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SENIORITY AS A PROPERTY RIGHT

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This article was inspired by a recent Washington case decided October 16, 1952, in which employees of a power and light company were refused an award of money damages to vindicate their loss of seniority rights upon the company's sale and transfer of its business.[1]
(1952).

The decision of the Supreme Court of Washington on the question is believed to be the first of its kind. "The question presented is a new one so far as we have been informed. None of the authorities cited in the briefs consider any claimed seniority rights of an employee where the employer has gone out of business . . . "[2] This action was instituted by Salome E. Wagner and A. W. Wright individually and in behalf of other employees of the power and light company to recover damages for a breach of the collective bargaining contract between their labor union and the company. This breach came as a result of a transfer of the defendant company's property to the city of Seattle subsequent to the contract. The propriety of a suit by an individual upon such a collective bargaining agreement as a contract made expressly for the employee's benefit is well established by numerous decisions.

The quotation following is that portion of the court's opinion which is pertinent to the question under our consideration here.

> 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. The business of defendant having been sold and transferred, there no longer exists any seniority in employment, and the former right thereto is no longer such a tangible thing that the loss of it can be measured in terms of money.[3]

"Seniority" has been defined as, "The state of being older in years, or in office; priority of age, service or rank." [4] That it is a valuable right as bearing upon the security of an employee and upon his opportunity to advance can scarcely be doubted. An employee has no inherent right to seniority but obtains his right to it through contract.[5] Once such a right has been obtained by

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* Written while a student at the University of Denver College of Law.
[1] Wagner v. Puget Sound Power & Light Co., ... Wash. ....., 248 P. 2d 1084
[2] *Ibid.*, at 1085.
[3] *Id.*, at 1085.
[4] 79 C. J. S. 1041.
[5] Wooldridge v. Denver and Rio Grande Western Ry. Co., 118 Colo. 25, 191 P. 2d 882 (1948).

the employee, it is generally considered to be a property right in the sense that an employee may sue for the loss of it when an employer wrongfully fills a certain position which such employee is entitled to by virtue of such right with an employee who is junior in rank or service.

Collective bargaining agreements such as that involved in *Wagner v. Puget Sound* [6] commonly contain an "assignability clause" which provides that in the event of sale, transfer, merger or other change in the form or management of the business, the employee's seniority right will continue without interruption. Such a clause is binding upon the employer's successor; but, even in the absence of such a clause, the employees are often considered to be similar to "fixtures" in trade and equipment, and the new management takes over the employees with whatever their respective lengths of service are at that time.[7] There is no apparent reason why seniority rights may not be enforced in the courts by the application of remedies usually employed in the enforcement of other legal rights.[8]

Many cases recognize that there is a property right in seniority in and of itself. "Although a right of seniority such as is here asserted is undoubtedly a valuable property it arises only from agreement." [9]

The recent Colorado case of *Wooldrige v. Denver and Rio Grande Western* [10] goes even farther in that it describes the seniority right as a property right in which an employee has a vested interest. In this case a majority vote of standard-gauge railroad men in a union committee suddenly divested the narrow-gauge men of their seniority rights. The court mentions that such action savors of impairment of contract and the wiping out of vested interests and goes on to say:

> If the contention of the standard-gauge men is that they have a property right or vested interest, all the more strongly can it be urged that the narrow-gauge men have a vested property right under the 1936 contract which had been in effective operation for nine years.[11]

The court then goes on to affirm the trial court's judgment in favor of the narrow-gauge men's seniority rights.

It would seem peculiar to say that a person has a "vested property right" in a thing called "seniority", and in the same breath to say that such an interest evaporates into thin air upon the company's wrongfully disabling itself from performing the terms of the contract in which seniority provisions are such an

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[6] *Supra.*

[7] Mitchem, *Seniority Clauses in Collective Bargaining Agreements.* 21 ROCKY MT. L. REV. 180-181 (1949).

[8] Fine v. Pratt, Ct. of Civ. App. of Tex., 150 S. W. 2d 308 (1941).

[9] Donovan v. Travers, 285 Mass. 167, 188 N. E. 705 (1934), p. 708.

[10] *Supra,* n. 5.

[11] *Id.* at 38. *Accord,* Piercy v. Louisville & N. Ry. Co., 198 Ky. 477, 248 S. W. 1042 (1923).

integral element. The Puget Sound Power & Light Co., to use the language of the Washington court, "disabled itself" in this very way by voluntarily selling its property to the city of Seattle.[12]

If the employees suing in *Wagner v. Puget Sound*[13] had a vested property interest which was thus destroyed, have they no remedy for its loss? What would be the result if a corporation decided to defeat the seniority rights of its employees by an ostensible "reorganization" in which the employees were forced to lose all prior seniority rights upon the formation of the "new" corporation? The result upon the rights of the employees would be identical in such a situation with the result in the case of a voluntary sale of its property by a going concern, which not only cuts short the seniority rights of employees under an existing contract, but which abrogates them altogether.

Seniority rights are closely bound up with the right and opportunity to earn a living, which itself has been recognized as a property right or right of substance in the nature of a property right, having a pecuniary value:[14]

> This is not an action to recover damages for the breach of an employment contract measured by loss of wages that *would have been* earned had the employment continued. The amended complaint contains some allegations that would be found in one proceeding upon that theory, but it is not so framed that, by giving it a liberal construction to determine whether it states a cause of action on *any* theory, we can say that the demurrer should have been overruled.[15] (Italics supplied.)

This language would seem to indicate that the court considers the complaint as drawn up by the attorney for the plaintiffs in this case to be inartful and ill-framed. It is possible that there is a basic misapprehension, not only on the part of the Washington court, but in the minds of many attorneys and businessmen as well, as to the exact nature of seniority rights. "Seniority rights do not affect the wage but they do affect very materially the character of the employment. . . . "[16] The "choice-of-jobs" feature of seniority rights is directly related to an employee's opportunities for advancement and his ultimate happiness in his work, both of which are in entirely different categories from that of wages alone.

The material cited thus far would clearly seem to indicate that seniority is not a mere concept or intangible interest, but rather a valuable property right; as such it would seem to deserve protection by the courts. If the basis for denial of recovery in

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[12] Wagner v. Puget Sound Power & Light Co., ... Wash. ....., 248 P. 2d 1084 (1952).

[13] *Ibid.*

[14] DE FUNIAK, HANDBOOK OF MODERN EQUITY, 33 (1950).

[15] Wagner v. Puget Sound Power & Light Co., ... Wash. ....., 248 P. 2d 1084 (1952), at 1085.

[16] Mosshamer v. Wabash Ry. Co., 221 Mich. 407, 191 N. W. 210 (1922), 211.

Wagner v. Puget Sound[17] be that the complaint by the plaintiffs indicates damages whereas it should have stated another remedy, the question would arise as to what other theory the plaintiffs' claim for relief should be predicated upon.

An injunction would appear to be a possible approach for these plaintiffs although success would be somewhat doubtful on the basis of decisions dealing with the attempts to gain injunctive relief in other cases. One court has said that since equity will not decree the specific performance of contracts for personal services, it will not decree specific performance of the provisions of a collective bargaining agreement relating to seniority rights.[18] On the other hand it has been said concerning a collective bargaining contract involving seniority rights that the contract is *not* one for personal services since it does not bind the employer to hire any particular member because of its collective bargaining aspect.[19] The conflict expressed in the two statements seems too obvious to bear further discussion.

In *Beatty v. Chicago, B. & Q. Ry. Co.*[20] it is stated that, except where an employee's services are unique, no injunction to enforce the collective bargaining contract or the seniority rights thereunder is possible. The court continues by stating that the only remedy in such a case is damages. The court in *Harper v. Local Union No. 520*[21] mentions that some state courts hold that the remedy at law for breach of seniority provisions by an employer is adequate and that therefore no injunction should be permitted.

Upon examination of the adequacy of the remedy at law, namely damages, one finds a case like *Gary v. Central of Georgia Ry. Co.*[22] wherein it was held that damages to enginemen for loss of seniority rights were too remote and speculative to support an action for wrongful discharge; however, the court continued by saying that the remoteness resulted from the fact that the injury to the plaintiffs could not be attributed *solely* to the railway company's breach of contract.

In the case of *Capra v. Local Lodge,*[23] the court held that the

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[17] *Supra.*

[18] Beatty v. Chicago, B. & Q. Ry. Co., 49 Wyo. 22, 52 P. 2d 404 (1935).

[19] Harper v. Local Union No. 520, Ct. of Civ. App. of Tex., 48 S. W. 2d 1033 (1935).

[20] *Supra.*

[21] *Supra.*

[22] Gary v. Central of Georgia Ry. Co., 37 Ga. App. 733, 141 S. E. 819 (1928). *Accord,* Harper v. Local Union No. 520, *supra.*

[23] Capra v. Local Lodge No. 273 of the Brotherhood of Locomotive Firemen and Enginemen, 102 Colo. 63, 76 Pfl 2d 738 (1938).

The Gary case describes the amount of damages as "usually" being measured by the employee's actual loss in wages up to the time of trial with no recovery for loss of seniority rights even where the employee is wrongfully discharged by the employer because of the speculative nature of such damages and the difficulty of computing them. *But cf.* Wagner v. Puget Sound Power & Light Co., ... Wash. ....., 248 P. 2d 1084 (1952), at 1085, where it is said that: "In other cases the employee has been wrongfully discharged and has been allowed damages based upon the compensation paid to one of his rank."

plaintiff employee was not entitled to a mandatory injunction enforcing his claimed seniority rights because the contract between the union and the D. & R. G. W. Ry. Co. did not cover the new Moffat Tunnel line on which the plaintiff was currently employed.

There is a strong implication in this opinion, however, that if this branch line *were* covered by the contract that a mandatory injunction would be proper remedy for the plaintiff.

This Colorado case finds a supporting precedent in *Gleason v. Thomas*,[24] in which it was held that an injunction restraining enforcement of an order of the board of directors of the union abolishing seniority rights was proper, for those rights, secured through the efforts of the union, are such property rights as a court of equity will enforce and protect. The court continues by stating, in accord with *Harper v. Local Union No. 520*,[25] that its decree is proper and is not one for specific performance because the plaintiffs may work or not as they choose.

CONCLUSION

The result reached by the court in *Wagner v. Puget Sound* [26] is probably a proper one in view of the fact that the defendant company was no longer in a position to retain the employees; however, since it was through no fault of the employees that their seniority rights were lost, it would appear that the court should hesitate in letting the defendant company breach its existing contract with impunity simply because the mere difficulty of assessing damages is an additional escape to the admittedly arduous task of determining the exact nature of the plaintiffs' loss. "Where there is a right there is a remedy." If the Washington court had clearly stated that the plaintiffs had *no* remedy the decision would be clearer, but as the case stands there is a strong indication by the court that if the complaint were drawn differently the plaintiffs might recover under some theory. Assuming that the plaintiffs had a vested property right in this case, should their loss of it go uncompensated for the reasons which the Washington court gives?

This article is intended to demonstrate the present confusion and conflict which prevails with respect to the effect given to the seniority provisions in collective bargaining contracts. It is hoped that it will also indicate not only the need of a more uniform and comprehensible treatment of this question in the future, but also point out a possible approach from the property right theory. If the interest of the practicing attorney has been in any way stimulated with respect to the effect to be given these increasingly frequent seniority clauses by the court through this article, it has served its purpose.

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[24] Gleason v. Thomas, 117 W. Va. 550, 186 S. E. 304 (1936).
[25] *Supra.*
[26] Note 12, *supra.*