup>28</sup> and Arbitrator Sidney Cahn in *H.K. Porter*<sup>29</sup> to support this conclusion.

The cases dealing directly with the intent and purpose of severance-pay provisions are those that raise questions such as what constitutes a "plant closing" and/or whether the payments should be made to employees who are hired by a purchaser of the assets or a successor employer.

Many closing benefit provisions apply to the closing of a department or some other subdivision of the employer. These provisions give rise to disputes over who decides whether there will be terminations, and at what point can it be said that the "plant" (or department) has been closed, thus creating a right to closing benefits such as severance pay.

In *Allegheny Ludlum Steel Corp.*,<sup>30</sup> the company closed a department but refused to terminate the employees. Instead, it required them to bump into different departments, generally at lower wages. The arbitrator reviewed other published awards and concluded that affected employees were entitled to severance-pay benefits unless they were offered jobs in the same classification or a higher classification.

The author was faced with a more dramatic example of this same problem when a large meat packing company decided to convert a full line, kill, cut, and processing plant into a distribution center. The company took the position that it was closing all departments except for maintenance and shipping and receiving and, therefore, even those numerous maintenance employees, who did not have enough seniority to bump into shipping and receiving to avoid layoff, were entitled only to be placed on a recall list and were not entitled to closing options, which included severance pay, transfer rights, and early retirement. The conclusion reached, in an unpublished award, was that the company's action amounted to a plant closing.

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<sup>28</sup>32 LA 156 (Wirtz, 1959).

<sup>29</sup>49 LA 147 (Cahn, 1967).

<sup>30</sup>86 LA 492 (Mullin, 1986).

A less dramatic example of this type of dispute occurred at another meat packing facility where the company eliminated a product line (canned hams) and the machinery used to prepare it, and installed a new product line (bacon bits) and the machinery used to prepare it. The question raised on those facts was whether a department had been "closed," thus giving rise to entitlement to a choice of closing benefits, including severance pay. The conclusion reached was that there was no departmental closing under the circumstances, and even if there were, there was no permanent separation of employment, as required by the wording of the agreement. Only a handful of employees suffered short-term layoffs, necessitated by the changeover.

Next, let us turn to those severance-pay cases involving a sale of the plant, as opposed to an outright closure. There are at least four variables that may affect the outcome of severance-pay disputes in such cases: (1) the particular wording of the severance-pay provision, including its definitions and exceptions; (2) the distinction between a sale of assets and a sale of ongoing operations; (3) whether the purchaser adopted the contract and, if so, whether it did so as a new employer or successor employer; and (4) whether the union agreed to accept the purchaser as a new employer or successor employer. The application of successor and assigns clauses in plant-closing disputes will be discussed later.<sup>31</sup>

In *N-Ren Corp.*,<sup>32</sup> the plant had been sold to a purchaser who hired all employees and continued operations without interruption. While the arbitrator's analysis had several facets, the outcome appeared to turn on the wording of the severance-pay provision, which required that there be a "general plant layoff." Formerly, the agreement had been worded differently, and eligibility for severance pay turned on the question of whether the employee was "terminated." Under the circumstances, the arbitrator concluded that the agreement was clear and unambiguous, and denied the claims for severance pay. It is probably not without significance that the new employer, in addition to hiring all the employees, reached an agreement with the union to include them under the terms of an existing agreement with the union.

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<sup>31</sup>The question of the circumstances under which a purchaser should be deemed to be a successor employer is not discussed herein; that question is beyond the scope of the present undertaking.

<sup>32</sup>81 LA 438 (Boyer, 1983).

The question of whether a sale of assets should be equated with a "closing" was answered in the affirmative in *Allied Chemical Corp.*<sup>33</sup> An attempt to consummate a sale of the ongoing operations, with union approval, fell through. Even so, operations later resumed under a new agreement with the union. Some permanent layoffs resulted. Both those employees who were hired and those who were not were found to be entitled to severance pay. The severance-pay provision had been negotiated the year before the alleged closing as part of a joint effort to keep the plant operating. The arbitrator reasoned: "Insofar as the Company herein is concerned the plant clearly closed . . . ."<sup>34</sup> In the absence of an agreement making an exception for those employees who were able to secure employment in the new operation, the arbitrator concluded that they were entitled to receive severance pay.

Where the purchaser of assets hired all the employees of the seller, the fact that the purchaser did not agree to adopt the agreement was deemed to be of controlling importance by the arbitrator in *Stouffer Publications*.<sup>35</sup> The company argued that an award of severance pay under these circumstances was contrary to the wording, intent, and purpose of the severance-pay provision. The provision referred to "suspensions of publication." According to the arbitrator the publishing company (which was held to be the employer in spite of its claim that the employer was the "newspaper") suspended publication when it sold its assets. In his view it was consistent with the purpose of the clause to compensate the affected employees for their economic loss occasioned by starting over in their employment with the new company, which had not agreed to continue any of the benefits under the old agreement, including the severance-pay clause.

In *Ward Foods*,<sup>36</sup> the arbitrator held that the employer was obligated to pay severance pay to its employees, even though the company that purchased the assets also leased the facility as an ongoing operation and promised to continue operations for two years. The purchaser agreed to accept the collective bargaining

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<sup>33</sup>81 LA 514 (Epstein, 1983).

<sup>34</sup>*Id.* at 518.

<sup>35</sup>68 LA 1037 (Madden, 1977). See also *Ala Moana Volkswagen*, 91 LA 1331 (Tsukiyama, 1988), where the arbitrator noted that the employees who were hired by the purchaser lost benefits and suffered a break in employment; *Atlantic Richfield Co.*, 91 LA 835 (Nelson, 1988), where the purchaser of a division hired the employees in question, but their employment was severed "through no fault of their own."

<sup>36</sup>61 LA 1032 (Dash, 1973).



agreement, but only as a new employer, that is, without giving employees credit for prior employment for benefits such as vacation. The union lacked confidence in the financial ability of the new employer and had rejected the purchaser as a legal successor. Instead, it pursued the severance-pay claim against the employer, and the arbitrator sustained that right. He held that he had no jurisdiction to require the purchaser to reimburse the employer for the payment of severance benefits.

On the other hand, in *Washington Star Communications*,<sup>37</sup> the arbitrator refused to require the payment of severance benefits by the seller of a radio station where all affected employees were reemployed by the purchaser. The evidence established that all three parties, including the union, had agreed that the purchaser would be a successor to the collective bargaining agreement. As such, the purchaser was "the company" and no obligation to pay severance pay arose because "the company" did not terminate any employees.

### *Other Benefits*

The second subgroup of cases involves benefits that were not necessarily negotiated with a possible plant closing in mind. By far the most common of these cases involve vacation-pay provisions. In reading them, it is helpful to focus on tension which may exist between the specific wording of the agreement and the "equities" of the situation, including the presence or absence of a provision dealing with closing benefits.

Arbitrators have frequently held that employees are not entitled to pro-rata vacation pay where the agreement contains strong language requiring that result. Where agreements provided that an "employee whose employment is terminated for any reason prior to midnight December 31 shall not be eligible . . ."<sup>38</sup> and "[i]f an employee quits (which includes retirement), is discharged or dies prior to January 1 of the vacation year, he will not be entitled to any vacation,"<sup>39</sup> arbitrators denied vacation pay for the year in question. One arbitrator

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<sup>37</sup>70 LA 1193 (Gamser, 1978).

<sup>38</sup>*Marshalltown Instruments*, 85 LA 123, 124 (Thornell, 1985). See also *Rexnord, Inc.*, 80 LA 703, 704 (Flaten, 1983), where the agreement provided: "Employees whose employment is terminated for any reason prior to the last work day of a calendar year shall not be entitled . . . ." There the arbitrator was influenced by the evidence of bargaining history and the existence of a separate provision for severance pay.

<sup>39</sup>*Pollock Co.*, 87 LA 325, 328 (Oberdank, 1986).

denied the request of an employee to take vacation before the plant-closing date, under equally clear language, even though the company had allowed employees to take vacation time in advance prior to its decision to close the plant.<sup>40</sup>

On the other hand, arbitrators have found employees eligible for vacation pay where the agreement specifically provided for payment to an employee who is "laid off for an indefinite period, . . . before taking his vacation,"<sup>41</sup> or where all the contractual requirements were met prior to the contractual anniversary date.<sup>42</sup> In the latter case the arbitrator expressed the view that "vacations are a form of deferred wages and thus payable to employees terminated in a plant closing unless such payments are clearly barred at the time of the closing by the terms of the labor agreement."<sup>43</sup> Employing similar logic, other arbitrators have reached the same result, notwithstanding the presence of anniversary date provisions in the agreement.<sup>44</sup>

An interesting twist on these vacation-pay cases arose recently in a case involving the sale of ongoing operations, where the purchaser agreed to be bound by the terms of the collective bargaining agreement.<sup>45</sup> There the agreement had no successorship clause, and the union had not agreed to look solely to the purchaser for compliance with contract terms. The employees were considered "terminated" and, therefore, entitled to pro-rata vacation benefits.

Holiday pay disputes are relatively rare. This is due to the prevalence of specific contractual requirements to qualify for holiday pay. One recent case<sup>46</sup> involved a plant closing that occurred immediately prior to seven recently negotiated holidays falling within the Christmas/New Year holiday period. The

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<sup>40</sup>*Hager Hinge Co.*, 74 LA 529 (Blackmar, 1980).

<sup>41</sup>*Continental Can Co.*, 76 LA 1212, 1215-16 (Gibson, 1981).

<sup>42</sup>*Ingersoll-Rand Co.*, 81 LA 1274 (Sabghir, 1983).

<sup>43</sup>*Id.* at 1277.

<sup>44</sup>For some recent examples, see *Carrick Foodland*, 87 LA 932, 936 (Hunter, 1986) ("employee service records at least 'touched' if they had not . . . 'hit' January 1," where contract expired and store closed at midnight December 31); *Celotex Corp.*, 88 LA 319, 321 (High, 1986) (employees otherwise qualified as of February 27, even though vacation entitlements were "determined as of May 31 of each year"); *Youngstown Bldg. Materials*, 91 LA 1363, 1364 (Feldman, 1988) (even though contract said "on or after his anniversary date"); *Mahoning Sparkle Mkts.*, 91 LA 1366 (Sharpe, 1988) (where separate provision entitled employees to vacation pay earned but not taken, when separated "for any reason"). But employees were not entitled to 12 weeks off when they failed to meet the contractual requirement that they work a full 15 years to qualify in *National Can Corp.*, 70 LA 1268 (Boner, 1978).

<sup>45</sup>*Pacific Coast Servs.*, 92 LA 116 (Nelson, 1988).

<sup>46</sup>*Container Gen. Corp.*, 85 LA 159 (McDermott, 1985).

arbitrator rejected the union's contention that it was the intent of the parties to grant the seven holidays as "earned benefits," because that intent was nowhere expressed in the agreement. On the other hand, the agreement did contain specific requirements for holiday pay eligibility and had a provision dealing with the negotiations which were to take place in the event of a plant closure.

Other cases of this type involve issues such as entitlement to supplemental unemployment benefits (SUB)<sup>47</sup> or insurance coverage.<sup>48</sup> At issue in the SUB case was whether the employees were on "layoff" or had been terminated. In addition, an arbitrability issue was raised by the employer, based on the fact that the employees in question had accepted severance pay and were therefore "terminated." The arbitrator found that the employer had waived the arbitrability issue by its conduct in the grievance procedure and held that the grievants were "employees" as that term was used in the context of the SUB agreement.

The insurance benefit cases also focused on whether the closing resulted in "terminations" or "layoffs." In *Teledyne Electro Finishing*,<sup>49</sup> the arbitrator reasoned that it did not matter what the employees were "told" (i.e., that they were terminated), they were appropriately treated as being on layoff for purposes of entitlement to a one-month continuation of company payment of health insurance premiums. Contrary reasoning was employed in *Carrick Foodland*.<sup>50</sup> There the agreement was silent on the continuation of health insurance payments in the case of a layoff. The arbitrator concluded that the employees were "terminated" under a clause providing for the continuation of payments to the end of the month in which an employee is terminated. In a case where the contract did not expressly provide for a continuation of payments under either circumstance, the arbitrator concluded that no obligation existed after the plant closed.<sup>51</sup>

One interesting health-insurance-benefit case employed an "election" theory of entitlement. The employees in question took early retirement along with severance-pay benefits in con-

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<sup>47</sup>*Ajax Forging & Casting*, 64 LA 1309 (Haughton, 1975).

<sup>48</sup>*Teledyne Electro Finishing*, 68 LA 36 (Cole, 1977).

<sup>49</sup>*Id.* But see *Hausman Steel Corp.*, 93 LA 813 (Borland, 1989).

<sup>50</sup>*Supra* note 44.

<sup>51</sup>*Steel Package Co.*, 74 LA 1028 (Belshaw, 1980). The same result applied to retired employees at the expiration of the agreement which provided that payments were to be made for the "term of this agreement."

nection with a plant closing. They were held not entitled to continuation of the health-insurance-premium payments otherwise available in connection with early retirement.<sup>52</sup>

### Restrictions

#### *Specific Restrictions*

Agreements containing a specific restriction on the employer's right to close a plant generally impose a notice requirement or prohibit actions tantamount to a closing, such as "transfers." Occasionally an agreement prohibits a closing as such.

In notice cases a question may arise as to the applicability of the notice requirement or the adequacy of the notice given. In one case an employer's failure to give four months notice was held not to violate the agreement because it was not a "planned" closing.<sup>53</sup> The company was effectively forced to shut down by a bank creditor who threatened insolvency proceedings. The arbitrator held that the employer was obligated to give the employees eight days back pay and benefits under work-guarantee language because it failed to give the union "prompt notice" of the "layoffs" which occurred as a result of the plant closing.

Written notice given 46 days prior to actual shutdown was deemed sufficient in one case,<sup>54</sup> even though the agreement called for 90 days written notice "if circumstances permit." There the union had the information it needed for effective bargaining four months before the formal notice was given. A more strict view was taken by Arbitrator Tony Sinicropi in *Wilson Foods Corp.*<sup>55</sup> The agreement did not contain permissive language, and it was held that notice of intent to close "on or after" a date six months later was insufficient. Only when the company gave notice stating when the last day would be was it deemed sufficient.

The question of what constitutes a "closing" has already been discussed in connection with severance-pay cases. In the context of a notice requirement, however, the answer to that question has greater importance. In an unpublished "sale of assets"

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<sup>52</sup>*Great Atl. & Pac. Tea Co.*, 67 LA 125 (Seitz, 1976).

<sup>53</sup>*Sterling Colo. Beef Co.*, 86 LA 866 (Smith, 1986).

<sup>54</sup>*Commonwealth Aluminum Corp.*, 89 LA 1097 (Corbett, 1987).

<sup>55</sup>83 LA 405 (Sinicropi, 1984).

case,<sup>56</sup> Arbitrator Byron Yaffe concluded that a plant-closing-notice requirement had been violated. That decision was enforced by the District Court for the Eastern District of Wisconsin in an unpublished decision affirmed by the Court of Appeals for the Seventh Circuit.<sup>57</sup> The same conclusion was reached by the arbitrator in *ARCO Metals Co.*,<sup>58</sup> even though the employees there, like many employees in Yaffe's case, were offered employment by the purchaser.

The closure of "the last store in the Wichita Falls district" meant the closure of an entire district in the view of the arbitrator in *Shop Rite Foods*,<sup>59</sup> and therefore employees were entitled to pay in lieu of 12 weeks notice, notwithstanding the employer's contention that it had merely "closed a store" in connection with the reorganization of its districts.

Finally, in a case involving an interesting twist,<sup>60</sup> Arbitrator Howard Gamser held that the terminations occasioned by a newspaper shutdown should be treated as "economic dismissals" under the agreement for purposes of applying a contractual, four-week notice requirement. He rejected the employer's contention that the provision in question was never intended to apply to a total plant closure.

Cases involving the application of prohibitions or restrictions on transfers include a straightforward application, where the employer was held to be prohibited from transferring to Chicago work "performed for customers in Michigan," notwithstanding the company's claim of financial justification;<sup>61</sup> a decision that focused on intent, where the company was held not to have violated a restriction on transfers made to avoid the contract terms, when it sold its assets after an unsuccessful effort to end its losses;<sup>62</sup> and a decision that turned on the words used, where it was held to be no violation for the employer, because of financial difficulties, to transfer operations to a plant located out of state since the restriction applied only to transfers to "another company."<sup>63</sup>

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<sup>56</sup>*Chrysler Marine Corp.*, (Yaffe, 1984) (unpublished).

<sup>57</sup>*Industrial Workers (AIW) Local 879 v. Chrysler Marine Corp.*, 819 F.2d 786, 125 LRRM 2681 (7th Cir. 1987).

<sup>58</sup>88 LA 1209 (Berkowitz, 1987).

<sup>59</sup>79 LA 1081 (Carter, 1982).

<sup>60</sup>*Washington Star Co.*, 78 LA 555 (Gamser, 1982).

<sup>61</sup>*Douwe Egberts Superior Co.*, 78 LA 1131 (Ellmann, 1982).

<sup>62</sup>*Lakeland Color Press*, 82 LA 1151 (Gallagher, 1984).

<sup>63</sup>*E-Lite Co.*, 66 LA 800 (Kronish, 1976).

Finally, in this subgroup are cases involving specific restrictions, sometimes negotiated in an effort to deal with a possible plant closing during a specified period of time. In one case the agreement said: "It is the intent of the Company to continue to provide its employees with present work or new work, provided economic conditions permit, and the Company's business does not suffer."<sup>64</sup> The arbitrator held that the company was justified in closing its warehouse and relocating its storage functions at other plants, where it had experienced a substantial reduction in shipments. A similar result was reached in a case<sup>65</sup> where the parties had negotiated a "safety net" agreement and the purchaser agreed not to close any plants for a specified period of time. The purchaser's decision to shut down a separately housed industrial fastener operation was not deemed to be a plant closing, because it affected only .03 percent of company assets and all affected employees were transferred to other jobs.

A somewhat exotic set of facts was presented in *Kansas City Philharmonic Association*.<sup>66</sup> There the arbitrator held that the association properly invoked language permitting the cancellation of concerts for a variety of reasons, including bankruptcy or insolvency. A substantial benefactor had refused to continue to guarantee loans if the remaining concerts covered by the agreement were not cancelled.

A specific provision in a management-rights clause was cited by the arbitrator in another case<sup>67</sup> to sustain the employer's decision to discontinue its operations at one facility and transfer them to a facility that had more sophisticated methods of production. The agreement provided that the employer could "manage the plant and determine, to what extent the plant shall operate or shut down." Interestingly, the agreement contained a clause providing that it was binding on all transferees or successors "to the extent permitted by law." This case provides a natural lead-in to the final subgroup of cases involving inferred and implied restrictions.

#### *Inferred and Implied Restrictions*

Most of the cases seeking to establish inferred restrictions on plant closings involve successorship clauses. While some suc-

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<sup>64</sup>*Food Fair Stores*, 71 LA 873, 874 (Hardy, 1978).

<sup>65</sup>*Bethlehem Steel Corp.*, 93 LA 120 (Valtin, 1989).

<sup>66</sup>78 LA 762 (Madden, 1982).

<sup>67</sup>*Leeds-Dixon Labs*, 74 LA 407 (Kramer, 1980).

cessorship clauses contain specific restrictions, most do not. They simply state that the agreement is between the union and "the company and its successors or assigns," or words to that effect. The cases involving implied restrictions often cite general provisions, such as the recognition or management-rights clauses. To some extent the arguments in these cases are similar to those advanced in subcontracting cases where the agreement contains no specific restriction on subcontracting.

The outcome of cases that rely on successorship provisions is often dependent on the use of restrictive words, bargaining history, and the facts in the particular case. The strongest cases involve a successorship provision containing a specific restriction and facts supporting a finding of successorship, even though the purchaser has not agreed to be bound by the agreement.

In *Sexton's Steak House*,<sup>68</sup> the arbitrator held that the employer violated a provision requiring it to "make it a condition of transfer that the successor or assigns shall be bound by the terms of this agreement." As a remedy he enjoined the employer from completing the sale unless it complied. While the claim was made that the purchaser was not a successor within the meaning of law or the agreement, because he agreed only to purchase the assets, the arbitrator looked at the facts and concluded otherwise.

The *Marley-Wylain Co.* case<sup>69</sup> involved a generally worded "successors or assigns" clause but had strong facts supporting a finding of successorship. The arbitrator found a violation, citing the company's practice in prior sales and the reasonable expectations of the union arising out of that practice and bargaining history. A recent case<sup>70</sup> reached the same conclusion, in part because the parties repeatedly used the term "successor" in the agreement when identifying the company.

Where the facts of successorship surrounding the sale of a warehouse operation were deemed weak, Arbitrator Robert Howlett held that there was no violation of a generally worded "successors or assigns" clause in *Kroger Co.*<sup>71</sup> Similarly, where the sale of a restaurant had not yet taken place, the arbitrator refused to find a violation under a general successors-and-

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<sup>68</sup>76 LA 576, 577 (Ross, 1981). See also *Martin Podany Assocs.*, 80 LA 658 (Gallagher, 1983) and cases cited therein.

<sup>69</sup>88 LA 978 (Jacobowski, 1987). Cf. *Kohn, Inc.*, 93 LA 1124 (Dworkin, 1989).

<sup>70</sup>*Boardman Co.*, 91 LA 489 (Harr, 1988).

<sup>71</sup>78 LA 569 (Howlett, 1982).

assigns clause.<sup>72</sup> The evidence of bargaining history in that case disclosed that the union had proposed to include more specific language, like that found in the agreement in *Sexton's Steak House*,<sup>73</sup> but that the company agreed only to the general provision, which the arbitrator characterized as "boilerplate."

The arbitrator in *Wyatt Manufacturing Co.*<sup>74</sup> also found it significant that the successors and assigns clause did not include a specific requirement that the company secure a commitment from the buyer to be bound by the agreement. Therefore, the sale of its manufacturing facility (but not its foundry) to a company that used a small portion of the facility to produce the same product was found not to violate the agreement. The union invoked several other general provisions in its unsuccessful effort to establish a violation.

The remaining cases involve efforts by unions to use generally worded clauses, such as the management-rights clause, labor-management cooperation clause, and recognition clause, to prevent a sale or closure. Judging by the published cases, these efforts have been largely unsuccessful. Predictably, the issue of arbitrability is sometimes raised in these cases. However, they are usually arbitrable, unless there is language specifically excluding them from arbitration or indisputable evidence of such intent.<sup>75</sup>

The *Sealttest Dairy* case,<sup>76</sup> decided by the Connecticut State Board of Mediation, is an interesting starting point for purposes of analysis. It held that the company violated an implied limit of a general but strongly worded management-rights clause by closing its distribution facility in New Haven and moving it to Hartford during the term of the agreement. A strongly worded successors-and-assigns provision was quoted in the award but was not specifically referred to by the Board in making its decision. In my view the decision would have been more persuasive if it had.

The opposite result was reached in a case where the management-rights clause provided that the company had the right to "discontinue all or any part of its business operations." In that

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<sup>72</sup>*Gallivan's Inc.*, 79 LA 253 (Gallagher, 1982).

<sup>73</sup>*Supra* note 68.

<sup>74</sup>82 LA 153 (Goodman, 1983).

<sup>75</sup>See *Bressette v. International Talc Co.*, 527 F.2d 211, 91 LRRM 2077 (2d Cir. 1975). See also *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 121 LRRM 3329 (1986).

<sup>76</sup>65 LA 858 (Blum, 1975).



case,<sup>77</sup> the employer, a hotel, closed its restaurant and bar and laid off the employees. The employer had not found a lessee willing to reopen and operate these facilities at the time of the hearing. The agreement did contain a strongly worded successors-and-assigns clause, which might have required a different outcome if a lessee had been found.

What if there is no management-rights clause? While the agreement did contain a generally worded management-rights clause, the arbitrator in *Blue & White Taxi Co.*<sup>78</sup> began his analysis with a review of the "reserved rights" theory, and concluded that, in the absence of a specific restriction, there was nothing in the agreement (including the recognition, maintenance-of-standards, and seniority provisions) to prevent an unprofitable company from going out of business. The employer had begun the process of selling its cabs to individuals who would become shareholders in a new corporation set up for that purpose.

A claimed violation of the duty to bargain is often raised in these cases. A decision focusing almost exclusively on that claim was made in *Lever Brothers Co.*<sup>79</sup> The contract contained a clause permitting the company to permanently eliminate jobs, provided it gave "due consideration to the interests of regular employees." The arbitrator found that the company had met its obligation to give such consideration and nothing in that clause or another, referring to the parties' intent to apply the agreement in compliance with federal and state laws, gave rise to a contractual duty to bargain over the decision to transfer soap operations to an out-of-state plant. The arbitrator declined to rule on the question of whether the company violated its statutory duty to bargain, as being beyond the scope of his authority.

The arbitrator relied on outside law in *Kenton Manufacturing Co.*<sup>80</sup> The company closed its plant and shifted the work to another related company when its major customer decided to comply with a "subcontractor's agreement" with a different union. It was undisputed that the subcontractor's agreement was lawful under the Labor Management Relations Act (LMRA). The dispute was arbitrated under a broadly worded arbitration clause, and the arbitrator concluded that the decision did not involve an unlawful runaway shop or unlawful refusal to bargain

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<sup>77</sup>*Holiday Inn/Town Square*, 90 LA 67 (Cooper, 1987).

<sup>78</sup>*Pioneer Holding Co. dba Blue & White Taxi Co.*, 79 LA 292 (Gallagher, 1982).

<sup>79</sup>65 LA 1299 (Edes, 1976).

<sup>80</sup>76 LA 817 (Hannan, 1981).

because the company engaged in good-faith bargaining over both the decision and its effects.

One final example is appropriate due to its uniqueness. In *West Virginia Baking Co.*,<sup>81</sup> the company had retained the right to "close down the plant or any part thereof." However, it also agreed to form a joint committee "to attempt to outline procedures in order to cope with any problems" brought about by changes in "market conditions." In the view of the arbitrator, the union failed to prove that changes in market conditions dictated the need for a "different type or form of distribution." He held that the changes were not brought about by the company itself, but by other subsidiaries of the same parent company.

### *Remedy in Restriction Cases*

Unless the employer agrees to withhold further action pending arbitration, as occurred in a few of the reported cases, the union must obtain a restraining order if it intends to prevent a closure or sale from occurring. In cases involving violation of notice requirements, back pay and other forms of monetary damages are generally awarded. If the violation involves language that should have prevented the closure or sale from taking place, restoration of the status quo is arguably appropriate, if feasible.

Where the agreement prohibited the sale of the business during the term of the agreement and the arbitrator found that the company and its individual owners were about to sell or had sold the business to a buyer who would repudiate the agreement, the arbitrator issued a comprehensive award that effectively enjoined the sale, ordered information sharing and bargaining, and held the company and its individual owners liable for compliance with the terms of the agreement, unless the sale occurred in a manner consistent with the requirements of the agreement.<sup>82</sup>

In *Sexton's Steak House*,<sup>83</sup> discussed above, a court injunction had already been issued, preventing the sale from taking place. Consequently, the arbitrator simply issued an award that effectively continued the injunction.

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<sup>81</sup>79 LA 269 (Flannagan, 1982).

<sup>82</sup>*Hosanna Trading Co.*, 74 LA 128 (Simons, 1980).

<sup>83</sup>*Supra* note 68.

In another case the arbitrator required the company to reopen a closed plant for a period of four weeks.<sup>84</sup> The arbitrator had previously ordered the company to maintain the plant, equipment, and records intact, and characterized that portion of his award as a continuation of injunctive relief. His decision to order reopening the plant for four weeks, rather than limit the award to damages, hinged on a finding that it was "still practicable and economically feasible" to do so, as required by court decisions cited in the opinion.

Difficult issues as to the availability and amount of damages can also arise in these cases. What if some or all of the employees are hired by a purchaser of the assets? What if the purchaser of an ongoing operation is found to be a successor employer? An award of damages to employees hired by the purchaser was upheld by the court in *Chrysler Marine*.<sup>85</sup> In *Martin Podany Associates*,<sup>86</sup> the arbitrator held that the union was entitled to collect damages from the seller even though a court had ruled that the buyer was a successor employer.

### Impact of WARN

Based upon this review of published cases, it is too early to determine what impact the Worker Adjustment and Retraining Notification Act (WARN)<sup>87</sup> will have on the arbitration of plant-closing disputes. It may be argued that closing benefit and notice provisions should be interpreted and applied consistent with the requirements of WARN and its implementing regulations,<sup>88</sup> particularly if the provisions were agreed to after the enactment of WARN. If the agreement is interpreted to incorporate the provisions of WARN by reference, it necessarily follows that the provisions of WARN and its implementing regulations should govern.

To the extent that the requirements of WARN and its implementing regulations are followed, they can have an important impact on the finding of a violation and the determination of an appropriate remedy. Thus, for a plant closing to take place

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<sup>84</sup>*Greif & Co.*, 78 LA 825 (Seibel, 1982).

<sup>85</sup>*Industrial Workers (AIW) Local 879 v. Chrysler Marine Corp.*, 819 F.2d 786, 125 LRRM 2681 (7th Cir. 1987).

<sup>86</sup>*Supra* note 68.

<sup>87</sup>*Supra* note 17.

<sup>88</sup>54 Fed. Reg. 16,042 *et seq.* (1989).

under WARN, 50 or more full-time employees must suffer an "employment loss" during a 30-day period as a result of a permanent or temporary shutdown of a single site of employment or of one or more facilities or operating units at the site.<sup>89</sup> If two or more groups of employees suffer an employment loss at the same site within a 90-day period, the plant-closing provisions of WARN may be invoked, unless it can be proved that the employment losses were the result of separate and distinct actions and causes.<sup>90</sup> An employment loss is defined as a termination, a layoff exceeding six months, or a reduction in hours exceeding 50 percent during each month of any six-month period.<sup>91</sup>

Notice must be given to the "exclusive representative or bargaining agent"<sup>92</sup> and to the "chief elected official" of the unit of local government in which the plant closing will occur.<sup>93</sup> Depending on the wording of the agreement, a failure to give the latter notice may not constitute a violation of the agreement, as distinguished from the law.

Failure to give the required notice can be excused in the case of a "faltering business,"<sup>94</sup> "unforeseen business circumstances,"<sup>95</sup> or a "natural disaster."<sup>96</sup> A faltering business is one that is seeking capital or business in order to postpone or avoid a closing. It must prove that it had a reasonable, good-faith belief that giving the required notice would have precluded it from obtaining the capital or business sought, in order to qualify. In all three cases, the employer must give notice as soon as practicable under the circumstances and explain why earlier notice was not given.

If the closing is a result of a strike or lockout, no notice is required.<sup>97</sup> If the closing follows the completion of a particular project, activity, or undertaking, and employees were hired with the understanding that their employment would be limited to its duration, no notice is required.<sup>98</sup>

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<sup>89</sup>29 U.S.C.A. §2101(a)(2). A "mass layoff" occurs if the number laid off represents 33% or more of the full-time work force.

<sup>90</sup>29 U.S.C.A. §2102(d). The "mass layoff" provisions may also be invoked.

<sup>91</sup>29 U.S.C.A. §2101(a)(6).

<sup>92</sup>29 U.S.C.A. §2102(a)(1).

<sup>93</sup>29 U.S.C.A. §2102(a)(2). The unit of local government entitled to receive the notice is the one to which the greatest portion of taxes was paid for the prior tax year.

<sup>94</sup>29 U.S.C.A. §2102(b)(1).

<sup>95</sup>29 U.S.C.A. §2102(b)(2)(A).

<sup>96</sup>29 U.S.C.A. §2102(b)(2)(B).

<sup>97</sup>29 U.S.C.A. §2103(2).

<sup>98</sup>29 U.S.C.A. §2103(1).

Importantly, WARN and its implementing regulations provide no specific exception in the case where an employer sells its assets or ongoing operations to a purchaser who hires all, or substantially all, the affected employees. It could be argued that under such circumstances there is no "employment loss."<sup>99</sup> WARN does allocate the liability of any violation that occurs in connection with the sale. The seller is responsible for the failure to provide notice for the period prior to the sale and the buyer is liable thereafter.<sup>100</sup>

Liability for a violation of WARN includes back pay and benefits for each day that the required notice was not provided up to a maximum of 60 days or one half the number of days the particular employee was employed, whichever is less.<sup>101</sup> Failure to provide the unit of local government with the required notice creates liability for a civil forfeiture of \$500 per day, not to exceed \$30,000.<sup>102</sup> The employer can escape liability for this fine by paying its employees all back pay and benefits to which they may be entitled within three weeks of the shutdown. Query: What is the remedy if the agreement incorporates the requirements of WARN by reference and the employer fails to give the unit of local government the required notice and fails to take advantage of the exculpatory provision?

The answer to this question may lie in the enforcement provisions of the law. The unit of local government is authorized to sue in federal district court for any alleged violation.<sup>103</sup> It could be argued that, by incorporating the provisions of WARN in the collective bargaining agreement, the parties cannot affect the legal rights or remedies of third parties.

### Summary and Conclusions

A review of published cases discloses that plant closings have not given rise to any unique new theories, such as that advanced in the *Glidden* case,<sup>104</sup> but have given rise to numerous disputes over the availability of benefits and the existence of restrictions on the employer's right to take such action. In the former cases

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<sup>99</sup>See Sholl and Howard, *Plant Closing Legislation*, Wis. Law. (Dec. 1989), 14, 70.

<sup>100</sup>29 U.S.C.A. §2101(b)(1).

<sup>101</sup>29 U.S.C.A. §2104(a)(1)(A), (B).

<sup>102</sup>29 U.S.C.A. §2104(a)(3).

<sup>103</sup>29 U.S.C.A. §2104(a)(5).

<sup>104</sup>*Zdanok v. Glidden Co.*, 288 F.2d 99, 47 LRRM 2865 (2d Cir. 1961), *aff'd on other grounds*, 370 U.S. 530, 50 LRRM 2693 (1962).

the disputes often involve conventional issues over status and the intent of contract provisions that do not specifically address the fact situation involved. However, some of the negotiated closing-benefit cases raise fundamental issues identical to cases dealing with restrictions, such as what constitutes a plant closing or the circumstances under which the provision may be invoked.

The cases involving restrictions are not limited to specific restrictions and often involve efforts to establish the existence of indirect or implied restrictions. These latter efforts are not often successful, and those deemed most successful involve successors-and-assigns clauses which are both specific in their requirements and are supported by strong facts establishing the existence of a legal successor who is refusing to adopt the agreement. Where a restriction is found, the question of the appropriate remedy is far more difficult and important than in the arbitration of the more conventional issues, such as those involving benefits.

While the impact of WARN on the arbitration of plant-closing disputes is as yet unclear, it is anticipated that the impact will be most significant in negotiated closing-benefit cases, cases involving notice requirements, and agreements that incorporate outside law by reference. It will have an impact both on the question of whether a violation has occurred and on the appropriate remedy for any violations found.