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VETERANS' REEMPLOYMENT RIGHTS UNDER SELECTIVE SERVICE INTERPRETATIONS

THE approaching period of large-scale demobilization of the armed forces directs increasing attention to the necessity of reabsorbing veterans into civilian occupations. A policy on the problem of the returning serviceman must serve two purposes: (1) it must prevent the employment rights of veterans from being impaired by their enforced absence, and (2) it must simultaneously avert a disruption of established employment arrangements with consequent dislocation of productive capacity. Prior to this century, a ready solution to both these phases was offered by the vast areas of government land available for statutory distribution [1] and by the more-or-less constant need of America's expanding economy for industrial workers. By the end of the first World War, however, the unlimited frontier had disappeared as a "safety valve for veteran discontent," [2] and the war-time overdevelopment of industry eliminated at least temporarily the continued

1. The Continental Congress rewarded indigent soldiers of the Revolution with tracts of land. See HICKS, THE FEDERAL UNION (1937) 180–2. In 1862, Congress cushioned the anticipated disruption of demobilization by extending the grant of western lands under the Homestead Act to veterans of the Union forces. REV. STAT. § 2290 (1875), 43 U. S. C. § 162 (1940); REV. STAT. § 2304 (1875), 43 U. S. C. § 271 (1940). See Andrews, *Re-employment and Postwar Planning* (1942) 220 ANNALS 186.

2. Maisel, *Warriors' Return* (1944) 159 NATION 590, 592.

availability of economic expansion as a limitless source of employment.[3] Reflecting a common belief that it was politically "impracticable to require reinstatement *in statu quo*," [4] Congress refused in 1918 to extend to private employment its mandate that all federal employees be reemployed at the salary grade they would have attained had they not entered military service.[5] The failure of efforts by the scattered public and private placement agencies which, thus ill-equipped, undertook to discover sufficient jobs [6] was dramatized by the numbers of chronically unemployed veterans of World War I.[7] Amply warned, therefore, of the possible results of legislative inaction, Congress in 1940 sought to assure the relatively few men being inducted under the Selective Training and Service Act (for what was then expected to be a single year of "precautionary" military training) that, in seeking reinstatement, they would be treated as though they had merely been on leave of absence.

Section 8 of that act [8] makes mandatory, with certain exceptions,[9] the

3. See STEWART, DEMOBILIZATION OF MANPOWER, 1918–19 (Bureau of Labor Statistics Bull. No. 784, 1944) *passim*.

4. See Comment, *Mobilization for Defense* (1940) 50 YALE L. J. 250, 262. In a message to Congress on December 2, 1918, President Wilson stated: "From no quarter have I seen any general scheme of 'reconstruction' emerge which I thought it likely we could force our spirited business men and our self-reliant laborers to accept with due pliancy and obedience." N. Y. Times, Dec. 3, 1918, p. 3, col. 2.

5. 40 STAT. 754 (1918), 39 U. S. C. § 818 (1940) (postal employees); 41 STAT. 142 (1919) (all federal civil service employees). A number of states enacted laws providing for reinstatement of veterans in public positions. LABOR LEGISLATION OF 1919 (Bureau of Labor Statistics Bull. No. 277 (1921) 26–8.

6. See generally HOWENSTINE, THE ECONOMICS OF DEMOBILIZATION (1944) cc. 9, 11, 14; Howenstine, *Demobilization after the First World War* (1943) 48 Q. J. ECON. 91–105; AFTER THE WAR: 1918–1920 (Nat. Resources Planning Bd., 1943); MOCK AND THURBER, REPORT ON DEMOBILIZATION (1944); Litchfield, *United States Employment Service and Demobilization* (1919) 81 ANNALS 19; Moulton, *Demobilization and Unemployment* in CLEVELAND AND SCHAFER, DEMOCRACY IN RECONSTRUCTION (1919) 293; *Provisions for Employment of Ex-Service Men* (1920) 10 MONTHLY LAB. REV. 462; Hines, *The Reemployment of Veterans* in SHAPING THE ECONOMIC FUTURE (1945) (21 Acad. Pol. Sci. Proceedings) 197, 198.

7. "The fact that a total of more than 200,000 World War veterans were finally enrolled in [CCC] camps, some twenty-three years after the end of the war, is proof of the need of a comprehensive reemployment program." Andrews, *supra* note 1, at 187.

8. 54 STAT. 890 (1940), 50 U. S. C. § 308 (1940) (hereinafter cited as Section 8). "The Congress which passed the Act was far more interested in mobilization than in questions which would arise when the war was finally won." Brown, *The Veteran's Stake in Organized Labor* (1944) 56 MACHINISTS' MONTHLY J. 377. Consequently, "it is on its face a law suffering from the inevitable weakness of an afterthought." *Re-employment of Veterans: Statutory and Administrative Sanctions* (1944) 4 LAWYERS GUILD REV. 40. The original Selective Service bill, introduced by Senator Burke of Nebraska as S. 4164 on June 20, 1940 and by Representative Wadsworth of New York as H. R. 10132 on June 21, 1940, contained no reemployment provisions. Provisions similar to Section 8 were incorporated in the Senate bill (S. 4164) and subsequently in the final version, H. R. 6215, but scant consideration was given to such provisions in committee. See *Hearings before Committee on Military Affairs*

reinstatement of honorably discharged veterans in their former positions or others "of like seniority, status, and pay" and protects them against discharge "without cause within one year after such restoration." [10] Disputes

on S. 4164, 76th Cong., 3d Sess. (1940); *Hearings before Committee on Military Affairs on H. R. 10132*, 76th Cong., 3d Sess. (1940).

9. See *infra*, pp. 436–41. The limited coverage of the statute is to be noted. Among those who have no legal reemployment rights are conscientious objectors and members of the Coast Guard Auxiliary and of unofficial service organizations such as the American Field Service and the American Red Cross. Furthermore, "as a practical matter, large segments of the Nation's working population will have no legal claim to jobs after discharge from military service," *Military Service and War-Job Clauses in Union Agreements* (1942) 55 MONTHLY LAB. REV. 1147, 1148. See also Couper, *The Reemployment Rights of Veterans* (1945) 238 ANNALS 112. Colonel Paul H. Griffith, director of the Veterans' Personnel Division, has asserted that ". . . we are making a mountain out of a molehill . . . we are not talking about ten or twelve million who are to be reinstated in permanent jobs that they left. *We are talking about only 19% or 20% of ten or twelve million men.* Of that 19% or 20% many thousands won't want their old jobs back." SENIORITY AND REEMPLOYMENT OF WAR VETERANS (National Industrial Conference Board Studies in Personnel Policy, No. 65, 1944) 7. See also Evans, *Preparing the Soldier for his Return to Industry* in VETERAN PLACEMENT AND REHABILITATION (Am. Management Ass'n, 1944) 3, 16; Slichter, *Fitting the Veteran into Industry* (1944) 17 STATE GOVERNMENT 462; Bolté, *The Veterans' Runaround* (1945) 190 HARPER'S 385, 389; Efron, *Old Jobs, or New Ones, for the Veterans*, N. Y. Times Magazine, March 18, 1945, p. 11 ("Most veterans will not want their old jobs back. . . ."). This disposition to simplify the reinstatement problem has been assailed by organized labor. See address by James B. Carey, Oct. 11, 1944, quoted in JOB RIGHTS FOR VETERANS (CIO, Supplement to ECONOMIC OUTLOOK, Oct. 1944) 1, 2.

10. "Section 8(b): In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate [indicating satisfactory completion of service under Section 3(b) of the Act], (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service . . . [for extension of application time to ninety days see note 97 *infra*]. "(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; . . ."

"Section 8(c): "Any person who is restored to a position . . . shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such persons was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

Section 8(b) (A) extends this protection to employees of the Federal Government. Section 8(b) (C), while declaring it to be the "sense" of Congress that state and local government employees should have reemployment rights, nevertheless exempts them from the Act's compulsory features. Similar reemployment rights were provided for retired personnel and reserve components of the Regular Army ordered into active service. 54 STAT. 859 (1940), 50 U. S. C. § 403 (1940).

The Service Extension Act of 1941 [55 STAT. 627 (1941), 50 U. S. C. § 357 (Supp. III,

arising under this section [11] have in general been adjudicated informally by local draft boards [12] in terms of policies outlined by National Selective Service Headquarters. Although that agency has no rule-making power under Section 8,[13] its statutory interpretations are important both because considerable reliance has been placed upon them by employers [14] and because courts may attach to them the weight of expert testimony.

1941–43)] extended by reference the benefits of Section 8 to all who entered active military or naval service after May 1, 1940, whether volunteers or inductees, and to federal employees whose positions were covered into the classified civil service during their absence in the armed forces. The Civilian Reemployment of Members of the Merchant Marine Act of 1943 [57 STAT. 162 (1943), 50 U. S. C. § 1472 (Supp. III, 1941–43)] climaxed a long controversy over proposals to cover members of the maritime service under provisions similar to Section 8. See Crucible Fuel Co., 15 WAR LAB. REP. 583 (1944). It should be noted that reemployment rights depend upon a showing of "substantially continuous service in the merchant marine" and that the problem of proof may be more complicated than in the case of a discharged member of the armed forces.

The Women's Army Corps receives similar reemployment rights by construction of 57 STAT. 371 (1943), 50 U. S. C. § 1552 (Supp. III, 1941–43).

11. An aggrieved veteran's only formal recourse under the statute is litigation. See note 35 *infra*. Under Section 8(e), he may apply to the United States district attorney in any district in which his former employer "maintains a place of business" to act as his attorney. The Section appears to place considerable discretion in that official in that he need not appear for the veteran unless he is "reasonably satisfied that the person so applying is entitled to such benefits." The federal district court trying such a suit "shall have power . . . to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such persons for any loss of wages or benefits suffered by reason of such employer's unlawful action . . . ."

12. There are voluntary, unpaid reemployment committeemen attached to the draft boards. See SELECTIVE SERVICE REGULATIONS, § 603.81 ("Reemployment Committeemen"); LOCAL BOARD MEMORANDUM No. 190 (March 1, 1944) pt. II, § 3; REEMPLOYMENT BULLETIN No. 1 (Sept. 29, 1943); 1 Prentice-Hall 1944 Labor Serv. 1014–D, ¶ 1022.

13. Section 8(g) instructs the Director of Selective Service to establish a "Personnel Division" with the dual function of assisting in the restoration to their former positions of those entitled to the benefits of Section 8 and of establishing contact with new positions for those who either are not covered or wish to change their employment. The name of this agency was changed by REEMPLOYMENT BULLETIN No. 1 to "Reemployment Division" and, again, by LOCAL BOARD MEMORANDUM No. 190 to "Veterans' Personnel Division." For an outline of the enforcement machinery see LOCAL BOARD MEMORANDUM No. 190, *supra* note 12, pts. II, III, V.

14. Concern over Selective Service constructions is attested by the growing number of advisory articles in trade and industrial journals. Among these are *Rights of Returning Vets Outlined for Job Reinstatement* (July 1944) 154 IRON AGE 149; Hadlick, *Discussing the Legal Obligation of Employers in Regard to Rights of Returning Servicemen* (Oct. 4, 1944) 36 NAT. PETROLEUM NEWS 48; *A. A. R. Committee Report* (1944) 117 RAILWAY AGE 552 (see also note 44 *infra*); *Veterans' Personnel Division to Aid Servicemen Regain Jobs* (July 31, 1944) 115 STEEL 42; Taylor, *From Uniforms to What?* (Nov. 1944) 43 AERO DIGEST 113; *Jobs for Veterans: Coal's Obligation and Opportunities* (Oct. 1944) 49 COAL AGE 80; *Reemployment of Ex-Servicemen and Women; Obligations of Employers* (1944) 13 INDUSTRIAL MEDICINE 56; *National Selective Service and Reemployment Policies* (July 1944) 36 AM. WATER WORKS ASS'N J. 794; *What is Cause? Selective Service Rules on Job Security*, Business Week, June 17, 1944, p. 106; Ashe, *What are Rights of the Veteran Returning to Prewar Position?* (Sept.

THE SPECIAL PRIVILEGES DOCTRINE

In rendering advice on the meaning of Section 8, Selective Service might have set as its aim the protection of returning veterans against prejudice by their military service; [15] for this purpose, the granting of accumulated seniority for the period of such service [16] would have been sufficient. Instead, it has sought as an appropriate reward for veterans a unique employment equity,[17] and its pronouncements both as to the veteran's reinstatement rights and his subsequent employment status reflect this policy.

The principle of special benefits has been embodied in the "absolute priority" formula,[18] which would replace seniority [19] as the yardstick for

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1944) 113 INLAND PRINTER 31; Fenton, *Re-employment of War Veterans* (1944) 26 PAPER INDUSTRY AND PAPER WORLD 498; Benge, *Re-employment of* Veterans, *id.* at 849.

15. There is some indication in the floor discussion of the reemployment provisions that Congress contemplated a restoration of the *status quo*. "SEN. DANAHER: 'Is it meant . . . that if a man goes out to serve his country . . . and comes back he assumes his prior status less one year's payment?' SEN. SHEPPARD: 'That is what this bill intends as I understand. That is what the members of the committee thought should be and could be done.' " 86 CONG. REC. 10107 (1940). See also statement of William L. Green, president, AFL, quoted in 86 CONG. REC. 10091–2 (1940). See also letter of August 21, 1941 addressed "to each soldier about to return to civil life," from Major General Lewis B. Hershey. In Hall v. Union Light, Heat & Power Co., 53 F. Supp. 817 (E. D. Ky. 1944), in which it upheld the constitutionality of Section 8, a federal district court interpreted the purpose of that Section as being "to minimize, in so far as possible, the sacrifices of those who were required to enter the military service by assuring them that their jobs, their pay and their status with their employers would be held inviolate . . ." *Id.* at 818. For evidence of Congressional doubts as to the feasibility and constitutionality of Section 8 see remarks of Senators Sheppard, Barkley and Norris, 86 CONG. REC. 10108–9 (1940).

16. For discussion of the seniority principle see note 19 *infra*. It is now settled that "seniority rights accumulate during the period of active military or naval service . . . in the same manner as [they] would have accumulated had the person remained continuously at work in his civilian occupation." LOCAL BOARD MEMORANDUM No. 190–A, pt. IV, § 1 (May 20, 1944) (hereinafter cited as MEMORANDUM 190–A). Until recently, however, there was some disagreement as to whether seniority rights accrued or were frozen as of the time of entering service. See Brecht, *Collective Bargaining and Re-employment of Veterans* (1943) 227 ANNALS 97; *Military Service and War-Job Clauses in Union Agreements* (1942) 55 MONTHLY LAB. REV. 1147, 1150. For an indication of the diversity of union military service clauses on the seniority-accumulation question see UNION AGREEMENT PROVISIONS (Bureau of Labor Statistics Bull. No. 580, 1942) *passim*. See also agreements summarized in (1940) 7 LAB. REL. REP. 184, 229; (1941) 8 *id.* at 625; (1941) 9 *id.* at 88; (1942) 10 *id.* at 80.

17. This underlying premise of the Selective Service interpretations has been vigorously emphasized by Colonel Griffith on several occasions. In a debate with Victor G. Reuther, Director of the War Policy Division, United Automobile Workers (CIO), before the National Industrial Conference Board on August 17, 1944, he said, in part: "I want to make it clear that I believe the man who served in uniform for $50 a month is due more consideration by his country than the man who stayed home in the plant for $150 a week, and time-and-a-half overtime." SENIORITY AND REEMPLOYMENT OF WAR VETERANS, *op. cit. supra* note 9, at 7. See also statement of Colonel John F. McDermott in which he referred to the "muddy foxhole" to support the thesis of preferential benefits. N. Y. Times, Oct. 10, 1944, p. 15, col. 6.

18. In recent popular discussions, this phrase has been used interchangeably with

determining the veteran's right to reemployment, and in two complementary interpretations which give him preferential status for one year.[20] Under the absolute priority construction, a veteran possesses an *absolute* claim to his former position or one of "like . . . status and pay" without reference to whether his reinstatement "necessitates the discharge of a non-veteran with a greater seniority." [21] Further, since a veteran reinstated on these terms would be vulnerable under seniority practice to lay-offs due to reduction in force, Selective Service has construed the statutory protection against discharges "without cause" for one year as an exception to the rule that length of service governs the order of lay-offs.[22] Finally, to forestall the neutraliza-

"super-seniority." See, *e.g.*, *What Price Glory this Time?* (Oct. 1944) 30 FORTUNE 117, 258; *Should Returning Soldiers Have Job Preference Over Senior Workers?* (1944) 10 TOWN MEETING BULLETIN, No. 25, pp. 3, 16; SENIORITY AND REEMPLOYMENT OF WAR VETERANS, *op. cit. supra* note 9, at 10.

"Super-seniority" is a useful abbreviation for the veteran's seniority status after reinstatement, since he has for one year a type of preference superior even to the top-seniority of union committeemen and shop-stewards in retention during lay-offs. But because seniority is irrelevant to the veteran's reemployment right, it appears inaccurate to use the word in this context, even with the prefix "super-."

19. Seniority is understood in industry as the principle whereby length of employment, rather than merit or ability, is the gauge of preference in such aspects of employment as promotions, lay-offs, rehires, transfers, division of available work and choice of job or shift. Reflecting the limitation of opportunity for advancement under the impersonal conditions of large corporate organization, the struggle for strict seniority rules has centered, in recent years, in mass production industries in which insecurity of tenure is promoted by seasonal lay-offs and new technologies, and in which routinized, semi-skilled operations neutralize differences in ability. For an extensive discussion of the seniority principle in the railroad industry see Comment, *Seniority Rights in Labor Relations* (1937) 47 YALE L. J. 73. For studies of seniority in other industries see Silver and Kassalow, *Seniority in the Automobile Industry* (1944) 59 MONTHLY LAB. REV. 463; Marquardt and McDowell, *Seniority in the Akron Rubber Industry*, *id.* at 792. A list of earlier studies will be found in Comment (1937) 47 YALE L. J., *supra*, at 73, n. 1. More general analyses are in SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT (1941) 98–163; FELDMAN, STABILIZING JOBS AND WAGES (1940) 196–226 (excellent inquiry into changing content of seniority concept); SENIORITY PRINCIPLES AND PROCEDURES AS DEVELOPED THROUGH COLLECTIVE BARGAINING (Princeton University, Industrial Relations Section, Research Report No. 63, 1941); HARBISON, SENIORITY PROBLEMS DURING DEMOBILIZATION AND RECONVERSION (Princeton University, Industrial Relations Section, Research Report No. 70, 1944); Herrick, *Application of Seniority Provisions* in THE COLLECTIVE BARGAINING AGREEMENT IN ACTION (Am. Management Ass'n, Personnel Ser. No. 82, 1944) 17.

20. All three interpretations were embodied in MEMORANDUM 190–A. As explained by Colonel Griffith, this document "consisted of excerpts taken from the answers to questions which we had received. . . . We published the memorandum so that everyone could be aware of just what his responsibilities are and what rights and privileges the veteran is entitled to when he returns." SENIORITY AND REEMPLOYMENT OF WAR VETERANS, *op. cit. supra* note 9, at 2.

21. MEMORANDUM 190–A, pt. IV, § 1(c).

22. See section 8(c), *supra* note 9. MEMORANDUM 190–A, pt. IV, § 4(b): "A veteran who has been reinstated to his former position cannot within one year be displaced by another on the ground that the latter has greater seniority rights. To permit such displacement would be to nullify the original reinstatement and thus deprive the veteran of his re-

tion of these advantages by union action, it has been announced that since "the veteran cannot be deprived of his reemployment rights by reason of [collective bargaining] agreements . . . setting up conditions of employment different from those which existed at the time [he] left," [23] he will not be bound by a closed- or union-shop contract signed in his absence or by the inclusion of a maintenance-of-membership clause in an existing contract.[24]

The preferential treatment doctrine is a natural reflection of the spontaneous public sentiment that every possible aid should be given to returning servicemen. It is not at all clear, however, that the policy is compatible with the reemployment statute which Selective Service purports to interpret or with other federal laws, or that it can be consistently enforced without arousing overwhelming opposition by large segments of labor and management.

Legal Considerations. The special benefits policy dictates not only the rehiring of a veteran whose seniority credits do not entitle him to restoration but also his placement in a position *more* advantageous than that to which he would have been entitled had he not been inducted. Yet all that Section 8 provides is that he be "restored to a position of like seniority, status, and pay." [25] This language does not connote all that the preferential status principle implies.[26] It requires no more than the accrual of seniority during the period of military duty as if the serviceman were on leave of absence.[27] But a veteran reemployed, for example, in a plant whose activities have

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employment rights under the Act, and would be, in effect, a repeal of an Act of Congress." See also Selective Service statement quoted in Drought, *Operating Problems in Re-employing Servicemen* (1944) 9 ADVANCED MANAGEMENT 90, 92. The most picturesque expression of this view is that by the executive officer of the Veteran's Personnel Division: "When cutbacks come, you just 'cut [the veteran] out' of the cutback." Golder, *Reemployment of Veterans* (July 1944) 6 MANAGEMENT RECORD (National Industrial Conference Board) 179, 181. See also *Super-seniority for Reinstated Vets* (1944) 14 LAB. REL. REP. 314. See *Reemployment Rights of Veterans* (1944) 7 NAM LAW DIGEST 17, 24 (affirming the Selective Service construction of Section 8).

23. MEMORANDUM 190–A, pt. IV, § 1(e).

24. The ground is that private contracts may not abrogate the laws of the United States. SELECTIVE SERVICE SYSTEM: ANNUAL REPORT FOR 1941–42, 305–6; *What Price Glory This Time?*," *supra* note 18, at 260. See also Golder, *supra* note 22, at 180. ("If [Congress] intended to limit [the right to reemployment] with a statement that the right could not be exercised unless it was done in conformity with union rules and regulations . . . , [it] could have so stated.")

25. Section 8(b) (B), *supra* note 10.

26. See circular letter from C. A. Miller, general counsel, American Short Line R. R. Ass'n. of Oct. 6, 1944, entitled "Reemployment Rights of Veterans Under Selective Training and Service Act of 1940": "It was not intended [by Congress] that [the veteran's] rights should be enlarged by reason of his military service." *Id.* at 2; *cf.* Couper, *supra* note 9, at 117; *Reemployment of Veterans: Statutory and Administrative Sanctions*, *supra* note 8, at 42; advisory opinion by H. A. Gray, arbitrator in Timken Roller Bearing Co.—United Steel Workers of America dispute, discussed in *Test of Veterans' Right to Jobs Despite Civilian Seniority is Due*, N. Y. Herald Tribune, April 1, 1945, § 2, p. 1, col. 2 and p. 2, col. 5.

27. See Section 8(c), *supra* note 10.

been so curtailed that all others of equivalent length-of-service standing have been laid off is not merely "restored" to his former status; he is given a superior standing.[28]

The statute exempts employers from the duty to rehire when their "circumstances have so changed as to make it impossible or unreasonable to do so." [29] Yet the absolute priority principle attenuates this clause's function as an escape more than Congress may be supposed to have intended.[30] Thus, it has been limited by Selective Service to mean that the employer's only escape is a showing that he maintains on his payroll no non-veteran hired after the veteran's departure in a position for which the latter is qualified.[31]

28. Compare the practice of the NLRB which, although it has a statutory mandate to punish unfair labor practices, does not interpret the reinstatement of discriminatorily discharged employees as a physical restoration in all circumstances. Thus, according to its standard reinstatement order, workers hired after the start of the strike are to be dismissed if necessary to provide employment for the reinstated employees; but ". . . upon reinstatement the striking employees [are] to be treated in all matters involving seniority and continuity of employment as though they had not been absent from work." Republic Steel Corp. v. NLRB, 114 F. (2d) 820, 821 (C. C. A. 3d, 1940), *construing* 107 F. (2d) 472 (C. C. A. 3d, 1939) (holding that the Board may not require reinstatement of a striker who has not been replaced by another employee). In considering the validity of reinstatement orders, the courts have frequently taken into account their economic impact. Thus an order of the Labor Relations Board directing reinstatement of all discriminatorily discharged employees with compensation for the period of unemployment "without regard to whether they would have been employed for that period had there been no discrimination" is invalid. NLRB v. American Creosoting Co., 139 F. (2d) 193 (C. C. A. 6th, 1943); *cert. denied*, 321 U. S. 797 (1943); NLRB v. Lightner Publishing Co., 128 F. (2d) 237 (C. C. A. 7th, 1942) (the employee need not be reinstated when his former job has been eliminated because of business losses); NLRB v. Somerset Shoe Co., 111 F. (2d) 681 (C. C. A. 1st, 1940) ("The order . . . does not require respondent to give present employment to more men than it needs. . . ." *Id.* at 689.); NLRB v. Nelson Mfg. Co., 120 F. (2d) 444 (C. C. A. 8th, 1941) ("The plain meaning of the order is that the . . . men are to be restored to their former positions and given work, when other like employees are given work." *Id.* at 446.) *Cf.* Union Drawn Steel Co. v. NLRB, 109 F. (2d) 587, 592 (C. C. A. 3d, 1940); NLRB v. Bell Oil & Gas Co., 98 F. (2d) 405 (C. C. A. 5th, 1938).

29. Section 8(c), *supra* note 10.

30. Thus one early observer predicted that "reinstatement would hardly be obligatory in the case of a necessary reduction in force." Comment, *Mobilization for Defense* (1940) 54 HARV. L. REV. 278, 290. There is some indication that the sponsors of the Senate bill contemplated such a limitation. "SEN. BARKLEY: '. . . It seems to me we could not require a company to restore the employment of men who, if there had been no military service, might have been discharged during the year because of a necessary reduction of the company's force. . . .' " 86 CONG. REC. 10108 (1940). The analogous British statute provides that "it shall not be treated . . . as reasonable or practicable for the former employer to take the applicant into his employment . . . if it can only be done by discharging some other person who . . . had been . . . employed . . . for a longer period than the applicant." Reinstatement in Civil Employment Act, 1944, 7 & 8 GEO. VI, c. 15, § 5. The Canadian Reemployment Act makes "the right to reinstatement . . . subject to established rules of seniority in the employer's establishment . . ." Reinstatement in Civil Employment Act, 1942, 6 GEO. VI, c. 31, § 3.

31. See statement of Colonel Griffith to Veterans of Foreign Wars, quoted in (1944) 15 LAB. REL. REP. 26.

Even if it be assumed that the reemployment right is unqualified, the further inference that there is a virtual one-year immunity against lay-off,[32] although a necessary buttress to absolute priority, is more than the statutory exemption from discharges "without cause" requires. Such a construction ignores a distinction clearly understood and carefully guarded in industry, and presumably recognized by Congress, between "discharge," an extreme form of discipline,[33] and "lay-offs," which are recognized as normal incidents of business recession during which seniority rights often are retained or accrue.[34]

Since the cases thus far brought for reinstatement and back pay under Section 8 have disclosed a benevolent judicial attitude towards veterans,[35]

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32. See MEMORANDUM 190–A, *loc. cit. supra* note 22. *Caveat*, there as yet appears to be no intention to place employers in the anomalous position of having to retain in all circumstances veterans whom, at least in some circumstances, they would not have been obligated to reemploy. Thus, closing of plant, elimination of the veteran's position and all similar positions held by non-veterans, and change of product so as to require different skills are all circumstances which would seem to exempt the employer from the duty to retain the veteran for one year. See note 84 *infra*.

33. Collective bargaining contracts commonly enumerate permissible reasons for discharge. Sample provisions will be found in UNION AGREEMENT PROVISIONS (Bureau of Labor Statistics Bull. No. 580, 1942) 138–44. Apparently on the theory that special grievance procedures governing the discharge of all employees would be adequate to protect reinstated veterans, few of the contracts surveyed in the last-mentioned study embodied the one-year protection of Section 8 against discharge without cause. See also *The Reinstatement of Draftees* (1942) 11 LAB. REL. REP. 133.

Under union agreements, "cause" for discharge is always an act or personal characteristic of the employee which renders him unfit for his job or constitutes a breach of employment rules. For a list of such "causes," generally, see *Reemployment Rights of Veterans* (1944) 7 NAM LAW DIGEST 17, 26; Dash, *Bargaining Through the Grievance Procedure* in THE COLLECTIVE BARGAINING AGREEMENT IN ACTION (Am. Management Ass'n, Personnel Ser. No. 82, 1944) 3, 5.

34. "Workers object to the policy of regarding a lay-off as a final termination of the employment relationship." UNION AGREEMENT PROVISIONS, *op. cit. supra* note 33, at 125. Hence, many union agreements provide for the accumulation of seniority in short lay-off periods, but generally a lay-off for more than twelve months leads to loss of seniority rights. *Id.* at 121. Nevertheless, even in such a situation the term "dismissal," rather than "discharge," is used.

35. In one case, a federal district court held that a reinstated veteran was entitled to back pay for the period in which his former employer had refused to reemploy him after application, even though he had been reinstated before filing of the suit and in spite of the fact that Section 8(e) makes the right to back pay an incident of the suit for reinstatement. Hall v. Union Light, Heat & Power Co., 53 F. Supp. 817 (E. D. Ky. 1944), cited *supra* note 15. In another case, involving suit for reinstatement by a company doctor whose place had been filled in his absence, the court ordered his reinstatement, holding that "handicapped as [returning veterans] are bound to be by prolonged absence, such competition [with employees who have replaced them] is not part of a fair and just system. . . ." Kay v. General Cable Corp., 144 F. (2d) 653, 656 (C. C. A. 3d, 1944). See *infra*, p. 438. But the reemployment provisions will not protect a member of the armed forces against the invocation of a termination clause in an employment contract by the employer. Wright v. Weaver Bros., Inc., 56 F. Supp. 595 (D. C. Md. 1944) (action for declaratory judgment under the

it is conceivable that the special privileges gloss on the statute will be ratified by the courts as an amendment to other federal laws governing employment relations.[36] But the alternative possibility that this doctrine may be defeated by its conflict with such laws is strengthened by three considerations: the fact that no case involving a direct clash between absolute priority and seniority has yet come to trial, the likelihood that current judicial rationalizations of privileged status will be soberly reconsidered as the reemployment problem grows more complicated,[37] and the apparently tenuous legal status of Selective Service interpretations.[38] Whatever the ultimate fate of

Army Reserve and Retired Personnel Law of 1940, 54 STAT. 858 (1940), 50 U. S. C. § 403 (1940), which granted to reserve officers reinstatement rights similar to those under Section 8). The court said, in part: "The right of reemployment . . . by virtue of the statute, is . . . in derogation of the common law, and therefore must be strictly construed and not extended by implication or by liberal interpretation." *Id.* at 600.

36. If Section 8 is considered in essence as a legislative grant of compensation to veterans, the cost of which must be distributed among the rest of the community, it may be argued that compliance should exempt employers from liability under labor laws or conflicting provisions of union agreements. From this point of view, the reemployment provisions are analogous to workmen's compensation laws. The judicial practice of giving an extended and liberal interpretation to such statutes is almost universal. W. J. Newman Co. v. Industrial Commission, 353 Ill. 190, 187 N. E. 137 (1933); Jensen v. So. Pacific Co., 215 N. Y. 514, 109 N. E. 600 (1915); Burke v. Industrial Commission, 368 Ill. 554, 15 N. E. (2d) 305 (1935); So. Pacific Co. v. Sheppard, 112 F. (2d) 147 (C. C. A. 5th, 1940) (construing Federal Longshoremen's and Harbor Workers' Compensation Act). But *cf.* Smith v. Wilson Foundry & Machinery Co., 296 N. W. 654 (1941). See also 3 SUTHERLAND, STATUTORY CONSTRUCTION (3d ed. 1943) § 7206 and cases cited in § 6604, n. 7.

37. See *infra*, p. 439.

38. See *supra*, p. 420. Selective Service concedes that "interpretation of the meaning and significance of [the reemployment] provisions is, in the last analysis, a matter for determination by the courts." MEMORANDUM 190-A, § 1. Informal interpretations, such as those in Memorandum 190-A, on the part of administrative agencies ordinarily carry little weight in the courts. Helvering v. New York Trust Co., 292 U. S. 455 (1934). Similar considerations hold when the agency issuing interpretations has no implied or express statutory authority so to do. United States v. Stewart, 311 U. S. 60 (1940).

Yet the NAM's Law Department has advised its members that Selective Service interpretations "although not binding on the courts, will unquestionably be given great weight by them." *Reemployment Rights of Veterans*, *supra* note 33, at 21. In support, the Law Department cites ICC v. American Trucking Associations, Inc., 310 U. S. 534 (1940), which involved interpretations of the MOTOR CARRIER ACT [49 STAT. 543 (1935) 49 U. S. C. § 301 (1940)] issued by the I.C.C. and in which the Court stated that "such interpretations are entitled to great weight" (*id.* at 549), and Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294 (1933) where it was held that "the practice [of an administrative agency] has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Id.* at 315. But *quaere* whether the issuance of an interpretation of Section 8 three and one-half years after its enactment constitutes "a contemporaneous construction," *especially* since management and labor had in the interim worked out a *different* interpretation (reinstatement on an accrued seniority basis) and embodied it in contracts? May not the inaction of Selective Service in that period be considered an abdication to management and the unions of the duty to interpret Section 8? Such failure of administrative agencies to assert authority has

the Selective Service policy,[39] it seems likely that an employer in a union shop who lays off or downgrades a union member in order to rehire a veteran would be exposed to the charge of attacking the union, under cover of the reemployment statute, in violation of the Wagner Act.[40] Even if the employer could vindicate the reinstatement of a non-union veteran with inferior

been held to be "significant in determining whether such power was actually conferred." Federal Trade Commission v. Bunte Bros., 312 U. S. 349, 352 (1941). See also Hennessy v. Personal Finance Corp., 176 Misc. 201, 26 N. Y. S. (2d) 1012 (1941). Moreover, the fact that absolute priority cannot be uniformly applied (as when the absolute priorities of two veterans to a given job conflict, see note 65 *infra*, may diminish its force as statutory interpretation. Lack of uniformity in such interpretations has been held to be sufficient ground for rejecting them as statutory guideposts. Burnet v. Chicago Portrait Co., 285 U. S. 1 (1932); McCann v. Retirement Board, 331 Ill. 193, 162 N. E. 859 (1928). See 2 SUTHERLAND, STATUTORY CONSTRUCTION (3d ed. 1943) §§ 5103-5108 and cases therein cited.

For discussions of the problem of the weight to be accorded administrative interpretations see generally Lee, *Legislative and Interpretive Regulations* (1940) 29 GEO. L. J. 1; Feller, *Addendum to the Regulations Problem* (1941) 54 HARV. L. REV. 1311; Griswold, *A Summary of the Regulations Problem*, *id.* at 398.

39. As to the possibility of judicial relief for an aggrieved senior employee, there are some square holdings in state courts that seniority rights are "property" the contravention of which entitles their holder to injunctive relief. Evans v. Louisville & N. R. R., 191 Ga. 395, 12 S. E. (2d) 611 (1940); Bradford v. Kurn & Lonsdale, 235 Mo. App. 1282, 146 S. W. (2d) 644 (1940) (failure of trustees in bankruptcy to recall a laid-off employee in accordance with contractual seniority rights gives employee a cause of action); Ledford v. Chicago, M., St. P. & Pac. R. R., 298 Ill. App. 298, 18 N. E. (2d) 568 (1939); Gleason v. Thomas, 117 W. Va. 550, 186 S. E. 304 (1936); Grand International Brotherhood v. Mills, 43 Ariz. 379, 31 P. (2d) 971 (1934). But the traditional reluctance of equity specifically to enforce contracts for personal service may be a bar to injunction. Shaup v. Grand International Brotherhood, 223 Ala. 202, 135 So. 327 (1931); Gore v. Pennsylvania R. R., 144 Misc. 639, 259 N. Y. Supp. 410 (Sup. Ct. 1932). Furthermore, seniority rights are alienable. Yazoo & M. V. R. R. v. Mitchell, 173 Miss. 594, 161 So. 860 (1935).

In the federal courts, seniority has been called "property," but only to protect the right to a hearing under the due process clause of the Fifth Amendment. Estes v. Union Terminal Co., 89 F. (2d) 768 (C. C. A. 5th, 1937); Nord v. Griffin, 86 F. (2d) 481 (C. C. A. 7th, 1936), *cert. denied*, 300 U. S. 673 (1937); Griffin v. Chicago Union Station, 13 F. Supp. 722 (N. D. Ill. 1936). For a similar limitation in a state court, see Watson v. Missouri-K.-T. R. R., 173 S. W. (2d) 357 (Tex. Civ. App. 1943). Thus a recent opinion by counsel for the Railway Brotherhoods [MEMORANDUM RE INTERPRETATION OF SECTION 8 OF THE SELECTIVE SERVICE ACT, WHICH CONCERNS REEMPLOYMENT RIGHTS OF VETERANS, 1944] stating that absolute priority "contemplates a taking of vested property rights . . . without compensation" and "that such a taking would be lacking in due process" [*id.* at 7] is supported only in its procedural aspects by federal court decisions. A similar inclination to read unwarranted implications into the seniority cases was displayed by Philip Murray in a speech in which he interpreted the *Griffin* case as declaring seniority to be "property." Cited *infra* note 53. See also *Seniority or Super-seniority for Veterans* (1944) 15 LAB. REL. REP. 25.

40. It is perhaps significant that an early Senate draft of the Selective Service Act made refusal of an employer to reinstate a returning veteran "an unfair labor practice within the meaning of and for all purposes of the National Labor Relations Act" and provided for recourse to the federal courts only where there was no remedy under the latter statute. SEN. REP. No. 2002, 76th Cong., 3d Sess. (1940). See remarks of Senator Danaher of Connecticut in 86 CONG. REC. 10107 (1940). It may be argued that the deletion of these provisions indicates a Congressional intent that the NLRB should not interfere with rein-

seniority standing on the ground of good-faith reliance on administrative interpretations,[41] he would still have to prove that such rehiring necessitated the elimination of a union member. Since the NLRB will probably be alert to scotch evasions of the Wagner Act under the guise of compliance with Section 8, it might be very difficult for such an employer to satisfy the Board that he had not discriminated against a dismissed employee *as* a union

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statement of veterans. See Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294 (1933); United States v. Great Northern Ry., 287 U. S. 144 (1932). But it appears from remarks of Senator Gurney, who presented the amendment to delete the NLRA section, that it was intended only to bring the Act into harmony with the National Guard Act of 1940 [54 STAT. 859 (1940), 50 U. S. C. § 403 (1940)]. 86 CONG. REC. 16659 (1940).

Section 8 (3) of the Wagner Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." 49 STAT. 452 (1935), 29 U. S. C. § 158 (1940). From the outset, the NLRB has treated disregard of seniority rules as a major element of proof of a discriminatory purpose in dismissals, Segall-Maigen, Inc., 1 N.L.R.B. 749 (1936); Brown Shoe Co., 1 NLRB 803 (1936); Maryland Distilling Co., Luchenbach Steamship Co., 8 N.L.R.B. 1280 (1938); Hamilton-Brown Shoe Co., 9 N.L.R.B. 1073 (1938); and also in reinstatements, Washington Mfg. Co., 4 N.L.R.B. 970 (1938); American Rolling Mill Co., 43 N.L.R.B. 1020 (1942). In NLRB v. Gallup American Coal Co., the Tenth Circuit Court of Appeals upheld a finding of discrimination where layoffs contravened seniority rules. 131 F. (2d) 665 (C. C. A. 10th, 1942), *enforcing* 32 N.L.R.B. 823 (1941); *accord*, Triplex Screw Co. v. N.L.R.B. 117 F. (2d) 858 (C. C. A. 6th, 1941) *aff. and mod.* 25 N.L.R.B. 1126 (1940). The Board has imposed a length-of-service standard in reinstatements. Timken Silent Automatic Co., 1 N.L.R.B. 335 (1936). Suppose the NLRB should issue a cease-and-desist order against the reemployment of a non-union veteran in violation of a closed-shop agreement. *Quaere* whether the U. S. Supreme Court's dictum in Pittsburgh Plate Glass Co. v. NLRB [313 U. S. 146, 155 (1941)] that "after such an order the employer may not be compelled by any other agency of the government to perform any acts inconsistent with that order" would deter Selective Service. See National Licorice Co. v. NLRB, 309 U. S. 350, 365 (1940). Again, if a veteran should be upheld by a federal district court in his claim to reinstatement after bringing suit under Section 8(e), would the NLRB be estopped from taking jurisdiction? See Mason Manufacturing Co., 15 N.L.R.B. 295 (1939) (". . . the respondent may not avoid its obligations under the terms of the National Labor Relations Act and nullify the rights of employees guaranteed by Congress through reliance on a decree or findings made in a private suit to which the Board was not a party." *Id.* at 315.) The Wagner Act provides that the "power [to prevent unfair labor practices] shall be exclusive . . ." § 10(e), (f).

41. The principle of non-liability for compliance in good faith with an administrative interpretation has a little support in the cases. See La Bourgogne, 210 U. S. 95 (1908). But *cf.* Long v. Thompson, 177 Wash. 296, 31 P. (2d) 908 (1934); State v. Foster, 22 R. I. 163, 46 Atl. 833 (1900); Hamilton v. People, 57 Barb. 625 (N. Y. 1870). It has been defended in a discussion of the Securities and Exchange Commission's informal advisory interpretations to which it is urged that great weight be attached on the grounds that (1) they are "made by experts in the field of finance" and (2) "it would be unreasonable, in view of the complexity of the Securities Act, for a court to impose upon an individual the burden of outguessing a commission of experts as to what its provisions mean." Comment (1936) 45 YALE L. J. 1076, 1079. See also Comment (1940) 49 YALE L. J. 1250, 1276; *Certainty in the Construction of the Law* (1935) 21 A. B. A. J. 19. But *quaere* whether Section 8 is so complex or Selective Service sufficiently expert in employment problems to justify the application of these arguments to that agency's interpretations.

member. Again, the reinstatement of a veteran at the expense of a senior worker would be, in the many industries in which internal grievance machinery and mixed tribunals are provided by contract [42] or statute,[43] a signal for the filing of a complaint; in the railroad industry, for example, in which the seniority principle has been almost uniformly sustained by the National Railroad Adjustment Board,[44] such action would almost certainly expose the operators to liability to injured employees. Moreover, in implementing absolute priority with the exemption from union membership, Selective Service appears to have violated the settled NLRB rule that failure to join an appropriate bargaining agency in a closed or union shop is cause for discharge under the Wagner Act [45] as well as the WLB policy against permitting exceptions to union-security provisions in favor of returning veterans.[46] Finally, since decisions of the WLB are not subject to judicial review, it is probable that not even a judicial validation of the special privileges doctrine would exonerate an employer from punitive action by that agency for contravention of seniority or union-security clauses in contracts.[47]

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42. See generally Note (1942) 51 YALE L. J. 496. See also Pacific Tel. & Tel. Co., 11 WAR LAB. REP. 250 (1943) ("In accordance with . . . sound industrial relations practice, disputes concerning . . . military furloughs should be subject to established grievance procedure . . . despite company's claim that . . . Selective Service Act makes adequate provision for [their] disposition in court. . . ." *Ibid.*) Extensive abstracts of seniority clauses may be found in UNION AGREEMENT PROVISIONS, *op. cit. supra* note 33, at 117–124; COLLECTIVE BARGAINING DEVELOPMENTS AND REPRESENTATIVE UNION AGREEMENTS (National Industrial Conference Board Studies in Personnel Policy, No. 60, 1944) 7–81. An outline of grievance adjustment and arbitration arrangements is contained in UNION AGREEMENT PROVISIONS, *supra*, at 145–61.

43. See, *e.g.*, THE RAILWAY LABOR ACT, 48 STAT. 1189 (1934), 45 U. S. C. § 153 (1940).

44. As to the possibility of liability to senior employees in the railroad industry, see warning by C. A. Miller, *supra* note 26, at 3; REPORT ON REEMPLOYMENT OF EX-SERVICEMEN AND WOMEN (A. A. R. Comm. for Study of Transportation, June 1944) 4; Couper, *The Re-employment Rights of Veterans* (1945) 238 ANNALS 112, 118; Robertson, *Rail Men Will Not Yield Seniority* (1944) 117 RAILWAY AGE 591.

45. Under a proviso to Section 8(3) of the National Labor Relations Act, an employer may require membership in a union as a condition of employment "if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made." 49 STAT. 452 (1935), 29 U. S. C. § 158 (1940). Refusal to join such a union is cause for discharge. Rosedale Knitting Co., 20 N. L. R. B. 326 (1940). Correlatively, a discharge under a closed-shop contract because of employee's failure to join a union which was an appropriate bargaining agency does not violate the Wagner Act. Virginia Electric & Power Co. v. N. L. R. B., 115 F. (2d) 414 (C. C. A. 4th, 1940).

46. See Ohio Falls Dye and Finishing Works, 16 WAR LAB. REP. 131 (1944), summarized in (1944) 14 LAB. REL. REP. 424.

47. The War Labor Board was established by Executive Order No. 9017 issued on Jan. 12, 1942, under the First War Powers Act. 55 STAT. 838 (1941), 50 U. S. C. § 601 (Supp., 1941). Hence its orders are in theory declarations of the President, who cannot be sued if he acted within his powers. See Marbury v. Madison, 1 Cranch 137 (U. S. 1803). Should the WLB be abolished or assume a different form after the war, this possibility would, of course, be eliminated.

It appears, then, not only that preferential reemployment benefits are not required by the terms of Section 8 but also that they contradict other labor laws and may subject employers to conflicting legal duties. It remains to be seen whether they are supported by practical considerations.

Policy Considerations. Although the doctrine of special benefits will not undergo a thorough pragmatic test until the period of mass rehiring to follow demobilization, a tentative analysis in terms of its probable impact on labor, returning veterans, and industry reveals serious practical defects.

From the point of view of organized labor, the absolute priority formula in rehiring, the virtual immunity to lay-offs, and the one-year exemption from union membership pose a threefold threat to union security. Seniority rights are inseparably identified with collective bargaining, and a recurring recruiting theme in recent years has been that job security depends upon these rights.[48] Hence, the apparent protection of veterans against seniority rules in reinstatement and lay-offs, along with the general implication that their job tenure is guaranteed outside the union fold,[49] may bring back into

48. The dependence of seniority on contract in the railroad industry is emphasized by a federal circuit court decision that the Railroad Adjustment Board may not give retroactive effect to a seniority clause in the contract. Dahlberg v. Pittsburgh & Lake Erie R. R., 138 F. (2d) 121 (C. C. A. 3d, 1943).

For *a caveat* against a too ready identification of seniority with security see FELDMAN, STABILIZING JOBS AND WAGES (1940) 224; Cottrell, *The Seniority Curse* (Nov. 1939) PERSONNEL JOURNAL 178–180; BROWN, SENIORITY PROBLEMS DURING DEMOBILIZATION AND RECONVERSION: FORWARD (Princeton University, Industrial Relations Section, Research Report No. 70, 1944) 3. But *cf.* DUNLOP, WAGE DETERMINATION UNDER TRADE UNIONS (1944) 36–7 (In periods of unemployment "the older workers will attempt to protect themselves by seniority.")

49. In February, 1944, a Selective Service spokesman stated that a reinstated veteran would be entitled to all of the advantages, but immune to all the liabilities accruing to his position in his absence. *Rights of Veterans on Reinstatement* (1944) 13 LAB. REL. REP. 746. Inferentially, union membership is such a "liability." See note 24 *supra*.

To combat this suggestion, many unions have remitted dues of members in service, waived initiation fees, and sought to obtain preferential treatment in contracts. Communication to YALE LAW JOURNAL from George Meany, secretary-treasurer, AFL, Nov. 17, 1944. The action of the International Association of Machinists (AFL) in waiving entry fees is typical. *IAM Waives Initiation Fees from Veterans* (1944) 14 LAB. REL. REP. 83. But the theory of union autonomy may lead to wide diversity in the concessions of affiliated AFL unions. Thus, Daniel J. Tobin, president, Teamsters' Union, has instructed the locals that servicemen must continue to pay dues. *Union Members in Army Required to Pay Dues to Retain Full Rights* (1944) 14 LAB. REL. REP. 55. Compare letter from Philip Murray, president of the CIO, pointing out that the CIO had exempted all of its members in the armed forces from the payment of dues while in the service and urging the unions to exonerate other veterans from the payment of initiation fees. Quoted in (June 1944) 1 THE NEW VETERAN (National CIO War Relief Committee) 4. The UAW-CIO constitution has long provided for the waiver of initiation and reinstatement fees for servicemen. As to the possibility, however, of a major struggle over the financial obligations of union membership, compare assertion by R. J. Thomas, president of the UAW-CIO, that those who propose relaxation of union rules really mean that the "unions should lie down and die" [N. Y. Times, April 7, 1944, p. 13, col. 1] with rhetorical plea of Representative Stewart that

industry men less susceptible to organization than formerly. Moreover, the concept of union security presupposes a stable working force.[49] Any re-employment formula, such as absolute priority, which discriminates against high-seniority workers would promote turnover in plant personnel. This would in turn decimate union membership. Should new elections be called by the NLRB,[51] the unions would need to wage again—particularly in such recently unionized industries as automobiles and industrial chemicals [52]—the hard-won struggle for recognition as exclusive bargaining agents. The task of organization, this time, would be amplified by the veterans' expectations of a special employment equity ostensibly greater than that which the unions, in insisting upon their subjection to seniority rules, will offer, as well as by an already articulate anti-union bias among servicemen.[53] Conse-

"in the name of high heaven let us not have this CIO . . . making our soldiers pay union dues, fees, tribute when they return from service." 90 Cong. Rec., Sept. 7, 1944, at 7680.

In view both of the limited coverage of Section 8 (see note 9 *supra*) and of the several statutory loopholes available to employers for evading the duty to reinstate former employees (see *infra*, p. 436), proposals for granting "synthetic" seniority to veterans not previously employed and for making more flexible seniority rules applicable to handicapped veterans have great potential value. See *UAW Convention Acts on Strikes, Veterans* (1944) 15 LAB. REL. REP. 87; MEMO TO ALL UAW-CIO LOCAL UNIONS RE: VETERANS' SENIORITY (National UAW-CIO War Veterans Committee, Aug. 31, 1944); RESOLUTIONS OF THE SIXTH CIO CONVENTION (Philadelphia, Nov. 1–5, 1943) 15; SEVENTH CIO CONVENTION, RESOLUTION ON VETERANS (Chicago, Nov. 22, 1944); HARBISON, *op. cit. supra* note 19, at 12–15; BAKER, THE READJUSTMENT OF MANPOWER IN INDUSTRY DURING THE TRANSITION FROM WAR TO PEACE (Princeton University, Industrial Relations Section, Research Report No. 71, 1944) 87–98; Shishkin, *Organized Labor and the Veteran* (1945) 238 ANNALS 146.

50. For a close analytical study of the membership function of trade unions see DUNLOP, *op. cit. supra* note 48, at 33–44.

51. "When it is demonstrated that servicemen have returned to their employment in sufficient numbers so that they comprise a substantial percentage of the employees in an appropriate unit in which we have certified a collective bargaining representative, a new petition for the investigation and certification of a bargaining agent may be filed with the Board. In this manner employees in the armed forces who were unable to cast a vote will be afforded an opportunity to affirm or change the bargaining agent selected in their absence." Mine Safety Appliances Co., 55 N. L. R. B. 1190, 1194 (1944). Employees in the armed forces may vote in elections for union representatives, but only if they appear at the polls. Carbide & Carbon Chemicals Corp., 58 N. L. R. B., No. 247 (Oct. 26, 1944). Suppose a returning veteran is unacceptable to the union because of previous conduct. It has been held that a union under a closed-shop contract may not be required to accept a strike-breaker. Shinsky v. Tracey, 226 Mass. 21, 114 N. E. 957 (1917).

52. Complete accounts of agreements reached since 1942 in these and other industries are contained in COLLECTIVE BARGAINING DEVELOPMENTS AND REPRESENTATIVE UNION AGREEMENTS, *loc. cit. supra* note 36.

53. "The army is everywhere reported as rabidly anti-labor." Kingsley, *Veterans, Unions and Jobs: II. Labor and the Veteran* (1944) 111 NEW REPUBLIC 621. See also *The Vets and Postwar Democracy* (1944) 111 NEW REPUBLIC 272. For an indication of the level on which this sentiment may be exploited, see remarks of Representative Stewart: "Whom of you favor the paying of tribute by our armed forces to a group of foreign-born self-appointed labor leaders?" 90 Cong. Rec., Sept. 7, 1944, at 7680. For the direction of

quently, even the temporary exception to seniority practice which would permit the return of non-union veterans might suffice to wipe out a union majority. The apprehensions of organized labor are enhanced, finally, by the possibility already noted [54] that hostile employers will by-pass the Wagner Act by selectively hiring anti-union veterans and firing union members.[55]

In addition to jeopardizing union security, absolute priority may have the further effect of discriminating unfairly against non-veteran employees who perform operations for which returning veterans are qualified.[56] Thus, for example, a veteran who was drafted from a plant because he was readily

organized labor's response to this tactic, see address by Philip Murray before the VFW's 45th Annual Encampment, Chicago, Aug. 22, 1944; Brown, *The Veteran's Stake in Organized Labor* (1944) 56 MACHINISTS' MONTHLY J. 377; *A New Anti-Labor Whopper* (Sept. 1944) 51 AM. FEDERATIONIST 32; *Anti-Union Drive Seeks to Pit Vets Against Non-Vets* (Nov. 1944) WORK (Catholic Labor Alliance) 5; *Vet-Worker Unity Vital in Post-War World*, CIO News, Nov. 13, 1944, p. 91; Silvey, *Labor's Viewpoint on Veterans' Reemployment* in EMPLOYER RESPONSIBILITY FOR VETERAN REEMPLOYMENT (Am. Management Ass'n, Personnel Ser. No. 83, 1944). "The [absolute priority] interpretation is a false and misleading appeal to veterans the result of which could prejudice them against organized labor and divide the working people of the country . . ." *Seniority of Veterans* (Resolution Submitted to National Convention by UAW-CIO War Veterans' Committee, Sept. 18, 1944). "Despite malicious attempts to divide the American people on the home front from their sons and brothers on the fighting fronts, this unity has not been broken." SEVENTH CIO CONVENTION, *loc. cit. supra* note 49. A unanimous resolution of the National UAW-CIO Veterans' Conference held in Washington in April 1944 stated that large segments of industry and some agencies of the government were seeking to shift the responsibility for failure to plan for full employment by creating the myth of "a conflict of economic interest between working people who are in the armed forces and working people who are civilians." Quoted in *Kingsley, Veterans, Unions and Jobs* (1944) 111 NEW REPUBLIC 513, 514. Compare resolution of Australasian Council of Trade Unions that preference in employment for veterans would not be in the best interest of the country, as it would shift the focus from the real issue of jobs for all. *Protection of Veterans in Australia* (1944) 59 MONTHLY LAB. REV. 759.

54. See *supra*, pp. 427–9.

55. "Some [durable goods companies and public utilities surveyed] think, and a few apparently hope, that enforcement of reemployment provisions of the Draft Law will produce a knock-down and drag-out fight between management and labor in which management, aided by Selective Service and the law, will come out on the long end." A SURVEY OF EMPLOYER POLICIES ON REEMPLOYMENT OF VETERANS (Bureau of National Affairs Handbook No. 4, 1944) 5. It has been suggested that the appeasement of veterans with a reemployment bonus would weaken the most potentially effective force for public works to supplement private enterprise in a period of less than full employment. See BAKER, *op. cit. supra* note 49, at 77.

56. The Seventh Constitutional Convention of the CIO deplored "the action of certain administrative officials who have promoted the illusion among veterans that their way of securing jobs is through displacing workers with longer seniority." PROCEEDINGS, Chicago, Ill., Nov. 22, 1944. In a letter to employers and unions, the American Veterans of World War II attacked the rule of absolute priority on the ground that it "rob[s] Peter to pay Paul." *Veterans Body's "No" to Superseniority* (1944) 15 LAB. REL. REP. 198. See also remarks of Charles J. McGowan of the International Brotherhood of Boilermakers AFL quoted in Labor (Railway Brotherhoods newspaper), Sept. 23, 1944, p. 2, col. 7.

replaceable would downgrade an employee who was deferred because of superior technical skill in war production.[57]

Even assuming that the objective of special privileges for veterans at the expense of others in the working community is sound, the methods propounded by Selective Service seem unadapted to the achievement of this limited aim. While affording to the veteran specific immunities for a limited period,[58] in the long run such methods do not protect him against seniority rules, union reprisal, the consequences of union defeat, the limited opportunities of the position to which he is reinstated, or inconsistent application of the methods themselves. Management, in seeking to mitigate the disruptions of orderly personnel practices, may well come to lean heavily upon seniority whenever feasible.[59] Where this occurs the reinstated veteran will become subject, at the end of one year, to the very seniority rules which he has hitherto contravened.[60] A union which has retained a voting majority in a closed or union shop, might then, because of mutual distrust cultivated during the veteran's year of privileged independence, impose the legal sanction of refusing to admit him to membership and thus bring about his discharge for "cause." [61] If, on the other hand, an influx of unorganized veterans should eliminate the established union, the former would share equally with all employees the loss of benefits attributable to collective bargaining.

57. A summary enumeration of the groups who might be adversely affected by contravention of seniority rules will be found in EFFECT OF CERTAIN PROVISIONS OF SELECTIVE SERVICE LOCAL BOARD MEMORANDUM No. 190–A ON THE SENIORITY SYSTEM (memorandum prepared by Veterans Bureau, War Policy Division, UAW–CIO, 1944). See also RAYNER AND WILLIAMS, VETERANS REINSTATEMENT AND SENIORITY RIGHTS (National War Labor Board, Research and Statistics Report No. 28, 1944) 14.

58. For summary of these immunities see *supra*, pp. 422–3.

59. It is difficult to perceive any valid basis for the dire prediction that the absolute priority formula "would wreck existing union seniority systems" Omar v. Ketchum, National Legislative Representative, VFW, quoted in Labor (Railway Brotherhoods newspaper), Aug. 26, 1944. See also Carey, *supra* note 9, at 1–3; Murray, *loc. cit. supra* note 53; EFFECT OF CERTAIN PROVISIONS OF SELECTIVE SERVICE LOCAL BOARD MEMORANDUM No. 190–A ON THE SENIORITY SYSTEM, *loc. cit. supra* note 57. The traditional aversion of employers to the seniority system as an intrusion on the right to hire and fire and a deterrent to working efficiency has given way to general acceptance in recent years. See Herrick, *Application of Seniority Provisions* in THE COLLECTIVE BARGAINING AGREEMENT IN ACTION (Am. Management Ass'n, Personnel Ser. No. 82, 1944) 17; Comment, 47 YALE L. J. 73, 97–8; *Seniority Provisions in Union Agreements* (May 1941) 52 MONTHLY LAB. REV. 1167. While the NLRB's generalization that "seniority is *prima facie* a relevant criterion of fitness" [Timken Silent Automatic Co., 1 N. L. R. B. 335, 346 (1936)] may be questioned, management has found it practical to identify seniority with job status. See *Seniority: A Memo to Government* (May 1944) 102 FACTORY MANAGEMENT AND MAINTENANCE 82.

60. That Selective Service anticipates such an impasse is indicated by the phrasing of its interpretation: a reinstated veteran "cannot *within one year* be displaced by another. . . ." MEMORANDUM 190–A, pt. IV, § 4(b) (emphasis supplied). The alternative possibility that the veteran will be permitted by management and the unions at the end of one year "to maintain the job status secured by legal protection" is suggested in HARBISON, *op. cit. supra* note 19, at 11.

61. See cases cited *supra* note 45.

Whether or not the veteran is eventually disciplined by the union or the employer, he may suffer a profound vocational loss in that the excessive emphasis of the Selective Service construction on the "security" of his former employment may discourage him from seeking other opportunities perhaps more consonant with newly-acquired abilities.[62] Moreover, the granting of absolute priority to some invites a sharp restriction in the number of veterans who will possess reinstatement rights. Anyone who replaces "a person entering service" has, according to Selective Service, "no reemployment rights even though he subsequently enters service," [63] for his job was a "temporary" one within the meaning of one exclusory clause in Section 8.[64] The assignment of temporary and ineligible status to replacements of inducted employees and permanent status to substitutes for resigning employees appears to be grounded on the theory that so long as the original incumbent of a position remains in the armed forces he retains a vested right against all subsequent holders. Yet it not only ignores the war-time changes which have almost everywhere erased the lines of contact between the original job and its holder, but reduces the reemployment rights of many servicemen to a haphazard chance.[65] Thus it seems that the special privileges policy would provide a year's hot-house security for some veterans, only to lead them into a blind-alley, while, by postulating an absolute job-right for some, it would eliminate the reinstatement claim of others.

The special benefits program has been challenged by management, too, on the ground that it will upset orderly employment practices, promote turn-

62. But *caveat*, the hiring of a veteran who has acquired new skills in other than "a position of like . . . status and pay" entails no rights or duties under Section 8. Thus, an offer to a veteran of an apparently better job than his former may be a method of evading the statute. For detailed discussion of related techniques of avoidance see *infra*, pp. 436–41.

63. MEMORANDUM 190–A, pt. III, § 4(b). The same paragraph, however, recognizes that "there may be exceptions to this" rule.

64. Section 8(b), *supra* note 10. For the potential use of this clause as a device for minimizing the duty to rehire, see *infra*, pp. 440–1.

65. Under the Canadian statute, a subsequent holder of a position would have a reinstatement right so long as the previously inducted employee had not been reinstated. 6 GEO. VI, c. 31, § 4(e) (1942).

A serious correlative criticism of absolute priority is that it would make the choice between two veterans with conflicting job-claims, in many cases, arbitrary and fortuitous. For example, if two men had been employed in a plant on similar operations before their induction, the one first discharged from the armed forces would be entitled to reinstatement even though one of the operations had in the meantime been eliminated; the other, later demobilized, would have no right to displace him, regardless of previous company seniority. This result, no matter now inequitable, would seem to be necessitated by the Selective Service pronouncement that a reinstated veteran "cannot within one year be displaced by another on the ground that the latter has greater seniority rights." See note 22 *supra*. It is conceivable that the pronoun "another" was not intended to include a veteran seeking reinstatement to a job held by a previously reemployed veteran with lower seniority standing. But this inference would hardly accord with the evident design of Selective Service to provide a year's job security for the one first rehired. See MEMORANDUM 190–A, pt. IV, § 4(a).

over, increase the burden on training facilities and damage productive efficiency.[66] Although *any* scheme of compulsory reinstatement—even the more limited one of rehiring on the basis of accumulated seniority rights [67]—would probably arouse similar misgivings, and although no comprehensive study in support of these criticisms has yet appeared,[68] there are certain industrial situations in which absolute priority would palpably be more disruptive than the suggested alternative of straight seniority. Thus it seems likely that the application of the Selective Service formula to plants which have lost much personnel to the armed forces and which will have undergone major production cutbacks would, in addition to exposing management to incompatible legal duties,[69] require a wholesale reconstitution of the work force and the elimination of highly-skilled senior employees.

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66. See, *e.g.*, *Seniority: A Memo to Government*, *supra* note 59, at 84–8; *Super-Seniority for War Veterans Held Unworkable*, N. Y. Journ. Commerce, Sept. 20, 1944, p. 1, col. 2; *New Laws Needed to Define Rights of War Veterans*, *id.*, Oct. 7, 1944, p. 1, col. 6; REEMPLOYMENT OF VETERANS (Industrial Relations Counselors, Monograph No. 68, 1944) 10; *Survey Shows that Post-war Employment for Returning Soldiers is the Major Problem of Industry*, (May 1944) 154 IRON AGE 87; *Seniority Bonus*, Business Week, Jan. 15, 1944, p. 90; REEMPLOYMENT OF VETERANS: WITH A PAPER ON MANPOWER OUTLOOK (American Management Association, Personnel Series No. 76, 1944); REPORT ON REEMPLOYMENT OF EX-SERVICEMEN AND WOMEN, (A. A. R. Comm. for Study of Transportation, June 1944); Post, *The Veterans' Problem: A Challenge and an Opportunity* (Nov. 1944) 21 PERSONNEL 126. Many of the current objections to the ambiguities of Section 8 were anticipated in a memorandum of the NAM during the hearings on the Selective Service Bill. *Appendix to Hearings before Committee on Military Affairs on H. R. 10132*, 76th Cong., 3d Sess. (1940) 632–3. Three months before the promulgation of Memorandum 190–A, the WLB's Shipbuilding Commission refused a union request for a contract provision that veterans whose former jobs were not available should be placed in jobs as nearly comparable as possible, in part on the ground that such a clause would lead to a mass reinstatement of men whose lack of aptitude might seriously impair productive efficiency. Sullivan Drydock and Repair Co., 14 WAR LAB. REP. 284 (1944).

Surveys of industry prior to Memorandum 190–A had disclosed a general intention to rely on seniority as a mitigant of readjustment difficulties. See, *e.g.*, *The Seniority Tangle* (April 1944) 102 FACTORY MANAGEMENT AND MAINTENANCE 82; BAKER, *op. cit. supra* note 49, at 64. A study published in June 1944 indicated that "few plant policies match Selective Service requirements [on absolute priority]." A SURVEY OF EMPLOYER POLICIES ON REEMPLOYMENT OF VETERANS, *op. cit. supra* note 55, at 1. For analysis of problems of turnover in the automobile industry, see ACWP SURVEY OF PROBLEMS RELATING TO THE RE-EMPLOYMENT OF VETERANS (Automotive Council for War Production Bulletin No. 1, 1944); MANPOWER REPORT No. 42 (Automotive Council for War Production, Oct. 19, 1944). More generally, see EFFECT OF CERTAIN PROVISIONS OF SELECTIVE SERVICE LOCAL BOARD MEMORANDUM No. 190–A ON THE SENIORITY SYSTEM, *op. cit. supra* note 57, at 3. But *caveat*, other factors than seniority tend to prevent voluntary turnover. Among these are wage differentials and merit increases which are unrelated to length-of-service rating.

67. See note 16 *supra*.

68. A promising reconaissance has been made, however, in such pamphlets, surveys, articles and memoranda as those mentioned *supra* note 66.

69. See *supra*, pp. 427–9 and notes 39–47.

TECHNIQUES FOR CIRCUMVENTING THE SPECIAL PRIVILEGES POLICY

By magnifying management's task in reinstating veterans, the doctrine of special benefits—particularly as embodied in the absolute priority rule—has brought into prominence those clauses of Section 8 the ambiguity of which may allow evasion of the duty to rehire.[70] It may be expected that harassed employers will explore the possibilities of three clauses, the first requiring that the veteran "still [be] qualified to perform the duties of [his position," [71] another making it a valid excuse for failure to reemploy that "the employer's circumstances have so changed as to make it impossible or unreasonable to [rehire]," [72] and a third specifying that the position to which the veteran seeks reinstatement must have been "other than a temporary [one]." [73]

Changes in Condition of the Veteran. The statutory requirement that the returning veteran still be able to perform his old job was grounded on the expectation that relatively unchanged individuals would return to former employment with capacities substantially unimpaired. But with the continuation of the war two potentially disqualifying types of change in the serviceman have become increasingly common: loss of skill, and physical or psychic disabilities incurred in or aggravated by his military experience.

How successful an employer will be in fitting the veteran's loss of skill into the evasionary clause may turn upon four considerations: the *method* of ascertaining the extent to which the veteran's ability has declined, the *burden* of demonstrating his present level of capacity, the *standard* of proficiency to be set, and the *time* allowed for meeting whatever norm may be specified. While quantitative measures of efficiency are feasible on a production line, the diverse situations in which more subjective evaluations, such as a personnel manager's observations, must be relied on would favor an employer bent on avoidance of the statute. But even in cases where the requisite skill is susceptible of measurement, the fact that Section 8 leaves the question of proof entirely open would seem to enhance the employer's advantage, since incapacity is more readily proved than capacity. A recent

70. As the war nears a climax, a growing skepticism over the reemployment guaranties may be expected. See, *e.g.*, remarks of Senator Guffey in introducing a bill to authorize one year's pay to veterans [S. 675]: "While we have done by legislation what we possibly could to assure their return to their pre-war jobs, we must recognize that as a practical matter the accomplishment of our aim will be impossible." 91 Cong. Rec., March 6, 1945, at 1790–1. See also *When 12 Million Come Home* (1944) 11 NEW REPUBLIC 707, 708: "The law says that the returning veteran must get back the job he left to go into the army; but the more you study this promise, the less it seems to mean." See also Bolté, *The Veterans' Runaround* (1945) 190 HARPER'S 385.

71. Section 8(b) (2).

72. Section 8(b) (B). This is the only respect in which the private reemployment provisions differ from those covering reinstatement with the Federal Government. See note 10 *supra*.

73. Section 8(b).

case, *Grasso v. Crowhurst*,[74] in which a veteran who brought suit under the statute after being refused reinstatement on the strength of this clause was required by the court to give a visual demonstration of his ability at his former job illustrates how easily the onus may be shifted to the job claimant. Moreover, there is little reason to doubt that a mere assertion by a former employer after a perfunctory mechanical test that the veteran is no longer qualified for his old job would have equal weight with the latter's claim that he could have passed an adequate test of skill. This raises the third question: whether the veteran must meet the same standard of performance as formerly. In the opinion of Selective Service, while he may not be rejected because of inability to meet standards raised in his absence,[75] he must still be qualified to do the "job in the manner in which he did it before he left." [76] If the veteran's present performance is to be assessed in terms of his previous proficiency, it would seem, finally, that after a comparatively short absence—as contemplated in Section 8—a showing of such ability might fairly be made a condition precedent to reinstatement, but that after prolonged military service he should be granted a reasonable time in which to regain his old ability.

If, instead of alleging loss of skill, the employer challenges the veteran's physical or psychological capacity, the testimony of company doctors may supply a more ready support for evasion than the job-trial. In the *Grasso* case,[77] for example, the plaintiff had been denied reinstatement ostensibly on the ground that his acquiring flat feet while serving in the armed forces had incapacitated him for his former work. The burden is thus cast on the courts of evaluating conflicting medical diagnoses and recommendations. Whatever assistance the judiciary might have received from the veteran's service record is apparently ruled out by the Selective Service orders which make his Report of Separation and medical history confidential.[78] Designed

74. Grasso v. Crowhurst, Feb. 15, 1945, 13 U. S. L. WEEK 2451. Judge Fake dismissed the suit on the ground that plaintiff had not filed an application for reinstatement within the 40-day period allowed by Section 8(b) (3). Within 40 days after his medical discharge from the army, plaintiff had requested an indefinite leave of absence. Upon its refusal by the company, he applied for reemployment. This second application was within the 90-day period allowed by an amendment to Section 8 [see note 97 *infra*] which was not, however, retroactive.

75. See MEMORANDUM 190–A, pt. III, § 3 (b). *Quaere* whether a veteran would continue for one year to be protected against a discharge because of a new merit-rating system or of inability to meet new job standards instituted in that period.

76. MEMORANDUM 190–A, pt. III, § 3 (a).

77. See note 74 *supra*. For an excellent inquiry into the use of physical examinations and tests of personality and skills as mechanisms for placement rather than as rationalizations of statutory evasion see BAKER, *op. cit. supra* note 49, at 80–97. The NLRB has held that in case of wrongful refusal of reinstatement, there is a presumption that there *is* a job which the former employee *can* perform, with the burden of proving otherwise on the employer. National Casket Co., 12 N. L. R. B. 165 (1939).

78. MEMORANDUM 190-A, pt. V, § 3 (a), (b). In a letter dated Sept. 29, 1943, the Chief of the Reemployment Division stated: "Since the military exit examinations are far more

to protect the veteran, these rulings may work detriment to him because, in denying the courts access to the materials for making informed judgments, they may induce unwarranted dependence upon the testimony of company doctors. Further, the cloak of secrecy may induce exaggerated inferences by well-intentioned employers as to the extent of veterans' physical ailments and thus promote stricter pre-reinstatement examinations. In both cases, the sound policy that veterans should not be prejudiced by their period of service is defeated.

Changes in Condition of the Employer's Business. The generality of the "impossible or unreasonable" clause invites managerial reliance upon it to support refusals to rehire veterans. But the effect of this clause has been narrowed by the Selective Service interpretation, already adverted to, that a reduction of force alone is not sufficient to terminate the employer's duty to reinstate,[79] and has been cast more generally in doubt by the decision in *Kay v. General Cable Corporation.*[80] In the *Kay* case, the plaintiff, having been denied reinstatement as a company doctor after his honorable discharge from the Army, petitioned a federal district court under Section 8(e).[81] On appeal from a dismissal,[82] the defendant argued that, since another physician had been hired by both the company and an employee's health association, to reemploy the plaintiff would lessen efficiency, cause loss of working time, and increase expenses, making his reinstatement "unreasonable" within the meaning of the statute. The court held that, as it is generally possible for an employer to find *some* "reason" for a refusal to reinstate a veteran and as "unreasonable" means more than "inconvenient or undesirable," acceptance of the company's reasoning would restrict the veteran's protection "to merely capricious or arbitrary refusals." [83]

It is premature, however, to infer that this decision augurs a strict judicial scrutiny of efforts to use the escape clause, for, as heretofore indicated, it reflects the favorable attitude towards veterans at the present time when individual reinstatement claims may be arbitrated without reference to a

thorough than those given by any employer, access by employers to these records is tantamount to saying that the veteran must pass a far more thorough physical examination than the non-veteran."

79. See *supra*, p. 424.

80. 144 F. (2d) 653 (C. C. A. 3d, 1944).

81. See note 11 *supra*.

82. The New Jersey federal district court had dismissed the complaint on the ground that plaintiff did not hold a position "in the employ of" defendant as required by Section 8(b). Judge Kirkpatrick found significance in the fact that the statute does not use the word "employee," inferring that "in the employ of" covers "employees in superior positions and those whose services involve special skills." Hence, except for independent contractors and temporary workers, the statute contemplates "almost every other kind of relationship in which one person renders regular and continuing service to another." 144 F. (2d) at 655. On this point, see Brief for Appellant, pp. 7–13; Brief for Appellees, pp. 5–10. An excellent recent study of the various tests of the employment relation is Comment (1944) 32 CALIF. L. REV. 289.

83. 144 F. (2d) at 655.

general employment situation. The implication of the *Kay* decision that general business conditions may not be an appropriate referent for the "impossible or unreasonable" clause would hardly survive the major crises of reconversion. Hence it may be expected that, as the burden of providing reemployment becomes more oppressive with general demobilization, this escape clause will display renewed virility.

There is also a possibility that the clause will be invoked by businesses undergoing formal or financial reorganization in the post-war period. Its potentialities in such circumstances, however, are limited, for, while curtailment of the business of war-expanded industries should supply a ground for exemption from the duty to reinstate,[84] reorganization,[85] dissolution of partnership,[86] sale or merger of the business [87] will probably not affect that obligation since, under the Selective Service rule, the duty runs to successors in interest.[88] By analogy to NLRB practice, responsibility lies with the employing unit, whatever its legal identity may be.[89] Hence, the fact of con-

84. The NLRB has upheld an employer's refusal to reinstate when, because of business conditions, reinstatement might have compelled a drastic cut in wages. Columbian Iron Works, Inc., 24 N. L. R. B. 883 (1940). Also when curtailment of business has caused elimination of former jobs. Neuhoff Packing Co., 29 N. L. R. B. 746 (1941). But *cf.* NLRB v. Remington-Rand, Inc., 94 F. (2d) 862 (C. C. A. 2d, 1938); *cert. denied*, 304 U. S. 576 (1938) (business dislocations which are threatened to *result* from compliance with a reinstatement order of the NLRB are no bar to the order); NLRB v. Jones & Laughlin Steel Co., 301 U. S. 1, 46 (1937); NLRB v. Hudson Motor Car Co., 128 F. (2d) 528 (C. C. A. 6th, 1942) (similarly with other claims of undue hardship, such as exposure to labor strife).

85. For purposes of the Wagner Act, the term "persons" includes ". . . trustees, trustees in bankruptcy, or receivers." 49 STAT. 449 (1935), 29 U. S. C. § 151 (1940). § 14 states that, if the Act can be validly enforced, it is to prevail over provisions of the Bankruptcy Act governing reorganizations. See NLRB v. Baldwin Locomotive Works, 128 F. (2d) 39 (C. C. A. 3d, 1942), *enforcing* 20 N. L. R. B. 1100 (1940) ("[The Board's] power must needs be unembarrassed by an intervening plan of reorganization concerned with the same employer's liability for its private obligations." *Id.* at 44). Proceedings under the Wagner Act are not affected by subsequently filed petition for reorganization under § 77B of Bankruptcy Act. Luchenbach Steamship Co., 2 N. L. R. B. 181 (1936). A successor company is subject to duties of its predecessor. Sussex Dye & Print Works, Inc., 34 N. L. R. B. 625 (1941); Kelly-Springfield Tire Co., 6 N. L. R. B. 325 (1938); *accord*, NLRB v. Chattanooga Bakery, Inc., 127 F. (2d) 201 (C. C. A. 6th, 1942).

86. Where one partner has died, the surviving partner has been held bound by an NLRB cease-and-desist order. NLRB v. Colten, 105 F. (2d) 179 (C. C. A. 6th, 1939), *enforcing* 6 N. L. R. B. 355 (1938).

87. When a company has committed unfair labor practices, and subsequently merged with a parent corporation, a cease-and-desist order against its "successors and assigns" is proper. NLRB v. Bethlehem Steel Co., 120 F. (2d) 641 (App. D. C. 1941), *enforcing* 14 N. L. R. B. 539 (1939). A subsidiary's liability for unfair labor practices runs to holding company after merger. Andrew Jergens Co. of Calif., 43 N. L. R. B. 457 (1942).

88. SELECTIVE SERVICE SYSTEM ANN. REP. FOR 1941-2, 305-6. The *Report* states that, in general, a change in the form of doing business will not impair the veteran's right to reemployment.

89. See, *e.g.*, NLRB v. Condenser Corp. of America, 128 F. (2d) 67 (C. C. A. 3d, 1942); NLRB v. Lund, 103 F. (2d) 815 (C. C. A. 8th, 1939); Sun Tent-Luebbert Co., 37 N. L. R. B.

tinued operation should not be obscured by dissolution of partnerships, petitions for reorganization, or the chameleon character of parent and subsidiary corporations and affiliated operating companies.[90]

Expansion of Temporary Employment Category. The deviational Selective Service pronouncement, already mentioned,[91] that those who replace inducted employees are in a "temporary" status and have no reinstatement rights suggests a third method whereby employers may compensate for the absolute priority of some veterans by avoiding all obligations to others. Certain employers have sought to implement the indicated distinction between "permanent" employees and others thus designated "temporary" by requiring all hired after a given date to sign temporary employment agreements as a condition of employment.[92] In these it is customarily stated as understood that the subscribing employee is a substitute for a regular employee and would not be entitled to reemployment should he enter the armed services. In the case of *NLRB v. Humble Oil and Refining Company*,[93] the Labor Relations Board had ordered the reinstatement of an employee

50 (1941); Waggoner Refining Co., Inc., 6 N. L. R. B. 731 (1938); Cosmopolitan Shipping Co., Inc., 2 N. L. R. B. 759 (1937).

90. Compare Consolidated Edison Co. v. NLRB, 305 U. S. 197 (1938), *aff'g* 95 F. (2d) 390 (1938), *enforcing* 4 N. L. R. B. 71 (1937) (order against parent corporation and affiliated operating companies involved); see NLRB v. Hearst, 102 F. (2d) 658 (1939), *enforcing as modified* 2 N. L. R. B. 530 (1937) (order was directed against William Randolph Hearst as well as three holding companies); Bethlehem Steel Corp. v. NLRB, 120 F. (2d) 641 (App. D. C. 1941); Bussmann Mfg. Co. v. NLRB, 111 F. (2d) 783 (C. C. A. 8th, 1940); NLRB v. Union Drawn Steel Co., 109 F. (2d) 587 (C. C. A. 3d, 1940) (parent corporation exercised complete control over subsidiary corporations); Todd Shipyards Corp., 5 N. L. R. B. 20 (1938) (holding company controlled subsidiary corporations); Fisher Body Corp., 7 N. L. R. B. 1083 (1938); Middle West Corp., 10 N. L. R. B. 618 (1938); Republic Steel Corp., 9 N. L. R. B. 219 (1938) (central direction of labor policies); Art Crayon Co., Inc., 7 N. L. R. B. 102 (1938); Hudson Knitting Mills, Inc., 56 N. L. R. B. 1250 (1944) (interlocking directorates); NLRB v. De Bardeleben, 135 F. (2d) 13 (C. C. A. 5th, 1943) (successor partnership continued family-owned organization). But *cf.* Jamestown Metal Equipment Co., Inc., 17 N. L. R. B. 813 (1939) (parent corporation held not liable for subsidiary's refusal to bargain collectively); South Carolina Granite Co., 58 N. L. R. B., No. 254 (Oct. 28, 1944) (holding company not liable for unfair labor practices of subsidiary whose policies it did not control); *accord*, Utah Copper Co., 7 N. L. R. B. 928 (1938).

A Board order against "successors and assigns" is improper when it includes good-faith successors and assigns. Commonwealth Edison Co. v. NLRB, 135 F. (2d) 891 (C. C. A. 7th, 1943); NLRB v. Cleveland-Cliffs Iron Co., 133 F. (2d) 295 (C. C. A. 6th, 1943); NLRB v. Bachelder, 125 F. (2d) 387 (C. C. A. 7th, 1942). *Cf.* Southport Petroleum Co. v. NLRB, 315 U. S. 100, 106 (1942) (". . . a bona fide discontinuance and a true change of ownership . . . would terminate the duty of reinstatement created by the Board's order. . . .").

91. See *supra*, p. 436.

92. Before the absolute priority rule was enunciated management had little disposition to distinguish those who had replaced inducted workers from others, on the theory that relative seniority would govern the reinstatement rights of *all* veterans. See BAKER, *op. cit. supra* note 49, at 64; A SURVEY OF EMPLOYER POLICIES ON REEMPLOYMENT OF VETERANS, *op. cit. supra* note 55, at 1–2.

93. 140 F. (2d) 777 (C. C. A. 5th, 1944).

who had signed such a "temporary employment" form and who, after an illegal discharge, had been drafted.[94] The Court of Appeals, in sustaining the order, indicated that since the Board must be supposed to have known that the injured employee's rights under the Selective Service Act were subordinate to those of permanent workers then in the armed forces, it could not have conferred upon him any reemployment rights antagonistic to it.[95] Though this rationale does not go as far as the Selective Service rule under which the employee who replaces a drafted worker has no statutory reemployment rights at all, it lends support to what may become—in cases where similar positions have had a series of incumbents—an important tool of evasion.

Conclusions and Recommendations

The policy of a special reemployment equity for veterans is incompatible with organized labor's interest in union and job security, with management's interest in minimizing dislocations through sound personnel practices, and with the general public interest in an orderly transition to a peace economy. Such a standard, moreover, seems to promise no compensating security even for the veteran. In view, therefore, of Selective Service's intransigent hostility to present seniority rules and collective bargaining arrangements which might block the veteran's assertion of superior prerogatives, merely to render the application of absolute priority more effective and predictable by plugging statutory loopholes is not a desirable goal.

Even should a wiser reinstatement policy—such as the accrual of seniority while in service[96]—be read into Section 8, substantive statutory changes may still be necessary to checkmate unconscionable refusals to rehire and to broaden the scope of employment opportunities for the returning veteran. Under the present statute, an employer's inability to furnish reemployment within the ninety-day period allowed for application[97] exonerates him from

94. 48 N. L. R. B. 1118, 1138 (1943).

95. "[The employment contract] but announced the relative rights of the contracting parties under and in harmony with the policy of the Selective Service Act. The order of the Board takes cognizance of these provisions and does not confer upon [the employee] any rights antagonistic thereto." 140 F. (2d) at 779–80.

96. See note 16 *supra*.

97. Memorandum 190–A, pt. III, § 2(b): "While the employer cannot . . . extend the 40-day period, he can voluntarily reemploy the veteran thereafter. . . ." The original 40-day grace has been extended by amendment to 90 days after discharge from the armed forces or from the hospital, provided that hospitalization is for not more than one year. Pub. L. No. 473, 78th Cong., 2d Sess. (Dec. 8, 1944). "Rehabilitation leave" has been granted both by union agreement and voluntary company arrangement in a number of instances. See *The Reinstatement of Draftees* (1942) 11 Lab. Rel. Rep. 133.

A forewarning of the emotional opposition which even substantive changes will encounter was the response to a recommendation to Congress by the then War Mobilization and Reconversion Director Byrnes that Section 8 required "clarification." N. Y. Times, April 1, 1945, p. 28, col. 5. Spokesmen for the VFW and the American Legion perceived in this a threat to the *supposed* statutory guarantee of absolute priority for veterans, and cer-

further obligation to the veteran, and a subsequent offer of employment would entail no statutory duties. Similarly, the veteran's acceptance of interim employment elsewhere would deprive him of all claim to his former employment.[98] The equitable consideration that a temporary inability to rehire should not conclude management's liability is supported by the suggestion in the one-year protection against discharge without cause [99] that a right to suitable employment also continues for that period; and a precedent is supplied by the carefully drafted British reemployment statute which provides for the veteran's retention of reinstatement rights by periodic application.[100] Further, the NLRB's interpretations of an employer's duty to rehire after discriminatory discharges may provide a fruitful reference. Thus, the Board requires the enrollment on a "preferential list" of employees who cannot be reinstated because of reduction in force,[101] regards a management closing a plant with intent to reopen as an "employer" having the continuing duty to rehire under the Wagner Act,[102] and insists upon the retention of reemployment rights by discriminatorily discharged workers who take interim jobs.[103] It is true that the partially punitive nature of the

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tain segments of the press interpreted the proposal as an effort of the administration to "renege" on its earlier promises.

98. Thus, a veteran who is discharged from the armed forces while the war continues and who responds to various pressures to take a war job rather than return to his former nonessential employment would have no reinstatement rights if he did not apply within 90 days.

In the United Kingdom, veterans who, upon discharge from the armed forces, are directed into war work other than their former employment do not lose their reemployment rights. INT. LAB. OFFICE, THE ORGANIZATION OF EMPLOYMENT IN THE TRANSITION FROM WAR TO PEACE (1944) 16. According to Selective Service, there is no retention of such rights by servicemen who were transferred to the Enlisted Reserve Corps at their request to engage in essential occupations and did not apply for reinstatement in their old jobs within the statutory period. MEMORANDUM 190–A, pt. V, § 2. This has been rationalized on the ground that "[the veteran] has . . . elected to take [such] employment . . . for the purpose of securing his release from active duty or service in the armed forces." VETERANS' EMPLOYMENT SERVICE, NEWS LETTER (Jan.-Feb. 1944) 5.

99. Section 8(c), *supra* note 10.

100. Reinstatement in Civil Employment Act, 1944, 7 & 8 GEO. VI, c. 15, § 1(2), (3). The veteran retains his eligibility for reemployment by renewing his application at intervals of not more than thirteen weeks, although the employer's duty to rehire ceases "after six months have elapsed from the end of the present emergency." *Id.* at § 1(2) (b).

101. See 3 NLRB ANN. REP. (1939) 201; 6 NLRB ANN. REP. (1942) 77.

102. Hoosier Veneer Co., 21 N. L. R. B. 907, 935 (1940). The significance of such a rule in a period when many plants will be shut down for retooling can hardly be overestimated.

103. The Board has ordered a reinstatement offer even when the employee, after a discriminatory discharge, has obtained "substantially equivalent employment" elsewhere. Eagle-Picher Mining & Smelting Co., 16 N. L. R. B. 727 (1939); 5 NLRB ANN. REP. (1941) 73; 7 NLRB ANN. REP. (1943) 51. However, in at least one case, this order has been grounded on the theory that loss of seniority rights has made the interim not really "substantially equivalent." Carlisle Lumber Co., 7 N. L. R. B. 332 (1938). The validity of a reinstatement in these circumstances has been upheld. Phelps Dodge Corp. v. NLRB, 331 U. S. 177 (1941); Continental Oil Co. v. NLRB, 313 U. S. 212 (1941); *accord*, NLRB v. Van Deusen, 138 F.

NLRB's reinstatement orders limits the appropriateness of the analogy; yet even if we adopt the limited theory that the veteran is entitled only to a restoration of the *status quo*, it would seem that he deserves at least the same measure of job protection as a striking employee. Accordingly, the failure of Section 8 to follow the lead of foreign legislation in requiring that the employer offer the next most favorable employment [104] when an equivalent job is not available seems to limit needlessly the range of opportunities for the veteran.

However, even if a more enlightened and feasible reemployment doctrine and method should be evolved and even if the more glaring statutory ambiguities and omissions should be cured by amendment, it is doubtful whether machinery now provided is adequate to enforce veterans' reinstatement rights. Authority to force compliance on recalcitrant employers is vested by Section 8 in the federal district courts.[105] But resort to litigation, even should the veteran have the necessary resources, is unsatisfactory both because the courts lack the expert competence required to adjudicate many of the issues which are bound to arise and because the non-continuing nature of the judicial process disqualifies it for formulating a pattern of reemployment policy. While it is conceivable that the courts will impose a voluntary limit on their own fact-finding powers and delegate them to internal industrial government,[106] the main task of administration will inevitably devolve upon some public agency. The failure of Selective Service to develop sufficient *expertise* in industrial relations, its intractable adherence to an ill-advised reemployment formula and its consequent alienation of the confidence of affected groups would seem to unfit it for this responsibility. In

(2d) 893 (C. C. A. 2d, 1943). *Contra:* NLRB v. Weirton Steel Co., 135 F. (2d) 494 (C. C. A. 3d, 1943); Phelps Dodge Corp. v. NLRB, 113 F. (2d) 202 (C. C. A. 2d, 1940); NLRB v. Botany Worsted Mills, 106 F. (2d) 263 (C. C. A. 3d, 1939); NLRB v. Carlisle Lumber Co., 99 F. (2d) 533 (C. C. A. 9th, 1938).

104. (United Kingdom) Reinstatement in Civil Employment Act, 1944, 7 & 8 GEO. VI, c. 15, § 1(b); (Canada) Reinstatement in Civil Employment Act, 1942, 6 GEO. VI, c. 31, § 4(c). See Couper, *Seniority and Reemployment of Veterans* in EMPLOYER RESPONSIBILITY FOR VETERAN REEMPLOYMENT (Am. Management Ass'n, Personnel Ser. No. 83, 1944) 46, 48.

105. See notes 11, 12 *supra*.

106. See notes 42, 43 *supra*. An increasing awareness that present arrangements were unsatisfactory found expression in the Baruch-Hancock Report which deplored the "present . . . scattering of efforts on the part of many agencies to plan for the veterans' return" and urged the integration of placement programs with other manpower controls. REPORT ON WAR AND POST-WAR ADJUSTMENT POLICIES (1944) 5–6. The Retraining and Reemployment Administration, created by Executive Order No. 9427 on Feb. 24, 1944, and sanctioned by The War Mobilization and Reconversion Act of 1944 [Pub. L. No. 458, 78th Cong., 2d Sess. (Oct. 3, 1944); see H. R. REP. No. 1902, 78th Cong., 2d Sess. (1944)] has thus far failed to implement its mandate to coordinate and supervise the activities of federal agencies dealing with manpower problems. See Pub. L. No. 458, § 302. See Bolté, THE VETERANS' RUNAROUND (1945) 190 HARPER'S 385. Instead, the RRA, in setting up veterans' referral centers, has revealed a disposition to segregate the reemployment of veterans from the general reconversion problem. See RRA, Order No. 1 (May 17, 1944).

view of the explosive potentialities of intra-labor strife which is dramatized in the reemployment issue, the NLRB, with a broad experience accumulated in a decade of acute industrial stress,[107] may be competent to represent the public interest in administering the veterans' reinstatement statute.[108] Although it is conceivable that placing veterans under the jurisdiction of an agency known to be pro-labor [109] might weaken the Board's public support and foster the very frictions that it was designed to obviate, yet it may be desirable to effect a coordination of the interests of veterans and of the unions within an agency dedicated to the promotion of collective bargaining.

107. See 1-8 NLRB ANN. REPS., *passim*.

108. *Caveat*, the Labor Federal Security Appropriation Act of 1944 [57 STAT. 494] sharply restricted the Board's use of the funds allotted to it under that statute. For critical discussion, see 8 NLRB ANN. REP. (1944) 6-10.

109. "The major function of the Board . . . has continued to be the protection of the basic statutory rights of workers to organize and bargain collectively through representatives of their own choosing." 8 NLRB ANN. REP. (1944) 1.