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Labor Law—Plant Removal—Employees Have No Right to Reemployment at New Plant Site Based on Seniority

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than one which might have found that Greenwald's statement was a request for counsel.

The dissent suggests that petitioner did not cite *Escobedo* and therefore the majority was wrong to consider it in its opinion. The Supreme Court should not be prevented from arriving at a proper decision because of an error or omission of citation especially in a case such as this where a layman prepared the petition for the writ of certiorari. The Supreme Court should always be free to cite the law of the land independent of the erudition and diligence of the adversaries. Certainly a court which can make an independent examination of the record to determine whether a confession is voluntary cannot be prevented from making a determination of the law independent of the accuracy of the petition. The days when cases were won and lost by the skill in preparing the pleadings has long since past.

It must be concluded that *Escobedo* played a major role in the decision, even though the Court couched its opinion in traditional totality of circumstances language. The case shows how far the *Escobedo* and *Miranda* decisions influenced the application of the totality of circumstances test even though those decisions were not directly applicable. Thus it may well be that the totality of circumstances test has been liberalized in the light of these decisions and that confessions will be more easily excluded when *Miranda* and *Escobedo* do not apply directly. In other words it appears that the Supreme Court will consider more closely the denial of counsel and failure to provide an adequate warning about constitutional rights in cases which arise between the decisions in *Escobedo* and *Miranda*. Even though these decisions are not to be applied retroactively they may have important bearing on confessions which are tested under the totality of circumstances standard.

EDWIN H. WOLF

LABOR LAW—PLANT REMOVAL—EMPLOYEES HAVE NO RIGHT TO REEMPLOYMENT AT NEW PLANT SITE BASED ON SENIORITY

Throughout the 1950's the Lux Manufacturing Company[1] periodically removed departments from its Waterbury, Connecticut plant to its other plants in Lebanon, Tennessee, and Canada; each removal resulting in layoffs of employees from the Waterbury plant. In March of 1961, for economic reasons, Lux transferred two departments from the Waterbury plant to the Lebanon plant, causing a susbtantial employee layoff at the Waterbury plant. In July of 1961, the assets of the Lux Company[2] were acquired by the Robertshaw Controls Company. Thereafter, pursuant to the March layoff, the union and certain of its individual members on behalf of themselves, brought an action in federal district

1. Hereinafter referred to as Lux.
2. Hereinafter referred to as Robertshaw.

court against Robertshaw to recover damages for breach of a collective bargaining agreement. The District Court for the Southern District of New York granted defendant's motion for summary judgment. On appeal from that decision the United States Court of Appeals for the Second Circuit *Held*, the seniority provisions of the collective agreement did not give employees from the Waterbury plant any right of recall at the Lebanon plant. *U.A.W. Local 1251 v. Robertshaw Controls Company 405 F.2d 29.* (2d Cir. 1968).

Section 301(a) of the Labor-Management Relations Act[3] gives federal courts jurisdiction over suits for breach of collective bargaining agreements. This section has been construed to give them the power to fashion a body of federal substantive laws based primarily on "the policy of our national labor laws" for the enforcement of collective agreements.[4] The Supreme Court realizing the difficulty of fashioning a new body of federal law, subsequently construed "national labor policy" to require arbitration whenever it was possible.[5] Generally, arbitration may be enforced even after the expiration of a collective bargaining agreement as long as the grievance involved took place during the life of the contract.[6] However, where there is no basis for arbitration, as when no difference arises between parties until the agreement has terminated,[7] or when there is no arbitration clause, the courts must develop their own rules in disputes brought under section 301(a).[8] Because a collective bargaining agreement has traditionally been considered a contract,[9] the judiciary has invoked a variety of contract theories to characterize the collective bargaining relationship.[10] At present, however, there is wide recognition that a collective

3. Labor-Management Relations Act (Taft-Hartley Act) § 301(a), 29 U.S.C. § 185 (1964), which reads: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

4. John Wiley and Sons, Inc. v. Livingston, 376 U.S. 543 (1964); Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957).

5. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); *cf.* United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

6. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); N.L.R.B. v. Knight Morley Corp., 116 N.L.R.B. 140 (1956), *enforced*, 251 F.2d 753 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1957).

7. Piano and Musical Instr. Wkrs. Union, Local 2549 v. W.W. Kimball Co., 333 F.2d 761 (7th Cir. 1964).

8. Comment, *Section 301(a) and the Federal Common Law of Labor Agreements*, 75 Yale L.J. 877, 889-92 (1966).

9. Note, *Rights and Obligations Upon Termination of the Collective Bargaining Contract*, 16 Rutgers L. Rev. 416 (1962).

10. "The judiciary has not always grasped the changing philosophies which have occurred in dealing with the labor movement. It is no surprise, therefore, to find that when originally faced with the problem of determining the rights secured by a collective bargaining contract, the judiciary often found it necessary to resort to various established legal theories. In this manner, they were frequently able to invoke traditional contract and agency principles and still reach a result which was desirable from a modern labor standpoint. One such theory was that the collective bargaining agreement (or craft agreement as it was then termed) created a "custom" or "usage" and until abrogated, became a part of the individual employment contract. At least one jurisdiction gave consideration to an agency

agreement is different from a normal commercial contract.[11] A collective agreement, like a contract, states rights and duties of the parties, although, it is more than a contract and has been characterized as ". . . a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate."[12] Despite the fact that the collective agreement is markedly different from a commercial contract, it is clear that contract principles are still a substantial factor in their interpretation.[13] Most employee rights, including seniority, are considered to be acquired from and limited by the collective bargaining agreement,[14] while some rights, such as vacation pay, severance pay and pensions, are thought to be accrued during the life of the agreement and therefore not terminated by the expiration of the agreement.[15] In contrast, it has been held that seniority rights are terminated by either expiration of the contract or sale of the business,[16] except that where the business is sold seniority may continue to exist if there is a finding that the buyer either expressly[17] or impliedly[18] assumed the collective agreement. Also, seniority rights are destroyed when the company completely terminates its activities.[19] Where the parties have included a clause in the labor contract explicitly dealing with the existence or termination of seniority rights on the occurrence of a state contingency, such as expiration of the agreement, it seems clear that the courts will enforce

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rationale, which regarded the union as agent of the employees. The effect was to make the collective bargaining agreement a direct contract between the employer and the employee. But, perhaps, the most widely accepted theory was that which regarded the collective agreement as a third party beneficiary contract between the employer and the union for the benefit of the individual employees. Although, these constructs, singularly or in combination, may prove to be highly useful in determining rights and remedies under a specific collective bargaining contract, they may, nonetheless, become dangerous when used artificially, without regard to underlying questions of policy." *Id.* at 417.

11. John Wiley and Sons, Inc. v. Livingston, 376 U.S. 543 (1964); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1 (1958); Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1001-02, 1024 (1955); Note, *supra* note 9 at 416.

12. United Steelworkers of America v. Warrier & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

13. Note, *supra* note 9 at 419.

14. Oddie v. Ross Gear & Tool Co., Inc., 305 F.2d 143 (6th Cir. 1962), *cert. denied* 371 U.S. 941 (1962); Local Lodge 2040, Int'l. Ass'n. of Machinists v. Servel, Inc., 268 F.2d 692 (1959), *cert. denied* 361 U.S. 884 (1959); Elder v. New York Cent. R.R., 152 F.2d 361 (6th Cir. 1945); 2 B. Werne, Administration of the Labor Contract § 38 (1963).

15. *In re* Wil-Low Cafeterias, Inc. Kaftan v. Siegel 111 F.2d 429 (2d Cir. 1940) (vacation pay); Botany Mills, Inc. v. Textile Workers Union of America, 50 N.J. Super. 18, 141 A.2d 107 (N.J. App. Div. 1958) (pension); Owens v. Press Publishing Co., 20 N.J. 537, 120 A.2d 442 (N.J. Sup. Ct. 1956) (severance pay).

16. Elder v. New York Cent. R.R., 152 F.2d 361 (6th Cir. 1945); System Federation No. 59 v. Louisiana and A. Ry., 119 F.2d 509 (5th Cir. 1941), *cert. denied* 314 U.S. 656 (1941).

17. Patton Throwing Mills, Inc., 13 Lab. Arb. 615 (1949); *see* L. Simpson, Handbook of the Law of Contracts § 206 (2d ed. 1965).

18. Home Fuel and Supply Co., 25 Lab. Arb. 66 (1955); Clendennings, Inc., 7 Lab. Arb. 580 (1947); *see* L. Simpson, *supra* note 17.

19. Local 2040, Int'l. Ass'n of Machinists v. Servel, Inc., 268 F.2d 692 (7th Cir. 1959), *cert. denied*, 361 U.S. 884 (1959).

this clause under contract theory.[20] Yet the effect of such a clause may be nullified, since rights so given may be subsequently bargained away be the employee or his authorized representative.[21]

Another event which may effect seniority rights is plant removal; well established doctrines prohibit plant removals based upon prohibited motives. For instance, if a plant removal is motivated by non-economic (i.e. anti-union) reasons, it may be considered an unfair labor practice under section 8(a)(1) and (3) of the National Labor Relations Act.[22] On the other hand, if the plant removal is for economic reasons and not merely to avoid the duty of collective bargaining, the move will not be considered an unfair labor practice.[23] Even if the motivation for plant removal is composed of both economic and anti-union reasons, the move is valid so long as the primary motivation is economic.[24] Although a removal may be motivated solely by economic reasons, the employer is required to notify the union of his intent to move or he will be subject to the assessment of an unfair labor practice under section 8(a)(5) of the National Labor Relations Act.[25] An employer, although not required to bargain with the union over its decision to terminate for economic reasons,[26] must bargain over the impact of the closing on employees whose jobs will be affected,[27] including transferal of employees to the new job location.[28] Barring the presence of specific contractual prohibition, a plant removal in accordance with the above cited principles will not likely constitute a breach of the collective agreement. However, where a clause explicitly dealing with plant removal is present, the courts will generally enforce it[29] and often impose severe penalties for violation of such a clause.[30]

20. United Shoe Workers v. Brooks Shoe Mfg. Co., 187 F. Supp. 509 (E.D. Pa. 1960), *modified*, 298 F.2d 277 (3rd Cir. 1962); Blumrosen, *Seniority Rights and Industrial Change: Zdanok v. Glidden Co.*, 47 Minn. L. Rev. 505, 522 (1963).

21. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Giordana v. Mack Trucks, Inc., 203 F. Supp. 905 (D.N.J. 1962); Johnson v. Archer-Daniels-Midland Co., 203 F. Supp. 636 (E.D. Mich. 1962).

22. N.L.R.B. v. Herman Bros. Pet Supply, Inc., 325 F.2d 68 (6th Cir. 1963); Reynolds Pallet and Box Co. v. N.L.R.B., 324 F.2d 833 (6th Cir. 1963); N.L.R.B. v. Deena Products Co., 195 F.2d 330 (7th Cir. 1952), *cert. denied*, 344 U.S. 827 (1952).

23. N.L.R.B. v. Brown-Dunkin Co., 287 F.2d 17 (10th Cir. 1961); N.L.R.B. v. E.C. Brown Co., 184 F.2d 829 (2d Cir. 1950); Re Kipbea Baking Co., 131 N.L.R.B. 411 (1961).

24. N.L.R.B. v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961); N.L.R.B. v. Lassing, 284 F.2d 781 (6th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961); Mt. Hope Finishing Co. v. N.L.R.B., 211 F.2d 365 (4th Cir. 1954).

25. Cooper Thermometer Co. v. N.L.R.B., 376 F.2d 684 (2d Cir. 1967); N.L.R.B. v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961).

26. N.L.R.B. v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967); N.L.R.B. v. Royal Plating and Polishing Co., Inc., 350 F.2d 191 (3d Cir. 1965); N.L.R.B. v. Wm. J. Burns International Dective Agency, 346 F.2d 897 (8th Cir. 1965); *But see Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966), which gives the position of the N.L.R.B. that an employee is obligated to bargain with the union about a decision to terminate any portion of its operations.

27. Cooper Thermometer Co. v. N.L.R.B., 376 F.2d 684 (2d Cir. 1967); N.L.R.B. v. Royal Plating and Polishing Co., Inc., 350 F.2d 191 (3d Cir. 1965); N.L.R.B. v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961); N.L.R.B. v. Lewis, 246 F.2d 886 (9th Cir. 1957).

28. Cooper Thermometer Co. v. N.L.R.B., 376 F.2d 684 (2d Cir. 1967); N.L.R.B. v. Lewis, 246 F.2d 886 (9th Cir. 1957).

29. United Shoe Workers v. Brooks Shoe Mfg. Co., 187 F. Supp. 568 (E.D. Pa. 1960), *modified*, 298 F.2d 277 (3rd Cir. 1962); Kennicott Copper Corp., 148 N.L.R.B. 1653 (1964).

While employee rights may be waived or bargained away,[31] such waivers are not easily inferred.[32] If seniority rights are not waived, it has been held that the rights will be retained if the plant moves to a new location within the geographical area to which the collective bargaining agreement applies.[33] Conversely, if the plant relocates outside the geographical boundaries of the agreement, it has been held that seniority rights will not survive.[34]

Controversy has developed over the question of whether employees have a right to be reemployed based on seniority at the new plant site in a plant removal situation. This problem is largely attributable to the holdings in *Zdanok v. Glidden Co.*[35] and *Oddie v. Ross Gear and Tool Co., Inc.*,[36] which were decided within a year of each other based on similar facts with the respective courts arriving at opposite conclusions. In *Glidden*, the collective bargaining agreement contained a provision on the seniority clause which gave employees who were laid off with five or more years of continuous employment the right to be reemployed based on their seniority, if an opening occurred within three years after the layoff. The union and the company normally negotiated for agreements with a two-year duration. Six weeks prior to the expiration date for one of these two-year agreements, the Glidden Company notified the union that the contract would be terminated at the expiration date because the company was moving the plant from Elmhurst, New York, to a new location at Bethlehem, Pennsylvania. The jobs of the employees were terminated at the time of the plant removal and the company refused to rehire at the new location based on seniority acquired at the old plant. Employees at the old plant brought an action against Glidden for breach of a collective bargaining agreement made for their benefit by the union. Noting that employees with over five years of seniority retained their right to recall for three years after layoff, the Federal Court of Appeals for the Second Circuit reasoned that the parties must have contemplated that seniority rights would survive the collective bargaining agreement with its two-year duration and therefore, the employer should not be able to unilaterally terminate the employees' rights merely by failing to renew the contract. The court also observed that some employee rights, such as retirement rights, were treated as vested rights because they were considered

30. Local 127 Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277 (3d Cir. 1962); Selb. Mfg. Co. v. Int'l. Ass'n of Machinists, 305 F.2d 177 (8th Cir. 1962).

31. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

32. N.L.R.B. v. Item Co., 220 F.2d 956 (5th Cir. 1955); California Portland Cement Co., 101 N.L.R.B. 1436 (1952); Tide Water Associated Oil Co., 85 N.L.R.B. 1096 (1949).

33. Oddie v. Ross Gear and Tool Co., Inc., 305 F.2d 143 (6th Cir. 1962), *cert. denied*, 371 U.S. 941 (1962); Metal Polishers v. Viking Equipment Co., 278 F.2d 142 (3d Cir. 1960); Slenczka v. Hoover Ball and Bearing Co., 215 F. Supp. 761 (N.D. Ohio 1963).

34. Wimberly v. Clark Controller Co., 364 F.2d 225 (6th Cir. 1966); Slenczka v.. Hoover Ball and Bearing Co., 215 F. Supp. 761 (N.D. Ohio 1963).

35. Zdanok v. Glidden Co., Durkee Famous Foods Div., 288 F.2d 99 (2d Cir. 1961), *aff'd on rehearing* 327 F.2d 944 (2d Cir. 1964), *cert. denied*, 377 U.S. 944 (1964), hereinafter referred to as *Zdanok*.

36. Oddie v. Ross Gear and Tool Co., Inc., 305 F.2d 944 (6th Cir. 1962), *cert. denied*, 371 U.S. 941 (1962), hereinafter referred to as *Ross*.

to be earned over the course of the employment and due the employee when he met the requirements specified in the contract. By analogy, the court reasoned that seniority rights should be considered similarly vested and due when the contract provisions were met. In view of the subsequent criticism, it seems that the court's denomination of seniority rights as "vested" was unfortunate and probably implied more status to the rights than the court intended to give them. Nonetheless, it is clear that the court intended to convey the fact that the seniority rights here endured beyond the termination of the collective bargaining agreement.

Another aspect of the seniority rights, their possible geographic limitation, was put in question by a statement in the preamble of the agreement that it was made by the Glidden Company "for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York."[37] The court interpreted the clause as a mere reference to the then existing situation rather than as a territorial limitation on rights granted in the agreement, contending that it was unreasonable to interpret the contract so that it would not apply if the company moved a few blocks or a few miles. Finally, stating that, "We can see no expense or embarrassment to the defendant which would have resulted from its adopting the more rational, not to say humane, construction of its contract,"[38] the *Glidden* court concluded that the employees had a right to re-employment at the new plant site based on the seniority rights acquired under the collective agreement at the Long Island plant.

In *Ross*, the company informed employees at the Detroit plant, through a series of notices, that a new plant was under construction at Lebanon, Tennessee, and that, for economic reasons, part of the Detroit production would be transferred to the new facility—the extent of the transfer to be determined by economic studies. The union at the Detroit plant consequently insisted that those employees who lost their jobs at Detroit as a result of the transfers be re-employed at the Lebanon plant based on the seniority obtained at Detroit. The company refused to accede to the union demands, insisting that workers laid off in Detroit had no reemployment rights in Lebanon. Later the company announced that the economic studies dictated that the Detroit plant be closed, whereupon the employees initiated an action against the company for a declaration of their rights under the seniority provisions of the collective bargaining agreement. The Court of Appeals for the Sixth Circuit began by considering the effect of the following provisions from the collective agreement:

AGREEMENT

THIS AGREEMENT is entered into this 19th day of December, 1958, by and between GEMMER MANUFACTURING COMPANY (of Detroit, Michigan), which is a division of Ross Gear and Tool

37. Zdanok v. Glidden Co., Durkee Famous Foods Div., 288 F.2d 99, 103-04, (2d Cir. 1961), *aff'd on rehearing*, 327 F.2d 944 (2d Cir. 1964), *cert. denied*, 377 U.S. 944 (1964).
38. *Id.* at 104.

> Company, Inc. (a corporation of Lafayette, Indiana), and which Gemmer is hereinafter referred to as the "Company" and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW (AFL-CIO), AND LOCAL 80, THEREOF, hereinafter referred to as the "Union."
>
> WHEREAS, the parties to this agreement desire to promote the spirit of harmony and cooperation between them and insure the most efficient operation of the Company's plant, the following agreement is entered into:
>
> RECOGNITION
>
> 1. The Company recognizes the Union as the exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit for the purpose of collective bargaining on matters of wages, hours and conditions of employment, excluding those mentioned in the next succeeding paragraph.[39]

Noting that the recognition clause referred to employees in the city of Detroit and not to any specific plant, the court reasoned that the clause could not be passed off as a mere reference to the plant's present location. It therefore, reasoned that the clause unambiguously limited the territorial scope of the rights given to employees under the agreement, to the Detroit city limits. The court distinguished the clause here from that in *Glidden*, on which the plaintiffs relied heavily, saying that here there was geographical limitation whereas the *Glidden* contract merely contained an ambiguous reference to plant location in its preamble. Based on that interpretation, the court concluded that in general, the agreement bestowed no rights at any place outside the Detroit city limits and specifically not at the new plant in Lebanon, Tennessee. Next the court considered plaintiff's argument that seniority rights were "vested," based on the holding in *Glidden*. But the court rejected the argument because "vested" connotes that such rights may not be cut off by unilateral action of the company, yet the collective bargaining agreement itself provided for the loss of seniority rights under certain conditions, such as death of an employee or discharge of an employee without reinstatement by grievance procedures. The fact that the union made no claim of "vested" seniority rights until after the *Glidden* decision was published influenced the court's construction of the agreement. The union's actions under the agreement indicated that it never thought the employees were receiving "vested" seniority rights, which suggested that the union merely sought to take advantage of the *Glidden* decision. However, in determining this issue the court made it clear that whether seniority rights continued in existence beyond the end of the agreement was an entirely different question which was not considered in this case. In the final analysis, this decision was based wholly on the finding that rights given in the agreement

39. Oddie v. Ross Gear and Tool Co., Inc., 305 F.2d 142 at 147 (6th Cir. 1962), *cert. denied*, 371 U.S. 941 (1962).

were subject to a geographical limitation, the court concluding therefore, that the employees were not entitled to reemployment at the new plant based on seniority accumulated in Detroit.

In *Robertshaw*, the validity of the plant removal was not contested. The two primary issues before the court were: (1) Whether the intention of the parties manifested in the collective agreement was to give the Waterbury employees the right to reemployment at the new plant based on seniority acquired at the Waterbury plant and (2) If not, whether other equitable considerations dictated this construction of the agreement. The court noted that no language in the contract expressly granted the Waterbury employees rights outside the Waterbury plant. Further, the court determined that the bargaining history between the union and the company demonstrated no basis on which to construe the agreement to give Waterbury employees rights at the Lebanon plant, inasmuch as the union had failed to demand any rights relating to termination of employment prior to the 1960 negotiations, despite its prior experience with the company's periodic department removals. Therefore, the court found that there was no evidence that the parties intended to confer on the employees a right to reemployment at the Lebanon plant. Instead the court found that the sole basis for the union's contention was the court's holding in *Glidden*, that seniority rights survived both termination of the collective agreement and a change in plant location of considerable distance. The court then noted that since its inception, the *Glidden* doctrine had received little support from law reviews, labor arbitrators and subsequent cases,[40] all of which seemed to prefer the contrary holding of *Ross*. The court felt that underlying the *Glidden* decision was the misconception that, once established, seniority acquired a status apart from the contract, in which its attributes were determined by equitable considerations and national labor policy. This misconception, the court felt, imposed a substitute agreement on the parties based on considerations which were improper because they were too obscure and because they came from outside the agreement, whereas the contested rights were to be created and limited by the intentions of the parties embodied in the collective agreement. The court, therefore, expressly overruled *Glidden*, although in his concurring opinion, Judge Waterman pointed out that *Robertshaw* was easily distinguishable from *Glidden* on its operative facts and might have been decided without overruling *Glidden*.

The overruling of *Glidden* need not represent a very substantial blow to the job security of employees, since they may protect their interests by insisting on appropriate provisions in the collective agreement. Furthermore, the overruling of *Glidden* seems a desirable result because of certain problems in the *Glidden* rationale. Basically they stem from the court's reasoning in each of the case's two facets: (1) the question of whether seniority rights survive under the contract and (2) if the contract does not resolve the issue, whether

40. U.A.W. Local 1251 v. Robertshaw Controls Co., 405 F.2d 29, 30-32 (2d Cir. 1968).

seniority rights survive without the contract. A court may give effect to seniority rights at a relocated plant by making a finding to that effect under either the first or the second question; but if it is determined that the contract expressly prevents the survival of seniority rights at a relocated plant, the case is decided and the second issue is never reached. In *Glidden*, one construction of the statement in the preamble to the collective bargaining agreement is that it was made "for and on behalf of" the Long Island plant, would place a geographical limitation on the rights granted in the agreement, thereby preventing survival of seniority rights at the new plant. However, the court alternatively chose to construe the statement as merely a reference to the existing situation. An examination of the case yields no convincing reasoning to support the court's preference for this construction; indeed both constructions appear to be equally reasonable. Therefore, since it is clear that principles of contract interpretation are largely applicable to collective bargaining agreements, it is hard to see why the court did not require evidence as to the intent of the parties before construing the statement.[41] Most probably, the statement was merely meant as a recognition clause, indicating that *Glidden* recognized the union as bargaining agent for the employees at the plant described. In that case the recognition clause has no bearing whatsoever on survival of seniority rights, and does not imply any limitation on seniority rights. However, as long as the issue was raised, the fact that the court did not consider the intent of the parties detracted from the validity of its holdings. If the parties intended that the statement should constitute a geographical limitation, the court would have been forced to hold for the company despite its conviction that the employees' case was otherwise valid. It should be noted that contrary to *Glidden*, *Ross* found that there was a geographical limitation and held for the company solely on that basis. However, *Ross* dealt with a clause that placed such a clear limitation on rights granted in the agreement that it is probable even the *Glidden* court would have arrived at the same conclusion. Nevertheless, this shows that despite the fact that *Ross* and *Glidden* arrived at opposite conclusions, their holdings are not inconsistent. While *Ross* was based entirely on interpretation of the contract, *Glidden's* interpretation of the contract merely opened the way for its resolution of the case based on another issue.

The other issue, whether seniority rights survive plant relocation where the collective bargaining agreement does not decide the question, was resolved by *Glidden* based on the controversial concept of vested seniority rights.[42] Under the better view this concept is incorrect and misleading. For the idea of vested

41. "Parol evidence of prior or contemporaneous negotiations is admissible, even where the parties have adopted the written document as the final and complete expression of their contract, for the purpose of explaining ambiguous expressions in writing and to explain latent ambiguities in the contract."
L. Simpson, *supra* note 17 at § 101, see 3 A. Corbin on Contracts § 579 (1960).

42. Lowden, *Survival of Seniority Rights Under Collective Bargaining Agreements: Zdanok v. Glidden Co.* 48 Vir. L. Rev. 291, 296-98; Aaron, *Reflections on the Legal Nature Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1553 (1962).

seniority rights is directly opposed to the widely accepted view that seniority rights are created and limited solely by the collective bargaining agreement. Assigning to seniority the attributes of vestedness would indicate that the employee receives an immediate fixed right which cannot be altered, changed or taken away without the consent of the employees.[43] However, it has been held that seniority rights are ended when a company terminates its business,[44] that seniority rights may be altered or bargained away by the employee's bargaining agent,[45] and that seniority rights cannot be passed on by the employee at death.[46] So, by according to seniority rights the status of being vested, the court attributed more status to them than they in fact enjoy; and this misconception formed the basis on which the court held that the seniority rights were applicable at the new plant location.

In addition to the specific problems in its rationale, *Glidden*, as well as other plant relocation cases, suffers from failure to properly articulate the real nature of the problem involved. Perhaps this problem stems from the relative dearth of information which the courts receive on many facets of the issue. It is said that the basic dispute involved in these cases is the conflict between the requirement of the economy for free mobility of industry and the interest of employees on job security.[47] The theory is that for the economy to achieve the best utilization of economic resources, industry must be free to move wherever it can secure the lowest combination of costs, and that allowing employees to be rehired at the new plant based on their seniority will hinder management's freedom of movement. On the other hand, plant relocation means that employees at the old plant will lose their jobs. Many of the senior employees will have considerable difficulty in finding new jobs, and those that succeed will lose many benefits which are based on seniority. Implicit in this analysis is the assumption that employees who are rehired at the new plant will receive the same wage that they received at the old plant. If the assumption were true, naturally a requirement that employees be rehired at the new plant based on seniority could be a great hindrance to plant mobility, particularly where the motivation for removal was primarily the burden of excessive labor costs. However, reemployment based on seniority does not necessarily imply that wages will remain at the level of the old plant; the only essential inference is that employees will receive a preferential right to employment at a new plant. Since the old collective bargaining agreement would not necessarily be applicable to the new plant in this situation, all wages and benefits would have to be renegotiated between

43. 3A Corbin on Contracts § 742 (1960).

44. Local 2040, Int'l. Ass'n. of Machinists v. Servel, Inc., 268 F.2d 692 (7th Cir. 1959), *cert. denied*, 361 U.S. 884 (1959).

45. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Giordana v. Mack Trucks, Inc., 203 F. Supp. 905 (D. N. J. 1962); Johnson v. Archer-Daniels-Midland Co., 203 F. Supp. 636 (E.D. Mich. 1962).

46. Aaron, *supra* note 42 at 1540.

47. Note, *Labor Law Problems in Plant Relocation*, 77 Harv. L. Rev. 1100 (1964); Comment, *Industrial Mobility and Survival of Seniority—What Price Security?*, 36 S. Cal. L. Rev. 269 (1963).

the company and the employee at the new plant. In most situations then, requiring that employees be rehired at the new plant based on seniority would not necessarily be detrimental to the company. In fact, it would often be beneficial inasmuch as the company could then take advantage of the expertise which the employees had acquired at the old plant. One exception might be where the company could not move except for tax advantages and financing which were given by the state in which the new plant was to be located, with the expectation that more jobs would be created for state residents. Since, the company was forced to bring its entire labor force with it, the state might withdraw the financial advantages, making it uneconomical for the company to move. At the old plant site, the company might well be faced with the prospect of going out of business, in which case the economy would be irreparably damaged with no offsetting gain to anyone. In such a situation, it would certainly seem improper to grant employees the right to reemployment at the new plant.

It seems apparent that there is a wide variety of situations and economic interests which must be balanced in determining the advisability of granting reemployment at a new plant based on seniority, including the interests of the economy as a whole, the employees, the company and the communities involved. Perhaps too little information has been presented on these issues, or perhaps the attorneys have simply failed to raise them. In any case, the courts have been reluctant to delve very deeply into these types of considerations despite the fact that they are the very heart of the problem. Another consideration which has received relatively little attention, although it would seem of paramount importance in deciding these cases, is whether or not a substantial number of employees would actually seek reemployment at the new plant. The discussion above assumed that all employees would move with the plant if given the opportunity. However, in a strong economy such as we have today, it is likely that the employee's ties with the community are so strong and his chances for reemployment so good, that he would be reluctant to move. In this situation, it should make little difference to the company whether or not a right to reemployment at the new plant is granted to the employees, because so few employees would move that there could be no significant economic effect on the company. On the other hand, if the economy were weak and the jobs were scarce, a much larger percentage of the workers would be willing to move with with the company. Only then would the court have to examine the exact nature of the company's economic problem to determine the extent to which the company might be harmed if employees were granted the right to reemployment at the new plant. The foregoing discussion is only demonstrative of a few of the considerations of this type which are relevant to the resolution of the issue. Where the collective agreement does not determine the question, these considerations should play a major role in the outcome. With the multitude of diverse situations and interests in these cases, it is impossible to devise a single rule or result which is proper in every case. Therefore, the courts should demand more

information on the possible consequences in a case and carefully consider this information in arriving at their decision.

Although *Robertshaw* commendably overturns *Glidden*, the decision creates further difficulties of its own. The court determines the case by deciding essentially that the plaintiff-employees did not meet their burden of proof with regard to the survival of seniority rights at the new plant. Based on a normal procedural rule, the decision would have been perfectly acceptable, except that the court went further and strongly implied (although it did not state it explicitly) that the burden of proof must be met by evidence solely from the contract. The difficulty with this apparently neutral standard is that, as a practical matter, it may amount to an affirmative rule that seniority does not survive plant removal in the absence of a contractual provision to the contrary; and this without consideration of the substantive aspects of the case. It is already clear that an express provision in the agreement will govern a case, therefore, the real issue involved is whether seniority rights are applicable at a relocated plant where the collective agreement gives no guidance on the question. In that situation, the burden of proof obviously could never be met by evidence solely from the collective agreement. In addition, when a company is relocating a plant, the union's bargaining position is extremely weak. Despite any strikes, picket lines or other pressure which the union might exert, the company is virtually certain to be able to secure sufficient help to remove equipment from the old plant. Therefore, it will always be the employees, rather than the company, who are forced to bring the suit; and under *Robertshaw*, they will be faced with the necessity of meeting a burden of proof which cannot be met. Such a solution hardly seems desirable inasmuch as the substance of the case will never be considered.

A much better resolution of the problem would be to adopt the approach to interpreting collective bargaining agreements used in *United Steelworkers of America v. Warrior and Gulf Navigation Co.*[48] The union in that case sought to have a grievance arbitrated under the arbitration provision of the collective bargaining agreement. However, the company refused to arbitrate, claiming that the arbitration provision was not applicable because the grievance complained of was excepted by a clause which provided that, "matters which are strictly a function of management shall not be subject to arbitration under this section." The agreement gave no further guidance as to whether the particular grievance was in fact a "function of management," and therefore, the issue fell into the category of one which was within the subject matter of a collective agreement, but which could not be resolved by the agreement. Recognizing that collective bargaining agreements are considerably different from commercial contracts, the court adopted the solution which it had earlier urged in *Textile Workers Union of America v. Lincoln Mills*:

48. 363 U.S. 574 (1960).

> The question then is, what is the substantive law to be applied in suits under § 301(a)? We conclude that the substantive to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . The Labor-Management Relations Act expressly furnishes some substantive law. It points out what parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction, but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.[49]

Considering the relevant concepts of policy which were embodied in our national labor laws, the *Warrior and Gulf* court found that the national labor policy favored the use of arbitration whenever possible in settling labor grievances; therefore, it directed that the union's grievance should be arbitrated. This approach is markedly different from the *Robertshaw* rule that only contractual evidence is valid to meet the burden of proof, in that, under *Warrior and Gulf* the burden of proof could also be met by evidence of relevant concepts of policy which are reflected in the national labor laws. The explanation for this difference lies in the fact that the *Robertshaw* rule is extracted from rules applicable to commercial contracts, whereas *Warrior and Gulf* recognizes that a collective bargaining agreement is more than a contract. Applying *Warrior and Gulf* approach to *Robertshaw*, a court would identify the relevant policies which best served those policies. Thus, where an issue was within the subject matter of a collective bargaining agreement but could not be resolved by it, a plaintiff could meet the burden of proof by showing that national labor policy dictated a decision in his favor. This approach is clearly superior to the *Robertshaw* method of deciding these cases on procedural grounds. It resolves issues based on their substantive aspects, plus it is flexible enough to allow for different results in cases dealing with the same issue, but where the facts and interests which are involved vary greatly. In addition, the inclusion of national labor policy as a relevant factor would allow decisions on an issue to be continuously aligned with the latest thinking on the subject as it is manifested in the national labor laws.

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49. 353 U.S. 448, 456-57 (1957).