must allege that appellees acted in their capacities as union officials. Judge Hastie's concurring opinion seems correct in so far as it would grant the appellant leave to plead over.

DAVID S. WORONOFF

**Labor Law—Seniority Rights As Vested Contractual Rights.—*Zdanok v. Glidden Company, Durkee Famous Foods Div.*[1]**—In a diversity action in the District Court for the Southern District of New York, five employees sued their former employer for breach of contract. The dispute concerned itself with the seniority provisions of a collective bargaining agreement covering a New York plant which the employer had closed when it transferred its operation to Pennsylvania. Pursuant to the agreement, the employer terminated the contract and offered the employees the chance to apply for similar positions in Pennsylvania, but without seniority benefits. When arbitration failed to resolve the resultant seniority dispute,[2] the employees brought this action alleging a denial of valuable contract rights that had vested in them.

The district court held that the plaintiffs had standing as beneficiaries of the bargaining agreement to enforce provisions made for their benefit, but that the employer was not required to preserve for its employees seniority status acquired under the expired New York agreement.[3] On plaintiff's appeal, this ruling was reversed. HELD: The seniority rights were vested and were not lost when the agreement expired; accordingly, the employees had seniority rights after the employer transferred the plant from New York to Pennsylvania.[4]

The collective bargaining agreement in this case recited, in its preamble, that it was made "for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York."[5] Judge Madden of the United States Court of Claims, sitting by designation,[6] in speaking for the majority found that this geographical description was nothing more than an identifying address and would not be treated as setting fixed boundaries on the scope of the contract.[7] The court concluded

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1 288 F.2d 99 (2d Cir. 1961), cert. granted, 82 Sup. Ct. 56 (1961) (No. 242).

2 Local 852, the plaintiffs' union, served on the defendant a notice of intention to arbitrate certain designated disputes, pursuant to the arbitration provision in the union's contract with the defendant. Defendants' motion to stay arbitration was granted on the grounds that there was no arbitrable dispute. The court concluded its opinion with the sentence: "It follows from all the foregoing that Glidden's motion to stay arbitration must be granted, whatever other remedies the Union may have with respect to the alleged disputes." Matter of General Warehousemen's Union, 10 Misc. 2d 700, 172 N.Y.S.2d 678 (Sup. Ct. 1958).

3 185 F. Supp. 441 (1960).

4 Supra note 1.

5 Id. at 103.

6 Judge Madden, who not only participated in the 2 to 1 finding but wrote the opinion, was sitting by special designation of Mr. Chief Justice Warren.

7 A rational construction of the contract would seem to require that the statement of location was nothing more than a reference to the then existing situation, and had none of the vital significance which the defendant would attach to it. Contracts must, in all fairness, be construed *ut res magis valeat quam*

that, since the parties had contractually created seniority rights without any area designation fixing boundaries upon the scope of the contract, the court would not rewrite the contract and draw those boundary lines for them. Chief Judge Lumbard wrote a dissenting opinion based on a different construction of the contract. He said: "The issue here is whether *this* collective bargaining agreement gave the employees the right to follow the work to the new site. I would hold that it did not." (Emphasis added.)[8] The basis for this conclusion was the same as that of the district court, namely, the absence of an *express* provision in the contract requiring inter-plant transfer of seniority rights.

Seniority is a status achieved by employees through length of service.[9] It gives rights under a contract with respect to jobs, and it has probably done more to encourage union membership than any other protective feature of the labor agreement.[10] Seniority was, at first, a means by which employers favored older, experienced, and more dependable workers. By giving seniority privileges, the employer could reduce employee turnover, protect his training investment, encourage skilled workers to remain with him, and reduce their desire to take action which might jeopardize their job security.[11] As the principle of collective bargaining became recognized, and ultimately required by the Wagner Act,[12] these privileges were converted into valuable contract rights which insured employee job status.[13]

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*pereat.* (That the thing may rather have effect than be destroyed.) If not, the reasonable expectations of the parties are sacrificed to sheer verbalism.

Supra note 1, at 103.

8 Id. at 105.

9 Brand v. Pennsylvania R.R., 22 F. Supp. 569 (E.D. Pa. 1938); Locomotive Eng'rs v. Mills, 43 Ariz. 379, 31 P.2d 971 (1934); George T. Ross Lodge v. R.R. Trainmen, 191 Minn. 373, 254 N.W. 590 (1934); Unkovich v. New York Cent. R.R., 128 N.J. Eq. 75, 174 Atl. 876 (1934), aff'd, 131 N.J. Eq. 468, 25 A.2d 893 (1942); Fine v. Pratt, 150 S.W.2d 308 (Tex. Civ. App. 1941); Gleason v. Thomas, 121 W.Va. 619, 5 S.E.2d 791 (1939).

10 "The promise of job 'ownership' . . . or the complete elimination of 'favoritism'" was this encouragement. Knowlton, Recent Problems in Arbitration of Seniority Disputes, 9 Arb. J. (n.s.) 194 (1954). See also Seniority Clauses in Collective Bargaining Agreements, 21 Rocky Mt. L. Rev., 156, 293 (1949); Seniority Provisions in Labor Contracts: Social and Economic Consequences, 1 De Paul L. Rev. 191-215 (1952); cf. Zook, Seniority as a Property Right, 30 Dicta 133 (1953).

11 Lapp, How to Handle Problems of Seniority 2-3 (1946). Seniority systems should consist of a series of principles which are highly flexible in their application. Leonard R. Sayles, in an article written for the Harvard Business Review, explored this proposition, and in so doing, made the following observation:

> . . . idea that seniority provides a rigid system for allocating jobs, and that disputes on the subject only arise on the "seniority v. ability" principle is not realistic. Seniority is not an exact measuring rod but rather a highly flexible instrument subject to use by all groups in the pursuance of their own interests. Those who wish to understand seniority, therefore, will not be totally informed after a mere reading of the contract. They must go out and observe the men in the plant, changing and adjusting their relations with each other through the manipulation of seniority. Sayles, Seniority: An Internal Union Problem, Harv. Bus. Rev. 55, May-June, 1952.

See Note, 38 Va. L. Rev. 655-68 (1952); Note, 39 Va. L. Rev. 240 (1953).

12 NLRA, 49 Stat. 449 (1935), 29 U.S.C. §§ 151-66 (1958).

13 Lapp, op. cit. supra note 11, at 3; See also Harbison and Coleman, Goals and Strategy in Collective Bargaining 39 (1951).

An employee's rights of seniority are contractual in origin, effective only to the extent provided in the contract which creates them and only against the parties bound thereby.[14] A leading Massachusetts case,[15] various federal courts, and the Supreme Court, have come to similar conclusions in holding that, in the absence of any contractual provision to the contrary, all contractual rights of employees terminate on the expiration of the collective bargaining contract creating such rights.[16]

In *Elder v. New York Cent. R.R.*,[17] an employee brought an action for damages for loss of wages arising out of a failure of the railroad to reinstate him after he had been laid off. It appeared that after fourteen years of employment, he had seniority recall rights under a collective bargaining contract between a railroad brotherhood and the railroad. Jobs of the nature of plaintiff's were affected by a consolidation of operations by the railroad after his lay-off. After a dispute between the union and the railroad arose out of this consolidation, a new agreement was entered into terminating the prior agreement, and providing for termination of plaintiff's seniority recall rights. In considering the nature of the seniority rights, the Court of Appeals for the Sixth Circuit stated that, "the authorities are uniform to the effect 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." (Emphasis

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[14] In Donovan v. Travers, 285 Mass. 167, 188 N.E. 705 (1934), it was said:

> Although a right of seniority such as is here asserted is undoubtedly valuable property, *it arises only from agreement*. We see no illegality in a rule that one who acquires seniority in a particular place and who is entitled to carry it with him to another, must reckon seniority in that other place from the time at which the right to its exercise in that other place accrued to him. One is not deprived of property thereby. (Emphasis added.)

See Carver v. Obrien, 315 Ill. 643, 43 N.E.2d 597 (1942); Cf. Ryan v. New York Cent. R. Co., 267 Mich. 202, 255 N.W. 365 (1934).

[15] *Donovan* case, supra note 14.

[16] Elder v. New York Cent. R.R., 152 F.2d 361 (6th Cir. 1945); System Federation No. 59 v. Louisiana & A. Ry., 119 F.2d 509 (5th Cir. 1941); Enterprise Wheel & Car Corp. v. United Steelworkers, 269 F.2d 327 (4th Cir. 1959), rev'd on other grounds, 363 U.S. 593 (1960), infra note 22. See also Aeronautical Industrial Dist. Lodge 727 v. Campbell, 337 U.S. 521 (1949); Local Lodge No. 2040, International Association of Machinists v. Servel, Inc., 268 F.2d 692 (7th Cir. 1959); UAW v. Federal Pacific Electric Co., 36 LRRM 2357, 28 CCH Lab. Cas., ¶ 69,274 (D. Conn. 1955).

In the *UAW* case, supra, the Connecticut court held that a five-year collective bargaining contract containing seniority, retirement, and pension provisions did not create any right of action in contracting union and its members on account of employer's sudden closing of plant covered by contract and removal of operations to another state. Compare this with a leading New York case involving the removal of a factory shown to be solely for the purpose of discouraging, intimidating, and punishing its employees by removing their hopes of re-employment by the corporation. The public policy of the State of New York and of the Nation is opposed to the closing or removal of factories for the purpose of intimidating or punishing employees by depriving them of the hope of further employment. Abrams v. Allen, 297 N.Y. 52, 74 N.E.2d 305, 173 A.L.R. 671 (1947). Significantly, in *Glidden*, the employees were offered the opportunity to be re-employed at the new plant. Also there was a finding that the plant relocation was based on sound economic principles. Supra note 3, at 443.

[17] *Elder*, supra note 16.

added.)[18] The court concluded that the district court had properly dismissed the action. The seniority rights in *Elder* were terminated by the adoption of a new agreement, but a substitute agreement is but one of many ways by which a contract and the rights thereunder are terminated.

In *System Federation No. 59 v. Louisiana & A. Ry.*,[19] the employer defended a damage action by a laid-off employee on the basis that his seniority recall rights had terminated with the contract creating them. The employee had been laid off in 1929 and had seniority recall rights under the current collective bargaining contract. The employer in 1931 repudiated the contract and adopted seniority rules inconsistent with plaintiff's rights under the 1929 contract. (These employee seniority rights were, in 1937, written into a new contract.) The position of the employee was that "once an employee, always an employee, once a senior, always a senior."[20] In holding that the action had properly been dismissed on the grounds that the plaintiff's rights under the 1929 agreement terminated when the agreement terminated in 1931, the court stated that "the rights of the parties to work under the contract are fixed by the contract. They persist during, they end with, its term."[21] Hence, the seniority recall rights of the employee in this case were lost in 1931 when the contract was terminated by the employer's repudiation.

In each of the above cases, the court recognized and held that seniority recall rights are coterminous with the contracts creating such rights. This rule was most recently recognized by the Court of Appeals for the Fourth Circuit in *Enterprise Wheel & Car Corp. v. United Steelworkers*.[22] Onto this background the Second Circuit and Judge Madden projected the "Doctrine of the *Glidden* Case."[23] In holding that seniority rights are

18 Id. at 364.

19 *System-Federation*, supra note 16.

20 Id. at 514.

21 Id. at 520.

22 *Enterprise Wheel & Car Corp.*, supra note 16. In this case the Court of Appeals directed that the award of an arbitrator be abated to the extent that it provided for back wages after the termination of a collective bargaining contract. The court held further that the arbitrator's direction that the employees be re-employed was invalid in view of the expiration of the contract. In so holding, the court stated, p. 331:

> So it has generally been held that collective bargaining agreements do not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond its life, but that these rights remain in force only for the life of the contract unless renewed by subsequent contract or preserved by statute.

The Supreme Court, in reversing the modification of the arbitration award by the Court of Appeals, did not question the Court of Appeals' holding that *seniority terminates with the contract termination, unless otherwise provided*, but held that the Court of Appeals could not substitute its determination of whether the contract provided otherwise for that of the arbitrator.

The concern here is not with the determination of a factual question by an arbitrator, but rather with an interpretation of a contract by a district court. Accordingly, the rule of the 4th Circuit that *the scope, as well as the significance, of seniority must be determined from the collective bargaining contract creating the seniority*, is not affected by the reversal of the Supreme Court.

23 This case has received considerable attention in the New York press since the decision of the Court of Appeals had been handed down. See Arthur Krock, The New York Times, Vol. CX, No. 37,827, p. 20, col. 3 (August 18, 1961).

vested rights that extend beyond the terms of the collective bargaining agreement, the court rejected the principle that seniority rights are coterminous with the contracts creating them. A critical factor in the *Glidden* case was the existence of a contract provision calling for rehiring a laid-off employee according to seniority. This lay-off provision could extend from two to three years beyond the effective date of the contract, depending on the individual employee's length of service.[24] Judge Madden, in seizing upon this factor, and the absence of a contractual provision to the contrary, came to the conclusion that the seniority rights did not terminate with the contract creating them. Judge Madden specifically stated:

> If one has in October a right to demand performance of the corresponding obligation at any relevant time within a period of three years, it would be strange if the other contracting party could unilaterally terminate the right at the end of three weeks. *Of course the employee owning the right, or his authorized union agent, could bargain away the employee's right.* Nothing of that kind occurred in the instant case. (Emphasis added.)[25]

The Judge continued to say that while these rights arose solely out of the terms of the contract, they were vested rights and the fact that the contract was not renewed, and that other workmen in the future might not have the opportunity to earn similar rights, was irrelevant. These rights were "earned" and "vested" and *could not be unilaterally annulled.*[26]

In *Elder* the seniority provisions relied on were modified by mutual agreement between the union and the employer so as to deny the employee the rights asserted. The action not being unilateral, the result in that case is not in conflict with the *Glidden* decision. But the broad dictum of that case, that seniority terminates with the contract creating it, has been rejected by the *Glidden* court.[27]

Similarly the employer's unilateral repudiation of seniority rights in 1931 in *System-Federation* could not divest the employees of such rights, according to Judge Madden. But in 1937 when the new contract was bargained the seniority rights could be and were terminated.[28] Thus the *result* of the case is in line with the "doctrine" of the instant case. Accordingly, for these two reasons: (1) there being a provision for an extension beyond the contract period,[29] and (2) the absence of a modification of such

[24] (b) In instances of continuous layoff, seniority shall be terminated after:

(1) An employee with less than five years' continuous employment at the time his layoff began is on a continuous layoff of two years; or

(2) An employee with more than five years' continuous employment at the time his layoff began is on a continuous layoff of three years.

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

Supra note 1, at 103.

[25] Supra note 1, at 103.

[26] Id.

[27] See supra note 18 and accompanying text. Cf. with notes 25 and 26, supra, and their accompanying texts.

[28] Cf. note 21, supra, and accompanying text with notes 25 and 26, supra, and their accompanying text.

[29] Supra note 24.

seniority rights by a union-management agreement,[30] it can be concluded that *Glidden* would not change the results in the previously cited cases, but certainly does overrule their rationale.

Chief Judge Lumbard agreed with Judge Madden that seniority rights are contractual in origin; and if they are to persist beyond the term of the collective bargaining agreement, the agreement must so provide or be susceptible of such construction. Judge Lumbard read the contract as not providing for such a construction.[31] Judge Madden and the court read it otherwise.[32] Yet all agreed that such rights do vest to the extent that the employer can not unilaterally repudiate such rights.

It is significant to note that the first and only case to arise since *Glidden* has accepted its rule and interpreted that case quite broadly. In *Oddie v. Ross Gear and Tool Company*,[33] the District Court for the Eastern District of Michigan held that seniority was a vested right; it continues despite the termination of the contract and removal of the plant. This opinion was rendered in the face of a contract which specifically spelled out the "geographical boundaries" of the collective bargaining agreement.[34] The *Oddie* court cited *Glidden* as its only authority, quoting "the employee owning the right, or his authorized Union agent, could bargain away the employee's right[s]."[35] In *Oddie*, the issue was whether or not the preexisting contract could be annulled unilaterally by the mere moving of the defendant's plant to another state. Like *Glidden*, then, the issue resolved itself into the narrow question of contract interpretation. And, like *Glidden*, the court interpreted the contract to provide for a continuation of the seniority rights beyond the term of the contract creating them.

The *Glidden* controversy went to arbitration before this court action. Unfortunately, the New York Supreme Court ruled that the dispute was not covered by a narrowly drawn arbitration clause in the contract.[36] Possibly Judge Madden's opinion is a reflection of his disagreement with that holding. Today, because of rising labor costs and changing industrial environments, many companies are facing relocation decisions. An added consideration now before them is their contract status with their employees. To what extent will seniority rights arising out of contracts entered into prior to relocation bind them at their new location?

A possible solution for companies having such problems, is to seek arbitration.[37] The Supreme Court, as previously mentioned, has granted

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30 Supra note 25 and accompanying text.

31 Supra note 7.

32 Supra note 8.

33 48 L.R.R.M. 2587, 195 F. Supp. 826 (E. D. Mich. 1961).

34 Cf. note 7, supra. In *Glidden* the geographical description appears in the preamble to the contract, whereas in *Oddie*, this was a bargainable item that was included in the body of the contract. Nevertheless, the *Oddie* court felt, as did the *Glidden* court, that the contract "has no geographical limitations as to the benefits of the employees and their rights under the contract." 195 F. Supp. 826, 830 (1961).

35 Supra note 1, at 103.

36 Supra note 2.

37 It is interesting to note that since the decision by the *Glidden* court, three cases of plant removal allegedly violating employee's accrued rights have gone to arbitration. Two of those disputes resulted in an award of damages and an order for the return of

certiorari, but the review is limited solely to the question of whether the participation of a federal Court of Claims judge in the ruling by the Second Circuit invalidates that ruling.[38] If the Supreme Court should invalidate the proceeding, then a retrial is possible, and the court can reexplore the whole legal jungle created by *Glidden*, in which industry, its contracts with labor, and the courts are deeply entangled. But if the Supreme Court sustains Judge Madden's participation, the interpretation of the Second Circuit will stand[39]—that seniority rights to a job, provided for in a contract, and not limited to any specific time or place therein, exist anywhere the employer may be in business, unless waived by the employee or bargained away by his union.

DAVID H. KRAVETZ

**Negotiable Instruments—Rights of Employer's Fidelity Insurer Against Collecting Bank on Employee's Unauthorized Endorsement.—*Aetna Cas. & Sur. Co. v. Lindell Trust Co.***[1]—A salesman of the insured, with no authority to endorse checks payable to his employer, endorsed and cashed three checks at the defendant Trust Company which, in turn, collected the amounts of the checks from the drawee bank. Upon learning of the fraudulent transaction, the insured demanded of the Trust Company reimbursement of the total amount of the three checks. The demand was refused, whereupon the insured made a claim against the insurer, Aetna Casualty & Surety Company. The claim was satisfied and, in return, the insured assigned all its right, title, and interest in and to any claims it may have against the Trust Company to Aetna. Aetna brought suit against the Trust Company allegedly for money had and received. The trial court rendered judgment for the defendant, holding that it would be inconsistent to allow Aetna to recover after it had paid the insured on its fidelity bond. In further support of the judgment, the trial court found that Aetna's right to recover was based upon and limited by the equitable doctrine of subrogation. The Court of Appeals reversed. HELD: (1) Insured did not, by demanding and receiving payment from the insurer, make such election as to preclude the insurer from asserting its subrogation right against the

the "runaway" shop. Sidele Fashions, Inc., 36 L.A. 1364 (1961); Address—O—Mat, Inc., 36 L.A. 1074 (1961). But see U.S. Steel Corp., 36 L.A. 940 (1961).

38 The issue raised grows out of the contention that the United States Court of Appeals is a constitutional tribunal, and the United States Court of Claims is a legislative body. The Supreme Court has previously been asked to settle this point as to all the statutory federal courts involved, and the grant of review for this specific purpose means it is ready to do so. If it should decide with the Glidden lawyers that the act of Congress of 1953 attempted unconstitutionally to repudiate the classification (by the Supreme Court in Williams v. United States, 289 U.S. 553 1933), that the Court of Claims was a legislative and not a constitutional court, then the Second Circuit's ruling would be vitiated by Judge Madden's participation.

39 "Should the Supreme Court leave this situation standing, however, it can be corrected by Congress since the grounding of the appeals court decision appears to be in equity and the implications found in long service, not in the Constitution of the United States." Krock, op. cit. supra note 23, at 20.

1 348 S.W.2d 558 (Mo. App. 1961).