Indiana Law Journal

Volume 37 | Issue 3 Article 6

Spring 1962

Plant Removal and the Survival of Seniority Rights: The Glidden Case

PLANT REMOVAL AND THE SURVIVAL OF SENIORITY RIGHTS: THE GLIDDEN CASE

The legal status of seniority rights earned under an expired collective bargaining agreement is in need of re-examination in light of the recent case of *Zdanok v. Glidden.*[1] The Court of Appeals for the Second Circuit held that seniority rights earned under a collective bargaining agreement which provides for priority of recall on the basis of seniority in the event of a layoff, but which fails to provide for the disposition of these rights upon the termination of the agreement, are "vested" rights which survive the expiration of the collective bargaining agreement. Seni-

1. 288 F.2d 99 (2d Cir. 1961), *cert. granted,* 368 U.S. 814 (1962). The petition for writ of certiorari was granted only on the question, "Does participation by a Court of Claims judge vitiate the judgment of the Court of Appeals?" In all other respects the petition for writ of certiorari was denied. 368 U.S. at 814.

ority rights were thus, perhaps for the first time, accorded the status of a "vested" property right.[2] But more significant, the court also held that seniority rights were legally binding upon the employer even though the employer had for valid economic reasons terminated the employment relationship in accordance with the terms of the collective bargaining agreement and moved his plant to another location. Survival of seniority rights in the event of plant removal and in the absence of an express provision to the contrary was found to be within the reasonable contemplation of the parties and an implied condition of the collective bargaining agreement. Employees possessing seniority rights under the expired agreement were held entitled to damages resulting from the failure of the defendant Glidden company to reemploy them at its new plant with their old seniority status.

The *Glidden* decision cannot be discounted as a mere case of contract interpretation with limited applicability resulting from the failure of the parties to anticipate plant removal. Parties to a collective bargaining agreement often leave specific problems unresolved when drafting the written agreement.[3] The parties rely in such a case upon the grievance machinery established by the agreement to settle any unanticipated or unresolved problems that may arise.[4] In the *Glidden* case, however, plant removal proved to be an issue which the parties to the agreement were unable to resolve within the framework of the collective bargaining system through the process of arbitration or additional collective bargaining. The individual employees were thus forced to resort to the courts for a resolution of the dispute with their employer. This, it is submitted, is the significant aspect of the *Glidden* decision; for the end result of *Glidden* will *not* be to alter the legal status of seniority rights, but to force the

2. See, 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); System Fed'n No. 59 of Ry. Employees v. Louisiana & Ark. Ry., 119 F.2d 509 (5th Cir. 1941), *cert. denied,* 314 U.S. 656 (1941); Held v. American Linen Supply Co., 6 Utah 2d 106, 307 P.2d 210 (1957); *But cf.* Piercy v. Louisville & N. R.R., 198 Ky. 477, 248 S.W. 1042 (1923). Professor Cox, commenting upon *Piercy* said: "Since seniority is not a vested property right, the decision is, on any other interpretation of the facts, opposed to the overwhelming weight of authority." Cox, *Rights Under a Labor Agreement,* 69 HARV. L. REV. 601, 637 n. 98 (1955-56). The court in *Glidden,* unlike the court in *Piercy,* did not hold that seniority rights were "vested" to the extent that they could not be modified by the union without the express consent of the individual employee. As pointed out by the court, "Of course the employee owning the right, *or his authorized union agent,* could bargain away the employee's right." Zdanok v. Glidden, *supra* note 1 at 103. (Emphasis added). Seniority rights in *Glidden* were held to be "vested" in the employee only to the extent that, absent a bargaining away of the right by the individual employee or his union, it was a right of which the employee could not be deprived by an unilateral action on the part of the employer.

3. See Ryder, *Some Concepts Concerning Grievance Procedure,* 7 LAB. LAW J. 15, 16 (1956).

4. See Ryder, *Some Concepts Concerning Grievance Procedure,* 7 LAB. LAW J. 15 (1956).

issue of plant removal back into the collective bargaining system where the union through collective bargaining will be in a position to protect the employees' security of tenure.

Through the process of negotiation referred to as collective bargaining, management and labor attempt to define the rights of one another and embody them in a written agreement. The process is facilitated by the National Labor Relations Act,[5] the basic policy of which is to encourage the settlement of labor disputes through collective bargaining. The NLRA places the parties under a duty to bargain in respect to certain subjects; namely, "wages, hours, and other conditions of employment."[6] The parties are not required to reach agreement on a mandatory subject of bargaining, but must bargain in good faith in an attempt to reach agreement.[7]

The determination of rights under the agreement, however, depends not so much on the duty to bargain as it does on the economic position and bargaining power of the respective parties. Hence, if the union is not satisfied with the offer of the employer and the subject is one about which there is a mandatory duty to bargain, it may call a strike to enforce its demands. The employer, on the other hand, has the economic weapon of the lockout, or perhaps more realistically, the power to wait out the union's attempt to force a concession. This is not to suggest that the parties enjoy the "freedom of contract" considered so important to the concept of mutuality and often attributed to the agreement or strike alternative.[8] The fact that the parties are under an obligation to bargain prevents it from being a contract in the traditional sense. Moreover, to say that a party may strike to enforce its demands is not always a realistic alternative for a union.[9] Nonetheless, such alternatives do provide room for a certain amount of give and take between the negotiating parties and enable the union to effectively demand and obtain the recognition of certain limited rights.

Another means utilized by management and labor to determine rights under a collective bargaining agreement is the grievance procedure. The process of collective bargaining provides the framework within which the employment relationship functions. The grievance procedure attempts to give body and meaning to the agreement and to provide a means by which any dispute as to the meaning of the rights defined by the agree-

5. National Labor Relations Act, § 1, 49 Stat. 449 (1935), 29 U.S.C. § 151 (1958).
6. Labor Management Relations Act (Taft-Hartley Act), § 8(d), 61 Stat. 140 (1947), 29 U.S.C. § 158(d) (1958).
7. *Ibid.*
8. See, Chamberlain, *Collective Bargaining and the Concept of Contract,* 48 COLUM. L. REV. 839 (1948).
9. *Ibid.*

ment may be resolved.[10] Justice Rutledge thus distinguished between collective bargaining and the resolution of grievance in *Elgin, Joliet & Eastern Ry. v. Burley*:[11]

> [I]t is precisely the difference between making settlements effective only for the future and making them effective retroactively to conclude rights claimed as having already accrued which marks the statutory boundary between collective bargaining and the settlement of grievances.

The *Elgin* case was decided under the provisions of the Railway Labor Act which provides for the adjustment of grievances. The distinction between collective bargaining and grievance settlement is not as sharp or as clearly defined under the NLRA.[12] The grievance procedure, for instance, is often considered to be nothing more than a continuation of collective bargaining.[13] Moreover, the parties to the agreement may determine to exclude certain subjects from the grievance procedure and so specify in the agreement.[14] These so-called "management prerogative" clauses are an example of the attempt by management to prevent certain "basic" rights from being subjected to the grievance mill. The fact remains that the grievance procedure, be it a continuation of the collective bargaining process or a forum for the interpretation of the existing agreement, provides an effective mechanism for the determination of rights within the framework of the collective bargaining system.

From the above, it can be concluded that the collective bargaining agreement, although perhaps capable of being fitted into the traditional concept of a contract,[15] is more than a contract.[16] It is an attempt to create a system by which the employer-employee relationship can be governed—a system which has been characterized as the "autonomous rule of law and reason."[17] Central to the proper functioning of this "autonomous rule of law" is the collective bargaining process and the grievance procedure. Both labor and management have resort to the courts for the enforcement of their rights under the agreement, but it is only when the

10. See, Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

11. 325 U.S. 711, 739 (1945), *aff'd on rehearing*, 327 U.S. 661 (1945).

12. Compare, Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 638 (1955-56).

13. See Ryder, *supra* note 3.

14. See Shulman, *supra* note 10 at 1009.

15. See Cox, *Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958).

16. See Chamberlain, *supra* note 8; Shulman, *supra* note 10.

17. Shulman, *supra* note 10 at 1007.

system breaks down completely that such resort is necessary or even desirable.[18] Such a breakdown occurred in the *Glidden* case.

The Dispute and Arbitration Proceedings

The collective bargaining agreement in the *Glidden* case contained a standard seniority clause which provided that layoffs would be by reverse order of seniority. An employee with five or more years of continuous employment was entitled to reemployment if an opening occurred within three years after he was laid off. The agreement did not provide for the disposition of this right to reemployment in the event of a termination of the collective bargaining agreement or in the event of a relocation of the plant. The preamble to the contract merely provided that the agreement was made and entered into by the employer "for and on behalf of its plant facilities located at Corina Avenue and 94th Street, Elmhurst, Long Island, New York."[19] It would thus appear that the specific situation that gave rise to litigation in the *Glidden* case was not provided for in the collective bargaining agreement. The agrement did contain an arbitration clause as the culmination of a five step grievance procedure.[20]

On September 16, 1957, Glidden, in accordance with the terms of the collective bargaining agreement, notified the union in writing of its intention to terminate the agreement and of its plans to transfer operations from its present plant in Elmhurst, to its newly constructed plant in Bethlehem, Pennsylvania. Whether or not Glidden undertook to bargain with the union concerning the contemplated move and the effect of the move upon the tenure of the Elmhurst employees is not clear from the record. Glidden did offer to consider applications for employment of its former employees at the Bethlehem plant, but the offer was conditional upon application being made at the Bethlehem plant and with the understanding that it would be considered only on the same basis as that

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18. As stated by Dean Harry Shulman:

> When it works fairly well, it does not need the sanction of the law of contracts or the law of arbitration. It is only when the system breaks down completely that the courts' aid in these respects is involved. But the courts cannot, by occasional sporadic decision, restore the parties continuing relationship; and their intervention in such cases may seriously affect the going systems of self government. When their autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions on the contract or on the arbitration award? I suggest that the law stay out—, but, mind you, not the lawyer.

Shulman, *supra* note 10 at 1024.

19. Zdanok v. Glidden, 288 F.2d 99, 103 (2d Cir. 1961).

20. "Any question, grievance or dispute arising out of and involving the interpretation and application of the specific terms of this Agreement . . . shall, at the request of either party, be referred to the New York State Mediation Board for arbitration." *Id.* at 101.

of a new applicant. It was this proviso of the offer that prompted the dispute.

The union, on behalf of the employees, first sought relief through arbitration in accordance with the arbitration provision of the collective bargaining agreement. It served notice on Glidden of its intention to submit six separate disputes to the New York State Board of Mediation for arbitration.[21] Thereupon, Glidden petitioned for the Special Term of the Supreme Court of New York for a stay of arbitration ". . . upon the ground that the alleged disputes sought to be arbitrated are not arbitrable under the collective bargaining agreement between the parties to this proceeding."[22]

The court upheld the position of Glidden to the effect that the disputes did not involve, in the language of the arbitration clause, ". . . any question, grievance or dispute arising out of and involving the interpretation and application of the *specific* terms of this Agreement. . . ."[23] The court distinguished the arbitration clause in the agreement from those arbitration clauses which use the phrase "any and all controversies arising out of the contract" or "any and all controversies in connection with the contract." The latter are frequently found in collective bargaining agreements and would have been sufficient, in the court's view, to embrace the matters in dispute. But in the absence of such an all inclusive phrase, and in that the union could not point to any specific provision in the agreement which provided for continued employment with full seniority beyond the expiration date of the agreement, the court concluded that the "disputes" were not arbitrable and granted Glidden's motion for a stay.

Since the New York Supreme Court handed down its decision, the role of the courts in the settlement of arbitration disputes has been given

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21. The disputes which the Union desired to be arbitrated were summarized by the court as follows:

> Whether the collective bargaining agreement between the parties provides for (1) a welfare plan, (2) a pension plan and (3) a group insurance plan which create property rights for the employees which were breached by the discontinuance of Glidden's plant at Elmhurst without first offering to each employee continued employment with full seniority. The remaining three issues sought to be arbitrated are (4) whether the discontinuance of the Glidden plant at Elmhurst without offering to each employee continued employment with full seniority was a breach of the collective bargaining agreement; (5) whether such discontinuance was designed to avoid, evade, disrupt and breach Glidden's contractual obligations to the Union and its employees and to prevent collective bargaining in violation of law; and (6) whether the employees . . . were discriminated against, solely by reason of their Union status. . . .

The court dismissed "disputes" (5) and (6) as involving allegations of unfair labor practices within the exclusive jurisdiction of the NLRB. Matter of Gen. Warehousemen's Union, 10 Misc. 2d 700, 172 N.Y.S. 2d 678 (1958).

22. *Id.* at 702, 172 N.Y.S. 2d at 679.

23. Zdanok v. Glidden, 288 F.2d 99, 101 (2d Cir. 1961) (Emphasis added).

somewhat clearer definition by the United States Supreme Court. In *Textile Workers v. Lincoln Mills*,[24] the Court held that under Section 301 of the Labor Management Relations Act, a union could bring suit to enforce an arbitration provision of a collective bargaining agreement. In *United Steelworkers of America v. American Mfg. Co.*,[25] however, the Court made it clear that its function was very limited in this area. As stated by the Court, "It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."[26] The role of the court would thus seem to be restricted to that of determining arbitrability. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*[27] goes one step further. In a suit brought under Section 301 of the LMRA, the Court said:

> Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. . . . An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[28]

Both of the above decisions concerned collective bargaining agreements with arbitration clauses broader than that contained in the Glidden agreement. Nevertheless, there is in these decisions an unmistakable shift in emphasis from that of the New York court, which placed the burden on the moving party to point out the specific terms of the agreement which would bring the disputed claim within the arbitration provision of the contract. The Supreme Court, on the other hand, would place the burden on the opposing party to point out a provision in the collective bargaining agreement which would specifically exclude the matter from arbitration. Unless clearly excluded by the terms of the agreement, the issue should be resolved in favor of arbitrability. This is a significant shift in emphasis which, if anticipated by the New York court, could have resulted in arbitration in the dispute between Glidden and the union.

Seniority Rights and Collective Bargaining

The union was thus thwarted in its attempt to utilize the grievance machinery established by the agreement to resolve its dispute with man-

24. 353 U.S. 448 (1957).
25. 363 U.S. 564 (1960).
26. *Id.* at 568.
27. 363 U.S. 574 (1960).
28. *Id.* at 581.

agement. There remained, however, the possibility of settlement through the process of collective bargaining; for Glidden, despite there being valid economic reasons for relocating, remained under a duty to bargain with the union ". . . concerning the effect of moving upon the tenure of the . . . employees."[29] Failure to do so has been held to be an unfair labor practice within the meaning of Section 8(a)(5) of the LMRA.[30]

The duty of the employer to bargain with the union about the effect of relocation upon the employees' tenure, like the duty to bargain about ". . . wages, hours, and other conditions of employment," would seem to provide the union with an opportunity to protect the rights of the employees under the contract. From the union's standpoint, however, an effective resolution of the dispute is dependent upon its bargaining power, without which the duty of the employer to bargain is not very meaningful. This is particularly true in any dispute involving seniority rights, since prior to the *Glidden* case seniority rights were not considered "vested" property rights but were dependent upon the bargaining power of the union for their continued value to the employee.[31]

The majority of disputes relating to seniority arise and are settled within the framework of the collective bargaining system.[32] Moreover, with few exceptions, cases in which it has been found necessary to resort to the courts have been been decided with reference to the workings of the collective bargaining system. Seldom, as in *Glidden,* have the courts been called upon to determine the status of seniority rights divorced from the processes of collective bargaining and the grievance procedure.[33] This fact has been primarily responsible for the legal status accorded to seniority rights prior to the *Glidden* case.

Seniority and the Bargaining Contract. The courts have been uniform in holding that seniority rights are not inherent in the employer-employee relationship, but are contract rights dependent upon the terms of the existing collective bargaining agreement for their legal vitality.[34]

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29. Bickford Shoe Inc., 109 NLRB 1346 (1954); *accord,* NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957); NLRB v. Diaper Jean Mfg. Co., 222 F.2d 719 (5th Cir. 1955); Rapid Bindery, Inc., 127 NLRB 212 (1960); Brown Truck & Trailer Mfg. Co., 106 NLRB 999 (1953); Rome Products Co., 77 NLRB 1217 (1948); *contra,* NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954).

30. Cases cited note 29 *supra.*

31. Cases cited note 2 *supra.*

32. See generally Comment, *Seniority Rights and Labor Relations,* 47 YALE L.J. 73 (1937-38).

33. *Cf.* Wagner v. Puget Sound & Light Co., 41 Wash. 2d 306, 248 P.2d 1084 (1952), in which the court said, "In all of the cases where seniority as a property right has been considered, the employer was a going concern and able to recognize and accord to the employee his contractual seniority rights."

34. See *e.g.,* Starke v. N.Y., Chicago & St. Louis R.R., 180 F.2d 569 (7th Cir. 1950); Elder v. New York Cent. R.R., 152 F.2d 361 (6th Cir. 1945); Zdero v. Briggs

As stated by the court in *Elder v. New York Cent. R.R.*:[35]

> In the absence of a statute, mere employment independent of the contractual conferring of special benefits upon those who have longest service records with the individual employer, creates no rights of seniority in retention in service or in re-employment.

Once defined and embodied in the agreement, seniority rights inure to the benefit of the individual employees. Because they are drivative from the collective bargaining agreement negotiated by the employer and the union, various theories have been advanced to explain the individual employee's status vis a vis these seniority rights. Whatever the rationale, the courts are in accord in holding that the individual may bring suit to enforce his seniority rights in accordance with the terms of the contract.[36] Moreover, seniority rights are considered valuable property rights within the meaning of the fifth amendment.[37] Seniority rights, however, are not considered to be "vested" rights in the sense that they cannot be altered without the express consent of the individual possessing them.[38] Just as the parties to the collective bargaining agreement have the power to create seniority rights, the parties likewise have the power to modify them. Modification is subject only to the requirement of fair representation.[39]

The requirement of fair representation has meant that certain minimal procedural standards be observed in the operation of the grievance machinery. It has thus been held a violation of due process to fail to notify an individual of a hearing at which the status of his seniority was being determined.[40] Beyond this, however, the requirement of fair representation has meant little more than that the modification of rights be made in good faith and for the benefit of the majority.[41] Barring fraud

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Mfg. Co., 338 Mich. 549, 61 N.W.2d 615 (1953); Ryan v. New York Cent. R.R., 267 Mich. 202, 225 N.W. 365 (1934).

35. 152 F.2d 361, 364 (6th Cir. 1945).

36. See Cox, *supra* note 12 at 646.

37. Nord v. Griffen, 86 F.2d 481 (7th Cir.), *cert. denied,* 300 U.S. 673 (1936); Primakow v. Railway Express Agency, 56 F. Supp. 413 (D.C. Wis. 1943); Clark v. Hern-Werner Corp., 8 Wis. 2d 264, 99 N.W.2d 317 (1959).

38. See *e.g.,* Ford Motor Co. v. Huffman, 345 U.S. 330 (1952); NLRB v. Wheland Co., 271 F.2d 122 (6th Cir. 1959); Holman v. Industrial Stamping Co., 344 Mich. 235 (1955); Hartley v. Brotherhood of Ry. Employees, 283 Mich. 201, 217 N.W. 885 (1938); Leeder v. Cities Service Oil Co., 199 Okla. 618, 189 P.2d 189 (1948); O'Donnell v. Pabst Brewing Co., 12 Wis.2d 491, 107 N.W.2d 484 (1961).

39. *Cf.* Cox, *supra* note 12; Cox, *The Duty of Fair Representation,* 2 VILL. L. REV. 151 (1957).

40. Nord v. Griffen, 86 F.2d 481 (7th Cir.), *cert. denied,* 300 U. S. 637 (1936).

41. In Hartley v. Brotherhood of Ry. Employees, the employer and the union entered into agreement whereby when economic conditions necessitated a reduction in personnel, married women were to be relieved from service in the absence of extenuating circumstances. Plaintiff brought suit against the union basing her claim on her seniority rights. The court upheld the validity of the agreement saying:

> The seniority rights acquired by her did not arise by virtue of her contract of

or arbitrary action on the part of the union the courts will usually not interfere with the determination or adjustment of seniority rights. As stated in *Ford Motor Co. v. Huffman*:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees. . . . The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.[42]

It can thus be concluded that, subject only to "complete good faith and honesty of purpose," it is within the discretion of the union to modify, or even bargain away completely an employee's seniority rights without the express consent of the employee.

One additional aspect of the legal status of seniority rights needs emphasis in order to place the *Glidden* case in proper perspective. Unlike other rights "earned" under the collective bargaining agreement, *i.e.*, severance pay, vacation pay and pension rights, seniority rights have been held limited to the duration of the collective bargaining agreement which created them.[43] As stated by the court in *System Fed'n of Ry. Employees v. Louisiana & Ark. Ry.*:[44]

> On this point the authorities are uniform. They settle it that collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract, beyond its life, when it has been terminated in accordance with its provisions. The rights of the parties to work under the contract are fixed by the contract. They persist during, they end with, its term.

Seniority rights, in other words, are not considered to be "vested" in the employee beyond the expiration date of any one agreement. They "survive" the contract only to the extent that any modification in subsequent

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employment with her employer, but existed by reason of the agreement . . . between the railway and the brotherhood. This agreement was executed for the benefit of all the members of the brotherhood and not for th individual benefit of plaintiff. . . . The brotherhood had the power . . . to modify or destroy these rights in the interest of all the members.

283 Mich. 201, 206, 277 N.W. 885, 887 (1938).

42. 345 U.S. 330, 338 (1952).

43. See generally Note, *Termination of Collective Bargaining Agreements—Survival of Earned Rights*, 54 NW. U.L. REV. 646 (1959-60), and cases cited therein.

44. 119 F.2d 509 (5th Cir.), *cert. denied*, 314 U.S. 656 (1941). *Accord*, McMullans v. Kansas, Okla. & Gulf Ry., 229 F.2d 50 (10th Cir. 1956); Lewellyn v. Fleming 154 F.2d 211 (10th Cir. 1946).

collective bargaining must be made in good faith and not so as to arbitrarily deprive the individual of his seniority status. Unless otherwise provided for in the agreement, the continued value of seniority rights to the individual employee is dependent upon the successful re-negotiation of the collective bargaining agreement by the union. The importance of the economic power of the union to the survival of seniority rights is therefore evident.

In a much more fundamental way, however, the continued value of seniority rights to the employee is dependent upon the continued existence of an employment relationship; for the employer-employee relationship is essential to the operation of the collective bargaining system. Within this relationship the union can effectively exercise its economic power. Backed by the economic weapon of the strike, the union is in a position to protect the seniority rights of the employees. The prospect of a continuing employment relationship provides the union with sufficient leverage that by threatening economic reprisal it can safeguard any arbitrary action on the part of the employer. But what is there to prevent the employer from depriving the union of this requisite leverage by unilaterally terminating the collective bargaining agreement, moving the plant to another location and thereby destroying the employment relationship? This is the issue raised by the *Glidden* case.

Preventing a Unilateral Termination of Seniority. There would seem to be three safeguards preventing the employer from embarking upon such action: (1) a provision in the collective bargaining agreement providing for the eventuality of plant removal; (2) the requirement that the move be undertaken for valid economic reasons and not with the object of interfering with the rights of the employees protected by the LMRA;[45] and (3) the duty of the employer, despite there being valid economic reasons for moving, to bargain with the union about the move and its effect upon the tenure of the employees.[46] As has been noted, the parties to the Glidden contract failed to provide for the possibility of plant removal. In addition, Glidden was not a "runaway shop"—that is, the move was apparently undertaken for valid economic reasons and the

45. If the object or effect of the relocation is to interfere with the rights of the employees protected by the LMRA, then the employer commits an unfair labor practice by moving the plant. See NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957); NLRB v. Diaper Jean Mfg. Co., 222 F.2d 719 (5th Cir. 1955); Rome Products Co., 77 NLRB 1213 (1948). If there are valid economic reasons for the move, then the employer can usually avoid the charge of being a "runaway shop" and of committing an unfair labor practice. See NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954); Mount Hope Finishing Co. v. NLRB, 211 F.2d 36 (4th Cir. 1954); E-Z Mills Inc., 106 NLRB 1039 (1953); Brown Truck & Trailer Mfg. Co. 106 NLRB 999 (1953).

46. Cases cited note 29 *supra*.

possibility of an unfair practice was not raised in the federal courts.[47] In this sense, the moving of the plant was not arbitrary. The employer, nevertheless, was able to terminate the collective bargaining agreement and deprive the employes of their expected security of tenure, despite the duty to bargain with the union about the prospective move.[48] The meaningfulness of the duty to bargain is thus brought into question. More precisely, the question would seem to be whether the union has sufficient economic power at this stage of employer-employee relations to make the duty of the employer to bargain meaningful; or whether the duty to bargain is nothing more than a procedural formality to which the employer must submit in order to avoid the charge of an unfair labor practice.[49]

In *Bickford Shoe Inc.*,[50] the NLRB took the position that the duty to bargain with the union about plant removal did not involve a duty to acquiesce in the union's demands. While it is an unfair practice to refuse to *discuss* the subject of plant removal with the union, there is no

47. The plaintiffs in *Glidden* apparently decided to drop charges of an unfair practice as a result of the finding of the Special Term of the New York Supreme Court that such charges were within the exclusive jurisdiction of the NLRB. It is interesting to note that in a situation similar to that found in *Glidden* the General Counsel refused to issue a complaint upon the union's allegation of an unfair practice. The fact that the company had entered into an agreement with the chamber of commerce of a city located in another state for construction of a new plant, plus lower yearly rent and tax advantages was held to be sufficient economic reason for moving to the new situs and discharging the employees at the old plant. Case No. SR-998, 47 LRRM 1053 (1960); *accord*, Case No. SR-1369, 48 LRRM 1264 (1961).

48. The employer, in other words, by his unilateral act of terminating the collective bargaining agreement was able to force the employees to resort to the courts for a determination of their rights. Even then the employees were only able to obtain damages as compensation for their expected security of tenure. In the unfair practice, "runaway shop" cases the courts are in the process of developing an effective remedy against plant removal. See United Shoe Workers v. Brooks Shoe Mfg., Co., 187 F. Supp. 509 (E.D. Pa. 1960) (Employer given choice of returning to the old situs or of paying twenty years union dues plus $50,000 punitive damages); Rome Products Co., 77 NLRB 1217 (1948) (Employer given choice of returning to the old plant situs or of offering reemployment to the old employees at the new plant with back pay plus paying for reasonable moving expenses for the employees from the old situs to the new). Absent an unfair practice, however, it is at least questionable whether damages for a breach of contract are a sufficient deterrent to prevent the employer from undertaking a plant removal and denying his former employees reemployment at the new plant.

49. This is not to suggest that the employer can enter into collective bargaining with the union about plant removal with the attitude that it is nothing more than a procedural formality. Although difficult of assessment, there is a subjective as well as an objective standard of good faith to which the parties engaged in collective bargaining must conform. Under the requirements of the NLRA, both labor and management must approach collective bargaining with an "open and fair mind" in an "honest and sincere" endeavor to reach agreement. Mere pretended bargaining does not suffice to satisfy this requirement. NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943). It is suggested, however, that in bargaining about plant removal at this stage of employer-employee relations the union is dependent *entirely* upon the good faith of the employer and that the union is not in a position to effectively induce concessions from the employer by the use of its economic power.

50. 109 NLRB 1346 (1954).

sanction for not *acceding* to the requests of the union. Plant removal is, then, a mandatory subject of bargaining. Like any other mandatory subject of bargaining, it is a subject which the parties must approach in good faith, but about which they may bargain to impasse. The only affirmative duty on either party is to bargain in good faith in an attempt to reach agreement. There is no requirement that the dispute be resolved one way or the other. In such a situation, it is submitted, the economic or bargaining power of the parties is the determining factor in the resolution of the disputed claim. In the case of plant removal, the economic power of the union is the determining factor.

In negotiations relating to plant removal, the bargaining power of the union would appear to be non-existent. This is especially true at the old plant situs, for a strike by its nature is not suited to preventing an employer from closing down his operations. The union's only remaining weapon, then, is picketing the employer at the new plant situs. This, too, would appear to be ineffectual at a situs relatively far removed from the old plant, as practical considerations prevent picketing from being effective in such a situation. This would be true particularly when it is considered that the object of the picketing is to gain employment at the expense of those already employed at the new plant. As a minimum, the efforts of a well organized national union would be required to induce concessions from the employer. Even then, provisions of the LMRA may serve to prevent effective economic action from being taken (assuming that, as in *Glidden,* the employer has committed no unfair practice in moving the plant to the new situs). Unless the union can show that it represents a majority of the employees at the new plant, or has complied with the requirements of section 8(b)(7) of the act,[51] it may be charged with an unfair labor practice. The difficult situation is presented by the removal of a plant to a situs not far removed from the old location where there remains some doubt as to the duty of the employer to bargain with the old bargaining representatives.

51. Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 544 (1959), 29 U.S.C. § 158 (Supp. II 1959-60). In New York picketing an employer's offices after the employer for valid economic reasons moved his plant to another state was held to be enjoinable because the object of the picketing was considered unlawful. Freydberg, Inc. v. Ladies' Garment Workers, 33 LRRM 3402 (N.Y. Sup. Ct. 1954). Similarly, it has been held that the New York Anti-Injunction Act does not prevent the issuing of an injunction against a union picketing the plant of the employer in an attempt to prevent the employer from moving his plant to another locaiton. Englander Co. v. Tishler, 33 LRRM 2753 (N.Y. Sup. Ct. 1954); Annheuser-Busch, Inc. v. Brewery Workers, Local 1059, 35 LRRM 2740 (N.Y. Sup. Ct. 1955). The apparent theory behind these cases is that the employer has the right to terminate his business and the exercise of that right precludes there being a labor dispute within the meaning of the Anti-Injunction Act. See American Type Founders, Inc. v. Webendorfer-Wills Employees Ass'n, 35 LRRM 2336 (N.Y. Sup. Ct. 1955).

Removal to a Nearby Situs. The law in this area of plant removal is far from settled. Moreover, almost without exception, the cases are predicated upon the charge of an unfair labor practice and may be distinguished from *Glidden.* Nevertheless, in that the basic inquiry in these cases is directed to determining whether or not the employer is under a duty to bargain with the old representative at the new plant situs, the cases are instructive. If the employer remains under such a duty it may be assumed that the union can employ its economic weapons without being subject to a charge of an unfair labor practice.

A relocation of a plant in and of itself does not relieve the employer from the duty to bargain with the designated bargaining unit at the old plant. As stated by the NLRB in *General Extrusion Co.*:[52]

> [A] mere relocation of operations accompanied by a transfer of a considerable proportion of employees to another plant, without an accompanying change in the character of the jobs and the function of the employees in the contract unit, does not remove a contract as a bar.[53]

The old contract, in other words, may be held to carry over to the new plant and bar a representation election, thereby requiring the employer to bargain with the union elected by the employees at the old plant.

Similarly, the employer may be under a duty to bargain with the old representative if a sufficient number of the old employees accompany the plant to the new situs. As pointed out by the court in *NLRB v. Lewis*:[54]

> But in these plant removal cases, after finding the duty to bargain about the removal, the board swerves one way when it thinks a majority of the local's employees would not have moved away, and another when it assumes that they would have moved.

In the *Lewis* case, the court upheld the majority position of the board to the effect that, but for an unfair labor practice of the employer, a majority of the employees would have moved with the plant.[55] Based upon

52. 121 NLRB 1165 (1958).
53. *Id.* at 1167; *accord,* Yale Rubber Mfg. Co., 85 NLRB 131 (1949).
54. 246 F.2d 886, 889 (9th Cir. 1957).
55. In its opinion, the board stated:
The interpretation which our dissenting colleague places upon the *Brown* case (Brown Truck & Trailer Mfg. Co., 106 NLRB 999 (1953)) would in effect establish an inflexible rule that the removal of a plant for economic reasons, no matter what the circumstance surrounding the move, terminates any pre-existing obligation to bargain with the employees' representative, which obligation is not revived unless that representative establishes a new majority at the new location. We cannot agree that such a result is either required by the Act or is necessary in order to effectuate its policies. California Footwear Co., 114 NLRB 765 (1955).

this assumption, the refusal of the employer to bargain with the union at the new plant situs was held to be an unfair labor practice within the meaning of section 8(a)(5).

Thus it would seem that the union, in order to establish its authority as the bargaining representative at the new plant, must be able to show not only that a large percentage of the old employees moved with the plant, but that this percentage constitutes a majority of the employees at the new location.[56] As is readily seen, such a requirement in the *Glidden* type situation merely begs the question. This is the very issue in dispute, *i.e.*, whether the employer is under a duty to hire the old employees at the new plant with their old seniority status. If the union must establish itself as the designated bargaining unit at the new plant situs before it can bring economic pressure to bear upon the employer, then it is precluded from effectively bargaining with the employer; for the employer may lawfully refuse employment to the old employees and in so doing deny the union the requisite basis of economic action at the new plant situs. It can thus be concluded that the bargaining power of the union is almost non-existent. The tenure of the employees and the continued value of their seniority rights is dependent solely upon the good faith of the employer for any equitable adjustment. Seen in this light, the duty of the employer to bargain with the union about plant removal and its effect upon the tenure of the employees would appear to be little more than a procedural formality.

The Employees' Action for Damages

As noted above, it is not clear whether Glidden did undertake to bargain with the union about the proposed move. It is clear, however, that if any bargaining did take place, the union was unsuccessful in gaining any concessions from the employer. Having failed to obtain relief

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It is possible to construe this passage to mean, as the dissent did, that the employer may be under a duty to bargain with the old bargaining unit at the new plant situs despite there being valid economic reasons for moving and despite the absence of an unfair labor practice. The Circuit Court of Appeals, in enforcing the order of the board, clarified the issue when it said:

> We believe that the majority members of the National Labor Relations Board do not really deny here the contention of Acting Chairman Rodgers that unfair labor practices *after* the closing of the plant . . . must stand on two legs:
> 1. The prior refusal to bargain about transferring employees from Los Angeles to Venice.
> 2. The assumption that most of local's employees would have transferred to Venice and thus preserved local's majority had it not been for the refusal to bargain about transfer of employees. NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957).

56. Plaintiff's counsel conceded to the trial court that even if all the Elmhurst employees had transferred to the new plant, Local 852 could not have continued as the accredited bargaining representative. Zdanok v. Glidden Co., 185 F. Supp. 441, 448 n. 26 (1960).

through the process of collective bargaining and through the grievance procedure, the union in effect exhausted its "remedies" within the framework of the collective bargaining system. Furthermore, as seniority rights are considered to be uniquely personal rights within the meaning of *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*,[57] the union was precluded from taking any further action on behalf of the employees in regard to seniority rights. The only recourse left to the individual employees was to bring an action on their own behalf.[58]

Several aspects of the court's opinion should be noted.[59] In the first place, the court refused to base its opinion on the specific provisions of the seniority clause. The collective bargaining agreement was for a two year period but contained a three year layoff provision for employees with five or more years of seniority. Conceivably, the court could have construed this provision of the contract as implying the survial of seniority rights beyond the expiration date of the agreement. The court, however, chose not to limit itself to this specific provision of the contract, but framed the holding in much broader terms.

Equating seniority rights to "valuable unemployment insurance" and analogizing them to pension rights, the court held that the plaintiffs ". . . had . . . 'earned' their valuable unemployment insurance, and that their rights in it were 'vested' and could not be unilaterally annulled."[60] The fact that the plant had been moved to another location should not alter the status of these rights. There was no reason, in the

57. 348 U.S. 437 (1954), *petition for rehearing denied*, 349 U.S. 925 (1954). In *Westinghouse*, the Court held that a union could not bring suit under § 301(a) of the LMRA to enforce uniquely personal rights of the employees. In Local 2040 Int'l Ass'n of Machinists v. Servel, Inc., seniority rights were held to be uniquely personal rights. 268 F.2d 692 (7th Cir. 1959). Despite this distinction between "individual" and "union" rights, the dissent in *Glidden* was of the opinion that "the contract should be construed in light of federal substantive law pursuant to § 301 of the Labor Management Relations Act. . . ." Zdanok v. Glidden, 288 F.2d 99, 105 (1961) (Dissenting opinion). In that § 301 is only applicable to "Suits for violation of contracts between an employer and a labor organization. . . ." the conclusion of the dissenting judge would seem to be in error. See LMRA § 301, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958). Nevertheless, a good case can be made to the effect that seniority rights are not uniquely personal rights and that the union should be permitted to bring suit under § 301 on behalf of the employees. *Cf.* Cox, *supra* note 12. In this respect, the *Glidden* case would appear to be a good example of the "tension" which still exists between the *Westinghouse* decision and Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

58. For an excellent analysis of the case, see 61 COLUM. L. REV. 1363 (1961).

59. The defendant Glidden Company, relying on Parker v. Borock, 5 N.Y.2d 156, 156 N.E.2d 297 (1959), contended that because the contract provided that disputes arising under the collective bargaining agreement be determined by arbitration the individual employees were prohibited from bringing suit. The court, however, rejected this contention citing the decision of the Special Term of the New York Supreme Court to the effect that the dispute in question was *not* covered by the arbitration provision of the contract. Zdanok v. Glidden, 288 F.2d 99, 102 (1961).

60. Zdanok v. Glidden, 288 F.2d 99, 103 (1961).

opinion of the court, why a mere change in physical location should have the effect of destroying an entire structure of valuable legal rights. The court dismissed the reference to the Elmhurst location in the preamble of the contract by saying: "A rational construction of the contract would seem to require that the statement of location was nothing more than a reference to the then existing situation. . . ."[61] Any other construction, the court reasoned, would be both "irrational and destructive."[62] The opinion was thus framed more in terms of the reasonable expectations of the plaintiffs than in terms of any specific provision of the contract.

Secondly, the court failed to cite any authority in support of its position. In that the court was construing a particular contract, this fact should not be considered prejudicial to the validity of the holding. Admittedly, the result was contrary to the generally accepted view of seniority rights, but the case was decided in a context different from that of the ordinary case involving seniority. The decision was not made with reference to the rights of the parties within the framework of the collective bargaining system. It was made, instead, with reference to the rights of the parties after the processes of collective bargaining and grievance settlement were exhausted. Seniority, as a result, was accorded a status which it had not previously enjoyed.

CONCLUSION

The *Glidden* case arose out of a situation which the parties failed to anticipate or provide for in the collective bargaining agreement. More important, it was a situation which the parties were unable to resolve within the framework of the collective bargaining system through the process of collective bargaining or the grievance procedure. That this was so was due in part to the failure of the parties, especially the union, to anticipate such a situation and provide for it in the agreement either in the form of a broader arbitration clause or a provision covering the specific situation. But to a much greater extent, the failure of the parties to resolve the dispute was the result of the disintegration of the employment relationship, the medium essential to the operation of the collective bargaining system. Because the union was unable to effectively exercise its economic power, the duty of the employer to bargain with the union about plant removal proved to be an ineffectual safeguard against unilateral action on the part of the employer. The individual employees, as a result, were forced to seek relief in a court of law. The *Glidden* decision, based on an interpretation of the specific collective bargaining agree-

61. *Id.* at 104.
62. *Ibid.*

ment and not on the rights of the parties within the framework of the system, was the result.

To say that the *Glidden* decision was a matter of contract interpretation is not to minimize its significance or its potential effect in the field of labor relations. The case has already been cited in a similar plant removal case[63] and would seem to have social and economic ramifications far beyond the issue of the survival of seniority rights.[64]

It is suggested, however, that the most important consequence of the *Glidden* decision will be to force the issue of plant removal and its effect upon the rights of the parties under the agreement back into the framework of the collective bargaining system. The employer desirous of avoiding the result of the *Glidden* case will be required to raise the issue of plant removal during contract negotiations in the attempt to incorporate a satisfactory resolution of the problem into the written agreement. Ironically, however, the mere raising of the issue may be tantamount to incorporating the result of the *Glidden* case into the agreement, because (and this is the significant aspect of the *Glidden* decision) the employer will be required to raise the issue at a time when the union is in a position to employ its economic weapons in support of its demands, *i.e.*, during contract negotiations as opposed to immediately preceding the move. Unlike the situation as it existed in *Glidden,* the effect of plant removal upon employee tenure will not be dependent upon the good faith of the employer, but upon the bargaining power of the union. In that the *Glidden* decision places the burden on the employer not only to raise the issue of plant removal, but also to resolve it, the bargaining advantage would seem to be with the union. Seen in this light, *Glidden* appears to be an important tactical victory for organized labor.

THE CONSTITUTIONAL STATUS OF THE INDIANA SUNDAY CLOSING LAW

Recent decisions of the United States Supreme Court[1] indicate that

63. Oddie v. Ross Gear & Tool Co., 195 F. Supp. 826 (E.D. Mich. 1961). Defendant Ross Gear and Tool Co. announced to its employees its intention of closing down operations at its Michigan division and moving to Tennessee, and of its plans to terminate employment one month prior to the expiration date of the collective bargaining agreement. A group of employees thereupon brought an action for declaratory relief in the Federal District Court. The court relying solely on *Glidden* held that the employees were entitled to employment at the Tennessee plant by virtue of their seniority rights.

64. Wall Street Journal, July 21, 1961, p. 1, col. 6.

1. McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys From Harrison-