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Industrial Mobility and Survival of Seniority - What Price Security?

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INDUSTRIAL MOBILITY AND SURVIVAL OF SENIORITY—WHAT PRICE SECURITY?

I. INTRODUCTION

On March 28, 1961, a new star[1] appeared in our legal firmament. Like the star of earlier and holier origin, this one also, has been gazed upon with wonder by certain Wise Men,[2] and its portent to some has been a cause of rejoicing and to others a cause of "weeping and gnashing of teeth."[3] Intermixed with the paens of praise may be heard pleas and supplications that the Supreme Court of the United States act soon to restore the heavens to their natural order.[4]

Zdanok v. Glidden Co.[5] dealt with whether seniority rights under a collective bargaining agreement survive the expiration of the agreement, and whether such rights are transferable to another plant in a different geographical location when operations cease at the old plant site.

The decision has brought into sharp focus the conflict between two urgent needs of our society, mobility of industry and economic security of the worker. There is a necessity to develop one or more *modi operendi* by which both needs may be satisfied to the extent that our nation will continue to have a dynamic, powerful industry manned by a relatively satisfied, contented working force.

More than ever before, the constantly accelerating pace of new technologies, requiring radically different plant facilities and machines, requireing new markets[6] and new sources of raw materials, and requiring, at the same time, control of manufacturing, delivering and selling costs if the pace is to be maintained, necessitates that mobility of industry be unhindered. The relocation of plants, the expansion of industry into new territories, and the contraction of individual company operations at one location while they expand at new sites, are methods used by industry to increase operational efficiency.[7] The ability to react swiftly in our present fluid economic environment is a *sine qua non* to continuing industrial strength and development.

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[1]Zdanok v. Glidden Co., 288 F.2d 99 (2d Cir. 1961).

[2]Aaron, *"Reflections on the Legal Nature and Enforceability of Seniority Rights,"* 75 HARV. L. REV. 1532 (1962); *"Plant Removal and the Survival of Seniority Rights: The Glidden Case,"* 37 IND. L.J. 380 (1962); *"Seniority Survival: A New Doctrine of Uncertain Prospects,"* 9 U.C.L.A. L. REV. 469 (1962); Lowden, *"Survival of Seniority Rights Under Collective Agreements: Zdanok v. Glidden Co.."* 48 VA. L. REV. 291 (1962); 61 COLUM. L. REV. 1363 (1961); Krock, *"Jobs as 'Vested Rights' Despite Location Changes,"* N.Y. Times, July 21, 1961, p. 22, Col. 4; Krock, *"Use of Judicial Power to Rewrite Labor Contracts."* N.Y. Times, Aug. 18, 1961, p. 20, col. 3; *"Plant Relocation—Industrial Relations Implications."* I.R.C. Industrial Relations Memo #142, May 1962.

[3]Matthew 8:12 (King James).

[4]*E.g.*, U.S. Chamber of Commerce Amicus Curiae Brief, p. 4.

[5]Zdanok v. Glidden Co., 288 F.2d 99 (2d Cir. 1961).

[6]Industrial Development Department, Los Angeles Chamber of Commerce, *The Story of 45 Firms and $180.000,000.* 1962.

[7]*"Plant Relocation—Industrial Relations Implications,"* I.R.C. Industrial Relations Memo #142, May, 1962, pp. 1-3.

Generally opposing this need is the quest by the individual worker for economic security, a quest whose urgency has been increased by the very factors that demand industrial mobility. "The value which most workers attach to security of employment can scarcely be overemphasized."[8] Thousands are left jobless in "backwash areas" all over the country as industry moves to new areas of population, to new sources of supply. Thousands are unemployed due to replacement of men by machines and the replacement of old industries by new ones requiring new and more sophisticated skills. Thousands are jobless in the "one crop" areas of our country such as the coal fields of West Virginia, where the "crop" is exhausted, or can no longer be produced competitively, or is no longer needed in as great amounts by industry.

There exists, then, this on-going conflict of opposing values. This comment will consider two questions, using as a vehicle for discussion, *Zdanok v. Glidden Co.*[9] The first question is: What method should a decision maker use, be he arbitrator, judge or juror, to resolve this conflict of values, where the intent of the parties regarding the questions of survival of seniority rights and their applicability to a new plant location is unclear or non-existent? The second question is: What methods should management and the collective bargaining agent of the employees use to avoid the necessity of resolving this conflict in court?

The security tool involved in the *Zdanok* case was seniority rights; the issues were the survival of such rights following the termination of the collective bargaining agreement and their applicability to a new plant site upon the cessation of operations at the old plant location. This comment will discuss the nature of seniority rights; the facts of the subject case and its judicial history; the validity of the technical reasoning that provided the basis for the decision; the nature of the impact that the decision may have on mobility of industry and security of the worker; and finally, various types of provisions that could be utilized by parties to collective bargaining agreements to satisfactorily deal with the problem.

II. THE NATURE OF SENIORITY RIGHTS[10]

Seniority is the principle by which length of employment determines the order of layoffs, re-hirings and advancements. Preference is given according to length of employment.[11] Seniority rights are not inherent in

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[8]REYNOLDS, *The Structure of Labor Markets* (New York; Harber & Brothers, 1951), p. 86.

[9]288 F.2d 99 (2d Cir. 1961).

[10]An excellent and detailed discussion of this subject may be found in Aaron, *"Reflections on the Legal Nature and Enforceability of Seniority Rights,"* 75 HARV. L. REV. 1532 (1962).

[11]International B'd of Locomotive Engr's v. Mills, 43 Ariz. 379, 31 P.2d 971 (1934). See generally, U.S. Bureau of Labor Statistics, Dep't of Labor Bull. No. 908-11, *Collective Bargaining Provisions: Seniority* (1949).

the employment relationship, but must stem either from statute or from a contract between employer and employee, or from a collective bargaining agreement.[12] The almost universal rule has been that upon termination of the instrument creating seniority rights, the rights are at an end (in absense of express agreement to the contrary).[13] Cases have held that collective bargaining agreements between the employees' bargaining agent and the employer are not designed to place in the hands of the parties the power to change or modify the contract at pleasure, so as to affect injuriously the individual rights of the employees theretofore secured by the agreement;[14] but the decisions generally hold that seniority rights accruing to an individual employee under a collective bargaining agreement may be modified by subsequent agreement which is to the general interest of all members, although an individual member is harmfully affected thereby.[15] Seniority questions, including discharges and layoffs alleged to be in violation of seniority rights, have been held arbitrable under a broad arbitration clause such as one providing for arbitration of "any grievance or dispute arising out of the application of any of terms" of the agreement,[16] but not under a narrow arbitration clause referring to arbitration of grievances and disputes regarding wages and working conditions and not mentioning disputes as to the interpretation or construction of the contract.[17] Seniority provisions contained in a collective bargaining agreement are enforceable by an individual employee on the theory that the provisions are inserted for his benefit.[18] Seniority provisions should be construed in the light of the surrounding circumstances, nature of the operations

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[12]Local Lodge 2040, International Ass'n of Machinists v. Servel, 268 F.2d 692 (7th Cir. 1959), *cert. den.*, 361 U.S. 884 (1960); Elder v. New York Cent. R. Co., 152 F.2d 361 (6th Cir. 1945); System Federation No. 59 of Ry. Employees v. La. & A. Ry. Co., 119 F.2d 509 (5th Cir. 1941); Local 201, Intern. Union of Elec. Radio and Mach. Workers, AFL-CIO v. General Elec. Co., 163 F. Supp. 741 (D.C. Mass.), *aff'd.* 262 F.2d 265 (1959).

[13]Elder v. New York Cent. R. Co., 152 F.2d 361 (6th Cir. 1945); System Federation No. 59 of Ry. Employees v. La. & A. Ry. Co., 119 F.2d 509 (5th Cir. 1941).

[14]Elder v. New York Cent. R. Co., 152 F.2d 361 (6th Cir. 1945); Piercy v. Louisville & N.R. Co., 198 Ky. 477, 248 S.W. 1042, 33 A.L.R. 322 (1923).

[15]Elder v. New York Cent. R. Co., 152 F.2d 361 (6th Cir. 1945); System Federation No. 59 of Ry. Employees v. La. & A. Ry. Co., 119 F.2d 509 (5th Cir. 1941); Britt v. Trailmobile Co., 179 F.2d 569 (6th Cir. 1950); Division 525, Order of Railway Conductors of America v. Gorman, 133 F.2d 273 (1943); Hartley v. Brotherhood of R.&S.S. Clerks, 283 Mich. 201, 277 N.W. 885 (1938).

[16]Myers v. Richfield Oil Corp., 98 Cal. App. 2d 667, 220 P.2d 973 (1950).

[17]Texoma Natural Gas Co. v. Oil Workers International Union, 58 F. Supp. 132 (1943), *aff'd* 146 F.2d 62 (1944), *cert. den.* 324 U.S. 872 (1944); Sinclair Prairie Oil Co. v. Dose, 189 Okla. 569, 118 P.2d 210 (1941); Re Local Union 1357, I.B.E.W., 40 Hawaii 183 (1953). But note the federal law now enunuciated by the United States Supreme Court, that grievance and arbitration provisions of a collective bargaining agreement embraces all of the questions on which the parties disagree except matters which the parties specifically *exclude*. United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

[18]Rentschler v. Missouri P.R. Co., 126 Neb. 443, 253 N.W. 694 (1934); Baron v. Kurn, 349 Mo. 1202, 164 S.W. 2d 310 (1942).

contemplated and regulated thereby, and the objects sought to be accomplished.[19]

III. Facts of the Case and Its Judicial History

The Elmhurst, Long Island, New York plant of Glidden Company's Durkee Famous Foods Division was in operation from 1929 to November 30, 1957. Vegetable oils were refined and coconut, spices and condiments were processed and packaged. The hourly paid employees of the plant had been, since December 1, 1949, represented by General Warehousemen's Union, Local 852, affiliated with the Teamster's Union. The employees had been covered by three successive two-year collective bargaining agreements, the last running from December 1, 1955, to November 30, 1957. Each of the contracts contained the same seniority provisions.[20] The contract also contained provisions providing for pensions, hospital, medical and surgical insurance, life insurance and accidental death insurance.

In 1953, the Glidden management undertook a program to review all of its operations in detail, with a view to improving operations and profits in all divisions. These reviews revealed that the Elmhurst plant was a comparatively marginal operation and that the equipment was not only old, but outdated. Refinements in techniques of coconut and condiment processing required more modern machinery.[21] Due to the Elmhurst plant's geographical location, Glidden was forced to pay certain freight penalties for shipment of oils to and from the vegetable oil refinery there. The plant contained four floors and a basement, and the expense required to modernize the plant and arrange production lines to form a more efficient operation was prohibitive. Glidden decided on a two stage plan. The first stage was to move the vegetable oil refining operations from the Elmhurst plant to Glidden's vegetable oil refinery in Louisville, Kentucky. This was accomplished in October, 1956. In May, 1957, the second stage was set in motion when Glidden leased a building at Bethlehem, Pennsylvania, for the spices, coconut, and condiment processing operations. Through the use of new and improved machinery, better production line layouts, and more modern production methods, operational efficiency would be greatly improved.

On May 16, 1957, Glidden notified employees at Elmhurst, by letter and by personal discussion, that the company had decided to discontinue the

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[19]Earle v. Illinois Cent. R. Co., 25 Tenn. App. 660, 167 S.W. 2d 15 (1942); *cert. den.* 317 U.S. 680 (1942).

[20]"In instances of continuous layoff, seniority shall be terminated after:

1. An employee with less than five (5) years' continuous employment at the time his layoff began is on continuous layoff of two (2) years; or
2. An employee with more than five (5) years' continuous employment at the time his layoff began is on continuous layoff of three (3) years.

Employees whose seniority is terminated due to continuous layoff shall receive first preference for employment before new employees are hired."

Statement of facts prepared by the Glidden Company, May 25, 1961, p. 5.

[21]*Id.* at 2.

remaining operations at Elmhurst, and to start up operations in the new Bethlehem plant.[22] The company did not expect to commence operations in the new plant until late fall of 1957, so the employees were being notified at least six months in advance. Glidden offered to give fair consideration to applications of Elmhurst employees for employment at Bethlehem, but only if they would come to Bethlehem and make application on the same basis as other persons who might seek employment there.

On September 16, 1957, the company gave written notice to the union at its Elmhurst plant that it would terminate the collective bargaining agreement on November 30, 1957, the expiration date of the agreement. The agreement provided for automatic renewal unless either party gave 60 days' notice of termination.

On October 23, 1957, the union filed and served on the company a notice to arbitrate six issues in connection with closing the Elmhurst plant. Two of the issues of relevance here were: (1) whether closing the Elmhurst plant without offering each employee continued employment with full seniority was a breach of the contract; (2) whether the closing was accomplished to evade the agreement and prevent collective bargaining in violation of the law.

Glidden made a motion in the Supreme Court of New York to stay arbitration on the ground that the disputes were not arbitrable under the arbitration provision of the agreement.[23] The arbitration clause provided:

> Any question, grievance or dispute arising out of and involving the interpretation and application of the specific terms of this Agreement . . . shall, at the request of either party, be referred to the New York Mediation Board for arbitration.[24]

The court granted the company's motion, on the ground that the subjects sought to be arbitrated were not covered by specific terms of the contract.[25] The opinion laid much emphasis on the word "specific" in the agreement to arbitrate, and said that "No one is under a duty to resort to arbitration unless by clear language he has so agreed."[26] The court concluded its opinion with the ruling that "Glidden's motion to stay arbitration must be granted, whatever other remedies the Union may have with respect to the alleged disputes."[27]

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[22]*Id.* at 2.

[23]General Warehousemen's Union v. Glidden Co., 10 Misc. 2d 700, 172 N.Y.S. 2d 678 (Sup. Ct. 1958).

[24]*Id.* at 703, 172 N.Y.S. 2d at 681.

[25]*Id.* at 704-05, 172 N.Y.S. 2d at 682.

[26]Notice that the New York court placed the burden on the moving party to point out the specific provision of the collective bargaining agreement which would bring the disputed issues within the arbitration clause. Since then, the "arbitration trilogy" *supra*, note 14, has placed the burden on the opposing party to point out the provision that would specifically *exclude* the disputed issue. Had this been the state of the law at the time the case came before the New York court, the issues would probably have become matters for arbitration.

[27]General Warehousemen's Union v. Glidden Co., 10 Misc. 2d 700, 706, 172 N.Y.S. 2d 678, 684 (Sup. Ct. 1958).

Following the decision in the arbitration case, Olga Zdanok and four other former employees at the Elmhurst plant brought an action for damages for breach of the collective bargaining agreement in the Supreme Court of New York. At the company's request, the case was moved to the United States District Court for the Southern District of New York, on the basis of diversity of citizenship.[28] The plaintiffs contended that they were beneficiaries of the contract between their union and the defendant company, and were entitled to jobs which were created by the opening of the plant at Bethlehem. They stated that they were laid off because of removal of machinery and cessation of operations at Elmhurst, and that since work was available at Bethlehem, they were entitled by reason of seniority and the contract provisions relating to it, to continue their work at Bethlehem with the seniority acquired at Elmhurst.[29]

The court ruled in favor of the company, pointing out that the critical issue was not whether the employee's seniority rights survived the termination of the contract *per se,* but rather, whether the contract spelling out their rights extended beyond the Elmhurst plant.

> It is not enough for plaintiffs to establish that if the Elmhurst operations had continued, their seniority status would have survived the termination of the collective bargaining agreement. In order to recover, plaintiffs must also show that the governing seniority system gave them the right to "follow their work" to the new plant.[30] . . . I find nothing in the record to warrant the conclusion urged by the plaintiffs as to the unlimited geographic scope of their seniority rights.[31]

The agreement between Glidden and Local 852, the court continued, refers to plant and department seniority, but says nothing about seniority in case of plant abandonment, transfer, merger or consolidation of operations. "It would be unreasonable," the court explained, "to expect a court to imply a general understanding between the parties as to the extent of the seniority unit when no evidence has been offered as to negotiations on the subject, or an established course of practice on the part of the employer."[32] The court then stated:

> This is not the case of an employer who has abandoned the specified plant and transferred operations to a new location in order to circumvent contractual or statutory requirements. Where, as here, the Board of Directors' decision to relocate is based on the exercise of business judgment in good faith, the employer's obligation to deal fairly and honestly with its employees is satisfied. In sum, under the circumstances presented in this case, where no relevant limitation on the employer's freedom of action is found in the agreement or the prior conduct of the parties, no policy of New

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[28]Zdanok v. Glidden Co., 185 F. Supp. 441 (S.D.N.Y. 1960).
[29]*Id.* at 444.
[30]*Id.* at 447.
[31]*Id.* at 448.
[32]*Id.* at 448.

> York law or our national labor law requires the employer to preserve for its employees seniority status acquired under an expired agreement covering a closed plant.[33]

The District Court in its decision appears to be enunciating the general rule that provisions for seniority rights in collective bargaining agreements should be interpreted by the courts in accord with well established canons of contract construction, and that the terms of the agreement, the surrounding circumstances and the prior conduct of the parties are all to be considered in determining the nature of the seniority rights embodied in the agreement.[34] The court in its consideration of those factors demonstrated quite convincingly that the parties intended neither that the seniority rights should survive the termination of the collective bargaining agreement, nor that such rights should be transferred to a new plant site. On appeal, the United States Court of Appeals for the Second Circuit reversed the District Court's judgment in a 2 to 1 decision,[35] holding on the procedural issues that a state court's decision refusing to compel arbirtation was not res judicata of the plaintiffs' case and that the plaintiffs were entitled to enforce their seniority rights under a collective bargaining agreement. On the merits of the case, the court held that ". . . plaintiffs were entitled to be employed in the defendant's Bethlehem plant, with seniority and re-employment rights which they had acquired at the Elmhurst plant. The refusal of the defendant to recognize that entitlement was a breach of contract, and the plaintiffs are entitled to recover the damages which that breach has caused them."[36]

The United States Supreme Court granted certiorari only on the question whether participation by a Court of Claims judge vitiated the judgment of the Court of Appeals. The Supreme Court held that judges of the Court of Claims could validly serve on United States District Courts and Courts of Appeals.[37]

IV. Analysis of Court of Appeals' Decision

"Come now, and let us reason together"
Isaiah 1:18

The Court of Appeals in reversing the District Court answered in the affirmative, two questions: (1) whether the plaintiffs had any seniority rights after November 30, 1957, when the contract expired, and (2) whether such rights were applicable at another plant.

In answering the first question in the affirmative, the court held that seniority rights under a collective bargaining agreement which provides

[33] *Id.* at 449.
[34] Earle v. Illinois Cent. R. Co., 25 Tenn. App. 660, 167 S.W. 2d 15 (1942), *cert. den.* 317 U.S. 680, 87 L.ed. 546, 63 S.Ct. 161 (1942).
[35] Zdanok v. Glidden Co., 288 F.2d 99 (2d Cir. 1961).
[36] *Id.* at 104.
[37] Glidden Co. v. Zdanok *et al.*, 370 U.S. 530 (1962).

for priority of recall on the basis of seniority in the event of a layoff, but which fails to provide for disposition of these rights upon termination of the agreement, are "vested" rights which survive the expiration of the agreement,[38] a sharp departure from previous holdings.[39] The court in arriving at this decision drew an analogy to the retirement benefits provided by the agreement, and considered the seniority rights to have been "earned" unemployment insurance,[40] that could not be unilaterally annulled by the employer. The court apparently reasoned that since the terms of the agreement provided for seniority rights for three years and the contract was merely for a term of two years, the parties contemplated survival of the seniority rights (this is not stated expressly in the opinion). But how the court could consider such rights as "vested" and at the same time assert that the employee's authorized union agent ". . . could bargain away the employee's right"[41] without the individual employee's approval, is a question left unanswered. As one writer has aptly put it:

> . . . it [the Court] has held seniority to be "vested" and at the same time termed it "contingent" upon the union's bargaining to keep it in effect, thereby really admitting that the quoted seniority provisions were written, not to extend the contract term, but in the "expectation" that the contract would be renewed.[42]

The analogy drawn between pension plans and seniority rights presupposes two propositions: (1) that a pension plan automatically gives the employee a vested right from the inception of the plan, and (2) that there is substantial similarity between pension plans and seniority rights. Both propositions are fallacious. The courts have generally held that unless the pension plan provides for complete or partial vesting of benefits in accordance with a fixed time schedule, the employee must work until he reaches the mandatory retirement age,[43] and the plan must continue in operation until that time,[44] before the employee can be said to have a vested right under the pension plan.

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[38]Zdanok v. Glidden Co., 288 F.2d 99, 103 (2d Cir. 1961).

[39]Local Lodge 2040, International Ass'n of Machinists v. Servel, 268 F.2d 692 (7th Cir. 1959), *cert. den.*, 361 U.S. 884 (1960); Elder v. New York Cent. R. Co., 152 F.2d 361 (6th Cir. 1945); System Federation No. 59 of Ry. Employees v. La. & A. Ry. Co., 119 F.2d 509 (5th Cir. 1941).

[40]The term "unemployment insurance" was applied to seniority rights by the court in Grand International Brotherhood of Locomotive Engineers v. Mills, 43 Ariz. 379, 31 P.2d 971 (1934).

[41]Zdanok v. Glidden Co., 288 F. 2d 99, 103 (2nd Cir. 1961).

[42]Lowden, *"Survival of Seniority Rights Under Collective Agreements: Zdanok v. Glidden Co."*, 48 VA. L. REV. 291, 296 (1962).

[43]Anaconda Wire & Cable Co., 30 Lab. Arb. 208 (Edes, 1958).

[44]"Collective-bargaining agreements run for a specific time — 1 year, 2 years, etc . . . If the agreement is not extended or renewed, the plan may be discontinued. It may be said, therefore, that the economic security provided the employee rests, to great extent, on the fortunes of collective bargaining." Senate Labor Committee's Subcommittee on Welfare and Pension Funds, S. Rep. No. 1734, 84th Cong., 2d Sess. 40 (1956).

Similarity between pension plans and seniority rights is completely lacking. Once the employee does have a vested right under the pension plan, and is allowed by his employer to continue to work, subsequent collective bargaining agreements cannot divest him of his right unless he so agrees.[45] However, seniority rights may be modified by subsequent agreement of the employer and the employee's collective bargaining agent.[46] The vested right under a pension plan represents an amount of money that can be calculated exactly, and is treated as property which may be lawfully claimed by the heirs or designated beneficiaries of the employee who acquire the right.[47] Seniority rights, however, cannot be easily valued in terms of dollars; the employee has no power of disposition, except the power of relinquishing the rights, and the rights exist only where there is continuing or potentially continuing employment.[48]

The label, "unemployment insurance," applied by the court to the plaintiffs' seniority rights is totally inaccurate. Insurance represents the concept of cash indemnity rather than continuing employment, which is what the plaintiffs are seeking.[49] Seniority rights do not guarantee the employee against unemployment but merely give him preference for jobs where jobs exist.[50] Under a contract of insurance, the right to indemnification is against the insurer. Seniority rights, however, are rights to job preference and are exercised against one's fellow employees. In fact, if the employee is under a system of seniority, then regardless of his ability to fill a certain job, if that is the only job available and if there are employees senior to him, he will be *unemployed.* The term, "unemployment insurance," would therefore appear to mislead rather than aid one who seeks to analyze the court's reasoning.

Having found that the seniority rights survived the termination of the agreement, the Court had little difficulty in finding that a condition should be implied in the agreement that such rights would be applicable at the new plant site. The court concluded that the language of the preamble in the agreement which states that the agreement was made "for and on behalf of its plant facilities located at Corona Avenue and 94th Street,

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[45]Vallejo v. American R.R. of P.R., 188 F.2d 513 (1st Cir. 1951); Allen v. City of Long Beach, 45 Cal. 2d 128, 287 P.2d 765 (1955).

[46]Elder v. New York Cent. R. Co., 152 F.2d 361 (6th Cir. 1945); System Federation No. 59 of Ry. Employees v. La. & A. Ry. Co., 119 F. 2d 509 (5th Cir. 1941); Britt v. Trailmobile Co., 179 F. 2d 569 (6th Cir. 1950); Division 525, Order of Railway Conductors of America v. Gorman, 133 F. 2d 273 (1943); Hartley v. Brotherhood of R. & S.S. Clerks, 283 Mich. 201, 277 N.W. 885 (1938).

[47]Mabley & Carew Co. v. Borden, 129 Ohio St. 375, 195 N.E. 697 (1935).

[48]Local Lodge 2040, International Ass'n of Machinists v. Servel, 268 F. 2d 692, 697 (7th Cir. 1959), *cert. den.*, 361 U.S. 884 (1960).

[49]"Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability, arising from an unknown or contingent event." CAL. INS. CODE, § 22.

[50]U.S. Bureau of Labor Statistics, Dep't of Labor Bull. No. 908-911, *Collective Bargaining Provisions: Seniority,* p. 1 (1949).

Elmhurst, Long Island, New York,"[51] was not meant to fix the geographical scope of the agreement.

> A rational construction of the contract would seem to require that the statement of location was nothing more than a reference to the then existing situation, and had none of the vital significance which the defendant would attach to it.

The court found it "hard to conjure up a reason why"[52] a change in geographical location should destroy contract rights. The company would be put to "no expense or embarrassment," and the court in so holding was "adopting the more rational, not to say humane, construction" of the agreement.[53]

So much for the court's reasoning. What may be presumed from the action of the Court of Appeals when, instead of affirming a well-reasoned opinion by the District Court, it reversed that decision on the basis of clearly inaccurate analogies and conclusionary labels? To answer this question, one should first make a careful distinction between the reasoning process used by a court in determining whether, by implication, it can find the intent of the parties regarding a certain issue, and the philosophy of the court as to its role in the judicial process, if such intent cannot be found. The District Court in the *Zdanok* case clearly adhered to the philosophy that courts should refrain from re-writing agreements and that the parties should be left in the position in which they placed themselves.[54] The opposing philosophy is that society depends on the courts to resolve disputes that the parties have been unable to resolve themselves, and that the basic, underlying question is not whether the intent of the parties has been manifested in some agreement, but rather, what are the rights and duties of the parties based on the court's conception of what will best effectuate the desires and needs of society. Under this philosophy, if the intent of the parties is unclear or non-existent, the job of the court is to determine the rights and duties of the parties based upon the best interests of the community.

No defense is here made for either philosophy. Both are answers to the same question: What is the role of the judiciary in our society? However, it must be pointed out that the discussion in this comment concerning the resolution of conflicting values where the intent of the parties has not been evidenced, necessarily presupposes that some courts have in the past adopted the latter philosophy, and that they can be expected to continue to adhere to that philosophy in the future. Under the "non-intervention" philosophy followed by the District Court, a discussion of

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[51] Zdanok v. Glidden Co., 288 F. 2d 99, 103 (2d Cir. 1961).
[52] *Id.* at 104.
[53] *Id.* at 104.
[54] Zdanok v. Glidden Co., 185 F. Supp. 441, 449 (S.D.N.Y. 1960).

the conflicting social values of industrial mobility and job security for the worker is an "exercise in futility," since the court will never arrive at the point where the conflict must be considered. Either the intent is evident, expressly or impliedly, or it is not. In either situation the case is over at that point.

It is where the court has adopted the broader philosophy that this discussion of conflicting values becomes operative, and it is here that the court must use care to maintain the distinction between: (1) the reasoning process used to determine the intent of the parties; and (2) the role of the court when no intent is found. Where that distinction is blurred, where the court talks in terms of implied intent but in reality is deciding on grounds of social desirability, confusion reigns in the minds of those who look to such a decision for guidance. Such was the *Zdanok* decision.

Why did the Court of Appeals overrule the District Court? The Court of Appeals, although actually finding nothing from the terms of the agreement or the conduct of the parties to imply an intention that the seniority rights survived, nevertheless felt impelled to act to relieve the plight of the plaintiffs, who would undoubtedly find it difficult to get work at the same rate of pay and job security that they had enjoyed with Glidden Company. The court's reasoning was nothing more than a facade behind which the court reacted to the need for security evidenced by the plaintiffs.[55] The court, however, did a twofold disservice to those who must engage in the collective bargaining process.

First, by labeling seniority rights as "vested" prior to the termination of the collective bargaining agreement where such intent is not evident, the court has set in motion the usual "solidifying process," wherein some courts adopt a term without regard to the context in which it was originally developed.[56] Thus is born the "blackletter" law which enlightened

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[55]Zdanok v. Glidden Co., 288 F. 2d 99, 104 (2nd Cir. 1961). The Court states that it is "adopting the more rational, not to say humane, construction" of the agreement, and states that a construction of the agreement which would disappoint the reasonable expectations of the plaintiff employees "would be irrational and destructive."

[56]In Oddie v. Ross Gear & Tool Co., 195 F. Supp. 826 (E.D. Mich. 1961), the court accorded the plaintiffs' seniority rights a status independent of the agreement, holding in accord with *Zdanok* (the only case cited), that the rights were transferable to a new plant location. The court did not quote nor interpret the seniority provisions in the collective bargaining agreement before it. However, in Oddie v. Ross Gear & Tool Company, 305 F.2d 143 (6th Cir. 1962), the Sixth Circuit Court of Appeals reversed the District Court. The Court compared the "recognition clauses" in the *Ross Gear* and the *Glidden* agreements and held that the language in the *Ross Gear* agreement was plain and unambiguious and limited the application of the provisions to "the City limits of Detroit.". Therefore, the Court found no merit in the argument that plaintiff's seniority rights were "vested" rights which could not be cut off by the relocation of the plant to Tennessee. The Court went to some pains to criticize the use of the word "vested" in the *Glidden* decision, and said:
"Accordingly, we do not have the question of whether plaintiffs' 'vested' rights can be validly terminated by relocation of the plant in Tennessee. Rather, it is the question of what rights if any, the plaintiffs have under express provisions of the bargaining agreement upon the relocation of the plant in Tennessee. If no rights were acquired under the bargaining agree-

courts must either avoid by legal gymnastics or directly oppose, if a proper decision is to be rendered. A candid opinion, stating the real factors that motivated the court, would have been of much greater worth to the collective bargaining process and to the legal profession.

Second, in considering the plaintiffs' need for security, the court examined only one of the conflicting values discussed earlier.[57] A proper resolution of this conflict demanded consideration of the other value, mobility of industry. Some factors necessary to consider were (1) the number of other employees at Elmhurst that could reasonably be expected to exercise their vested seniority rights; (2) the commitments, moral or legal, that Glidden had made with the Bethlehem community regarding the hiring of local citizens; and (3) the financial assistance programs, perhaps requiring local hiring as a prerequisite, being offered to industry by Pennsylvania or the Bethlehem community.[58]

The conclusion drawn from the foregoing analysis is that the reasoning supporting the decision in the *Zdanok* case is clearly wrong. Furthermore, it cannot be said with any degree of certainty that the court chose the proper value in deciding the case. The conflict of values can always be resolved by arbitrarily choosing one or the other, but if the dual objectives of a dynamic industry and a satisfied working force are to be attained, the factors supporting each value must be fully considered.

V. Impact of the Decision

Consideration of an interesting study, "Plant Relocation and Job Security: A Case Study,"[59] will provide assistance in judging the impact that the *Zdanok* case will have on mobility of industry and economic security of the worker. This study considered the effect of various personal and social variables on the decision made by a group of workers when they

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ment as employees at the Tennessee plant, it necessarily follows that no rights have been cut off."

The Court of Appeals' decision, if not directly *contra* the *Glidden* decision, at least clearly rejects the survival doctrine enunciated by the *Glidden* case.

[57]One might wonder why defendant Glidden Company did not make a stronger argument supporting unhindered mobility. Generally, management defends on the basis of traditional contract doctrine, with little emphasis on factors that support the social policy favoring its case. Whether management does so because it takes the court at its word, *i.e.*, that the court will decide interpretation cases through the application of traditional principles of contract construction, or because management seeks to halt the steady encroachment of the collective bargaining agent on "management perogatives," is not clear. If the latter is the reason, then management should profit from the experience of the French with their Maginot Line — a static defense ultimately results in defeat. If the former is the reason then the *Zdanok* case and the District Court's decision in the *Oddie* case surely should have convinced management that in the future it would be well advised to emphasize not only technical contract doctrine, but also the social value of mobility of industry.

[58]See *"Hotter Bidding for New Plants,"* Business Week December 16, 1961, p. 127. The article points out that 33 states now offer a variety of financial aids to attract new industry. Financial assistance may be in the form of tax exemptions, loans at a reduced rate of interest, donations of land and/or buildings, and cash.

[59]Gordon and HcCorry, *"Plant Relocation & Job Security: A Case Study"*, 11 IND. & LAB. REL. REVIEW 13 (1957-58).

were faced with the choice of following jobs to another locality or risking the uncertainties of finding a new job in the local labor market area.

The case study was conducted in the San Francisco Bay Area in early 1954. A large automobile corporation decided to discontinue car production in its Bay Area plant. A special agreement was negotiated with the union, in which the production workers were offered an opportunity to transfer to the corporation's Los Angeles plant 450 miles distant, with retention of seniority rights.[60] The plant employed 1450 workers at this time. According to the authors of the study, both management and union apparently expected that the group choosing transfer would be composed predominately of workers possessing relatively high seniority.[61] However, such was not the case.

The June, 1954, agreement contained the following provisions:

(1) Each employee electing to transfer retained his seniority and was to continue work in the Los Angeles department or division which corresponded most closely to the department in which he had worked in the Bay Area.

(2) The employees would be called to work in Los Angeles in accord with seniority order on the Los Angeles lists (after integration of seniority lists of Los Angeles employees and Bay Area transfers), subject to ability to do the available work.

(3) The employees who elected to transfer would get the same wages if assigned to the same job.[62]

The agreement made no provision for payment of travel or moving expense. If the employees became unemployed in Los Angeles, wages and employment conditions would be about the same as in San Francisco.

Although approximately one third of the employees decided to transfer in June, five to seven months before hiring began in Los Angeles, only three hundred and fifteen actually transferred. Probably those who changed their minds found jobs in the interim.

The study showed that the men who were most apprehensive about their chances of finding other suitable jobs in the Bay Area were most likely to elect to transfer. These were the older men (age group 45 and up), Negroes, and men with relatively low rates of pay. Seniority standing appeared to have relatively little influence on transfer choices.[63]

The effect of the *Zdanok* case is to give the plaintiffs basically the same rights as received by the employees in the case study. The plaintiffs'

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[60] *Id.* at 14.
[61] *Id.* at 14.
[62] *Id.* at 15-16.
[63] *Id.* at 34-35. The important aspect of seniority to men in these classifications was job preference over those who would have no seniority rights whatever with the company.

seniority rights at Bethlehem would also be subject to the availability of jobs that the plaintiffs could perform. Assuming that the rights under the transfer agreement in the case study and the rights granted by the *Zdanok* decision are basically the same, the results of the case study should be helpful to management and the collective bargaining agent. Whenever a plant relocation is contemplated, the study should prove helpful in estimating the number of transferees to the new plant site. The case study indicates several factors to be considered: (1) the number of employees classified as probable transferees; (2) the comparative economic situation at the old and the new plant sites; (3) the comparative cultural environment and the way of life at the old and the new plant sites; (4) the period of advance notice to be given to the employees; and (5) the effort expended by both management and the collective bargaining agent in assisting employees in finding employment elsewhere. What terms each of the parties to a collective bargaining agreement will desire may well depend upon the results of the consideration of these factors.

VI. Various Approaches to Settle the Problem

A wide range of approaches are available for handling the seniority problem if plant relocation is contemplated.[64] The following suggested agreements could be utilized by parties to collective bargaining agreements to satisfactorily deal with the problem.

1. The parties may agree on provisions recognizing the transferability of seniority to the new plant site without any limitations.

2. The parties may agree on provisions expressly stating that there will be no transferability of seniority and no hiring preference given to former employees at the new plant site.

3. The parties may agree on provisions which allow preferential hiring with limited seniority. Under the terms of the American Can and International Association of Machinists contract, an employee who is being terminated as the result of a plant closing and who is eligible for severance pay or allowance, may instead elect to receive preferential hiring at another plant, if there are jobs available there.[65] A transferred employee carries his credit for length of service to the second plant but he is placed at the bottom of the seniority roster for purposes of layoff and promotion.

4. The parties may agree on provisions which permit negotiation on transfer eligibility when work is removed to a new plant. The agreement between Lockheed Aircraft (California Division) and the Machinists provides that if work is transmitted from one plant to another, the company

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[64] An excellent coverage of personnel planning for relocation may be found in *"Plant Relocation — Industrial Relations Implications"*, I.R.C. Industrial Relations Memo #142 pp. 24-43, May, 1962.

[65] *Id.* at 41.

and union will negotiate the matter of which employees shall transfer to such plant.[66] The employee's rights and benefits continue, except as restricted by a subsequent contract negotiated with the bargaining agent representing the employees at the new plant.

5. The parties may agree on provisions that do not provide for the problem of plant relocation, waiting until relocation occurs before arriving at an agreement on the matter. For example, at Mack Trucks, Inc., problems relating to plant relocation have been handled through a separate agreement with Local 343 of the United Auto Workers.[67] The agreement was designed to provide for the moving of a plant from Plainfield, New Jersey to Hagerstown, Maryland, shortly after the termination of the regular contract. Some employees in the Local challenged the relocation agreement in the federal court. The agreement was held to be a full discharge of any contractual obligations owed by the employer to the employees at the old plant. The employees transferring were permitted to carry over their seniority credits to the extent that these related to layoff and recall, and to the usual employee benefits.

6. Finally, the parties may agree on provisions permitting monetary settlements for liquidation of seniority rights, using some system of years and months as a basis for measurements of the amount of the settlement.[68]

VII. CONCLUSION

Our nation is at the threshold of what may be termed the Technological Renaissance. The accomplishments of science and industry during the next few decades, even the next few years, may exceed the most optimistic expectations. Yet, industrial power has value in our society only if men, and not machines, are the masters. The well being of the individual provides the rationale for these intensive efforts to increase and improve industrial production. The worker's quest for security is as urgent a need, as important a social value, as the mobility of industry. Each is a *sine qua non* of continuing progress in our society, and although the values appear to conflict, they are also complementary. Mobility results in the expansion of industry and, therefore, the creation of more jobs. Job security results in a more productive labor force.

However, the individual worker who at the moment is faced with loss of his job, or the individual company which is faced with difficulties caused

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[66] *Id.* at 42.

[67] *Id.* at 42.

[68] In Johnson v. Archer-Daniels-Midland Company, 203 F. Supp 636 (1962), the Court held that the union, in negotiating a severance pay clause in the collective bargaining agreement, had effectively negotiated away rights which might have belonged to the employees had such clause not been present. In Giardana v. Mack Trucks, Inc., 203 F. Supp. 905 (1962), the Court held that a separation agreement negotiated by the employer and the collective bargaining agent left only such rights as were established by the separation agreement itself.

by having to "carry" employees to the new plant location, cannot be expected to consider the overall situation and here the values conflict. The *Zdanok* case dealt with this conflict but failed to consider the factors supporting each of the values. Perhaps the fault partly lies in the attempt by the courts to apply a body of traditional contract principles to the collective bargaining agreement, rather than developing a body of labor law responsive to the inherently different nature of the collective bargaining process.[69] Applying contract principles developed in the pastoral setting of medieval England and early America, rather than viewing the collective bargaining process in the setting of a complex society built upon a dynamic technology, can only result in a failure of the courts to properly resolve the conflicts before them. Struggling to maintain verbal symmetry with a body of law that may not be applicable to begin with only compounds the fault, and forces future decision makers to waste time and energy in arriving at the true issues.

As to the company, the question the court should ask is: *What price mobility?* As to the employees, the question that the court should consider in relation to the factors mentioned in this comment; the question that the court should state clearly to all who will later read the opinion is:

What price security?

WALTER L. WILLIAMS, JR.

[69]An interesting discussion on this question may be found in Chamberlain, *"Collective Bargaining and the Concept of Contract"*, 48 COLUM. L. REV. 829 (1948).