Seniority Rights Under the Collective Agreement*

Roger I. Abrams**
Professor of Law
Case Western Reserve University Law School
Cleveland, Ohio

Dennis R. Nolan†
Professor of Law
University of South Carolina School of Law
Columbia, South Carolina

I. Introduction

Every workplace has rules. When does work begin and end? Who performs what jobs? Who is to be laid off if there is not enough work? In the non-union workplace, management sets the rules unilaterally and enjoys broad discretion in their administration. When employees unionize, their representative brings the workers’ interests to bear in the rule-formation process. Through the negotiation of a collective bargaining agreement, labor and management jointly establish the standards which order their workplace.

Seniority, the term used to describe an employee’s length of service in some relevant unit, serves two major purposes in labor relations. First and of greatest practical importance, seniority constitutes the primary measure of relative job rights and eligibility for fringe benefits. It is a convenient and attractive measure because it is objective, unlike most of the other available criteria. Length of service from date of hire can be determined with ease and accuracy. Skill, diligence and quality cannot.

Seniority can be relevant (and sometimes the sole consideration) for a variety of managerial decisions. One category of decisions involves

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1. DUNLOP, INDUSTRIAL RELATIONS SYSTEMS (1958). It is common for the parties in their agreement to allocate to management discretion in rule creation, subject to the generalized limitation that the standards be “reasonable.” See Cox & Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 HARV. L. REV. 389, 401 (1950).
choosing between employees when two or more compete for a limited benefit and is termed "competitive status seniority." Among the limited benefits for which seniority might be used are layoffs and recalls, promotions, transfers, job assignments, shift choices, selection of days off and vacation periods, distribution of overtime, and even parking privileges. A second category involves eligibility for and calculation of fringe benefits and is appropriately termed "benefit seniority." Among these are vacations, holidays, severance, sick leave, profit sharing, job security plans, wage adjustments, promotions, and protection from disciplinary action. Given this extensive use of seniority, it is easy to see why collective bargaining agreements may make seniority the most valuable coin of the industrial realm.

Seniority serves a second and more symbolic purpose in industrial relations: it functions as a type of marker in the continual struggle over "job control." Unions dislike unrestricted management discretion in the selection of employees or the allocation of benefits, fearing it will be used to undermine the union, to punish assertive employees, or to reward the employer's "favorites." Seniority limits (and may eliminate) that discretion. Where seniority is widespread and decisive, the union gains significant job control. Where seniority is of limited importance, management retains control. This second purpose of seniority lies beyond our scope, but the interested reader will find several provocative discussions elsewhere.

It is hard to overestimate the role seniority plays in labor relations. In the words of the Supreme Court, "[m]ore than any other provision of the collective agreement . . . seniority affects the economic security of

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4. See, e.g., D. Montgomery, Workers' Control in America 140–43 (1979); Horlacher, Employee Job Rights Versus Employer Job Control: The Arbitrator's Choice, 15 PROC. NAT'L ACAD. ARB. 165 (1962); Slichter, et al., supra note 2 at 950. At the extreme, the job control theory of seniority merges with the assertion that employees possess property rights in their jobs. See Meyers, The Analytic Meaning of Seniority, 18 PROC. INDUS. REL. RES. ASSOC. 194, 201–02 (1965) (Seniority expresses "the notion that people acquire property-like rights in employment opportunities and the prerogatives that are to be shared"); Kramer, Introductory Statement, 9 PROC. NAT'L ACAD. ARB. 41–42 (1956).
the individual employee covered by its terms." Given its importance, seniority naturally leads to numerous controversies as problems arise in the administration of the collective bargaining agreement. Unresolved disputes typically are submitted to arbitration for a final and binding determination. The way arbitrators perform this task tells us much about the nature of seniority and, ultimately, much about the way labor and management have ordered their relationship in the unionized firm.

This article explores the resolution of seniority disputes in labor arbitration. It begins by describing the sources and nature of seniority rights. It then treats in detail the administration of seniority systems, including the acquisition, calculation and loss of seniority, and the use of seniority, with a focus on the interplay of seniority and ability. The final substantive sections of the article discuss the issues of superseniority and the relationship between seniority and civil rights statutes.

II. The Source and Nature of Seniority Rights

A. Historical Background

The neutral and objective values expressed in the principle of seniority undoubtedly preexisted the union movement, but the advent of formalized and enforceable seniority rules came with the organization of workers outside the craft industries during the nineteenth century. Seniority first took hold on the railroads shortly after the Civil War. After the turn of the century, seniority became the controlling criterion in layoffs and recalls in the newspaper industry.

As collective bargaining spread throughout American mass production industry, unions sought to adopt seniority as the measure of entitlement to job preferences and benefit programs. In situations where an employee’s attachment was to a particular employer rather than to an industry or craft, one objective of bargaining was to substitute seniority for unrestricted employer choice as a device for the allocation of employer

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6. See infra at notes 11–35 and accompanying text.

7. See infra at notes 36–160 and accompanying text.

8. See infra at notes 161–206 and accompanying text.

9. See infra at notes 207–243 and accompanying text.

10. See infra at notes 244–267 and accompanying text.

11. Meyers, supra note 4, at 195.

12. Id.

13. Id. at 197–98.

14. SLICHTER, et al., supra note 2, at 105.
ment opportunities.15 The decisions of the War Labor Board spread seniority arrangements even further.16

By 1960, Professors Slichter, Healy and Livernash could report that “there has been a growing belief among both managements and employees that for many purposes the long-service workers are entitled to greater security and superior benefits as a matter of equity.”17 Use of the seniority principle in layoffs, recalls, promotions and for benefit qualification was “no longer a point of contention.”18 Use of the seniority principle in other employer choice situations, such as transfers, overtime and shift preference, job assignment and vacation scheduling, was growing, but was not yet universal.19

Today, the seniority principle is embodied in virtually every collective bargaining agreement.20 There is no doubt that in the typical unionized plant, seniority is a very good thing to have. An employee with seniority may be entitled to employment privileges and preferences. Seniority may translate into job security, job advancement and job choice. What then is the source of this most valuable currency?

B. Inherency Theory

One model bases seniority on an employee’s status and argues that seniority is inherent in every employment relationship. According to this theory, seniority rights reflect both an employee’s expectations and a true sense of equity in the workplace, and they enhance productive efficiency in the employing enterprise. Accordingly, seniority preference is earned simply by working. Workers are entitled to earn the privileges that flow from seniority because of their status as employees.

Many, perhaps most, employees implicitly accept the inherency theory. The employee who fulfills his side of the employment bargain receives compensation in several forms—wages, benefits and seniority. Wages and benefits have economic value in the world outside of the work plant; seniority has value only within the four walls of the plant, but that value is substantial. Seniority is earned. If seniority is part of the worker’s compensation, it is, as one union argued in an early arbitration case, “a property right of the workers.”21 To many employees,
then, the benefits flowing from seniority are their just desserts.

Alternatively, or additionally, one can argue that seniority inheres in the employment relationship because justice so dictates. Many workers talk of seniority rights in these terms: "I've worked here a long time and deserve preference."22 While seniority may hinder the advancement of the junior employees,23 even they know that in time—when they need it most—they too will enjoy the privileges of seniority. Perhaps fairness itself demands that employees who have devoted the most years of their work lives to the employer’s success should be entitled to a greater share of employment benefits.

Finally, the inherency model suggests that recognition of seniority rights enhances production and should, as a matter of policy, be deemed inherent in the employment relationship. By definition, senior employees have more experience at their jobs.24 More experienced workers reasonably might be expected to perform more and better work. When the employer and the employee set the terms of the employment bargain, they contemplate that each will act to maximize productive efficiency. One route to that goal is to recognize seniority as an objective substitute for other more subjective and less reliable measures of employee quality.

The inherency theory is instinctively attractive to its beneficiaries, but it is not logically compelling. Its most serious failing is that it begs the very questions it purports to answer. The connection between status as a worker and seniority rights is hardly self-evident. One could imagine—and even point to examples of—employment relationships founded on other bases, casual labor for one example and pure performance (as in many sales positions) for another.

Each of the asserted supports for the inherency theory—expectations, equity, and efficiency—is dubious at best. The primary difficulty with the employee expectations rationale is its unilateral perspective. Employees may expect and desire preference based on length of service on the job, but unilateral expectations, however strong, are not binding on the other party to a contract. Seniority rights, in other words, are not a part of the employment bargain unless the parties make them so.25 The parameters of the employment bargain cannot be determined by examining only the employees' expectations. Binding obligations in the

workplace, as elsewhere, are the product of mutual consent and exchange.

The equity and efficiency justifications asserted for a status-based recognition of seniority rights are equally questionable. Why is a job-security and job-preference system that discounts the interests of the junior employees fairer than one that treats people as individuals evaluated on their own merit and contributions? How is productive efficiency achieved by making employment-related decisions on the basis of length of service as opposed to ability? Certainly, there is no empirical evidence that seniority equates with ability in every instance and there is some evidence to the contrary.\(^{26}\) The case for seniority’s fairness and efficiency is not so compelling that one must accept it as a matter of policy in all employment relationships. Seniority “is not an inherent aspect of every employment.”\(^{27}\) If it were inherent, it would be universal, extending even to non-union employment. That is demonstrably not the case.

C. Contractual Basis

What then is the source of seniority rights? In the unionized plant, seniority is created, defined, and limited by the terms of the collective bargaining agreement.\(^{28}\) The contract converts the needs and interests of the company and the union into mutual obligations. Labor and management may agree that seniority will determine who will receive preference in any number of employment situations or they may decide that seniority will not be used as an allocative measure at all. As Justice Frankfurter wrote for the Supreme Court in 1949, seniority rights “derive their scope and significance from union contracts.”\(^{29}\)

Arbitrator Sidney Cahn explained the importance of the contractual context:

An employee’s seniority as such does not by itself confer any rights upon him. Seniority, without more, is merely the service status of a particular employee, in relation to the service status of other employees.\(^{30}\)

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27. Tecumseh Bd. of Educ., 82 Lab. Arb. (BNA) 609, 612 (1984) (Daniel, Arb.); Pannier Corp., 41 Lab. Arb. (BNA) 1228, 1230 (1964) (McDermott, Arb.). Seniority may play an insignificant role in protecting job security in industries with a tradition of worksharing, such as the garment industry, and in those where the craftsman’s casual employment pattern limits the importance of length of continuous service, such as the building trades. Taylor, Seniority Concepts, 8 Proc. Nat’l Acad. Arb. 127 (1955).


The something "more" Cahn refers to is an agreement that management will use seniority when it makes certain decisions. "Seniority rights do not exist in a vacuum, but arise out of and depend upon" the collective bargaining agreement. 31

A seniority-based system of allocating job rights entails obvious costs. Professor Walter Gellhorn wrote eloquently in *Universal Atlas Cement Co.*:

When seniors "get the breaks," the more ambitious and capable of the junior men may feel frustrated. Moreover, a management that likes to see a clear line of promotability from within the work force does not welcome the inflexibility that sometimes comes from giving a preference to older, perhaps less adaptable workers. But these costs were measured when the contract was made. The parties presumably concluded that the price was worth paying. From the standpoint of the men, they must have concluded that the deferment of youthful hope was offset by the assurance of fair opportunity for veteran employees. From the standpoint of management, they must have concluded that an occasional personal rigidity was offset by the enhanced loyalty and stability that are encouraged by an effective seniority clause. 32

The concept of equity divorced from contractual rights has no meaning in the application of a seniority system. As Arbitrator Ralph Seward explained over thirty years ago:

In seniority matters, the advantage of one employee is the disadvantage of another. To "stretch" the agreement to be "fair" to Smith is to stretch it to be "unfair" to Jones. Fairness, then, exists when each employee has the relative seniority rights he is entitled to under the Agreement—no more and no less. 33

The contract theory of the source of seniority rights complements labor arbitration, the dispute resolution system through which those rights are interpreted and applied. The power of the labor arbitrator, jointly appointed to resolve disputes, flows solely from the parties' collective bargaining agreement. He has power only to order the parties to fulfill obligations undertaken in the exchange process which ordered their relationship. Bilateral expectations control and mutual intent is the definitive gloss on the parties' collective agreement. The parties may intend to create a fair system that achieves productive efficiency or they may intend to create an unfair system that results in industrial chaos. The arbitrator must apply whatever system they negotiated. He rarely knows enough about the parties' circumstances to decide what is fair, efficient or wise for them, even if he had the power to do so. He is thus institutionally incapable of recognizing seniority rights outside of

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32. 17 Lab. Arb. (BNA) 755, 757 (1951) (Gellhorn, Arb.).
the consensual source, the agreement from which he draws his power to resolve disputes. As Arbitrator Bernard Cantor stated:

The contract is the touch stone of the arbitration. Its provisions must be enforced as they are written . . . [T]he parties so often admonish an Arbitrator that his hands are tied and his lips are sealed, save that he speak the truth of the writing they have produced in their arm's length negotiation.34

Thus, seniority finds its source and explication in the collective agreement, a proposition seemingly so obvious that arbitrators universally accept it as the starting point for analysis.35

III. Acquiring and Calculating Seniority

A. Seniority Units

Seniority is the measure of the relationship between employees in a specified unit.36 Unless the contract clearly states otherwise, seniority begins to accrue only when an employee joins the unit. Prior work, even for the same company, will not automatically translate into seniority.37 The unit may be the department, the plant, the division, the company or the industry. The contract may specify even more than one seniority unit, and use them for different purposes: company seniority might determine pension benefits, while departmental seniority could control layoffs. An employee might thus have several seniority dates. Ideally the agreement will define the various units and explain their uses. When contract directions are clear, the arbitrator must of course apply the parties' arrangement.38 Unfortunately, the directions are not always clear.

Arbitrator Ralph Roger Williams was able to apply clear contract language in Heckett Co.,39 when the grievant sought to credit years worked at the employer's Fairfield plant to his seniority accumulated at the Gadsden plant for purposes of vacation and pension calculation. The provision defined seniority as "the length of continuous service with the Company from the day when the employee was last hired for work at the Company's Gadsden, Alabama, plant." Stating that he could not redefine seniority and overrule the parties' designation of a plant-wide

rather than a company-wide seniority unit, the arbitrator denied the grievance. Service for the company outside the plant was not to be counted.\footnote{40}{Id. at 185.}

In Tecumseh Board of Education, Arbitrator William Daniel interpreted an unusual contract provision which granted seniority credit to persons “in a position requiring teacher certification.”\footnote{41}{82 Lab. Arb. (BNA) 609, 611 (1984).} The Board of Education had included nonbargaining unit administrators on the seniority list and had credited them with time served outside the bargaining unit. In an opinion that lucidly discusses the concepts of bargaining and seniority units, Daniel ruled that the language used was sufficiently clear and unambiguous to include nonbargaining unit administrators within the seniority unit.\footnote{42}{Id. at 614; cf. Wyoming Public Schools, 77 Lab. Arb. (BNA) 295 (1981) (Kotch, Arb.).}

Often an agreement does not define the seniority unit expressly and simply states that seniority controls certain employment decisions, such as layoff and recall. In this situation, arbitrators tend to presume that parties want a plant-wide seniority system unless they state otherwise.\footnote{43}{Great Lakes Homes, Inc., 44 Lab. Arb. (BNA) 737 (1965) (Gundemann, Arb.).} A clearly established practice may clarify intentions when the contract is silent or ambiguous.\footnote{44}{Quality Beer Distributors, 73 Lab. Arb. (BNA) 669 (1979) (Ziskind, Arb.); Streator Div.—Clow Corp., 52 Lab. Arb. (BNA) 983 (1969) (Larkin, Arb.).} Arbitrator David Ziskind used such a practice to resolve a dispute which arose when a company laid off a driver instead of a less senior warehouseman.\footnote{45}{Quality Beer Distributors, 73 Lab. Arb. (BNA) 669 (1979).} The contract referred in a single paragraph both to “seniority lists for warehousemen, drivers and for drivers’ helpers” (in the plural) and to “such seniority list” (in the singular). The arbitrator found the past practice was to maintain a common list and to shift employees from driver to warehouse jobs. Relying on this practice, he sustained the grievance, ruling that the parties intended to use a single seniority unit in the layoff situation.\footnote{46}{Id. at 673.}

Designation of the seniority unit may determine the value of an employee's seniority under a collective agreement. Consider a layoff situation in the company’s plating department. If the contract provides for layoff by reverse order of seniority and seniority is measured as length of service in a department, an employee with many years of service for the company, but few years of service within the plating department, would be laid off before an employee with fewer years of service with the company but more years of service in the plating department. By comparison, if the contract provides that total length of service with the company controls layoff, the junior employee company-wide would be
laid off first, even if he were the senior employee in his department.

The parties' conflicting interests in this situation are evident. For example, a union might believe that the employee with longer company service deserves a greater measure of job security when there is a decrease in the amount of work available. This might mean laying off an employee whose skills are needed while retaining another whose skills are redundant. A company might believe that productivity would be enhanced by retaining a junior employee with experience in the plating department while laying off a more senior employee in the shipping department. If the contract allows laid off employees to bump into other jobs, the employer's problems are compounded. A union generally will favor broader seniority units since they enhance the value of seniority rights. Management generally favors narrower units, since they give less weight to the total length of service and more weight to experience in certain areas of production.47

Seniority unit designations may decrease efficiency in the workplace through a misallocation of manpower resources even without a layoff. Departmental seniority units might discourage a qualified employee from bidding on a more highly skilled job in another department because he may be forced to forfeit the job security and benefits accrued in his present department. Broader seniority units, such as a plant-wide unit, would not have that effect.48

Management must live with the contract it signed even if, in a given case, seniority rights cause inefficiency. For example, in Pearl Brewing Co., the contract stated that employees in the bottling department "may choose a specific job according to seniority."49 The company was held to have violated this provision when, for reasons of operational flexibility, it assigned a junior employee to operate a forklift in the bottling area, the area preferred by a senior employee. The arbitrator concluded: "The Union bargained for and gained the seniority rights it claims in this case. . . . The Company cannot unilaterally and abruptly cancel those rights."50 It is not the arbitrator's job to make efficiency a higher priority than the parties chose to make it.

Parties should design seniority units to meet their particular needs and interests. The most common seniority units may include all employees in the plant51 or only those in a particular department52 or classifica-

48. See, e.g., Super Valu Stores, Inc., 52 Lab. Arb. (BNA) 112, 114 (1968) (Davis, Arb.) (Shifts from one department to another are "most costly . . . because all prior seniority with the company is sacrificed."). See generally Kelley, Discrimination in Seniority Systems: A Case Study, 36 INDUS. & LAB. REL. REV. 40, 42 (1983).
49. 53 Lab. Arb. (BNA) 89 (1969) (Post, Arb.).
50. Id. at 92; see also City of North Las Vegas, 80 Lab. Arb. (BNA) 270, 273 (1983) (Darrow, Arb.).
52. Super Valu Stores, Inc., 52 Lab. Arb. (BNA) 112 (1968) (Davis, Arb.).
tion. In rare situations, the seniority unit may extend beyond the immediate employer to the industry and a laid-off employee might be able to bump employees of another company. Such arrangements are most likely to be found in a multi-employer bargaining unit, but they also occur where a union has separately organized several employers in a local industry. In Rueter Worth Dairy Co., the dairy industry-wide collective agreement included such a right. It was proposed originally by the companies in order to minimize their exposure under the supplemental unemployment compensation plan set forth in the contract. When an employee attempted to use seniority and move into another company, the company argued it had the right to review his qualifications for the job in the same way it would consider a new applicant. The arbitrator disagreed, finding the broad protection for seniority contained in the agreement meant that bumping to a position in the other company was to be treated in the same manner as intraplant bumping, that is, strictly in accordance with seniority.

Some seniority provisions, redrafted and amended over the course of numerous negotiations, have become intricate mazes of job rights and privileges. Under some contracts, seniority is calculated on one basis (e.g., company-wide), used within another grouping (e.g., department-wide) for any one of a number of particular purposes (e.g., layoff, shift change, promotion). The permutations are endless. With so many possible combinations, it is easy to understand why disputes arise over the interpretation and application of seniority clauses. Somehow in the bargaining process, parties may have lost sight of the central value of seniority—an objective, easily ascertained, accurately administered criterion for decisionmaking.

B. Seniority Dates

1. PROBATION PERIODS

When does an employee begin to accumulate seniority? The terms of the collective bargaining agreement which create seniority also define and limit it. Under most agreements an employee must serve a probation period before permanent status is obtained and seniority begins to accrue. The length of these probation periods vary: some are as short as thirty days, others as long as six months. Generally a period of continu-

54. 45 Lab. Arb. (BNA) 111, 114 (1965) (Elson, Arb.).
55. Id. at 116.
56. Columbus Retail Merchants Delivery, 65 Lab. Arb. (BNA) 825, 829 (1975) (Mili-
70. The BNA survey reported in 1983 that probation periods are included in 78% of the contracts. 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS 75:1.
ous service is required to qualify for permanent status, and thus prior service for the employer may not be counted. 59

How long should the probation period be? Professor Paul Prasow, serving as an interest arbitrator in Yellow Cab Co., stated that "the practice of industry has been to correlate the length of the probationary period with the expected time it takes the employee to acquire certain skills and achieve adaptability to the particular job involved." 60 During the probation period, the employer will decide whether to retain the employee. 61 As Arbitrator Pearce Davis explained, "The probationary interval is one in which the employer is free to appraise fully and without restriction the qualities of his recruits and make decisions concerning the recruits before becoming committed to them." 62 Management’s discretion during the probation period is broad and virtually unreviewable, since the probationary employee normally lacks the right to grieve under the contract. 63 Employers "are free to do with probationary employees what they will." 64 After the employee completes the probation period, an employer generally has the right to discharge only for "just cause." 65 As a result, a company generally will try to negotiate for a lengthy probation period so that it can ensure an adequate evaluation and to retain its discretionary flexibility. The union usually will seek a short probation period so that contractual protections (and union membership) can be extended quickly. The contract will reflect the compromise between these conflicting objectives.

Legal philosopher Lon Fuller explained why it was prudent for parties to include an employee trial period provision when he served as a labor arbitrator in Boston Herald-Traveler Corp.:

During the first period of a worker's attempt to adjust himself to a new job, the standards of judgment that must be applied to his performance are intangible, and are inherently unsuited to a review by the formal procedures implicit in arbitration. It is the course of wisdom during this period to accord to the employer a rather free hand. What he has to determine is not whether the employee has failed in this or that particular—since all beginners make mistakes—but whether the employee's abilities and temperament are such that he can be expected ultimately to adjust himself to the demands of the job. The judgment necessary to reach this decision rests so largely on intuitive elements that it generally ought not to be fettered by

60. 27 Lab. Arb. (BNA) 468, 474 (1956).
65. Theory of Just Cause, supra note 25.
contractual restraints, except those designed to restrict any anti-union bias. 66

Fuller explained that the union "increases the force of the protection accorded those employees who have achieved 'regular status' by surviving the contractual trial period" 67 in exchange for conceding this discretion to the employer. In the case before Fuller, the employer had imposed a probation period unilaterally. The agreement made no mention of a probation period, but it did include a just cause standard for discharge. Fuller ruled that although probation periods were wise, they must be the product of an agreement and, accordingly, the employer acted improperly by unilaterally instituting the probation period. 68

One important issue brought to arbitration is whether an employee has completed his contract probation period when he was absent for some days during that period. The purpose of the probation period, as noted above, is to afford the employer the opportunity to observe the work performance of an employee and make an informed decision concerning retention. If an employee has been absent for a considerable length of time during the probation period, the employer has not been given this full opportunity to make the permanent employment decision. Thus the mere passage of the stated number of days might not constitute completion of the probation period. 69 If the employee has been absent only for a few days, however, there should be no argument once the stated period has expired, for the employer will have had a substantial amount of time in which to exercise his discretion. 70

The preferred practice for the arbitrator should be to take the parties at their word when they specify the number of workdays within which management retains the unrestricted right to dismiss a new employee. It is safe to assume that company and union negotiators know that some probationary employees will miss work during a probation period. They can make express allowance for the extension of the probation period in their agreement. For example, in Red Jacket Mfg. Co., the agreement's probation period was defined as the "first 60 days plus any days of missed work over 5." 71 Even without a general extension, the parties are free to waive the limit in a particular case. If an employer has not had sufficient time for evaluation and the union refuses to extend the probation period, the employer is free to terminate the employee. The arbitra-

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66. 27 Lab. Arb. (BNA) 74, 75 (1956) (Fuller, Arb.).
67. Id. at 75.
68. Id. at 76.
70. Crane Carrier Co., 47 Lab. Arb. (BNA) 339, 342 (1966) (Merrill, Arb.) ("A few days cut off . . . ought not to be material.").
71. 69 Lab. Arb. (BNA) 211 (1977) (Erbs, Arb.).
The arbitrator should not amend the contract to save the employer from its own failure to use one or another of its options. The arbitrator must read with care the precise language chosen by the parties to express their probation arrangement. In *American Steel, Inc.*, the agreement provided for a six month "full-time continuous service" probationary period. The grievant, hired on February 2, 1977, went on medical leave from March 22 through May 22. He was terminated on August 5, 1977, six months and three days after his date of hire. Relying on the dictionary definitions of the words "continuous" and "service," the arbitrator concluded that the grievant had not completed his probationary period prior to his discharge since the parties intended a six-month period of actual work performance. Arbitrator Samuel Kates also focused on the precise language used in the contract, when, in *Convey-All Corp.*, he decided that a forty-five "working day" probation period was fulfilled when the grievant worked forty-three weekdays and two Saturday half-days. He reasoned that the parties had provided a period specified in the number of "days" and that the number of hours worked on those days was unimportant. It may be difficult to take the parties at their word concerning the length of the probation period when the wording of their agreed probationary period is ambiguous. When the parties provide for a thirty-day probationary period, do they mean thirty calendar days or thirty working days? A common sense reading of the phrase would be thirty calendar days, approximately one month. But in *C. H. Stuart & Co., Inc.*, Arbitrator Joseph Shister carefully examined the parties' entire collective bargaining agreement and reached the opposite conclusion. The seniority clause stated: "New employees shall be considered probationary employees until they have been in the employ of the Company for thirty (30) days." The wage clause stated: "All employees who have completed their probationary period (30 days worked from the date their employment began) . . . shall receive an increase in the rate. . . ." Shister ruled that the wage clause clearly and explicitly defined the term "days" to mean "working days," and he used that definition to interpret the probation clause in the same manner.

Once a probation period is completed, the employee obtains whatever seniority rights are provided in the collective bargaining agreement. First and foremost this means that the employee now enjoys

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73. 70 Lab. Arb. (BNA) 494, 495 (1978) (Beck, Arb.).
76. Id. at 177.
78. Id. at 774.
grievance rights on employment matters and that the employer must establish "just cause" to sever the employment relationship. Seniority ordinarily is calculated by the total length of service, so the employee's original date of hire becomes his seniority date, not the date he completed his probation.  

2. COMMON SENIORITY DATE

Who is the more senior employee when two workers joined a seniority unit the same day? The reported arbitration cases show that this is of more than hypothetical interest and that it can be a real problem for employees. The answer to this question may determine which of two employees has a job, and which does not. In Schnucks Super Saver, the employer argued that there really was no need to face this issue in the absence of an actual controversy.  

Arbitrator Timothy J. Heinsz disagreed:

In order to give validity to the principle of seniority, employees with the same date of hire should have some non-discriminatory method of knowing how they might choose their hours under the contract or how layoff and recall procedures will occur, so that they will know what contractual rights accrue to them and what plans should be made if an economic layoff becomes a distinct possibility.

In any event, Heinsz found that there was a specific situation in which the seniority question had already arisen, the allocation of available work, which was to be accomplished by contract in accordance with seniority.

Parties have adopted a variety of tie-breaking methods. For example, seniority preference may be determined by the time of hiring interview, clock number, lowest (or highest) social security number, alphabetical order, or toss of a coin. When the seniority clause does not explain how ties in seniority are to be broken, the arbitrator must adopt some reasonable basis for determining who should be advantaged. Prior practices, when available, can provide a suitable standard. At least one arbitrator ordered the two tied employees to toss a coin to decide who would be laid off. Chance may not be the best way to resolve most seniority grievances, but eliminating human judgment does seem to place the matter in the hands of higher (and presumably more objective) au-

80. 84 Lab. Arb. (BNA) 282, 284 (1985) (Heinsz, Arb.).
81. Id. See also Armstrong Rubber Co., 74 Lab. Arb. (BNA) 301 (1980) (Williams, Arb.).
83. For examples of contract language, see 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS 75:82–84 (1985).
85. McCall Corp., 49 Lab. Arb. (BNA) 183, 186 (1967) (McIntosh, Arb.).
authorities. Such a procedure at least disposes of the case at hand. Another arbitrator upheld management’s choice of the more qualified employee as between two workers tied in seniority. A third arbitrator ruled the employee who first clocked in for work on the initial day of employment was the more senior. In matters this fine, almost any method will do as long as it appears to be impartial.

C. Seniority Lists

Collective bargaining agreements generally provide that management must post and periodically update a seniority list. Alternatively, or additionally, contracts may provide that the company must give a seniority list to the union. Arbitrators are sometimes asked to determine whether a company has complied with such contractual requirements.

What happens when a posted seniority list contains an unnoticed error? Consider the case of an employee disadvantaged by some seniority-controlled employment decision (for example, a layoff) who finds that his seniority date was incorrectly calculated or reported on the posted list. The error may have remained undiscovered for a considerable period of time during which the company and the union relied on the list. The employee brings a grievance claiming that his real seniority date entitled him to be retained and not laid off. His union brings the matter to arbitration. How should the arbitrator rule? Does the true senior employee regain his rightful place or does the false senior employee gain a reliance interest in the erroneous list?

If the seniority provision imposes an express time limit for questioning the posted list and that time has passed, the arbitrator must deny the grievance. This may not do justice for the true senior employee but it certainly gives all employees an incentive to review the list promptly upon posting. Absent such a provision, an arbitrator may properly rule that a seniority list posted for a substantial period of time becomes the

88. The BNA survey reports that 47% of all seniority clauses expressly require management to post the seniority list and 80% of the clauses require management to revise the list periodically. 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS 75:1–2 (1983). For an example, see Moore Business Forms, Inc., 24 Lab. Arb. (BNA) 793 (1955) (Somers, Arb.).
89. The BNA survey showed that 78% of all seniority clauses required management to give a copy of the seniority list to the union. 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS 75:1–2 (1983). For examples, see The Dayton Steel Foundry Co., 37 Lab. Arb. (BNA) 231 (1961) (Stouffer, Arb.); American Bemberg, 19 Lab. Arb. (BNA) 372 (1952) (McCoy, Arb.).
90. See, e.g., Bethlehem Steel Co., 31 Lab. Arb. (BNA) 423 (1958) (Stark, Arb.).
status quo between the parties for competitive status purposes. The union and the affected employees effectively waive the right to challenge the seniority listing after a reasonable period has passed.\textsuperscript{92} No employee is entitled to rely on an erroneous list if he contributed to the error or knew of it and failed to correct it. But, an arbitrator should not imply a waiver if the union or the affected employees have not had access to the list. The employer would be solely at fault in that situation.

There is less reason for an arbitrator to find a waiver of the right to correct an error in benefit seniority cases, especially when there has been no detrimental reliance on the erroneous date and the error can be corrected without harm. In \textit{General Plywood Corp.}, the company listed the grievant’s seniority date incorrectly for six years.\textsuperscript{93} The grievant retired and sought vacation pay calculated on the incorrect seniority date. Arbitrator Arthur Porter granted the grievance, ruling that the company was bound “by its own mistakes.” The grievant was illiterate so could not be faulted, and the union had no reason to know of the error since the erroneous date did not alter the grievant’s relative seniority standing.\textsuperscript{94}

The principle that Porter applied works well in cases where not allowing a benefit is unnecessary and unjust. Stability and certainty in making competitive employment decisions based on seniority, such as layoffs and promotions, require that an erroneous list be considered “frozen” after a period of time. Those factors do not apply when the question is the amount of benefits an employee should receive. Unless the employee relied to his detriment on the erroneous date, for example by retiring in the expectation of a full pension when his actual service would qualify him only for a partial pension, he should receive just what he earned. That is especially true in a case like \textit{General Plywood} where the employee couldn’t even read the inaccurate list. The error did him no harm, nor should it give him a windfall.

**IV. Retaining, Accumulating and Losing Seniority**

The employee who has completed the probation period accumulates seniority through service. A variety of events may affect the continued accumulation, however. A worker’s employment may be temporarily or permanently interrupted, for example by a layoff or a medical leave of absence; a worker may remain employed but transfer to a position outside of the bargaining or seniority unit; the worker’s employer may


\textsuperscript{93} 36 Lab. Arb. (BNA) 633 (1961) (Porter, Arb.).

\textsuperscript{94} Id.
merge with or be purchased by another company. The questions raised by these situations are among the most difficult seniority issues faced by arbitrators. Are seniority rights lost as a result? Does an employee continue to accumulate seniority during service outside the bargaining unit?

A. Interruptions in Employment

1. LAYOFFS AND LEAVES

Temporary interruptions in employment, for example by a layoff or a medical leave of absence, are common events in the typical employee’s worklife. How is seniority affected by these events? Seniority clauses often provide an answer, for just as seniority rights are created by the collective agreement, so they can be terminated only in accordance with the terms of that agreement.

A common provision allows retention of seniority for one year while on layoff; a laid-off employee not recalled to work within that year loses all seniority and recall rights. An equally common provision terminates seniority after an absence for medical reasons in excess of twelve consecutive months. Arbitrators are often asked to apply such clauses to particular fact situations in order to determine if an employee falls "off the [seniority] ladder." Their objective should be to apply the terms as written, but even if a clause is "no model of clarity," the arbitrator must determine what the parties intended.

Employers and unions have reasons for terminating seniority after some interruptions of work. Both benefit by the certainty provided by time limits on seniority retention. After the time period passes, the employer need not retain records for recall or reemployment. Current employees are protected from displacement by returning employees.

Given the importance unions and employers attach to seniority, however, inferences of forfeiture should not be made rashly. Absent a contractual provision for termination of seniority, an arbitrator should presume that seniority rights are retained during a temporary interruption in employment.

95. The BNA survey reports that 78% of the contracts in the sample discuss when seniority is lost, for example, after a layoff of a specified length. 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS 75:1 (1983). For an example, see Firestone Tire & Rubber Co., 61 Lab. Arb. (BNA) 136, 138–39 (1973) (Rentfro, Arb.).
101. Id.
seniority terminated when an employee’s "services with the Company are permanently severed." The arbitrator ruled that a pilot on medical leave retained his seniority rights and could use them to downgrade to a second officer position after he was certified as fit to return to duty.

If the contract does not place a specific limit on retention of seniority rights, a rule of reason should govern. It would not be within the reasonable expectation of either contracting party to preserve seniority rights forever—or if it were in their expectations, they surely would say so. To take an extreme example, an employee given leave for personal reasons should not expect to return with seniority ten or twenty years later. Just how long an absence must be before retention would be unreasonable will vary with the type of leave. A leave for the employee’s convenience might be expected to be fairly short, while an industrial accident victim might legitimately expect to be welcomed back, with seniority, even after several years.

As always, the agreement must be the arbitrator’s charter, but interpreting the agreement may mean more than reading the literal terms of the contract. There are times when the language of the contract fails to express the entire agreement. In SCM Corp., the seniority clause provided for the termination of seniority after an employee was laid off for a year. The employer terminated an employee’s seniority after a year on sick leave, arguing that there was an oral agreement to apply this clause to persons on medical leave. The arbitrator found that the oral agreement represented the parties’ true understanding, despite the more limited contract language. He then ruled that the company was bound by the full terms of the oral agreement, which guaranteed twenty-four months of retained seniority for disabled employees and sustained the grievance.

In Schnadig Corp., Arbitrator Carl Cabe dealt with the grievance of an employee who had been on injury leave for twenty-one months before the union signed its first agreement with the employer. The contract provided for the termination of seniority after absence from work for any reason for a continuous period of twelve months, but the employee handbook in force before the agreement was negotiated contained no limit on lengths of leaves. Arbitrator Cabe concluded that the grievant “has fallen into a trough of two different modes of operation.” He ruled the grievant retained her seniority, but only for twelve months.

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106. Id. at 1187–88.
108. Id. at 558.
under the new collective agreement. The arbitrator's conclusion is consistent with understanding seniority as the product of the agreement. He stated that although the employee handbook was a source of rights, it might continue indefinitely the grievant's leave status. The seniority rights she sought to protect in arbitration were created by the collective agreement, and not by the employee handbook. The contract clause creating her seniority rights also limited them to twelve months of leave after the contract went into effect. Employee rights existing before the collective agreement took effect do not restrict the contract's application.

2. MILITARY SERVICE

Employment is sometimes interrupted as a result of military service, and disputes arise concerning the veteran's seniority and reemployment rights. Because of the length of military service, the veteran may have lost his contractual right to reemployment; even if reemployed, the veteran would be junior to nonveterans with the same original date of hire because of the potential work years spent in the service. As a result, the veteran may lose the opportunity for job advancement and may not qualify for certain job benefits.

Congress has enacted statutes intended "to place the veteran in the position he would have been in if he had not entered the service." The statutes often are raised in arbitration as a source of rights for the veteran. Many contracts include provisions for special treatment for veterans, and arbitrators are correct in applying these agreements as written. At times, the contract clauses will refer to the federal law and embody in contract form the elements of those statutes.

The federal laws do not always mandate a special preference for the veteran in a particular case. Arbitrator Clare McDermott interpreted a clause requiring the company to "accord each employee who applies for reemployment after conclusion of his military service . . . such reemployment rights as he shall be entitled to under then existing statutes." The company determined that the grievant's seniority was terminated because he was on layoff for more than two years, most of which time he was in the service. McDermott found the grievant would have been laid off had he not left for the service and denied the grievance

109. Id.
since it was not the purpose of the Universal Military Training and Service Act of 1948 to protect an employee from "consequences which normally would have flowed in the orderly administration of a seniority system had he remained at work and never entered the armed forces."  

Sometimes, in an effort to provide a fair result, arbitrators have applied federal statutory rights to resolve a veteran's grievance even though the agreement's seniority provision included no mention of any special veteran's preference.  

As a general rule, the arbitrator should limit his inquiry to an interpretation of the contract and should leave the application of external law to the courts. The arbitrator should apply external law only if both parties so request or if the contract expressly or impliedly incorporates statutory rights.

3. RESIGNATION AND DISCHARGE

A common contractual clause provides for the termination of seniority upon an employee's resignation. Arbitrator Edwin Teple interpreted such a clause in Simmons Co. when the employer did not terminate the seniority of one Paxhia after he was seen leaving the plant waving goodbye. Paxhia returned to work two days later after finding his new job unsatisfactory. Three years later another employee protested when he lost a job bid to Paxhia, claiming that Paxhia's seniority had been broken by his quit. The arbitrator upheld the company's decision not to terminate Paxhia's seniority, ruling the employee had not quit his job by the mere wave of his hand and the employer had not accepted a resignation since the necessary documents to terminate his employment were not issued. Loss of seniority is a very serious matter; forfeiture ought not be imposed unless the contract provision clearly calls for it.

B. Work Outside the Unit

What is the effect on seniority of employee movement out of the bargaining unit to a nonbargaining unit job or to a supervisory position? Does service outside the unit break seniority? Does the employee continue to accumulate seniority while serving outside the unit? It may be that the agreement will supply specific rules for the arbitrator to apply in these situations. Many contract clauses provide that an employee

115. Id. at 1013.
who moves out of the bargaining unit retains accumulated seniority either indefinitely or for a limited period of time. Generally, the employee does not accumulate additional seniority based on service outside of the bargaining unit. In all instances, express contract provisions control.

An employer generally will seek contract language at least protecting the right of employees to return to the bargaining unit by exercising seniority accumulated prior to leaving the unit. Such language will provide management "with an internal source of qualified candidates to fill supervisory positions." In the absence of such a clause, "many well qualified employees would not risk the possible loss of employment that could result from their inability to perform satisfactorily in supervisory positions."

When the provision addressing the effect on seniority of movement out of the bargaining unit is ambiguous, the arbitrator must decide what to do. One approach that arbitrators take is to examine the prior practice of the parties as an indicator of their mutual intent. For example, the contract in *Mississippi Lime Co.* provided that an employee promoted to a supervisory position who returns to his former unit position shall "retain his seniority and privileges in the line-up he left." Did this mean a returning employee should be credited with seniority for time he spent working as a supervisor? The union argued that the word "retain" surely did not mean "accumulate." The company responded that an employee could not "retain" his relative status "in the line-up he left" at the time of his departure from the unit unless he accumulated seniority while a supervisor. The arbitrator opined that "a wiser man than I might find one or another of these arguments so clear and convincing that it would require no further analysis to decide the case." Apparently feeling that he lacked that wisdom, the arbitrator found the contract provision ambiguous and the past practice supporting the company's position compelling.

What if the contract is silent on this issue? Arbitrators will again examine available evidence of past practice to determine the parties'

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124. Id.
125. 31 Lab. Arb. (BNA) 859 (1959) (Fleming, Arb.).
126. Id. at 860.
mutual intent. In the absence of such evidence, arbitrators generally will rule that an employee who leaves the unit for another position with the company retains his seniority but does not accumulate more. Arbitrator Thomas McDermott explained that this result flows from the correct understanding that seniority rights are created and eliminated solely by the terms of the contract. A person working outside the unit is not covered by the contract and does not receive the benefits of the contract, such as accumulating seniority. For the same reason, unless the contract expressly takes away seniority, a worker leaving the unit does not lose accumulated rights. Thus, a worker returning to the unit can exercise previously accumulated seniority rights unless the parties have expressly agreed to the contrary.

Although this interpretation of seniority makes sense to arbitrators, it may not to judges. In Clark v. Hein-Werner Corp. the contract defined seniority as "an employee's length of service with the company in years, months and days." Pursuant to that clause, the company returned a number of supervisors to the bargaining unit and credited them with accumulated seniority, with the result that four other employees were laid off. The union grieved and an arbitrator ruled the employees could not accumulate seniority while working outside the bargaining unit, a holding consistent with others discussed above. Shortly after learning of the award, however, fourteen demoted supervisors sued the company and the union to have the award set aside. The Wisconsin Supreme Court granted the requested relief on the ground that the union had not represented the former supervisors fairly. At two points the court said its holding was due to the union's failure to notify the plaintiffs of the arbitration hearing, but at another point the court suggested the real breach was a conflict of interest:

In most situations whether the union is performing its fiduciary duty of fair representation in an arbitration proceeding presents a question of fact. However, where the interests of two groups of employees are diametrically opposed to each other and the union espouses the cause of one in the arbitration, it follows as a matter of law that there has been no fair representation of the other group. This is true even though, in choosing the cause of which

130. 8 Wis. 2d 264, 99 N.W.2d 132 (1959), reh'g denied, 8 Wis. 2d 264, 100 N.W.2d 317, cert. denied, 362 U.S. 962 (1960).
group to espouse, the union acts completely objectively and with the best of motives. The old adage, that one cannot serve two masters, is particularly applicable in such a situation. 131

The court’s statement generally has not been accepted, but it remains as a warning that seniority disputes may require more than interpretation of the agreement. It also illustrates that judicial meddling has the potential to threaten the status of the arbitrator as the primary interpreter of the collective bargaining agreement as designated by the parties.

A related issue concerns seniority accumulated in one seniority unit (for example, a department or job classification) when the employee moves to another seniority unit within the bargaining unit. Again collective agreements follow a variety of approaches, some allowing retention of seniority accumulated in the prior unit indefinitely or for a limited period of time, 132 others providing for forfeiture of acquired seniority. 133 If the contract is silent, the arbitrator should analogize to company seniority during a period of non-unit work, that is, the employee preserves but does not increase his seniority.

Arbitrators are also asked to decide whether an employee should be credited with seniority for years served with the company before joining the bargaining unit. In Caterpillar Tractor Co., the contract defined seniority as “length of service with the company.” 134 An employee’s original date of hire was designated as his seniority date when he was transferred into the unit. Arbitrator Henry Sisk concluded the contract language clearly supported the company’s decision. 135 Other arbitrators have reached a contrary result under similar contract language, presuming that unless the agreement specifies otherwise, seniority can only be earned by service under the agreement. 136 There is a certain attractiveness to Sisk’s literalist approach in the sense that parties should be taken at their word. But, in this instance the words cannot be examined out of context without distorting the parties’ intention. Seniority systems normally credit employees for service inside the unit. When a company and a union choose to do the unusual—to credit for service before joining the unit—they had better make their intention plain in their agreement. While Sisk’s reading of the common phrase basing seniority on “length of service with the employer” was certainly plausible, it was not consistent with what the parties most probably meant.

131. 99 N.W.2d at 137.
134. 80 Lab. Arb. (BNA) 625 (1983) (Sisk, Arb.).
135. Id. at 628.
C. Merger of Seniority Lists

The seniority of employees can be affected when two companies merge. Federal law requires employers to bargain with the union about the effects of the merger, including the impact on seniority. 137 Some collective agreements even require that the employer and union reach "mutual agreement" on the effect of a merger on seniority rights. 138 As a result of the collective bargaining process, the surviving company may agree either to dovetail or endtall seniority lists. Dovetailing integrates two or more seniority rankings, 139 while endtailing tacks one seniority list to the end of the other. 140 Combinations of the two procedures are also possible. 141

Dovetailing has a superficial aura of fairness about it, but the equities are not so clear. Length of service is certainly an important part of seniority, and dovetailing reflects that importance. There is another important aspect, however. For many employees, relative ranking is of greater concern than absolute seniority, and employees may as reasonably wish to preserve their standing as their seniority date. 142 Dovetailing gives no weight to that factor. The senior person in a department may, as a result, find himself dovetailed to the bottom half of a merged seniority list. Employees facing that prospect, particularly employees of the larger entity, can be expected to argue for endtailing, and not without some justification. Resolving disputes of this sort can be extraordinarily difficult for a union, especially since the losing group may charge the union with breach of the duty of fair representation. 143

In the absence of an express bargain on this issue, the arbitrator faces a difficult task when asked to resolve a dispute concerning merged seniority lists. Some arbitrators have used dovetailing as the method for dealing with such situations, reasoning that this approach is consistent with the parties' presumed intent to preserve and protect seniority. 144 By comparison, where the parties' conduct indicates that was not their in-

141. Indeed, there are numerous variations of these approaches available, such as integration by rank or by ratio. See generally Kennedy, Merging Seniority Lists, 16 PROC. NAT'L ACAD. ARB. 1 (1963); Kahn, Seniority Problems in Business Mergers, 8 INDUS. & LAB. REL. REV. 361 (1955); Seniority Roster, Local 640, I.A.T.S.E, 53 Lab. Arb. (BNA) 1253 (1969) (Spelfogel, Arb.).
142. See Kennedy, supra note 141, at 22-23.
tent, endtailing was ordered.\textsuperscript{145} In a few instances, a combination of the two approaches was found to be appropriate so that both total length of service and the workers' relative positions on the prior seniority lists could be weighed.\textsuperscript{146}

A similar conflict of interests arises when a company closes down one operation and transfers employees to another facility. The best way to deal with this conflict is to apply the relevant terms, if any, of the contract governing the grievance. Usually this will be the contract at the receiving facility, because few agreements provide for portable seniority. If the receiving unit's contract is silent, the transferred employees should be treated as new hires. In \textit{Carling National Breweries, Inc.}, Arbitrator James Harkless followed this principle and ruled that the company had no contractual basis for dovetailing the seniority list of the closed Dillon Street plant with that of the Beltway plant.\textsuperscript{147} There had been separate collective agreements for the two facilities and the Beltway contract was silent on whether seniority rights could be transferred from one plant to another. Dovetailing would result in the layoff of some Beltway employees, diminishing the seniority rights protected by their agreement.\textsuperscript{148}

Similarly, in \textit{Bruno's Food Stores, Inc.}, the employer closed one store, transferred the employees who had been represented by the Meatcutters Union to the remaining store where the employees were represented by the Retail Clerks Union, and dovetailed the two seniority lists.\textsuperscript{149} The contract with the Retail Clerks Union provided that non-unit employees placed in the unit "shall be treated as newly hired employees in regard to seniority...." The Retail Clerks Union grieved, claiming the dovetailing violated this provision. Arbitrator Ralph Roger Williams properly sustained the grievance, on the ground that the plain and definite contract language controlled, despite evidence of a past practice of allowing transferred employees to carry their seniority with them.\textsuperscript{150}

**D. Contract Termination and Successorship**

Contractual seniority rights expire when the agreement terminates. Under the 1972 Supreme Court decision in \textit{NLRB v. Burns International Security Services},\textsuperscript{161} that may occur when an employer sells the

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\textsuperscript{145} Alleghany County Commissioners, 83 Lab. Arb. (BNA) 464 (1984) (Mayer, Arb.).

\textsuperscript{146} Moore Business Forms, Inc., 24 Lab. Arb. (BNA) 793 (1955) (Somers, Arb.). Possible combinations are discussed at length in Kennedy, \textit{supra} note 141, at 26–30 and Kahn, \textit{supra} note 141, at 373–76.

\textsuperscript{147} 71 Lab. Arb. (BNA) 476, 479 (1978).


\textsuperscript{149} 66 Lab. Arb. (BNA) 999 (1976) (Williams, Arb.).

\textsuperscript{150} \textit{Id.} at 1002.

\textsuperscript{151} 406 U.S. 272, 281–82 (1972).
company's assets to another concern. Unless the successor agrees to be bound by the predecessor's collective agreement or is held to be the predecessor's alter ego, it is under no legal obligation to follow the terms of the contract, including the seniority provisions. If the majority of persons hired by the successor as its employees are persons who were employed by the predecessor, the successor has a legal obligation to bargain in good faith with the union that represented those employees. Included in that obligation is the duty to negotiate whether seniority accumulated under the predecessor's regime should be counted as service under whatever seniority system the parties adopt, if any.  

But must a company that purchases the assets of a unionized employer arbitrate a grievance claiming seniority rights? The Supreme Court concluded there was such an obligation in John Wiley & Sons v. Livingston, if there was a "substantial continuity of identity in the business enterprise" after a change in ownership. After Burns, however, there was serious question as to the continued viability of the earlier Wiley holding. If the successor was not bound to the agreement, what possible remedy could the arbitrator issue? The Court in Howard Johnson Co. v. Detroit Joint Board, reaffirmed the essence of Wiley—the arbitration obligation—but without clarifying the arbitrator's powers. It ruled there was "no substantial continuity" if the successor employed less than a majority of the predecessor's employees. Thus, as the law presently stands, a successor may be bound by the arbitration promise, but not the substantive terms of the predecessor's contract, and then only if it hires a majority of the predecessor's employees.  

Even prior to the Supreme Court's decision in Burns, most arbitrators held that a successor employer need not recognize seniority unless it has agreed to be bound by the terms of the agreement between the union and the predecessor employer. But when a successor has agreed


153. 376 U.S. 543, 551 (1964). In the arbitration ordered by the Court, Arbitrator Benjamin Roberts ruled the successor was not bound to follow seniority after the predecessor's employees were integrated into John Wiley's operation. Interscience Encyclopedia, Inc., 55 Lab. Arb. (BNA) 210 (1970).


155. Id. at 263–64.

156. See Stulberg, supra note 152; Goetz, supra note 152; R. Gorman, Labor Law—Basic Text 583 (1976); Severson & Willcoxon, Successorship Under Howard Johnson: Short Order Justice for Employees, 64 Calif. L. Rev. 795 (1976).

to be bound by the existing contract, arbitrators held it to the complete
bargain, including the seniority clause. 158

Post-Burns arbitration awards have followed the same approach. In
Hubacher Cadillac, Inc., for example, an employer purchase of another
employer’s business was held insufficient to require the recognition of
seniority accumulated under the predecessor employer. 159 But in Maho-
ney Plastics Corp., the employer purchased the assets of another com-
pany and expressly assumed the predecessor’s contract, except for lost
wages and fringe benefits, and the arbitrator ruled the employer was
required to follow seniority in recalling employees laid off by the prede-
cessor. 160 Seniority was not a claim for lost wages or fringe benefits and,
therefore, it was protected by the contract assumed by the company.

V. Using Seniority

Seniority rights are used by employees in various situations: For ex-
ample, a vacancy opens in a preferred position and the job is posted for
bid or because of a reduction in available work, a layoff is announced.
The labor agreement commonly discusses how an employee may use
seniority in such situations. It is not unusual, especially in the case of
promotions, for both the seniority and the ability of applicants to be con-
sidered in awarding a position. Seniority is considered as a mitigating
factor in disciplinary actions and as a means of calculating contract ben-
efits.

A. Seniority vs. Ability

1. TYPES OF SENIORITY CLAUSES

Contract clauses may provide for the use of both seniority and abil-
ity as criteria in making certain employment determinations, or they
may provide that one of the two criteria is determinative. Under a
straight seniority clause (not unusual in a layoff provision), the employ-
ment decision must be made strictly in accordance with seniority rank-
ing. Concerned that straight seniority may impair efficiency, some com-
panies have bargained for a “senior-qualified” clause that requires the
senior employee to be able to perform the work available. The contract
formulation that gives rise to the questions that are arbitrated most fre-
quently provides that the most qualified candidate should be favored,
for example for a promotion, but if the candidates are equally qualified,
the position goes to the most senior. This type of provision is known as a
“relatively equal” clause because seniority controls if the applicants are

158. Country-Belle Cooperative Farmers, 48 Lab. Arb. (BNA) 600, 603–05 (1967);
(BNA) 569 (1981) (Howlett, Arb.).
(BNA) 366 (1978) (Turkus, Arb.).
relatively equal. Some contracts include a so-called "hybrid" clause which requires the comparison of applicants on the basis of both seniority and ability. Management may be able to secure through negotiations the right to select the most qualified person or even retain the unreserved right to select who it wishes for the position in question.  

2. THE MEANING OF ABILITY

There are two different concepts of "ability" used in collective agreements. Minimum or sufficient ability is involved when the contract provision makes reference to an employee's ability to perform certain work. Comparative ability is involved when the employment decision depends on which employee is better or best able to perform certain work.

Arbitrator Edward Harrison had to address the difference between the two meanings of ability in American Sawmill Machinery Co., where the company awarded the posted job of leadman to the junior applicant who had knowledge and experience superior to the senior grievant. The agreement specified that the job should go "to the bidder who has the apparent ability to perform the work and the greatest plant seniority." Arbitrator Harrison ruled that this was a "sufficient ability" clause under which comparisons between applicants were unnecessary and improper and the job must be given to the senior bidder if he is competent. By comparison, in Screw Conveyor Corp., the company had promoted the junior applicant and the contract required awarding the position to the senior applicant only where ability and physical fitness were relatively equal. Arbitrator D. L. Howell ruled that under such a clause comparison between the bidders was proper and that the company had shown that the senior grievant, while a good employee, did not have ability equal to that of the junior employee.

An employee possesses sufficient ability when he has the skills to perform the job after the customary break-in instruction that is involved in any new job. The senior employee should not be disqualified simply

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165. Id. at 108–09.

166. 72 Lab. Arb. (BNA) 434 (1979) (Howell, Arb.).

167. Id. at 437.
because he cannot step in and perform the work without any instruction. On the other hand, the employee who has the native ability but would require full training prior to performing the work does not have the requisite sufficient ability.

3. MEASURING ABILITY

Under both uses of the ability criterion discussed above, disputes arise concerning the methods of measurement. "Human beings are different and cannot be inspected and measured as finished products from an assembly line."\(^{168}\) Arbitrators often are asked whether the methods used by an employer in measuring ability are consistent with the intent of the parties.\(^{169}\)

The inquiry into ability must begin with an examination of the needs of the job in question. Ability is not measured in a vacuum, but only in relation to the requirements of a position. In Universal Atlas Cement Co., Arbitrator Walter Gellhorn interpreted a clause which granted the promotion to the senior employee when the applicants were relatively equal in ability.\(^{170}\) He explained:

A basic purpose of seniority clauses like the present one is to assure the senior men that they will be permitted to progress just as far as their individual capacities permit, even though there may be junior employees who may ultimately surpass them. To carry out that purpose, one cannot weigh two individuals' qualifications as an abstraction. Qualifications have to be evaluated with a particular end in view.\(^{171}\)

That end, according to Gellhorn, was the particular job in question. On that basis, the grievant's abilities were relatively equal to those of the junior and, as the most senior, he deserved the promotion according to the contract.\(^{172}\)

How does one measure ability? Arbitrators regularly approve the use of tests shown to be related to the job in question.\(^{173}\) On the other

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168. Id.


171. Id. at 756.

172. Id. at 757; compare Georgia Kraft Co., 55 Lab. Arb. (BNA) 104, 106 (1970) (Williams, Arb.).

hand, arbitrators discount subjective opinions of supervisors that are unsupported by objective indicia, and describe them as unreliable and susceptible to abuse and favoritism. 174 The arbitrator cannot simply accept "general assertions as gospel." 175 A selection procedure must be more than "a popularity contest." 176 Arbitrator Harry Platt explained:

Obviously, it is desirable, when possible, to have satisfactory objective standards of measurement. Objective qualifications and written and situational tests may satisfy the need and supplant personal judgment which is subject to dispute. If the qualifications and the tests are mutually agreed upon, they are by definition satisfactory. If they are not agreed upon, they must be so carefully and clearly related to the measurement of the relevant ability and so fairly administered as to persuade the disinterested mind of their fairness and approximate accuracy. 177

Numerous measures of employee ability have been approved by arbitrators as relevant. Employee production records are commonly examined. 178 Employers have also considered employee attendance 179 or disciplinary 180 records, prior education 181 or training, 182 experience in performing the work in question 183 or similar work, 184 physical and psycho-

logical fitness, and, at times, age and sex. The latter two criteria require careful scrutiny in light of federal and state antidiscrimination laws. In each instance, the measure of employee ability must be shown to be related to the needs of the job in question. Depending on the job, personal characteristics, such as initiative, appearance and personality, might also bear on one's ability.

Attendance and disciplinary records might not seem to be encompassed within the usual meaning of "ability" and their use by employers frequently results in grievances. From a union's perspective, ability means the capacity to perform certain tasks, something unrelated to attendance or discipline. From an employer's perspective, an employee cannot perform tasks (or at least perform them well) if he or she is absent or in constant disciplinary trouble. There is no simple answer to this conflict. In some cases, attendance records might be relevant—for example, a promotion to a critical job with few available qualified replacements. In some other cases, a particular disciplinary record might affect ability. An employee with a severe drinking problem may not be able to handle a job on an unusually dangerous machine. As a general rule, though, attendance and disciplinary problems should be dealt with through disciplinary procedures, not by limiting advancement. An unreliable employee should be warned, suspended or discharged, but if his flaws are not serious enough to warrant his termination, he should not be penalized in an indirect manner.

Even under the best of circumstances, evaluation of ability is a hazardous business. There are so many relevant factors that in all but the clearest cases each employee will have some evidence on his side. Management's evaluations should be given due weight, but competitive seniority rights would evaporate if any slight edge in a supervisor's judgment could throw a job to the junior employee. Over the years, arbitra-


190. Professor James J. Healy's study, The Factor of Ability in Labor Relations, 8 Proc. Nat'l Acad. Arb. 45 (1955), raises questions about management's evaluation of ability. A follow-up investigation of cases where arbitrators had set aside company decisions to promote junior over senior employees found that in over 60% of the situations, the senior employee—who had been considered unqualified by the company—proved himself on the job. Id. at 51–52.
tors have applied the "head and shoulders" test as a rule of thumb in relative ability disputes. All this means is that if seniority is to count for anything, the senior employee should be preferred unless the junior is clearly—"head and shoulders"—above him.\footnote{191} Because ability is so difficult to measure, the arbitrator’s allocation of the burden of proof may be decisive. Consider a debatable case subject to the head and shoulders rule. An employer will have a much harder time prevailing if it has to prove the junior employee was far better qualified than the senior than if the union is obliged to prove the two relatively equal. Generally, the party alleging the contract breach bears the burden of proving its position, except in discipline cases.\footnote{192} Nevertheless, arbitrators often expect employers to prove that the junior employee is superior.\footnote{193} It is proper to expect the employer to bear the burden of proof where the employer has exclusive access to the relevant information—the requirements of the job, for example, or the supervisor’s confidential evaluations. But in other cases, the general rule should apply and the union should be required to demonstrate that the agreement has been breached by showing the senior was relatively equal in ability to the junior who received the promotion. The employer could then rebut this \textit{prima facie} case by demonstrating that the junior’s ability was head and shoulders above that of the senior employee.

4. TRIAL PERIODS

Some contracts provide for a trial period within which ability can be judged on the job.\footnote{194} Even when the contract does not so provide, some arbitrators have held that management must give senior employees a trial period in which to prove themselves.\footnote{195} Unless there is an established practice signifying an agreement to provide a trial, the arbitrator should not force one into the contract.\footnote{196} Unions know how to bargain for trial period provisions, and they are not at all uncommon.\footnote{197} As the better reasoned cases hold, whatever the wisdom of a trial period, the arbi-

\begin{footnotesize}
\footnote{191}{See O. Fairweather, \textit{Practice and Procedure in Labor Arbitration} 250–256 (2d ed. 1983).}
\footnote{192}{See Edwards, \textit{supra} note 22, at 126–27; McDermott, \textit{supra} note 169, at 110.}
\footnote{193}{Ford Motor Co., 2 Lab. Arb. (BNA) 374, 376 (1945) (Shulman, Arb.).}
\footnote{196}{Chromalloy American Corp., 62 Lab. Arb. (BNA) 84 (1974) (Fox, Arb.).}
\footnote{197}{For examples of trial period provisions, see \textit{2 Collective Bargaining: Negotiations and Contracts} 68:181–82 (1983).}
\end{footnotesize}
trator should not create such a plan for the parties. 198

B. Seniority as a Mitigating Factor in Discipline

Seniority routinely is considered by arbitrators as a mitigating factor in disciplinary actions. As we have discussed at length elsewhere, 199 the concept of "just cause" includes certain protections for employees which reflect the union's interest in guaranteeing fairness in disciplinary situations. One of those protections is the employee's right to individualized treatment, that is, consideration of distinctive facts in his record which warrant mitigation of the discipline.

An employee's seniority often is considered by arbitrators as one of those distinctive facts which may warrant mitigation. 200 For example, a very senior discharged employee may be reinstated, albeit without back pay, while a very junior employee guilty of the same offense would not. 201 Why should an employee's length of service be relevant? One theoretical reason might be that an employee gains a stronger right to possession of "his" job as time goes on. 202 Alternatively, an arbitrator might treat satisfactory prior service as building up merit—a sort of savings account of "good" which can be drawn upon to pay the debts of "bad" performance. A more practical reason is that extensive prior service may provide evidence of future prospects. An employer may discharge an employee in part because the worker's performance—unacceptable absenteeism, for example—indicates the employee will not be able to fulfill essential obligations of his job in the future, such as regular attendance. At least in the past the senior employee had demonstrated the ability to fulfill the attendance obligations of his job to the satisfaction of his employer. This suggests that he may be capable of doing so in the future and that his unsatisfactory conduct can be remedied with discipline short of discharge. Lacking that evidence, the junior employee will find it harder to convince the arbitrator that his promises of improvement can be believed. 203

An arbitrator will weigh seniority along with other individualized

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199. Theory of Just Cause, supra note 25.


202. Ross, supra note 201, at 149.

facts, such as the grievant’s attitude, demeanor and other personal factors, in deciding whether the employer has proven “just cause.” Although arbitrators normally will consider the length of an employee’s service to the employer, the weight given to that factor depends upon the nature of the grievant’s misconduct. Seniority is weighed in cases of minor offenses, especially those related to consistency and quality of work. A fundamental breach of employee responsibilities—such as an unprovoked physical attack on a supervisor or coworker—should not be excused simply because the employee has a long service record. Other workers must be deterred from such deliberate misconduct. To mitigate the attacker’s discharge because he had served many years would send workers the wrong message.

C. Benefit Seniority

The collective bargaining agreement normally contains numerous benefit provisions under which employees receive paid vacations, paid holidays, pensions, severance pay and other fringe benefits. Seniority may determine whether the employee qualifies for any benefit. For example, it is common for contracts to require an employee to meet a minimum service requirement before receiving holiday pay. In addition, seniority may determine the amount the employee receives under the benefit clause. Vacation provisions illustrate this use of seniority. Employees with greater seniority are entitled to more weeks of paid vacation, assuming they fulfill whatever work eligibility requirement is contained in the contract provision.

VI. Superseniority

A. Superseniority and the Law

The term “superseniority” refers to either a special kind of seniority that is worth more than the ordinary variety or to an extra grant of seniority beyond that which would be provided by the normal application of seniority principles. The purpose of both types is to give certain employees a favored position. This can be done to harm the union or to help it. At one time, companies often granted superseniority to “key” employees, but such provisions are now rare.

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205. Westover Fabrics, Inc., 5 Lab. Arb. (BNA) 735 (1946) (Wallen, Arb.) (thirteen weeks of service required). In addition, the employee will have to fulfill any work eligibility requirement set forth in the holiday clause, such as working the day before and the day after the holiday to be entitled to the holiday pay. See Abrams & Nolan, Resolving Holiday Pay Disputes in Labor Arbitration, 33 C.W.R. L. Rev. 380 (1983).

The prime example of an antiunion use of superseniority occurred in *NLRB v. Erie Resistor Corp.*,\(^{207}\) where the employer unilaterally gave an extra twenty years of seniority credit to employees who worked during a strike. The Supreme Court categorized the superseniority grant as conduct "inherently discriminatory or destructive" of employee rights and therefore unlawful even without proof of antiunion motivation. Later cases have held that such a superseniority clause is unlawful on its face even if negotiated with the union\(^{208}\) and that an employer's insistence on such a clause is itself an unfair labor practice.\(^{209}\) As a result of its obvious illegality, disputes concerning this type of superseniority are not likely to be presented to an arbitrator.

Unions have traditionally sought a different sort of superseniority, special seniority preference for union officials. Originally designed to balance the employer's right to give superseniority to "key" employees, such provisions are now quite common.\(^{210}\) A typical clause makes certain union officials, such as stewards, the most senior employees. One legitimate purpose of such superseniority is to maintain continuity in the administration of collective agreements, "to assure, to the fullest extent possible, union representation at the worksite by experienced representatives."\(^{211}\) When the contract mandates that union officials be the most senior workers, they will be the last laid off and thus will be able to process grievances and otherwise monitor and enforce contract provisions as long as unit members are employed. Unions might also regard superseniority as a needed protection from employer discrimination and as a reward for union service.

The Supreme Court long ago held that some forms of union superseniority were lawful: "A provision for the retention of union chairmen beyond the routine requirements of seniority is not at all uncommon and surely ought not be deemed arbitrary or discriminatory."\(^{212}\) It is when superseniority is pushed beyond this simple form that legal problems abound.

When superseniority is granted on the basis of union status, it may run afoul of sections 8(a)(3) and 8(b)(2) of the Labor Management Rela-

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207. 373 U.S. 221 (1963).
208. Great Lakes Carbon Corp. v. NLRB, 360 F.2d 19 (4th Cir. 1966).
tions Act\textsuperscript{213} which prohibit discrimination to encourage or discourage union membership. The National Labor Relations Board has attempted to balance the interest in a stable collective bargaining relationship with the risk of pro-union discrimination. In \textit{Dairylea Cooperative, Inc.},\textsuperscript{214} it stated that superseniority clauses limited to layoff and recall situations were presumptively valid. The \textit{Dairylea} principle also protects union officers from at least some demotions.\textsuperscript{215} Where the smooth operation of the collective bargaining relationship is not involved, superseniority for union officers is unlawful. Thus, a clause granting union officers special preference in the allocation of lucrative jobs or other benefits unrelated to continuity in the administration of the agreement would violate the Act.\textsuperscript{216} Also violative would be a provision applying to individuals whose presence on the job is not essential to contract administration.\textsuperscript{217}

B. Superseniority in Arbitration

Given the dubious legality of some superseniority arrangements, what should an arbitrator do when presented with a clause that might fall outside the bounds of legally permissible pro-union favoritism for union officers? Arbitrator Carl Cabe faced such a situation in \textit{Heil-Quaker Corp.}\textsuperscript{218} The company argued that it refused to grant superseniority preference to a union trustee because to do so would be illegal. Cabe agreed after analyzing the Labor Board rulings on the point. Although the contract clearly provided for superseniority for such officers, Cabe ignored the agreement’s command because “to rule otherwise would be a dereliction of duty.”\textsuperscript{219} By comparison, Arbitrator Reginald Alleyne, in a thoughtful treatment of the subject in \textit{Hunter Engineering Co., Inc.}, concluded that the appropriate function of the arbitrator in such a situation is to determine whether the collective bargaining agreement has been violated, “leaving pure questions of contractual legality to those authorized by law to resolve such questions.”\textsuperscript{220}

Although commentators have differed on the correct approach to

\textsuperscript{213} 29 U.S.C. § 158(a)(3) and (b)(2).
\textsuperscript{214} 219 NLRB 656 (1975), en\'fd sub nom. NLRB v. Milk Drivers and Dairy Employees, Local 338, 531 F.2d 1162 (2d Cir. 1976).
\textsuperscript{215} Parker-Hannifin Corp., 231 NLRB 884 (1977); Hospital Service Plan of New Jersey, 227 NLRB 585 (1976).
\textsuperscript{216} United Electrical, Radio and Machine Workers of America, Local 623 (Limpco Mfg., Inc.), en\'fd sub nom. Anna M. D’Amico v. NLRB, 582 F.2d 820 (3d Cir. 1978).
\textsuperscript{218} 79 Lab. Arb. (BNA) 513 (1982).
\textsuperscript{219} Id. at 518.
this situation, 221 when faced with a superseniority question, the correct approach is that followed by Alleyne, to interpret the parties' collective agreement. If the parties request a ruling on the legality of the clause, the arbitrator should supply one. The clause itself may indicate that it grants superseniority rights only to the extent allowed by federal law or the parties may agree that that was their intent. 222 If so, it is certainly appropriate for the arbitrator to review the law. If neither the parties nor the contract obliges the arbitrator to consider legal issues, he simply should give the parties a reading of the clause to which they agreed. The offices of the Labor Board are available for scrutiny of superseniority provisions under the Labor Management Relations Act. 223

Who is entitled to superseniority? Although union stewards are often granted superseniority by contract, the arbitrator should not grant it when the parties themselves have failed to do so. 224 The terms of the clause will determine the persons entitled to the preference. Usually this will mean that only a person holding a specified position will have superseniority, and then only so long as he holds the office. For example, in Matlock Trailer Corp., only the "chief steward" was granted superseniority. 225 When the chief steward left that office on medical leave and another person was named to it, the grievant lost his preference. 226

When do superseniority rights attach? The simple answer is that they attach as soon as the union position does. Arbitrator A. Howard Bode ruled, in Keller Industries, Inc., that five employees who were elected to union offices while on layoff were entitled to immediate preference in recall and could bump working employees. 227 Similarly, preference for stewards attached upon their election in Koehring Co., under a contract which protected union representatives from transfer. 228 The company told the grievant he was to be transferred out of the cutting department to the welding department. Nine days later, but before the transfer was made, the grievant was elected a steward and promptly notified his foreman. Three days later the company carried out its previously announced intention to transfer the grievant. The arbitrator

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222 District Concrete Co., 74 Lab. Arb. (BNA) 719 (1980) (Ordman, Arb.).
225 75 Lab. Arb. (BNA) 263 (1980) (Crane, Arb.).
228 64 Lab. Arb. (BNA) 1080 (1975) (Cohen, Arb.).
found that this action violated the clear contract language prohibiting the transfer of representatives. 229

Superseniority rights expire for union officials when their terms of office end. For example, in American Safety Razor Co., an arbitrator ruled that an ex-shop steward lost her contract right to preferential treatment when she was voted out of office. This meant that she should not have been retained at work when there were more senior employees on layoff status. 230

Contract clauses may provide that union officials are supersenior as long as they are "able to perform the work available." Disputes may arise as to whether the officials possess the requisite ability. For example, in Kennecott Corp., the company did not recall laid off union officers to the job of mothballing, contending that they were not able to do that work. 231 Arbitrator Mei Bickner ruled the contract was not violated; while the employees could have "learned" to perform the work through retraining, they did not "possess the ability to perform the work" as was required under the superseniority clause. 232

One recurring issue in arbitration is whether the superseniority preference should be applicable when a plant temporarily shuts down or reduces the work week. For example, in Litton Business Systems, Inc., the agreement stated that the president and two chief stewards of the union were to be "the last laid off and first to be rehired," but it also provided that the company was not required to follow the layoff and recall "procedures" when the layoff was for two weeks or less. 233 The company laid off the union officers while retaining other employees during a "temporary" layoff of less than two weeks, claiming that the superseniority right attached only during "permanent" layoffs. The union responded that the contract clause clearly provided for superseniority rights during all layoffs. Arbitrator Gladys Gruenberg upheld the union's claim, emphasized that the purpose of superseniority is "to prevent the breakdown in the grievance procedure," and noted that there may be more grievances during a temporary layoff than at any other time. 234 Although the company was freed from following layoff "procedures" for a short layoff, the superseniority clause was not a procedural provision, but rather one providing substantive rights. 235 Arbitrator Arthur Cook followed a similar line of analysis and upheld a union claim to

229. Id. at 1082.
230. 69 Lab. Arb. (BNA) 157, 161 (1977) (Jones, Arb.).
231. 80 Lab. Arb. (BNA) 1142 (1983) (Bickner, Arb.).
232. Id. at 1145. See also Cascade Corp., 82 Lab. Arb. (BNA) 313, 324–25 (1984) (Bressler, Arb.).
234. Id. at 1146.
235. Id. See also Lamar & Wallace, Inc., 83 Lab. Arb. (BNA) 625, 629 (1984) (Bowers, Arb.) ( superseniority clauses "liberally construed . . . to safeguard the legitimate purpose for which they were negotiated").
superseniority rights when a few employees worked during a plant shut-
down, but union officials covered by the superseniority clause were laid 
off.\textsuperscript{236} He added that superseniority was needed to "preserve the integ-
rit y of the union organization which might be severely damaged if all 
elected officials could be placed on layoff at the same time."\textsuperscript{237}

Job changes other than layoff do not involve the same consid-
erations, and superseniority is less likely to be applied. For example, in
\textit{District Concrete Co.}, the superseniority agreement was that the prefer-
ence for union stewards applied only in layoff and recall situations.\textsuperscript{238}
During an economic downturn, the company applied straight seniority 
and ignored superseniority when it placed the only union steward on 
late starting times. The union argued this action constituted a layoff. 
However, Arbitrator Arnold Ordman gave a literal reading to the super-
seniority clause and stated that while the grievant did lose some work, 
he still had the fifth highest yearly earnings in a unit of sixteen employ-
ees and he was regularly available to the membership to effectively 
carry out his steward functions.\textsuperscript{239} Similarly, in \textit{Styberg Engineering 
Co.}, Arbitrator William Petrie ruled that a superseniority clause ex-
pressly limited to layoff and recall did not cover a shift change.\textsuperscript{240} Accor-
ding to the arbitrator, the union could have bargained for broader protec-
tion covering shift assignment, but it did not do so during negotia-
tions.\textsuperscript{241}

Where the contract or past practice shows that superseniority was 
meant to apply beyond layoff situations, the arbitrator must follow the 
parties' guidance. Thus Arbitrator Mark Santer found Rexham Corpo-
ration's union officers entitled to shift preference because the bargain-
ing history of the provision showed the parties' intent to extend cover-
age to this type of situation.\textsuperscript{242} In the same fashion, Arbitrator Charles 
Ipavec upheld a grievance protesting the bumping of the union steward 
from the first shift; under the agreement, union officials had the right to 
be "retained in their classified jobs on their shifts [emphasis added]."\textsuperscript{243}

\textbf{VII. Seniority and Discrimination}

Seniority systems naturally favor employees with greater service.

237. Id. at 248; Cascade Corp., 82 Lab. Arb. (BNA) 313, 324 (1984) (Bressler, Arb.) 
(purpose of superseniority clause "to preserve the structure of the Union").
(Sabo, Arb.) (reduced work week constitutes layoff).
Arb. (BNA) 1242, 1243 (1983) (Groshong, Arb.).
In employment situations where minorities and women are the most recent hires, a potential conflict exists between the national goals of collective bargaining and equal employment opportunity. When a layoff is necessary and seniority provisions must be followed, minorities and women will be out the same door they recently entered.\textsuperscript{244} Conversely, companies pursuing affirmative action goals may give preference to minority candidates in layoff and promotion situations, despite contract provisions requiring seniority to control.\textsuperscript{245} They may act to comply with government guidelines or consent decrees. Employees disadvantaged by these actions may pursue grievances claiming discrimination as a result of the failure to follow contract seniority provisions.

The Supreme Court has addressed the relationship between seniority and antidiscrimination laws in a number of important decisions under Title VII of the Civil Rights Act of 1964.\textsuperscript{246} In general, the Court has enforced Congress' mandate to protect rights under "bona fide" seniority systems.\textsuperscript{247} The Court also has addressed the question of a labor arbitrator's asserted obligation to consider antidiscrimination laws when resolving grievance disputes. In \textit{W. R. Grace & Co. v. Rubber Workers, Local 759},\textsuperscript{248} the company had reached a conciliation agreement with the EEOC to redress prior sex discrimination, but the union did not participate in the agreement. Following the conciliation agreement, the company denied males certain promotions and laid them off. They filed grievances, some of which were heard by Arbitrator Anthony Sabella who ruled that although the seniority clause of the collective agreement was violated, it would not be equitable to penalize the company for complying with its responsibilities under federal law. Other grievances were later heard by Arbitrator Eamonn Barrett who ruled he was not bound by the prior arbitrator's decision. He found that the layoffs were in breach of the collective agreement, and he would not examine matters external to the collective agreement such as the EEOC conciliation agreement. The company brought suit to set aside Barrett's award. The Supreme Court ruled that a district court should enforce an arbitration award where the arbitrator considered only the collective agreement's seniority language. It is the district court's responsibility to determine


\textsuperscript{248} 103 S. Ct. 2177 (1983).
whether "an explicit public policy" is violated by the arbitrator's award, and only then should the court deny enforcement of the award. 249

Labor arbitrators have been asked to deal with seniority and discrimination issues under the terms of collective agreements and have wrestled with the difficult issues posed in such cases. 250 As the W. R. Grace case demonstrates, employers easily can find themselves caught between a contractually binding seniority system and the dictates of the civil rights laws. As a general rule, arbitrators are on safer ground if they interpret the agreement and leave legal issues to the agencies charged with administering them. 251 If the seniority system has been found by a court to be discriminatory, however, the arbitrator might excuse compliance with the illegal provision without doing violence to his primary role as contract interpreter. Arbitrator Jay Kramer faced that situation in Operating Engineers Employers. 252 The union argued that Kramer had no authority to address the issue since the agreement only granted the arbitrator power to decide disputes concerning the meaning of the contract. Kramer noted that the contract expressly prohibited discrimination and interpreted this as an authorization for him to consider external law and interpret controlling judicial precedent. 253

Abstention is not always a viable option and thus many arbitration cases grapple with this conflict. Most commonly the question is not a clear contradiction between the contract and a statute, but rather between the contract and a settlement agreement or a "voluntary" affirmative action program. W. R. Grace was typical of these cases. The employer agreed with the union that promotions would be based on seniority but then signed a consent decree requiring affirmative action for female employees. The employer complied with the consent decree and promoted women with less seniority than men who sought the positions. How should the arbitrator reconcile obligations under law with those created by contract? Which instrument—the consent decree or the agreement—should be given preference?

Arbitrator Edgar Jones faced this situation in Stardust Hotel. 254 He first plainly enunciated the basis of his jurisdiction: The case involved a claimed violation of contract and, as evidenced in the agreement, the parties selected arbitration as the forum for resolving such disputes. 255

On the merits, Jones focused carefully on the terms of the consent decree

249. Id. at 2182–83.
253. Id. at 1227.
255. Id. at 945; USM Corp., 69 Lab. Arb. (BNA) 1051, 1056–57 (1977) (Gregory, Arb.).
and found it was not intended to modify the contract seniority system. The employer had no power to change the agreement unilaterally. Thus, the contract—and not the consent decree—was enforced by the arbitrator. 256

In an attempt to meet federal affirmative action regulations, Bliss & Loughlin Industries awarded a posted job to a junior minority employee instead of a senior qualified employee under a contract provision requiring awarding the job to the senior qualified employee. 257 The employer argued that the promoted employee’s race was a “qualification” rightfully considered under the agreement, and, in any case, the seniority clause was superceded by a federal executive order requiring affirmative action. Arbitrator Joseph McKenna rejected both arguments. He found that treating a person’s “minority status” as a qualification was an attempt to circumvent the seniority clause and that clause had not been found to be discriminatory under national law. Reverse discrimination, ruled Arbitrator McKenna, was justified neither by law nor by contract. 258

While we are not insensitive to the pressures government agencies or private litigants can impose on employers to produce satisfactory settlements, it is hard to have much sympathy for a company that promises one thing to its union and a contradictory thing to another party. It is not unlike the automobile owner who sells the same car to two different buyers. One who does that must expect to pay damages to the disappointed buyer. Likewise, an employer who “sells” promotions to different promisees cannot be surprised when one of them sues him. An employer faced with this situation can choose either to negotiate an amendment to its agreement or seek to force the union into the legal action it is trying to settle. If the employer fails to do either of these, it has no basis for unilaterally rewriting the agreement, and no basis for asking an arbitrator to save it from the consequences of its actions. Arbitrator Sabella’s decision in the first of the W. R. Grace awards purported to apply equity by releasing the employer from its contractual obligations. What he actually did was rob the union of an important part of its bargain, simply because the employer made inconsistent promises.

When a company and union have agreed to modify the contract’s seniority provisions in compliance with an affirmative action plan, the terms of that plan control, and supercede the prior seniority arrangement. That plan then may require some interpretation by an arbitra-

256. Id. at 947.
A threshold question is whether the union has joined the arrangement worked out between a company and a government agency. In *Hayes International Corp.*, for example, Arbitrator Rolf Valtin carefully analyzed the evidence and found that the union had concurred with an affirmative action transfer plan negotiated between the employer and the Defense Contract Administration Service. This concurrence modified the agreement’s seniority provision. By comparison, in *Detroit Department of Police*, Arbitrator Mark Kahn found no evidence that the union agreed to modify the seniority clause in order to remedy prior handicap discrimination against a police officer, and, in the absence of such agreement, the contract language prevailed.

Discrimination issues may also come into play if an employer weighs an employee’s sex when evaluating “ability.” This is illustrated by *Bethlehem Steel Corp.* The company laid off a senior female janitor instead of a junior male janitor because the assignment available was cleaning a large male “welfare facility” including bathrooms, showers and lockers. The company acted out of concern for the privacy of both the male workers and the female grievant. Its claim was that the seniority provision did not apply because the grievant lacked the “ability to perform” the work, an exception to seniority contained in the clause. While a warning buzzer system and screens were employed in other bathrooms to allow female janitors to perform their work, this facility was almost constantly in use by hundreds of male employees. A female janitor would have to exit with such frequency and be gone for such durations as to make it impossible for her to complete her work.

Should seniority control in such a situation? Certainly the facts proved beyond any doubt that the grievant was laid off solely because of her gender. Arbitrator Joseph Sharnoff, in an opinion approved by Impartial Umpire Rolf Valtin, remanded the matter to the parties to examine whether a local seniority agreement required the company to reshuffle other employees to ensure a suitable position was available for the more senior grievant. Although he did not rule on the merits of the case, Sharnoff noted that the parties could not have contemplated, when the parties wrote the seniority clause,” that management would be required to bear the “unduly severe” burden of having to place a female employee in a work assignment she would not have the time to complete during a normal day’s work.

While a remand to the parties may be appropriate under some permanent panel systems, ad hoc arbitrators do not often enjoy that luxury.

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262. 82 Lab. Arb. (BNA) 175 (1984) (Sharnoff, Arb.).
263. *Id.* at 176.
Addressing facts such as those in the *Bethlehem Steel* case under a contract which mandates layoff by seniority as long as the retained employee is "able to perform the work available," the arbitrator must decide whether a person's gender will in fact render them unable to meet the requirements of a position. When combined with the reasonable objective of protecting privacy, the evidence presented in *Bethlehem Steel* would have established an inability. Outmoded stereotypes and assumed physical deficiencies, however, should not substitute for proof of genuine incapacity.

*A. J. Bayless Markets, Inc.*, illustrates this last point.264 The company laid off or reduced the hours of senior female meatwrappers when it placed a new scheduling plan into effect because it believed that women would have great difficulty and less interest in performing the available meatcutting work. Arbitrator Howard Finston sustained the female meatwrappers’ grievance. He concluded that the employer failed to show a legitimate business objective for a plan with a clear disparate impact on female employees and also failed to prove that women were neither capable of nor interested in performing the work.265

By comparison, in *Illinois Bell Telephone Co.*, the contract required the company to weigh "very carefully" a grievant’s "ability and qualifications" since she was the senior applicant for a position.266 The grievant claimed gender discrimination when she was not promoted after failing to pass the pole climbing test required for the installation/repair technician job. The arbitrator relied upon the testimony of the company’s witness, Dr. Mary Tenopyr, that addressed the scientific validity of the test for the position in question. He concluded that the contract seniority provision had not been violated since the grievant did not possess the requisite ability.267

**VIII. Conclusion**

In 1962, Professor Benjamin Aaron wrote that seniority issues are "likely to be . . . of historical interest only."

The very concept of seniority is doomed to extinction, because the economic system upon which it is based is even now in the process of fundamental and irrevocable change. . . . The rapidity of technological change strongly suggests that the average employee in the immediate future will have to change jobs at least several times during his work life. Length of service in a given job thus will become increasingly meaningless as a criterion for employment preference.268

267. Id. at 435–36.
Professor Aaron's prediction was far off the mark. Rather than becoming "increasingly meaningless," seniority remains the controlling measure of job rights in the unionized workplace. Questions concerning the acquisition and calculation of seniority and the administration of seniority systems make up an important part of an arbitrator's case load. Protecting seniority remains an important union goal. Balanced against this union goal is the employer's legitimate interest in managerial flexibility in facing the problems of today's international economy. The resulting tension guarantees there will be disputes over the interpretation and application of seniority provisions—grist for the arbitrator's mill.

The labor arbitrator will neither defend the union's interests nor ally himself with management's productivity concerns. As their jointly selected neutral interpreter, the arbitrator owes his allegiance to the contract and to the arbitration process he is privileged to administer. The arbitrator must stand as the protector of the seniority rights—and only those rights—created by contract.