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SENIORITY RIGHTS IN LABOR RELATIONS

SECURITY of tenure assumes prime importance as an objective of employed workers under economic conditions that severely restrict chances for advancement. Labor's attempts to attain this end have often led to the incorporation in collective trade agreements of the principle of seniority¹—a

1. See generally REPORT OF THE EIGHT-HOUR COMMISSION (Wash., Govt. Printing Office, 1918) 305-316, 387-396; THE SENIORITY RULES OF THE NATIONAL AGREEMENT (Brief before U. S. Railroad Labor Board, prepared by W. J. Lauck of the BUREAU OF RESEARCH, RAILWAY EMPLOYEES' DEPARTMENT, AMERICAN FEDERATION OF LABOR, 1921); E. C. BROWN, JOINT INDUSTRIAL CONTROL IN THE BOOK AND JOB PRINTING INDUSTRY (U. S. Bureau of Labor Statistics, Bulletin No. 481, 1928); J. D. BROWN, RAILWAY LABOR SURVEY (Social Science Research Council, Division of Industry and Trade, 1933, mimeogr.) 104-106; CATLIN, THE LABOR PROBLEM (2d. ed. 1935) 327, 478, 492; McISAAC, THE ORDER OF RAILROAD TELEGRAPHERS (1933) 254; RAILROAD WAGES AND WORKING RULES (National Industrial Conference Board, Research Report No. 46, 1922) 40; ROUNTREE, THE RAILWAY WORKER (1936) 29, 216-228, 273; SMELSER, UNEMPLOYMENT AND AMERICAN TRADE UNIONISM (1919) 44, 107; STEVENS, NEW YORK TYPOGRAPHICAL UNION No. 6 (Annual Report of the Bureau of Labor Statistics of New York, 1911, part I) 529; WOOD, UNION-MANAGEMENT COOPERATION ON THE RAILROADS (1931) 58; Barnett, *The Printers* (1909) 10 AM. ECON. ASS'N Q., Third Ser. 3, p. 230; Christenson, *Seniority Rights under Labor Union Working Agreements* (1937) 11 TEMP. L. Q. 355.

principle under which length of employment determines the order of lay-offs, rehiring, and advancements.²

Seniority first emerged in the railroad industry of the '80's, in an atmosphere of stratified opportunity and precarious tenure.³ The growth of vast and complex railroad organizations and of absentee ownership militated against recognition of merit. And several factors combined to make employment insecure. Not only were nepotism and job-selling rife, but it was the customary practice for superintendents, in their frequent shifts from road to road, to transplant employees who ousted the incumbents of the lower positions. The seniority movement in the railroad industry grew slowly, spreading from west to east and from craft to craft⁴ until it became definitively established under governmental wartime administration.⁵ Today, the seniority principle has reached its fullest development in the railroad industry, but it has also gained a strong foothold in numerous other industries,⁶ especially the printing trades,⁷ and even now is making its appearance in the automobile⁸ and steel industries.⁹

Seniority rights stem almost exclusively from collective trade agreements between labor unions and employers. The provisions range from a short sentence recognizing the rule of seniority, to an elaborate code of detailed regulations, covering many printed pages. The administration of seniority is ordinarily entrusted to the employer. Unjustified departures on his part from the principles laid down in the trade agreements are considered as grievances. Various procedures have been provided for their redress.¹⁰ The

2. These three features of the seniority rule are ordinarily but not necessarily combined. Preferential rights of minor importance may be added, such as the privilege of choosing the time for vacations. Agreement between Sinclair Refining Co. and International Association of Oil Field, Gas Well and Refinery Workers of America (1936).

3. REPORT OF THE EIGHT-HOUR COMMISSION, *supra* note 1, at 307.

4. *Id.* at 305 *et seq.*; McISAAC, *op. cit. supra* note 1, at 256. The clerks on the N. Y., N. H. & H. R. R. operated under the seniority rule as early as 1909. Materials on the early developments of railroad seniority are extremely scarce.

5. See SENIORITY RULES OF THE NATIONAL AGREEMENT, *supra* note 1; WOLF, THE RAILROAD LABOR BOARD (1927) 38 *et seq.*

6. Seniority rules of some kind are found in the following industries: aluminum, bakeries, barbers, blacksmiths, borax, breweries, brick and clay, cigarettes and tobacco, coal, dyeing and finishing, gas stations, glass, hosiery, machinists, mine, mill and smelter workers, paper, petroleum, powder, street railways, telegraphers, telephone operators, textiles, window washers. Abstracts or summaries of trade agreements will be found in the Monthly Labor Review; in Bulletins 393 (1923-24), 419 (1925), 448 (1926), 468 (1927) of the U. S. Bureau of Labor Statistics; and in the Report of the Federal Co-ordinator of Transportation on Hours, Wages and Working Conditions in the Inter-city Motor Transport Industries, Part III (1936, mimeogr.) 169-209.

7. E. C. BROWN, *op. cit. supra* note 1, at 92, 102, 107.

8. See N. Y. Times, March 13, 1937, p. 6; (1937) 44 MONTHLY LAB. REV. 667.

9. See N. Y. Times, March 18, 1937, p. 6; (1937) 44 MONTHLY LAB. REV. 1238.

10. See *e.g.*, BLOCH, LABOR AGREEMENTS IN COAL MINES (1931) 101.

aggrieved employee must usually submit his case to officers of the union or to a union committee. If the case is found meritorious, the union will enter into negotiations with the representatives of the employer. If no agreement can be reached, provision is frequently made for resort to arbitration. Special tribunals, set up by the federal government, act as arbiters in the railroad industry. Section 304 of the Transportation Act of 1920¹¹ vested the Railroad Labor Board¹² with a quasi-judicial power to determine seniority disputes. After the Board was abolished in 1926,¹³ regional adjustment boards undertook the adjudication of grievance cases,¹⁴ until the Railway Labor Act of 1934¹⁵ centralized their task in the National Railroad Adjustment Board in Chicago.¹⁶ During the N. R. A. similar boards were established in other industries,¹⁷ the most important of these being the Automobile Labor Board¹⁸ and the Petroleum Labor Policy Board.¹⁹ In the printing and related trades "priority" is administered by the foremen rather than by the employers.²⁰ Since the closed shop ordinarily prevails in the industry, the foremen, as union members, are obliged to obey the priority rules of their organizations. Grievances are settled within the unions by means of the remedies provided in the by-laws, or by arbitration between the union and the employer.

Employees, dissatisfied with the decisions of the internal tribunals or the mixed railroad boards, have occasionally sought redress in the courts.

11. 41 STAT. 456, 470 (1920).

12. See WOLF, *THE RAILROAD LABOR BOARD* (1927); WARD, *THE U. S. RAILROAD LABOR BOARD AND RAILWAY LABOR DISPUTES* (1929). Seniority disputes constituted of course only a minor, though substantial fraction of the Board's business. For the method of adjusting labor disputes during the governmental administration of railroads, see WOLF, *supra*, at 47 *et seq.*

13. Railway Labor Act, 44 STAT. 577, 587 (1926) § 14.

14. Railway Labor Act, 44 STAT. 577, 578 (1926) § 3; *cf.* *Bell v. Western Ry. of Alabama*, 228 Ala. 328, 153 So. 434 (1934) (railroad employee held bound to take his seniority grievance before the adjustment board instead of resorting to the courts). For a brief account see First Annual Report of the National Mediation Board (1935) 37, 38.

15. 48 STAT. 1185, 1189, 45 U. S. C. § 153 (1934).

16. See Garrison, *The National Railroad Adjustment Board* (1937) 46 *YALE L. J.* 567.

17. See BERNHEIM AND VAN DOREN, *LABOR AND THE GOVERNMENT* (1935); LORWIN AND WUBNIG, *LABOR RELATIONS BOARDS* (1935).

18. See Statement of the Automobile Labor Board, May 18, 1934; LORWIN AND WUBNIG, *op. cit. supra* note 17, at 361. For criticisms directed against the seniority practice of the Board, see notes 56, 72, *infra*.

19. The award of the Arbitration Board in the controversy between the Gasoline Station Operators Union No. 18378 and the major oil companies of Cleveland and Cuyahoga County [Decisions of Petroleum Labor Policy Board 78, 83 (1934)] established seniority as one of the governing principles.

20. Under a union rule in existence since 1858 the union members may secure their jobs only through application to the foreman. See STEVENS, *op. cit. supra* note 1, at 529.

However, several difficulties stand in the way of the complaining employee who seeks judicial protection.²¹ He must first exhaust the remedies provided either in the trade agreements or in the union by-laws unless these remedies can be characterized as obviously futile.²² And if he has submitted his case to an internal tribunal, the decision will be set aside only if it is termed arbitrary or obviously unreasonable.²³ Since the right to be heard in a seniority dispute is protected by the due process clauses, seniority being considered "property" for that purpose,²⁴ the complainant may further be inconvenienced by the necessity of joining other claimants for the job or others affected by the dispute.²⁵ This doctrine may impose onerous procedural obstacles, for if the displacement of a senior employee occasions similar displacements down the entire seniority list, it is necessary to join a large number of employees as defendants.²⁶ This inconvenience may perhaps be avoided by the institution of a representative class suit.²⁷

Even if these hurdles are surmounted,²⁸ an employee who seeks to assert seniority rights in a suit against his employer may be confronted with serious difficulties. For while courts have frequently recognized the enforce-

21. See Christenson, *supra* note 1, at 377 *et seq.*

22. *Shaup v. Grand Int. Brotherhood*, 223 Ala. 202, 135 So. 327 (1931); *Bell v. Western Ry. of Alabama*, 228 Ala. 328, 153 So. 434 (1934); *Norfolk & W. Ry. v. Harris*, 260 Ky. 132, 84 S. W. (2d) 69 (1935); *Henry v. Twichell*, 286 Mass. 106, 189 N. E. 593 (1934); *Yazoo & M. V. R. R. v. Mitchell*, 173 Miss. 594, 161 So. 860 (1935); *Crisler v. Crum*, 115 Neb. 375, 213 N. W. 366 (1927); *Burger v. McCarthy*, 84 W. Va. 697, 100 S. E. 492 (1919); *West v. Baltimore & O. R. R.*, 103 W. Va. 417, 137 S. E. 654 (1927); *Comments* (1936) 45 YALE L. J. 1248, 1259; (1936) 20 MINN. L. REV. 657, 664.

23. See notes 105, 117-119, 139, *infra*.

24. *Nord v. Griffin*, 86 F. (2d) 481 (C. C. A. 7th, 1936), *cert. denied*, 57 Sup. Ct. 612; *Estes v. Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 5th, 1937); *Griffin v. Chicago Union Station*, 13 F. Supp. 722 (N. D. Ill. 1936); *Gregg v. Starks*, 188 Ky. 834, 224 S. W. 459 (1920).

25. *McMurray v. Brotherhood of R. R. Trainmen*, 50 F. (2d) 968 (W. D. Pa. 1931); *Cannon v. Brotherhood of R. R. Trainmen*, 262 Ky. 113, 89 S. W. (2d) 620 (1935); *Gordon v. Hawkins*, 66 S. W. (2d) 432 (Tex. Civ. App. 1933); *cf. McGregor v. Louisville & N. R. R.*, 244 Ky. 696, 51 S. W. (2d) 953 (the union and the employees who might be displaced by the plaintiff have a right to intervene).

26. In *Brotherhood of R. R. Trainmen v. Price*, 108 S. W. (2d) 239 (Tex. Civ. App. 1937), more than 150 employees were affected by the asserted seniority rights.

27. *Grand Int. Brotherhood of Locomotive Engineers v. Mills*, 43 Ariz. 379, 31 P. (2d) 971 (1934). But the union has been held not to be a proper class representative in seniority suits. *Brotherhood of R. R. Trainmen v. Price*, 108 S. W. (2d) 239 (Tex. Civ. App. 1937).

28. Jurisdictional mistakes are another hazard encountered. The duties imposed with respect to collective bargaining by § 2 of the Railway Labor Act [44 STAT. 577 (1926)] do not render a seniority controversy a suit arising under the laws of the United States and federal courts have therefore no jurisdiction over such controversies. *Malone v. Gardner*, 62 F. (2d) 15 (C. C. A. 4th, 1932); *cf. Lane v. Union Terminal Co.*, 12 F. Supp. 204 (N. D. Texas 1935).

ability of seniority rights in suits against unions²⁹ or their officers, or against competing employees,³⁰ they have generally not enforced them in suits against employers. Some courts deny the existence of a right, others acknowledge the right but deny a remedy. Those courts which employ the former rationale state that the seniority clause is wanting in mutuality since the employee is privileged to quit the service at any time.³¹ But under conventional contract doctrines, the subsequent labor of the employee is sufficient to support the employer's promise.³² Nor do the objections of those courts which adopt the latter ground seem persuasive. Specific performance has been denied on the grounds that seniority is not a property right which will be protected by equity,³³ that the relations between master and servant are highly personal³⁴ and that courts should not charge themselves with the conduct of an employer's business.³⁵ But these are statements of result rather than reasons. Seniority has been labelled a property right for other purposes;³⁶ and the rule against specific performance of service contracts has little justification under conditions of modern mass production, at least so far as the employer is concerned. Equally unconvincing are the reasons advanced by the courts to support a denial of damages for the loss of security of employment. Such damages are thought to be too remote and too speculative because the value of seniority rights depends on the general trend of employment, the condition of the employer's business and the place of the employee on the seniority list.³⁷ But juries have often been allowed to

29. But the union itself was not considered as a suable entity in *Graham v. Grand Division Order of Railway Conductors*, 107 S. W. (2d) 121 (Mo. App. 1937).

30. *Grand Int. Brotherhood of Locomotive Engineers v. Mills*, 43 Ariz. 379, 31 P. (2d) 971 (1934); *Gleason v. Thomas*, 186 S. E. 304 (W. Va. 1936). Accord: *Gregg v. Starks*, 188 Ky. 834, 224 S. W. 459 (1920); *Piercy v. Louisville & N. Ry.*, 198 Ky. 477, 248 S. W. 1042 (1923).

31. *Louisville & N. R. R. v. Bryant*, 263 Ky. 578, 92 S. W. (2d) 749 (1936); *Beatty v. Chicago, B. & Q. R. R.*, 49 Wyo. 22, 52 P. (2d) 404 (1935). *Contra*: *Rentschler v. Missouri Pac. R. R.*, 126 Neb. 493, 253 N. W. 694 (1934).

32. 1 WILLISTON, CONTRACTS (2d ed. 1936) §§ 102, 139 *et seq.*

33. *Shaup v. Grand Int. Brotherhood*, 223 Ala. 202, 135 So. 327 (1931); *Burger v. McCarthy*, 84 W. Va. 697, 100 S. E. 492 (1919). Seniority has been held not to be "property within the state" for the purpose of obtaining *in rem* jurisdiction. *Gore v. Pennsylvania R. R.*, 144 Misc. 639, 259 N. Y. Supp. 410 (Sup. Ct. 1932), *aff'd*, 236 App. Div. 881, 260 N. Y. Supp. 941 (4th Dep't 1932).

34. *Louisville & N. R. R. v. Bryant*, 263 Ky. 578, 92 S. W. (2d) 749 (1936); *Mosshamer v. Wabash Ry.*, 221 Mich. 407, 191 N. W. 210 (1922); *Ryan v. New York Central R. R.*, 267 Mich. 202, 255 N. W. 365 (1934); *Chambers v. Davis*, 128 Miss. 613, 91 So. 346 (1922); *Beatty v. Chicago, B. & Q. R. R.*, 49 Wyo. 22, 52 P. (2d) 404 (1935). But *cf.* *Gregg v. Starks*, 188 Ky. 834, 224 S. W. 459 (1920); *Piercy v. Louisville & N. Ry.*, 198 Ky. 477, 248 S. W. 1042 (1923).

35. *Mosshamer v. Wabash Ry.*, 221 Mich. 407, 191 N. W. 210 (1922).

36. See note 24, *supra*.

37. *Gary v. Central of Georgia Ry.*, 37 Ga. App. 744, 141 S. E. 819 (1928), 44 Ga. App. 120, 160 S. E. 716 (1931); *Louisville & N. R. R. v. Bryant*, 263 Ky. 578,

assess damages of equally uncertain nature. And in any event this problem would not be encountered if specific performance were decreed, since the wages lost up to the date of trial are definitely ascertainable.³⁸

The unfavorable attitude of the judiciary has, however, a lesser impact on seniority rights than might be expected, since those seniority disputes which eventually reach the courts form a small fraction of those heard by the internal and mixed tribunals. And these latter agencies enforce seniority rights without hesitancy. Specific performance and recovery of back pay are granted in proper cases,³⁹ although the latter remedy is sometimes denied if the employer has acted in good faith.⁴⁰ The various railroad boards have insisted that every reasonable interpretation in favor of seniority should be adopted, since seniority is considered as one of the foundations of the railroad trade agreements.⁴¹ Thus the scope of the seniority right today can best be determined by a consideration of the provisions of the trade agreements and of the work of the railroad boards in expounding and amplifying those agreements.

LAY-OFFS, REINSTATEMENTS AND ADVANCEMENTS

While the trade agreements generally make the seniority rule applicable to lay-offs, reinstatements, and advancements, the scope of these three aspects of seniority is not always defined with precision. Serious controversy has arisen, in particular, over the breadth of the lay-off preference. During the recent depression junior employees insisted that lay-offs be curtailed and the

92 S. W. (2d) 749 (1936); *Rentschler v. Missouri Pac. R. R.*, 126 Neb. 493, 253 N. W. 694 (1934). The more liberal attitude of federal courts is evidenced by their willingness to appraise the value of seniority above \$3,000 for the purpose of assuming jurisdiction; to attain this end the value of the future right to a job is taken into account. *Nord v. Griffin*, 86 F. (2d) 481 (C. C. A. 7th, 1936), *cert. denied*, 57 Sup. Ct. 612.

38. Compensation for wages lost up to the date of trial has been granted. *Cook v. Des Moines Union Ry.*, 16 F. Supp. 810 (S. D. Iowa 1936); *McGee v. St. Joseph Belt Ry.*, 93 S. W. (2d) 1111 (Mo. App. 1936); *McCrorry v. Kurn*, 101 S. W. (2d) 114 (Mo. App. 1936); *San Antonio & A. P. Ry. v. Collins*, 61 S. W. (2d) 84 (Tex. Comm. App. 1933); see *Beatty v. Chicago, B. & Q. R. R.*, 49 Wyo. 22, 52 P. (2d) 404 (1935). An employee discharged despite his seniority is not bound to seek other employment to mitigate his damages, if he would thereby lose his seniority standing. *San Antonio & A. P. Ry. v. Collins*, *supra*.

39. As a rule the orders of the National Railroad Adjustment Board are obeyed. Annual Reports of the National Mediation Board (1935) 29, (1936) 34; *Garrison*, *supra* note 16, at 591. If necessary they may be enforced under the provisions of the Railway Labor Act, 48 STAT. 1192, First (p), 45 U. S. C. § 153, First (p) (1934); *cf. Cook v. Des Moines Union Ry.*, 16 F. Supp. 810 (S. D. Iowa 1936).

40. See, *e.g.*, Nat. R. R. Adj. Board, Third Div. I No. 35, 44, 61, 67 (1935), II No. 108, 128 (1935), 136, 256 (1936).

41. Nat. R. R. Adj. Board, Third Div. II No. 105-107, 132 (1935), 188 (1936); *cf. R. R. Lab. Board II No. 119* (1921).

available work be distributed equally among all employees.⁴² In this they were supported by the unions who favored distribution because it increased their dues. When several carriers agreed to spread the work, however, their power to do so was challenged by the senior employees.⁴³ But there was little basis for their attack. While the promise of preferential employment determines the order of lay-offs in the case of force reductions, it does not bind the employer to effect a force reduction in order to secure more work for his remaining employees. And since in times of great unemployment the policy of spreading work is desirable,⁴⁴ the seniority clauses in the trade agreements should be confined to their necessary implications and the employer should be allowed to distribute his work. The Railroad Labor Board and the National Railroad Adjustment Board have repeatedly refused to interpret trade agreements so as to deny the carrier that power.⁴⁵ These decisions, of course, will not foreclose a contrary ruling when differently-worded trade agreements are involved.⁴⁶ Various trade agreements now incorporate the rule of distribution, sometimes alone, and sometimes as a supplement to the seniority rules.⁴⁷

42. See J. D. BROWN, *op. cit. supra* note 1, at 104, *et seq.* There were entire divisions on certain roads where hardly a single fireman or trainman had been employed for long periods because they had been supplanted by engineers and conductors. (1932) 93 RAILWAY AGE 779. Furloughed railroad men find it hard to secure other jobs, since employers know that these men will return to the railroad service, if called for, in order not to lose their seniority rights.

43. It is clear that the value of the preferential rights of the older men is greatly reduced by the rule of distribution. Not only their current wages, but also their pension rights are affected, since pensions are determined both by years of service and by average earnings. See J. D. BROWN, *op. cit. supra* note 1, at 105; SELEKMAN, LAW AND LABOR RELATIONS (1936) 30; (1933) 94 RAILWAY AGE 704.

44. See REPORT OF THE FEDERAL CO-ORDINATOR OF TRANSPORTATION (1934), H. R. Doc. No. 89, 74th Cong., 1st Sess., pp. 99, 131. The federal labor boards, when assuming arbitral functions, likewise indicated the desirability of spreading work, though not to the extent of reducing wages below a minimum standard of subsistence. See, *e.g.*, The Rosedale Knitting Co., Inc., and the American Federation of Hosiery Workers, 1 N L B 52 (1934); Consolidated Film Industries and New York Printing Pressmen's Union No. 51, 2 N L B 82 (1934).

45. R. R. Lab. Board II No. 334, 519 (1921), III No. 771, 1040 (1922); IV No. 1667 (1923); Nat. R. R. Adj. Board, Third Div., I No. 31, 32 (1935), II No. 189, 219, 290 (1936).

46. In Nat. R. R. Adj. Board, Third Div., II No. 189 (1936) it was indicated that a clear rule guaranteeing six days' work each week would preclude the employer from spreading work; but the language of the agreement that "six consecutive days shall constitute a week's work" was held not to establish such a guaranty.

47. The agreement of the Locomotive Engineers with the N. Y., N. H. & H. R. R. (February 19, 1931), art. 25(B), provides that no reductions in force will be made so long as those in passenger service are earning the equivalent of 4,000 miles per month—those in service paying freight rates are earning the equivalent of 3,200 miles per month—those on the extra list are averaging the equivalent of 2,600 miles per month. This "rule of mileage" has gained considerable importance in railroad labor agreements;

A principle akin to distribution is laid down in the trade agreements to make adjustments for irregular traffic.⁴⁸ Since more than half of the railroad traffic depends on the amount of freight to be handled from time to time, the number of regular runs available for engineers, firemen, conductors, and trainmen is limited. Only the oldest men in the service can hope to obtain a regular assigned run with a definite time to start and to end work each day. To take care of the irregular traffic, employees whose service age does not entitle them to regular work are placed on the so-called extra board or revolving board, which operates under a system called "first in, first out."⁴⁹ The man on the top of the list is the first to be called to work; he "stands first out." His work done he returns to the bottom of the list; he "stands last out." In the operation of the revolving board seniority does not play a part, all men on the board having equal rights to be called in their turn. When work dwindles below a certain minimum, however, the younger men are the first to be laid off, and the seniors are the first in line to be assigned to regular jobs as they become vacant. Sometimes there will be two extra boards in one district, one for senior men occupying the more desirable jobs, the other one for the juniors. For emergency cases there may be an extra list of men, who cannot expect continuous employment, but are called in only as the need arises. The new employees and men dropped from the extra board are listed on emergency boards of this kind.

Under the trade agreements an employee whose job has been abolished⁵⁰ is ordinarily allowed to exercise "bumping" privileges against a junior man. The latter in turn supplants his junior and this process is continued until the youngest man is removed from the service. Obviously this system entails a considerable amount of inconvenience and hardship for the employees affected and for the employer. In order to minimize these disadvantages, trade agreements frequently seek to avoid disturbing the tenure of the holders of intermediate positions by providing that displacement privileges may be asserted only against the youngest man⁵¹ or a group of the youngest employees.⁵² Not until a new vacancy arises may the senior man, whose former

it constitutes a compulsory, though limited, system of sharing the available work. In other cases the basis for distribution is a minimum number of hours per week. See, e.g., the agreement of the United Electrical and Radio Workers of America, Local 106, with the Wirt Co.

48. For a detailed discussion of the procedure described in the text see the REPORT OF THE EIGHT-HOUR COMMISSION, *supra* note 1, at 312 *et seq.*

49. The operation of the revolving board is well illustrated by Nat. R. R. Adj. Board, First Div., VIII No. 1410 (1936).

50. The question of what amounts to the "abolition" of a job is often a close one. See Nat. R. R. Adj. Board, Third Div., II No. 188 (1936); R. R. Lab. Board VI No. 3461, 3487 (1925). And see *San Antonio & R. P. Ry. v. Collins*, 61 S. W. (2d) 84 (Tex. Comm. App. 1933).

51. See Nat. R. R. Adj. Board, Third Div., I No. 50 (1935).

52. See Nat. R. R. Adj. Board, Third Div., II No. 129 (1935).

position has been abolished, be promoted to a more desirable job. During economic depressions this rule has met with some opposition on the part of the senior employees because the scarcity of vacancies offers them only a remote chance of promotion to a preferred position.⁵³ While difficulties similar to those of the displacement process are encountered when an employee is advanced from one position to another, no provision apparently is made in the trade agreements to care for this situation. The problem is perhaps slightly less acute, since the employee may, under most agreements, refuse to assert his advancement privilege without forsaking his priority rights to other vacancies.⁵⁴ But this option would have a material effect only if it were availed of by a sizeable number of employees.

The trade agreements also delimit to some extent the right to preferential reinstatement of employees who are laid off but not discharged.⁵⁵ Provisions of this kind are designed particularly for industries suffering from seasonal unemployment. If reinstatement does not occur within a specified time, usually from three months to a year,⁵⁶ the unemployment is taken to be permanent rather than seasonal and the reinstatement privilege expires.⁵⁷ An awareness of the limited span of the reinstatement privilege has induced the railroad boards to stretch the provisions of the trade agreement relating to temporary vacancies so as to include those positions within the seniority rule.⁵⁸ Senior laid-off men are thereby allowed to protect their seniority. During the lay-off the men may seek employment elsewhere, provided that they keep ready and willing to re-enter the service of their former employer after reasonable notice.⁵⁹

53. For a detailed discussion see McISAAC, *op. cit. supra* note 1, at 257 *et seq.*

54. R. R. Lab. Board III No. 1343 (1922).

55. The furloughed men retain their seniority rights and are entitled to cast their votes in the election of employees' representatives. City-Auto Stamping Co. and Int. Union, United Automobile Workers of Am., Local No. 12, 3 NLRB No. 24 (1937). Cf. Brotherhood of Locomotive Firemen and Enginemen v. Kenan, 87 F. (2d) 651 (C. C. A. 5th, 1937); Brotherhood of R. R. Trainmen v. National Mediation Board, 88 F. (2d) 757 (App. D. C., 1936).

56. The six months limit for reinstatements established by the Automobile Labor Board has been considered as insufficient, since during the depression even efficient workers were frequently laid off for longer periods. See National Recovery Administration, Research and Planning Division, Preliminary Report on Study of Regularization of Employment and Improvement of Labor Conditions in the Automobile Industry (1935, typewritten) Appendix B, Exhibit 19, p. 19.

57. But see Nat. R. R. Adj. Board, Third Div., I No. 91 (1935) (in absence of pertinent provision in trade agreement employer may not establish retroactive time limit.)

58. Nat. R. R. Adj. Board, Third Div., II No. 105-107, 132 (1935).

59. See *George v. Chicago, R. I. & P. Ry.*, 183 Minn. 610, 235 N. W. 673, 237 N. W. 876 (1931).

RECOGNITION OF MERIT

The seniority rule ordinarily does not completely divest the employer of the power to recognize merit,⁶⁰ for the heavy responsibilities of railroad operation forbid forcing on the carrier an employee of doubtful qualifications.⁶¹ The employer may therefore always discharge an employee who is proved to be incompetent. But the employer's power to prefer better-qualified employees in disregard of the rule of seniority is somewhat limited. Trade agreements usually confine seniority to cases where the ability⁶² and efficiency of the applicants for a job are equal;⁶³ but since absolute equality will never be found, the rule is construed to mean that only striking differences in competence warrant a departure from seniority.⁶⁴ In other agreements the test of fitness is sufficiency of ability rather than equality of competence.⁶⁵ Either provision gives the employer a wide latitude, since his judgment is not subject to judicial review unless arbitrariness or bad faith are shown.⁶⁶ But he must state specific facts to justify his departure from the order of seniority; he can not merely assert that the employee lacks

60. The claim that seniority prevents giving preference to the better man has been one of the main objections advanced by employers against the seniority rule. See CATLIN, *op. cit. supra* note 1, at 327, 479, 480.

61. Nat. R. R. Adj. Board, Third Div. II No. 235 (1936).

62. Ability is ordinarily understood in terms of training and competency. Legal disabilities, however, have also been held to break seniority privileges. Thus a job may require overtime work; if the state laws forbid overtime for women, the senior female applicant may be disqualified. See R. R. Lab. Board II No. 269, 345 (1921), III No. 1038 (1922); *cf.* III No. 661, 727 (1922).

63. See, *e.g.*, the trade agreements of the N. Y., N. H. & H. R. R. with the Brotherhood of Maintenance of Way Employees (November 6, 1936), Rule 10(B) (" . . . promotion shall . . . be based on ability, merit and seniority. Ability and merit being equal, seniority shall prevail").

64. See Nat. R. R. Adj. Board, Third Div., I No. 44 (1935). The agreement in that case provided that where qualifications are equal, seniority will prevail. Although the junior man had more experience, the senior man was held entitled to the job, unless definite reasons were shown why he was not qualified.

65. See, *e.g.*, agreements of the N. Y., N. H. & H. R. R. with System Federation No. 17, Railway Employees' Department Mechanical Section thereof (April 9, 1937) Rule 16: "When new jobs are created or vacancies occur in the respective crafts, the oldest employees in point of service shall, if sufficient ability is shown by trial, be given preference in filling such new jobs or any vacancies that may be desirable to them." Under the "sufficient ability" clause a junior man's superior experience was held not to justify a departure from the order of seniority, where the senior man possessed adequate competence. R. R. Lab. Board V No. 2639 (1924).

66. Nat. R. R. Adj. Board, Third Div. I No. 96, 98 (1935), II No. 106, 110 (1935), 275 (1936). The R. R. Lab. Board seems to have assumed the unrestricted review of questions of ability. See II No. 124, 141, 213, 458, 475, 538, 558 (1921); III No. 705, 735, 836 (1922); IV No. 1630 (1923); V 2202 (1924); VI No. 3188, 3368. See Garrison, *supra* note 16 at 586. *Cf.* Rentschler v. Missouri Pac. R. R., 126 Neb. 493, 253 N. W. 694 (1934).

experience and ability.⁶⁷ A suspicion of bad faith arises if the carrier fails to assert the inefficiency of the senior man in due time.⁶⁸ Full familiarity of an applicant with the duties of the new position cannot be demanded, for the employee must be given an opportunity to acquaint himself with his new task.⁶⁹ The carrier may discriminate between employees on the ground of merit in cases of promotion, displacement, lay-off and reinstatement.⁷⁰ In no case, however, will the Railroad Adjustment Board overrule the carrier's decision without further investigation. Sometimes an examination or a probationary period is ordered, the results to be submitted to the Board as final arbiter.⁷¹

The fact that there is so much discretion in the hands of the employer with so little control over its exercise is felt by the unions to invite evasions of the seniority rule.⁷² Those trade agreements which are drawn with greater technical refinement seek to cope with the problem in various ways. One method is to limit the number of departures from the seniority rule permitted the employer, to a definite percentage of all the promotions, demotions, and reinstatements within a given period.⁷³ A more satisfactory system allows preferments outside the regular order only with the assent of the union or a union-elected shop committee; arbitration is sometimes provided for cases where differences of opinion as to a man's ability cannot be amicably settled.⁷⁴ Another device provides for a trial period before a new job is definitely assigned to an employee. During that period the employee keeps his seniority on his old job, to which he may be sent back at the employer's discretion. If, however, he is retained at the new job beyond the trial period,

67. Nat. R. R. Adj. Board, Third Div. I No. 44 (1935), II No. 103 (1935), 275 (1936). An employee's right to promotion is not defeated by his lack of fitness for still further advancement. Nat. R. R. Adj. Board, Third Div., I No. 62 (1935). A man who was repeatedly and successfully used as assistant foreman cannot be denied sufficient ability for promotion to regular foreman. Nat. R. R. Adj. Board, Third Div., II 214 (1936).

68. R. R. Lab. Board III No. 1247 (1922); Nat. R. R. Adj. Board, Third Div. I No. 65 (1935), II No. 256 (1936).

69. Nat. R. R. Adj. Board, Third Div. II No. 108 (1935); see R. R. Lab. Board II No. 124 (1921).

70. Nat. R. R. Adj. Board, Third Div. II No. 275 (1936).

71. See the decisions of the Board's Third Div. I No. 44, 65 (1935), II No. 103 (1935), 214, 275 (1936).

72. The struggle over the "individual merit clause" in the N. I. R. A. codes of fair competition is significant. See LORWIN AND WUBNIG, *op. cit. supra* note 17, at 65-68, 363. The Automobile Labor Board's susceptibility to the clause was one of the main factors in discrediting it in the eyes of labor. See AUTOMOBILE LABOR REPORT, *supra* note 56, Conditions of the Industry 50, Appendix B, Exhibit 19, p. 19.

73. See, *e.g.*, agreement between Sinclair Refining Co. and Int. Ass'n of Oil Field, Gas Well and Refinery Workers of America (October 1, 1936) art. VI 3.

74. See, *e.g.*, agreement between Empire Oil and Refining Co. and Local Union No. 210 of Int. Ass'n of Oil Field, Gas Well and Refinery Workers of America (October 1, 1936) art. 3, sec. 1(j).

his ability is conclusively presumed to be adequate and a removal cannot ordinarily be based on lack of efficiency.⁷⁵ A final plan calls for examinations to test fitness for promotion.⁷⁶

The power of the employer to discriminate on grounds of merit is further recognized by the exemption from the seniority rule of certain positions of higher responsibility.⁷⁷ While such jobs are ordinarily designated in the trade agreement with much detail, the question of the classification of a particular job as an exempt or "official" position may cause some doubt.⁷⁸ Recourse will frequently be taken in such cases to the former dealings of the parties. Where the brotherhood and the incumbent for several years treated the job as an official one, they can no longer insist that it should be subject to the seniority rule.⁷⁹ If the carrier fails to offer a newly created position to the senior applicant because he considers it as an official one, his action must promptly be protested by any interested party; an employee who has slept on his rights cannot at a later date deny the exempt character of the job.⁸⁰ If, on the other hand, the carrier does bulletin a position, he must give it to the senior applicant; and he will not be heard asserting that the job actually was an exempt one.⁸¹ The holders of exempt positions, who have been promoted from the rank and file, ordinarily retain their priority rights in the service,⁸² but if dismissed from the exempt position, they are not always allowed to displace their juniors from regular jobs. They may be placed on the extra board, where they must wait for a vacancy on which to exercise their seniority rights.

75. See, e.g., the agreements of the N. Y., N. H. & H. R. R. with the Brotherhood of Railway and Steamship Clerks (July 1, 1921), Rule 9, and with the Brotherhood of Maintenance of Way Employees (November 6, 1936), Rule 13(A).

76. See, e.g., agreement of the N. Y., N. H. & H. R. R. with the Brotherhood of Locomotive Firemen and Enginemen (February 1, 1927), art. 42(B). It has been held to be proper for a brotherhood to contract with a railroad company that failure in an examination shall entail a certain loss of seniority. *Casey v. Brotherhood*, 197 Minn. 189, 266 N. W. 737 (1936).

77. As a rule the employer's discretion in filling exempt positions is unrestricted. *R. R. Lab. Board V No. 2572* (1924). For a limitation see *Nat. R. R. Adj. Board Third Div., II No. 187* (1936) (the holder of an exempt position, when displaced by a junior employee, was held not to have those displacement rights in the ordinary service he would have had if displaced by a senior officer).

78. Where under the terms of the agreement the excepted character of a position is doubtful its more or less confidential nature may determine the classification. *Nat. R. R. Adj. Board, Third Div., II No. 199* (1936). See *R. R. Lab. Board III No. 986* (1922).

79. *Nat. R. R. Adj. Board, Third Div., I No. 72* (1935).

80. *Nat. R. R. Adj. Board, Third Div., II No. 116* (1935).

81. *Nat. R. R. Adj. Board, Third Div., II No. 104* (1935).

82. *R. R. Labor Board III No. 1370* (1922). But in the absence of a rule in the trade agreement preserving accumulated seniority rights, an employee holding an exempt position has been held to have lost his seniority standing. *Nat. R. R. Adj. Board, Third Div., I No. 6* (1935). Cf. *Boucher v. Godfrey*, 119 Conn. 622, 178 Atl. 655 (1935).

DEPARTMENTALIZATION

Seniority rights would seem to be of most value to the employee if they could be exercised with respect to jobs in the entire business unit. Practical difficulties, however, militate against such a widespread application, for the shifting of skilled laborers from one trade to another meets the opposition of both employer and employees. The employer, in order to minimize the cost of training and the waste of material incident to the breaking in of the senior man to his new job, is anxious to restrict seniority rights to jobs closely related to those previously held.⁸³ The employees, too, are often reluctant to assume strange duties, since incompetence in the new position may result in discharge and a complete loss of all seniority rights.⁸⁴ Furthermore, where the employer's operations extend over distant localities, as in the case of the railroads, the unlimited exercise of seniority is also restricted by the costs and social inconvenience of a change of residence.⁸⁵ Some sort of departmentalization along occupational and geographical lines is therefore necessary if seniority is to operate efficiently. In actual practice the extent of this subdivision has been limited by the desire to preserve an adequate reservoir of jobs within which seniority rights may be exercised.

Since railroad labor is organized by crafts and each brotherhood has its own trade agreement with the carrier, occupational departmentalization in the railroad industry for the most part follows craft lines. In some cases, however, the seniority group is either larger or smaller than the organized craft unit. Thus firemen are combined for seniority purposes with engineers,⁸⁶ trainmen with conductors,⁸⁷ telegraphers with train dispatchers.⁸⁸

83. See Jeffery-DeWitt Insulator Co. and Local No. 455, United Brick and Clay Workers of America, 1 NLRB 618, 623 (1936).

84. Under the General Laws of the International Typographical Union the recognition of departments in printing shops is optional with the local unions; but in no case may a foreman transfer a person to a department he is not familiar with and then declare him incompetent. For a construction of the rule see *Robinson v. Dahm*, 94 Misc. 729, 159 N. Y. Supp. 1053 (Sup. Ct. 1916); for its origin see BARNETT, *op. cit. supra* note 1, at 234. Cf. *United Textile Workers and Hannah Picket Mills (1934)*, cited in *Crew, The Textile Labor Relations Board (1935)* 41 W. VA. L. Q. 189, 190.

85. ROUNTREE, *op. cit. supra* note 1, at 223 *et seq.*

86. Firemen are thus in line for promotion to engineers; and the engineers may, when work is slack, displace the members of the lower ranking craft. The latter must bear, therefore, the main burden of unemployment. The relations between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen are governed by the "Chicago Joint Agreement" of 1913, which has been repeatedly amended. See REPORT OF THE EIGHT-HOUR COMMISSION, *op. cit. supra* note 1, at 309. See also, SELEKMAN, *op. cit. supra* note 43 at 30. Cf. *Mosshamer v. Wabash Ry.*, 227 Mich. 407, 412, 413, 191 N. W. 210, 211 (1922).

87. For a more detailed description, see *Brotherhood of R. R. Trainmen v. Nat. Mediation Board*, 88 F. (2d) 757 (App. D. C. 1936); ROUNTREE, *op. cit. supra* note 1 at 29, 130.

88. See R. R. Labor Board III No. 1084 (1922); Nat. R. R. Adj. Board, Third Div. II No. 117 (1935).

Mechanical workers, on the other hand, are subdivided under one agreement into as many as twenty-four classes.⁸⁹ Sometimes other bases of classification are superimposed on the craft division. One criterion frequently utilized is type of service. Thus employees engaged in freight service are often separated from their fellows in the passenger department;⁹⁰ yardmen and roadmen are likewise generally differentiated.⁹¹ Occasionally the lines of organized unions cut a craft into separate seniority groups. Welders, for instance, are subdivided according to whether they are machinists or boilermakers.⁹² Departmentalization of this sort often causes inconvenience to the carrier since it operates to place men qualified to do the same work in different seniority groups, between which no interchange of employees is allowed.⁹³

Along geographical lines divisions are frequently, but not always, made co-extensive with the operating departments. These divisions, however, may vary considerably in scope. Thus while telegraphers on the New York, New Haven & Hartford R. R. acquire seniority in the various Superintendents' Divisions,⁹⁴ clerks have seniority only at their particular station or job.⁹⁵ The size of the division may even differ for the same type of employee. The seniority of maintenance of way employees, for instance, may be confined to the subdepartment and the point at which they are employed,⁹⁶ or extended over the jurisdiction of one division engineer, or of one track supervisor, or over districts specifically defined in the agree-

89. Agreement between the N. Y., N. H. & H. R. R. and System Federation No. 17, Railway Employees Department, Mechanical Section thereof (April 9, 1937), Rule 28.

90. Cf. Nat. R. R. Adj. Board, First Div. III No. 430 (1935).

91. Cf. Nat. R. R. Adj. Board, First Div. VIII No. 1495, 1497, 1508-1510 (citing earlier cases) 1527; Garrison, *supra* note 16, at 590. For a controversy between yard and road employees, see Hunt v. Dunlap, 248 S. W. 760 (Tex. Civ. App. 1923). The difference between the rules governing and the experiences obtained in yard and road service accounts for the separation of the two classes.

92. ROUNTREE, *op. cit. supra* note 1, at 222.

93. See statement of J. Kruttschmitt, Chairman of the Board of Directors of the Southern Pacific Co.: "Under the present classification rules of the Shop Crafts, in order to change a nozzle tip in the front end of a locomotive, it is necessary to call a boilermaker and his helper to open the door, because that is boilermakers' work; to call a pipeman and his helper to remove the blower pipe, because that is pipemen's work; and to call a machinist and his helper to remove the tip, because that is machinists' work; also for the same force to be employed for putting in the new tip." The Railroad Inquiry, issued by authority of the Association of Railway Executives, 1921, Bull. No. 6.

94. Telegraphers' Agreement (March 25, 1927) art. 11-C, 12-D. For a description of "office seniority," see McISAAC, *op. cit. supra* note 1, at 258.

95. Agreement (July 1, 1921), Art. II, Rule 6.

96. Agreement between the N. Y., N. H. & H. R. R. and the Brotherhood of Maintenance of Way Employees representing Shop and Roundhouse Laborers (September 1, 1936), Rule 1(c).

ment, or over the entire system of the carrier.⁹⁷ The Big Four Brotherhoods, on the other hand, have ordinarily secured a seniority departmentalization independent of the operating set-up of the carrier, by defining in the trade agreements the geographical limits of their seniority districts.

Departmentalization operates to limit the rights of both employer and employee. If a carrier, by mistake or in an emergency, assigns work of one department to members of another, it must not only compensate the men who were entitled to do the work, but it may also be forced to pay additional sums to the employees who were compelled to step outside of their class.⁹⁸ An employee, of course, can exercise his seniority rights only within his division. But employees in a division where work is slack may under some agreements demand to be transferred to another district where all are employed. Generally the transferee must start at the bottom of the list in the new division,⁹⁹ but the agreements exhibit a marked diversity. He may under some provisions, for example, be allowed to retain half or even all his seniority.¹⁰⁰ Transfers may usually be made against the will of the employee only if seniority is left intact.¹⁰¹ But the effect of this provision depends largely on fortuitous circumstances, for a seniority date which places its holder at the top of the list in his old district may leave him at the bottom of the roster in the new department. A voluntary transfer¹⁰² generally operates to extinguish the seniority rights of the transferee in his old department.¹⁰³ Although he is occasionally allowed to retain his rights, he cannot accumulate seniority while absent.¹⁰⁴

97. Agreement between the N. Y., N. H. & H. R. R. and Brotherhood of Maintenance of Way Employees (November 6, 1936), Rule 2. For a peculiar kind of regulation, see *Donovan v. Travers*, 285 Mass. 167, 188 N. E. 705 (1934).

98. Nat. R. R. Adj. Board, First Div., cases cited *supra* note 91; *Garrison, supra* note 16, at 589, 590.

99. *Cf. Unkovitch v. New York Cent. R. Co.*, 117 N. J. Eq. 20, 174 Atl. 876 (1934).

100. For more details, see *McISAAC, op. cit. supra* note 1, at 259.

101. *Cf. Engineers' agreement with the N. Y., N. H. & H. R. R.* (June 1, 1928), art. 26(A); *Firemen's Agreement with the N. Y., N. H. & H. R. R.* (July 1, 1931) art. 40(A).

102. There may be doubts as to what amounts to a "transfer"; see *e.g., Griffin v. Chicago Union Station*, 13 F. Supp. 722 (N. D. Ill. 1936).

103. *Cf. Florestano v. Northern Pac. Ry.*, 198 Minn. 203, 269 N. W. 407 (1936); *McClure v. Louisville & N. R. R.*, 16 Tenn. App. 369, 64 S. W. (2d) 538 (1933); *Panhandle & S. F. Ry. v. Wilson*, 55 S. W. (2d) 216 (Tex. Civ. App. 1932); *McGregor v. Louisville & N. R. R.*, 244 Ky. 696, 51 S. W. (2d) 953 (1932); *West v. Baltimore & O. R. R.*, 103 W. Va. 417, 137 S. E. 654 (1927); *Aulich v. Craigmyle*, 248 Ky. 676, 59 S. W. (2d) 560 (1933). The agreement between a railroad and its employee to disregard the rule in a particular case has been held to violate the trade agreement and hence to be beyond the power of the corporation. *Chicago, R. I. & P. Ry. v. Sawyer*, 176 Okla. 446, 56 P. (2d) 418 (1936).

104. *Cf. Boucher v. Godfrey*, 119 Conn. 622, 178 Atl. 655 (1935). A peculiar arrangement obtains in the oil industry where employees carry double or even multiple seniority.

Since the value of a seniority right depends in large part on the number of jobs to which it is referable, the allocation of jobs between districts becomes a matter of paramount importance. The problem may arise both in the initial allotment and in redistributions necessitated by operating changes. The former is a relatively simple task, since the initial apportionment is almost always automatic. Allocation has been necessary only in the case of those train runs which pass through more than one seniority district. Various rules have been developed to handle this situation. The runs may be awarded to the district in which the greatest mileage is made, or alternated between districts, or divided between districts, either equally or on the basis of another percentage which is usually fixed according to the mileage in each district. In the absence of pertinent provisions in the trade agreement it is competent for the union to allocate the proper share to each division;¹⁰⁵ on the other hand, a one-sided distribution by the carrier does not bind the employees.¹⁰⁶

Once a job has become identified with a particular division, it is generally retained within that division, even in the face of operating modifications. When a carrier moves a position from one seniority district to another, the incumbent may retain the position, and it is continued under the jurisdiction of the first seniority district, until some new arrangement is made between employer and union. Accounting work that had been transferred to a central office from the offices of local freight agents was, for example, held to be pre-empted by the local clerks who had performed the work.¹⁰⁷ A similar rule applies when a carrier introduces mechanical improvements. Thus when a carrier installed an electrically driven belt conveyor for purposes of mail transportation, the employees who had formerly handled the mail were held to be entitled to the positions at the conveyor.¹⁰⁸ Nor is the employer permitted to effect economies by assigning the work of one group of employees to another. Even though the amount of daily telegraphy work at a particular position, for example, may dwindle to a

A worker may start as an unskilled laborer, thereby acquiring plant seniority, and then advance through the various departments, accumulating special seniority rights in each of them, while retaining the privilege of returning to the labor force and displacing any man who is his junior in plant seniority. (1937) 44 MONTHLY LAB. REV. 420.

105. In the absence of fraud, arbitrariness or grave procedural defects the determination by the union concludes the rights of the employees. *McMurray v. Brotherhood*, 50 F. (2d) 968 (W. D. Penna. 1931), *aff'd*, 54 F. (2d) 923 (C. C. A. 3d, 1931); *Harris v. Missouri Pac. R. R.*, 1 F. Supp. 946 (E. D. Ill. 1931); *Louisville & N. R. R. v. Bryant*, 263 Ky. 578, 92 S. W. (2d) 749 (1936); *Ryan v. New York Cent. R. R.*, 267 Mich. 202, 255 N. W. 365 (1934); *Crisler v. Crum*, 115 Neb. 375, 213 N. W. 366 (1927); *Burger v. McCarthy*, 84 W. Va. 697, 100 S. E. 492 (1919).

106. *Gordon v. Hawkins*, 66 S. W. (2d) 432 (Tex. Civ. App. 1933).

107. Nat. R. R. Adj. Board, Third Div. II No. 198, 199 (1936). See also, R. R. Lab. Board IV No. 1742 (1923); V No. 2236 (1924).

108. Nat. R. R. Adj. Board, Third Div., I No. 5 (1935).

minimum, the carrier must maintain the telegrapher's position rather than assign whatever work is left to the train crews.¹⁰⁹ The complete abolition of useless positions is, of course, permitted; but the test of what amounts to abolition is usually strict and the carrier may not continue part of the functions of the allegedly discontinued position in disguised form.¹¹⁰ The prohibition against assigning work of one department to another applies equally to the assignment of a department's work to an outside group. This rule outlaws the former practice of hiring independent contractors for work that could be performed by employees of the carrier.¹¹¹

A more difficult problem is presented when a change affects the whole structure of the seniority districts. Various reasons may lead to such modifications. The carrier may readjust his operating departments; he then will seek to obtain a corresponding rearrangement of the seniority districts because of the convenience of having seniority districts coextensive with operating departments.¹¹² On the other hand the union may also feel prompted to demand the change or consolidation of seniority districts, particularly when old employees are laid off in one district in which work is slack, while younger men are fully employed in another division.¹¹³ The most frequent cause of this situation is the consolidation of railroads or of road facilities, such as yards or tracks.¹¹⁴ When work in one road or yard is abandoned entirely and is concentrated in another, the employees of the abandoned district can escape complete unemployment only if their seniorities are merged with those of the subsisting district. But the employees of the subsisting district will vigorously oppose such a move, and the employer may join them in order to avoid the costs incident to a seniority

109. Nat. R. R. Adj. Board, Third Div. II No. 244-246 (1936); see R. R. Lab. Board VI No. 3418 (1925); Garrison, *supra* note 16, at 589.

110. Nat. R. R. Adj. Board, Third Div. I No. 18, 94 (1935), II No. 139, 233, 234, 236 (1936).

111. R. R. Lab. Board III No. 982, 1077, 1262 (1922); V No. 2080 (1924); Nat. R. R. Adj. Board, First Div. II No. 351 (1935); Third Div. II No. 189 (1936).

112. See *Long v. Baltimore & O. R. R.*, 155 Md. 265, 271, 141 Atl. 504, 506 (1928) where the court describes the inconveniences arising from the incongruity of operating and seniority departments: ". . . it was necessary for the engineers working in this yard, and repeatedly passing from one end of the yard to the other, . . . to have their engineers and crews change every time an engine crossed the intangible boundary line between the two brotherhood divisions . . . Such an impossible situation cried out for a solution . . ." Other technical difficulties are described in *Burton v. Oregon-Washington R. R. & N. C.*, 148 Ore. 648, 38 P. (2d) 72 (1934). But see *Nat. R. R. Adj. Board*, Third Div. I No. 99 (1935).

113. See, *e.g.*, *Board of Street Ry. Commissioners of Detroit, The Motor Coach Operators' Ass'n, and Amalg. Ass'n of Street & Elec. Ry. & Motor Coach Empl. of Am., Local 26*, 1(old) N. L. R. B. 123 (1934). A similar situation was presented in *Malone v. Gardner*, 62 F. (2d) 15 (C. C. A. 4th, 1932).

114. See *REPORT OF THE FEDERAL CO-ORDINATOR OF TRANSPORTATION*, *supra* note 44, at 139, *et seq.*

merger. The attitude of the union will in such a case frequently be dictated by the group of members that commands a majority.

Since there is often no essential clash between the employer and the union, an agreement for merger of the seniority districts may be made. But no matter how willing employer and union may be to arrive at an equitable solution, there must always be some employees whose seniority standing is adversely affected by a consolidation of the rosters. In an effort to set aside arrangements entered into between employer and union, employees so injured have frequently claimed that seniority is an inviolable property right.¹¹⁵ While an analysis of whether seniority may be thus termed is not particularly productive, it would seem that seniority, rising as it does from a collective trade agreement, is subject to modification by common action of employer and union. Whatever theory of trade agreement is adopted,¹¹⁶ the rights accruing to the single worker under the agreement must be taken to be subject to the condition of the continuing existence of the trade agreement. Hence it has been repeatedly held that changes in the seniority structure properly agreed upon between the employer and the labor organization are binding upon the single worker.¹¹⁷ Courts insist, however, that the union, in modifying the existing seniority arrangements must observe the procedure prescribed in its constitution and by-laws,¹¹⁸ and must act in good faith for the purpose of reaching a genuine collective agreement.¹¹⁹

Minorities of union members, feeling aggrieved by the seniority policy of their organization, have attempted to defend or to improve their standing by seceding from the old union, forming a new one and seeking independent trade agreements with the employers. If such an attempt is successful, it

115. See, e.g., *Grand Int. Brotherhood of Locomotive Engineers v. Mills*, 43 Ariz. 379, 31 P. (2d) 971 (1934).

116. For the various theories regarding the legal effects of collective trade agreements, see, e.g., Anderson, *Collective Bargaining Agreements* (1936) 15 ORE. L. REV. 229; Christenson, *Legally Enforceable Interests in American Labor Union Working Agreements* (1933) 9 IND. L. J. 69; Fuchs, *Collective Labor Agreements in American Law* (1925) 10 ST. LOUIS L. REV. 1; Johnson, *An Analysis of the Present Legal Status of the Collective Bargaining Agreement* (1935) 10 NOTRE DAME LAWY. 413; Rice, *Collective Labor Agreements in American Law* (1931) 44 HARV. L. REV. 572; Comments (1932) 41 YALE L. J. 1221; (1924) 24 COL. L. REV. 409; (1931) 31 COL. L. REV. 1156; (1932) 10 N. C. L. REV. 394.

117. *Aden v. Louisville & N. R. R.*, 276 S. W. 511 (Ky. 1921); *Long v. Baltimore & O. R. R.*, 155 Md. 265, 141 Atl. 504 (1928); *Henry v. Twichell*, 286 Mass. 106, 189 N. E. 593 (1934); *G. T. Ross Lodge No. 831 v. Brotherhood of Railroad Trainmen*, 191 Minn. 373, 254 N. W. 590 (1934); *Yazoo & M. V. R. R. v. Mitchell*, 173 Miss. 594, 161 So. 860 (1935); *Franklin v. Pennsylvania-Reading Seashore Lines*, 193 Atl. 712 (N. J. Ch. 1937); *Brotherhood of Railroad Trainmen v. Price*, 108 S. W. (2d) 239 (Tex. Civ. App. 1937). But see *Grand Int. Brotherhood of Locomotive Engineers v. Mills*, 43 Ariz. 379, 31 P. (2d) 971 (1934).

118. *Gleason v. Thomas*, 186 S. E. 304 (W. Va. 1936).

119. *Piercy v. Louisville & N. Ry.*, 198 Ky. 477, 248 S. W. 1042 (1923).

may result in the establishment of a new and separate seniority group, the top places of which are occupied by men who were in the lower seniority ranks of their former organization. While grave abuses or oppressive practices in the old union may justify such a course,¹²⁰ it is socially undesirable under normal conditions. The splitting up of a labor organization weakens the workers' bargaining power; the existing seniority system is undermined, and valuable rights acquired by long years of patient waiting are threatened with destruction. In one case that came before the National Labor Relations Board¹²¹ an agreement entered into between employer and union for the consolidation of two seniority divisions (trolley car and bus conductors) would have resulted in the discharge of more than 150 bus operators. The bus men thereupon seceded and attempted to enter into a separate trade agreement with the employer. The National Labor Relations Board held that the bus operators did not constitute an appropriate bargaining unit, but that the proper unit was the trolley car and the bus conductors combined. This ruling operated to defeat the secessionists, since the trolley car men by their command of a majority could select the union representatives.

If the union and employer are unable to reach an agreement, either of these parties may attempt to force a seniority consolidation by resorting to the provisions of the trade agreement. Some of the agreements contain express stipulations against the merger of seniority districts by the employer.¹²² A detailed enumeration of the seniority divisions in the agreement would likewise seem to bind the carrier,¹²³ and probably the union.¹²⁴ Other trade agreements, by providing only for the consequences resulting from changes and mergers of seniority districts, seem to assume that the carrier is entitled to effect such changes.¹²⁵ Where the seniority districts

120. Seniority regulations have been declared unreasonable and arbitrary and therefore null and void in *Cameron v. International Alliance*, 118 N. J. Eq. 11, 176 Atl. 692 (1935), 119 N. J. Eq. 577, 183 Atl. 157 (1936); *Collins v. International Alliance*, 119 N. J. Eq. 230, 182 Atl. 37 (1935); (1935) 44 YALE L. J. 1446; (1936) 45 YALE L. J. 1494; (1935) 19 MINN. L. REV. 818; *cf. Walsche v. Sherlock*, 110 N. J. Eq. 223, 159 Atl. 661 (1932). Seniority in these cases, however, was not based on length of service, but on length of union membership.

121. Board of Street Ry. Comm'rs of Detroit, *The Motor Coach Operators' Ass'n and the Amalg. Ass'n of Street and Elec. Ry. and Motor Coach Empl. of Am.*, Local 26, 1(old) N. L. R. B. 123 (1934).

122. See, *e.g.*, Agreement between a Midwest Bus System and a Division of the Amalg. Ass'n of Street and Elec. Ry. and Motor Coach Empl. of Am., §XII part 7: "During the continuance of this Agreement there shall be no combination of the . . . seniority lists into one seniority list . . ." MOTOR TRANSPORT REPORT, *op. cit. supra* note 6, at 187.

123. R. R. Lab. Board, III No. 1039 (1922).

124. *Cf. Nat. R. R. Adj. Board, Third Div. I No. 99* (1935).

125. See, *e.g.*, the agreement between the N. Y., N. H. & H. R. R. and the Brotherhood of Ry. and Steamship Clerks (July 1, 1921), Rule 26.

are in terms identified with the operating departments,¹²⁶ the change or consolidation of the latter automatically affects the former; both employer and union can therefore insist, under such a provision, that the departmentalization of seniority rights must be assimilated to any alterations in the operating set-up.¹²⁷

Even in the absence of appropriate provisions in the trade agreement or of a subsequent agreement between the parties,¹²⁸ the employees of a district abandoned because of a railroad merger may seek to protect their seniority rights by invoking the aid of the Interstate Commerce Commission. The Commission is empowered to authorize mergers of railroad systems subject to such conditions as it shall find just and reasonable.¹²⁹ And in one case¹³⁰ the Commission, in granting the application for a merger, imposed the condition that the applicant railroad should hire the employees of the merged corporation, should maintain a separate seniority register for them and should otherwise see to it that they would not suffer in their tenure by the consolidation. But in cases of consolidations of station or yard facilities, and of road abandonment, the Commission did not deem itself authorized to protect the interest of the employees.¹³¹ In these situations the Act permits the imposition only of such conditions as the public convenience and necessity may require;¹³² and the Commission thought that the preservation of employment was a private rather than a public benefit.

126. See notes 94-97, *supra*.

127. R. R. Lab. Board IV No. 1676 (1923); Nat. R. R. Adj. Board, Third Div. II No. 183 (1936). If two districts are combined under the jurisdiction of one superintendent, the seniorities are merged, even though the two districts may still be owned by two legally separate corporate entities. *Ibid*.

128. In the absence of union assent the merger by two carriers of their seniority lists has been held to be ineffective and violative of the agreement in force. *McCoy v. St. Joseph B. Ry.*, 229 Mo. App. 506, 77 S. W. (2d) 175 (1934); *McGee v. St. Joseph B. Ry.*, 93 S. W. (2d) 1111 (Mo. App. 1936) (assent to merger was given by unauthorized union officer.) And *cf.* *Grand Int. Brotherhood of Locomotive Engineers v. Mills*, 43 Ariz. 379, 31 P. (2d) 971 (1934); *Aden v. Louisville & N. R. Co.*, 276 S. W. 511 (Ky., 1921); *Long v. Baltimore & O. R. Co.*, 155 Md. 265, 141 Atl. 504 (1928); *Henry v. Twichell*, 286 Mass. 106, 189 N. E. 593 (1934); *G. T. Ross Lodge No. 831 v. Brotherhood of Railroad Trainmen*, 191 Minn. 373, 254 N. W. 590 (1934); *Graham v. Grand Div. Order of R. R. Conductors*, 107 S. W. (2d) 121 (Mo. App. 1937); *Franklin v. Pennsylvania-Reading Seashore Line*, 193 Atl. 712 (N. J., Ch. 1937); *Brotherhood of Railroad Trainmen v. Price*, 108 S. W. (2d) 239 (Tex. Civ. App. 1937); *Gleason v. Thomas*, 186 S. E. 304 (W. Va. 1936).

129. Interstate Commerce Act, § 5(4)(b), 48 STAT. 217 (1933), 49 U. S. C. § 5(4)(b) (1934).

130. *St. Paul Bridge & Terminal Ry. Control*, 199 I. C. C. 588 (1934).

131. *Chicago Gt. W. R. R. Trackage*, 207 I. C. C. 315 (1935); *Atchison, T. & S. F. Ry. Abandonment*, 212 I. C. C. 423 (1936).

132. Interstate Commerce Act § 1(18), (20), 41 STAT. 477, 478 (1920), 49 U. S. C. § 1(18), (20) (1934).

The precise manner in which the consolidation of the districts is to be effected is sometimes spelled out in the trade agreement, and is normally indicated in agreements entered into between the employer and the union for the specific purpose of executing the merger. Thus trade agreements have provided that positions corresponding to those existing before the merger shall be retained by the employees occupying them formerly.¹³³ But when the Railroad Adjustment Board elicits from the terms of a trade agreement the implication that a merger is required, there is normally no provision for the technical execution of the merger. The Board then requires employer and union to negotiate in common conference an agreement upon a consolidated roster.¹³⁴ If no agreement can be reached, the Board orders that the seniorities be "dovetailed".¹³⁵ The employees, under this system, simply retain their old seniority dates and are assigned to their places on the consolidated roster accordingly. While this method is recommended by the Federal Coordinator of Transportation,¹³⁶ it is doubtful whether it is the most equitable. If one of the two enterprises that are merged is of a comparatively recent origin, its employees stand no chance of obtaining a fair share of the consolidated work, even though the business of their former employer may have been the better one and may have contributed a large number of the jobs available in the consolidated enterprise. In one case¹³⁷ a local union applied the "dovetailing" rule to the merger of two printing shops; as a result many employees of one shop, although occupying advanced positions on their roster, had to be dismissed, while employees of the other shop, who had been out of work a long time, were called back. The result was so unsatisfactory that the court upset the ruling of the union and reinstated the displaced employees to their former positions. It would seem a better method to compare the amount of work contributed by the two combining enterprises and to allocate proportionate fractions of the work still available to each of the two competing groups of employees. This solution has been widely adopted.¹³⁸

133. See *Cannon v. Brotherhood of Railroad Trainmen*, 262 Ky. 113, 89 S. W. (2d) 620 (1935); Nat. R. R. Adj. Board, Third Div. II No. 102 (1935).

134. See, e.g., Nat. R. R. Adj. Board, Third Div. I No. 85 (1935); First Div. VIII No. 1561 (1936).

135. See, e.g., Nat. R. R. Adj. Board, Third Div. II No. 183, 190 (1936). A similar system of merging seniorities is reported in *Long v. Baltimore & O. R. R.*, 155 Md. 265, 141 Atl. 504 (1928). Cf. *Henry v. Twichell*, 286 Mass. 106, 189 N. E. 593 (1934).

136. REPORT, *supra* note 44, at 141.

137. *Hamilton v. Rouse*, 178 App. Div. 81, 165 N. Y. Supp. 173 (1st Dep't 1917). See also R. R. Labor Board, IV No. 1676 (1923).

138. See the constitution of the Brotherhood of Locomotive Firemen and Enginemen, art. 13, § 16(a). The laws of the Order of Railway Conductors, § 62, make the mileage run on the territory of each district the standard of allocation. See *Graham v. Grand Division*, 107 S. W. (2d) 121 (Mo. App. 1937). Other standards that have been applied are, e.g., the relative engine hours of two yards merged [*Nat. R. R. Adj. Board*, First Div. VIII No. 1561 (1936)]; *Yazoo & M. V. R. R. v. Mitchell*, 173 Miss. 594,

FORMAL RULES

Seniority rights may be affected, finally, by the formal rules governing the administration of seniority lists. Seniority rosters listing the employees in the order of their service age are maintained ordinarily by the employer, occasionally by the union. Even where the employer keeps the list, the word of the union representative regarding a man's seniority date carries great authority. It ordinarily binds the employee affected,¹³⁹ provided he is given a fair hearing¹⁴⁰ and the determination is not arbitrary or unfair.¹⁴¹

The seniority roster is ordinarily readjusted once or twice a year. It is posted on the bulletin board for the information of all the employees and copies are furnished to the officers of the union or brotherhood. Mistakes and errors in the list must be protested within a specified time, usually thirty days. The trade agreements generally provide that the roster will be taken as correct if no protest is lodged. Courts are inclined to enforce this provision and to hold the dilatory employee estopped from claiming a mistake in the seniority list.¹⁴² But the Railroad Boards have often mitigated the severity of the rule by allowing the rectification of a wrong seniority date at the next roster revision.¹⁴³ No prediction can be made as to when the board will permit such corrections, for although a distinction has been made between names entirely omitted and names erroneously listed, it has not been maintained consistently.¹⁴⁴

161 So. 860 (1935)], or the relative earnings of the two districts consolidated [Franklin v. Pennsylvania-Reading Seashore Lines, 193 Atl. 712 (N. J. Ch. 1937)], or a plain fifty-fifty rule [Eastern Air Transport, Inc., and Air Line Pilots' Ass'n, 1 N. L. B. 28 (1933); G. T. Ross Lodge No. 831 v. Brotherhood of Railroad Trainmen, 191 Minn. 373, 254 N. W. 590 (1934)].

139. *Aulich v. Craigmyle*, 248 Ky. 676, 59 S. W. (2d) 560 (1933); *Norfolk & W. Ry. v. Harris*, 260 Ky. 132, 84 S. W. (2d) 69 (1935); *Cannon v. Brotherhood of Railroad Trainmen*, 262 Ky. 113, 89 S. W. (2d) 620 (1935); *Donovan v. Travers*, 285 Mass. 167, 188 N. E. 705 (1934); *Mosshamer v. Wabash Ry.*, 221 Mich. 407, 191 N. W. 210 (1922); *Ryan v. New York Central Ry.*, 267 Mich. 202, 255 N. W. 365 (1934); *Casey v. Brotherhood of Locomotive Firemen and Enginemen*, 197 Minn. 189, 266 N. W. 737 (1936); *Hunt v. Dunlap*, 248 S. W. 760 (Tex. Civ. App. 1923); *West v. Baltimore & O. R. R.*, 103 W. Va. 417, 137 S. E. 654 (1927). See also cases cited, notes 105, 117-119, *supra*.

140. *Nat. R. R. Adj. Board*, Third Div. II No. 257 (1936).

141. See *Piercy v. Louisville & N. R. Co.*, 198 Ky. 477, 248 S. W. 1042 (1923); cases cited note 139, *supra*.

142. *Moore v. Yazoo & M. V. R. R.*, 176 Miss. 65, 166 So. 395 (1936).

143. *Nat. R. R. Adj. Board*, Third Div. II No. 201, 250 (1936). The carrier, too, is not precluded, by the erroneous omission of a name from the seniority list, from assigning the proper seniority date to an employee. *R. R. Lab. Board VI No. 3797* (1925).

144. *Cf. Nat. R. R. Adj. Board*, Third Div. I No. 77 (1935) and *R. R. Lab. Board VI No. 3427* (1925) with the case cited note 143, *supra*. Occasionally there is a tendency to pass tacitly over alleged laches where justice appears to require it. See *Nat. R. R. Adj. Board*, Third Div. I No. 61 (1935), II No. 257 (1936).

Vacancies occurring in the service must ordinarily be bulletined within ten days.¹⁴⁵ The rate of pay and conditions of the vacant job must be clearly indicated; if the notice is defective, the job, even though already filled, must be bulletined again.¹⁴⁶ The carrier is responsible for the correctness of the statements in the bulletin, and an employee deterred from bidding in a job because of errors may demand full compensation.¹⁴⁷ An employee wishing to assert his right to a vacancy must do so within a short specified period.

CONCLUSION

The experience of the railroad and printing industries demonstrates rather clearly the feasibility of the seniority system; but before judgment can be passed on its desirability, a more detailed analysis must be made of the effect of the system on the individual worker, the union and the employer.

Seniority of course provides a greater measure of security to the individual worker. He will not be automatically weeded out from the production process when he becomes older and less able to adapt himself to a loss of his job, for it takes a shortcoming on the part of the employee more serious than a mere suspicion of slackening speed to justify a discharge in departure from the seniority order.¹⁴⁸ At the same time, however, seniority is a barrier against rapid and extraordinary advances¹⁴⁹ since the power of the management to grant exceptional promotions for exceptional ability is narrowly restricted and is indeed viewed with extreme jealousy by labor itself.¹⁵⁰ But the seniority rule is attractive to the individual worker in other respects. The use of the "speed-up" may be partially checked by the elimination of arbitrariness in discharging and rehiring, since the success of the "speed-up" depends largely on the worker's constant fear of losing his job at the slightest sign of a slackened pace.¹⁵¹ The practice of refusing to let an employee know whether he is definitely discharged after a seasonal lay-off, and thereby

145. The employer's duty to bulletin a vacant job is not relieved if a survey of the working force yields no suitable employee. R. R. Lab. Board V No. 2484 (1924).

146. Nat. R. R. Adj. Board, Third Div. I No. 81 (1935).

147. Nat. R. R. Adj. Board, Third Div. II No. 254 (1936).

148. FEDERAL CO-ORDINATOR OF TRANSPORTATION, COMPARATIVE LABOR STANDARDS IN TRANSPORTATION (1937, mimeogr.) 123; E. C. BROWN, *op. cit. supra* note 1, at 102, 111; notes 64, *et seq.*, *supra*. As a result of seniority, railroad conductors in employment are today at least fifty years of age and have twenty-five years of railway service; see J. D. BROWN, *op. cit. supra* note 1, at 106; (1932) 93 RAILWAY AGE 779.

149. The attitude of labor towards seniority is necessarily influenced by the characteristics of the various crafts. See E. C. Brown's intelligent discussion of this question in reference to seniority in the printing trades, *op. cit. supra* note 1, at 103. And see the objections against the priority rule voiced by President Lynch of Typographical Union 6. BARNETT, *op. cit. supra* note 1, at 241.

150. FAGAN, LABOR AND THE RAILROADS (1909) 39.

151. AUTOMOBILE REPORT, *op. cit. supra* note 56, "Conditions of the Industry" 46, 51.

causing him to refrain from seeking other employment, will likewise be curbed by an established order of reinstatements.¹⁵²

The position of organized unions is also considerably strengthened by seniority. The rule is a valuable expedient for preventing anti-union discrimination¹⁵³ since it forces the employer to show good cause for any departure from the established order.¹⁵⁴ The mere prohibition of discrimination against union members and union activities¹⁵⁵ is doomed to failure unless the employer is called upon to give reasons for laying off a union member rather than a non-member.¹⁵⁶ This fact has been recognized by the National Labor Relations Board which has held that disregard of seniority, if coupled with other circumstances,¹⁵⁷ was indicative of discriminatory intention,¹⁵⁸ even where the employer had made no seniority agreement.¹⁵⁹ The Board has gone still further. When an employer refused to reinstate former strikers after the termination of a strike caused or prolonged¹⁶⁰ by

152. *Id.* at 50.

153. Seniority may operate also to curb discrimination against non-members of the union. R. R. Lab. Board IV No. 1975 (1923).

154. See, *e.g.*, Brown Shoe Co. and Boot and Shoe Workers' Union, 1 NLRB 803, 821-822, 829 (1936). But the power of the employer to recognize differences in ability reduces the effectiveness of seniority as a preventive of discrimination. See p. 82, *supra*.

155. Such prohibitions are frequently found in trade agreements. See, *e.g.*, the Sinclair Agreement, note 73, *supra*, § 23.

156. Regarding the burden of proof in discrimination cases, see Comment (1935) 48 HARV. L. REV. 630, 650.

157. In the absence of a trade agreement the employer is under no duty to apply the seniority rule. See, *e.g.*, Boucher v. Godfrey, 119 Conn. 622, 178 Atl. 655 (1935); Battle v. Atlantic Coast Line, 132 Ga. 376, 64 S. E. 463 (1909); Norfolk & W. Ry. Co. v. Harris, 260 Ky. 132, 84 S. W. (2d) 69 (1935); Casey v. Brotherhood of Locomotive Firemen and Enginemen, 197 Minn. 189, 266 N. W. 737 (1936).

158. The departure from seniority does not of itself constitute a discriminatory action prohibited by the practice of the Labor Boards. Johnson Bronze Co. and International Brotherhood of Foundry Employees, 2(old) NLRB 161 (1935); Vincennes Packing Co. and Federal Labor Union 19511, 2(old) NLRB 433 (1935).

159. Eastern Air Transport, Inc., and Air Line Pilots' Ass'n, 1 NLRB 28 (1933); F. & N. Lawn Mower Co. and International Ass'n of Machinists, etc., 2 (old) NLRB 245 (1935); Brown Shoe Co. and Boot and Shoe Workers' Union, Local No. 655, 1 NLRB 803 (1936); Segall-Maigen, Inc., and International Ladies' Garment Workers Union, Local No. 50, 1 NLRB 749 (1936); Appalachian Electric Power Co. and International Brotherhood of Electrical Workers, Local Union No. 906, 3 NLRB No. 21 (1937).

160. When a strike, unjustified at its inception, has become justified by the employer's subsequent refusal to bargain collectively with the strikers, the latter, upon termination of the strike, can displace only such strike breakers as have been hired *after* the employer's refusal of collective bargaining. Columbian Enameling & Stamping Co. and Enameling and Stamping Mill Employees Union, No. 19694, 1 NLRB 181 (1936); Jeffery-DeWitt Insulator Co. and Local No. 455, United Brick and Clay Workers of America, 1 NLRB 618 (1936); Pioneer Pearl Button Co. and Button Workers Union, Fed. Local 20026, 1 NLRB 837 (1936).

unfair labor practices of the employer, the refusal to rehire has been treated as an unfair labor practice.¹⁶¹ These rulings encourage a more aggressive unionism, for the disposition of workers to strike should be increased if the risk of ultimately losing their jobs is lessened. And employers who cannot promise permanent employment to prospective strikebreakers may be somewhat handicapped in fighting strikes.

Seniority not only provides the unions with a valuable anti-discriminatory device, but also furnishes a strong impetus to union membership. Today one of the chief talking points of many organizing campaigns is that a strong union can induce an employer to establish a seniority system. Where seniority has already been attained, it still provides an incentive for workers to become or to remain union members. Many agreements restrict seniority rights to union members,¹⁶² even where seniority extends to non-members,¹⁶³ the trade agreements generally vest the union with large powers over the administration of seniority,¹⁶⁴ and the worker may feel safer if he is not in the position of a non-member contesting the right of a member.

Seniority has encountered considerable emotional opposition from employers. The right to hire and fire is said to be an indispensable element of being master in one's house.¹⁶⁵ It has also been argued that if employees feel too well assured of their jobs their efficiency is lowered;¹⁶⁶ that the pressure to retain older employees in the service lowers the morale of the

161. See, *e.g.*, National Lock Co. and Federal Labor Union, No. 18830, 1 NLRB 15 (1934); M. H. Birge & Sons Co. and United Wall Paper Crafts of North America, 1 NLRB 731; Columbia Radiator Co. and International Brotherhood of Foundry Engineers, Local No. 79, 1 NLRB 847 (1936); Oregon Worsted Co. and United Textile Workers of America, Local 2435, 3 NLRB, No. 5 (1937). See BERNHEIM AND VAN DOREN, *op. cit. supra* note 17, at 253 *et seq.*

162. *E.g.*, the agreements of the International Ass'n of Oil Field, Gas Well and Refinery Workers of America; the Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees, *semble*.

163. Seniority rights have frequently been held to accrue to non-members of the union which had concluded the trade agreement; Florestano v. Northern Pac. Ry., 198 Minn. 203, 269 N. W. 407 (1936); Yazoo & M. V. R. R. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931). Non-members were consequently held bound by the rulings of the union with respect to seniority to the same extent as union members; Boucher v. Godfrey, 119 Conn. 622, 178 Atl. 655 (1935); G. T. Ross Lodge No. 831 v. Brotherhood of Railroad Trainmen, 191 Minn. 373, 254 N. W. 590 (1934). Expulsion from the union was held not to affect the seniority status of the expelled member; George v. Chicago, R. I. & P. Ry., 183 Minn. 610, 235 N. W. 673, 237 N. W. 876 (1931). *Contra*: Gary v. Central of Georgia Ry., 44 Ga. App. 120, 160 S. E. 716 (1931).

164. See notes 105, 117-119, 139, *supra*. A single worker is generally not financially able to enforce his rights against the employer. See testimony of W. W. Atterbury, Vice-president of the Pennsylvania Railroad, before the U. S. Commission on Industrial Relations (1916) v. 11, p. 10146.

165. This attitude is reflected by the reluctance of courts to interfere with the employer's business by enforcing seniority. See note 35, *supra*.

166. See CATLIN, *op. cit. supra* note 1, at 479, quoting from the N. Y. Evening Post of September 3, 12, 1913, October 13, 1913.