Vanderbilt Law Review

Volume 21
Issue 1 *Issue 1 - December 1967*

Article 4

12-1967

The Use of Tests in Promotions Under Seniority Provisions

Aubrey L. Coleman, Jr.

The Use of Tests in Promotions Under Seniority Provisions

I. INTRODUCTION

The significance of seniority provisions in collective bargaining agreements arises from the effect of seniority clauses upon promotions, transfers, layoffs, and recalls. Because these provisions invade the field of management prerogatives, utilization of the principle of seniority has traditionally been strongly resisted by employers. However, the mass layoffs caused by the depression of the thirties and at the end of World War II led to irresistible pressure by unions for job security through recognition of seniority rights.[1] While the early importance of seniority was primarily in determining the order of layoffs,[2] the role of seniority in promotions is of greater concern in today's full employment economy. One of the principal arguments for the use of seniority is that it is an objective means of determining who receives the promotion when a job opening occurs. In most contracts, however, in recognition of management's right to an efficient and productive operation, seniority is tempered by some consideration of employee ability, particularly in the matter of promotions. Obviously, the subjective nature of such a determination gives rise to disagreements as to whether management's determination of ability was correct and in accordance with the terms of the contract. In order to make the evaluation of ability less subjective, and thus less subject to union challenge, management has turned increasingly to the use of various tests. This note deals primarily with the role of such tests in promotion disputes under seniority clauses.

While factual distinctions and differences in contract provisions limit the value of prior arbitration awards as precedents, certain principles and methods of approach have evolved to guide the parties concerned.[3] Although arbitrators are not obligated to follow these principles,[4] a study of awards reveals a rather clearly defined body of law with respect to tests.[5] Until recently, the only "law" regulating the use of tests was that enunciated by the arbitrators. However, Title 7 of the 1964 Civil Rights Act provides that ". . . [i]t shall not

1. C. RANDLE & M. WORTMAN, COLLECTIVE BARGAINING 484 (2d ed. 1966) [hereinafter cited as RANDLE & WORTMAN]; McCaffrey, *Development and Administration of Seniority Provisions*, N.Y.U. 2D ANN. CONF. ON LABOR 131 (1949).

2. Mitchem, *Seniority Clauses in Collective Bargaining Agreements*, 21 ROCKY MT. L. REV. 156, 158 (1949).

3. *See* Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1020 (1955).

4. Nicholson File Co., 34 Lab. Arb. 46, 48 (1959) (Warns).

5. That prior, well-reasoned awards are given great respect, see North Shore Gas. Co., 40 Lab. Arb. 37, 42 (1963) (Sembower).

be . . . an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration, or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin."[6] Guidelines defining a "professionally developed ability test" have been enunciated,[7] and at least one Equal Employment Opportunity Commission decision has held that an employer did not prove that the tests he used for promotion purposes were properly related to the jobs in issue or properly validated.[8] Undoubtedly, the interpretations of and decisions under this section of the Act will eliminate the use of tests for discriminatory purposes. But the indirect effect of these decisions may be even greater as unions will press for the incorporation of these principles on proper testing procedures into labor contracts in order to protect all employees. Decisions under the testing provision of the Civil Rights Act will be of assistance to unions in the present trend toward attacks upon the validity of tests employed, rather than upon the right of management to use tests at all.[9]

II. SENIORITY

A. *Seniority Defined and Interests Involved*

To appreciate fully the problems involved in the use of tests to determine ability under seniority clauses, one must understand seniority itself, as well as the basic differences between types of seniority provisions, which by their inherent ambiguities demand objective criteria such as tests. Seniority has been defined as the employee's "length of service for the particular employer in the particular . . . unit of that employer."[10] It is the employee's status in relation to other employees which thereby establishes certain preferences for him in instances of layoff and promotion.[11] Because of these preferences or rights, seniority has been described as the "working man's . . . most cherished possession."[12] Seniority is a manifestation of the employee's search for job security, and is based on the premise that the longer an employee has been with the company, the more he has contributed

6. 42 U.S.C. § 2000e–2(h) (1964).
7. CCH EMPLOYMENT PRACTICES, ¶ 16,904 (1966).
8. *Id.* at ¶ 17,304.53.
9. *See* Metzler & Kohrs, *Tests and "The Requirements of the Job,"* 20 ARB. J. (n.s.) 103 (1965).
10. Shulman, *supra* note 3, at 1005.
11. Dep't of Labor, Labor Information Bull. 6 (Feb. 1950), *quoted in* RANDLE & WORTMAN 487.
12. IAM Flash (Baltimore), March 11, 1946 at 1, *quoted in* RANDLE & WORTMAN 487.

to its success; therefore, he is entitled to the jobs and promotions available.[13]

In addition to their concern with seniority as the representatives of employees, unions have a vital interest in the concept because the psychological appeal derived from its objectivity makes seniority an important tool in organizational campaigns.[14] On the other hand, since management is primarily interested in an employee's efficiency and productivity, it would prefer that seniority not be relevant, and definitely not controlling, in determining promotions. These competing interests, plus the fact that younger workers' interests are in conflict with those of older workers, necessarily produce dilemmas which must be resolved in order for the parties to agree on seniority provisions.[15]

B. *Advantages and Disadvantages of Seniority*

Two commentators in the field have recently compiled the following arguments as those most frequently used in negotiating seniority.[16] While, admittedly, several are more emotional than logical, they are the ones commonly heard. Furthermore, it will be noticed that the arguments are in terms of a strict seniority clause vis-à-vis no consideration of seniority, when in practice most contracts contain modified seniority clauses.[17] No attempt is made to evaluate them, as their validity or fallaciousness is in most instances obvious.

Advantages

(1) Seniority improves worker morale because the worker feels secure; indirectly this will result in increased efficiency.

13. *See* N. CHAMBERLAIN & J. KUHN, COLLECTIVE BARGAINING 96 (2d ed. 1965).

14. "The promise of job 'ownership' through seniority . . . has probably persuaded more American workers to join unions than any other single element . . . ." Knowlton, *Recent Problems in Arbitration of Seniority Disputes*, 9 ARB. J. (n.s.) 194 (1954).

15. Arbitrator Walter Gellhorn has analyzed the problem and reached the following conclusion: "To be sure, the full utilization of seniors cannot be achieved without costs. When seniors 'get the breaks,' the more ambitious and capable of the junior men may feel frustrated. Moreover, a management that likes to see a clear line of promotability from within the work force does not welcome the inflexibility that sometimes comes from giving preference to older, perhaps less adaptable workers. But these costs were measured when the contract was made. The parties presumably concluded that the price was worth paying. From the standpoint of the men, they must have concluded that the deferment of youthful hope was offset by the assurance of fair opportunity for veteran employees. From the standpoint of management, they must have concluded that an occasional personal rigidity was offset by the enhanced loyalty and stability that are encouraged by an effective seniority clause." Universal Atlas Cement Co., 17 Lab. Arb. 755, 757 (1951), *quoted in* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 374 (rev. ed. 1960).

16. RANDLE & WORTMAN 488-92.

17. *See* Part III *infra*.

(2) Seniority results in a decrease of labor turnover because a worker who has accumulated seniority does not want to sacrifice it by quitting.

(3) Seniority's objectivity reduces grievances over promotions.

(4) In many instances, seniority is as accurate a yardstick of ability as employer judgment.[18]

(5) Seniority encourages employees to learn as much as possible on their jobs, since they know they will advance to more difficult positions.

(6) Seniority prevents an excessive work pace by elimination of rivalry among workers.

(7) Both to the workers and to society, in the long run, job security is more important than efficiency.

(8) Long-service employees have greater family responsibilities and should therefore be given preference.

Disadvantages

(1) Seniority is an unwarranted interference with the prerogatives of management.

(2) Seniority exploits the more efficient employee and kills his productive impulse, since the same rewards go to the less efficient worker.

(3) Basing advancement on length of service drives the ambitious young employee to seek employment elsewhere, leaving behind an older, less efficient work force.

(4) While personnel management must be flexible to meet the demands of modern production, seniority imposes a rigid, mechanistic system.

(5) Seniority over-values experience, because there is not necessarily a positive correlation between experience and ability.

(6) Seniority does not eliminate discrimination, but merely establishes a different basis.

(7) Disputes over the application of seniority provisions are among the most frequent causes of grievances.[19]

---

18. James J. Healy followed up 58 arbitration awards in which the arbitrator had set aside management's promotion of a junior employee on the basis of superior ability. Of the 46 responses, 29 said the senior proved himself on the new job immediately or within a very short period. Sixteen of this 29 had since advanced even higher. In only 10 of the 46 did the company still feel the arbitrator's decision was wrong. *Promotions: A New Slant,* BUSINESS WEEK, Feb. 19, 1955, at 174-75.

19. For further discussion of the attitudes toward seniority, see N. CHAMBERLAIN, LABOR 263-69 (1958).

III. CRITERIA FOR PROMOTIONS

A. *Introduction*

The vast majority of grievances over promotions involve the issue of whether management has properly applied the clauses dealing with the criteria for making promotions. There are two basic types of "seniority provisions"[20]—strict seniority clauses, under which the exclusive criterion is length of service, and modified seniority clauses, which permit to varying degrees consideration of "fitness and ability." Although some contracts do contain strict seniority clauses,[21] the great majority, while serving the basic aims of seniority, recognize more fully the need for ensuring employee capability. The modified seniority provisions can be further broken down into three categories: relative ability, sufficient ability, and hybrid.[22] It is the function of these seniority provisions to establish and rank the factors which the employer may consider in the selection process. Typically, these clauses govern both promotion and layoff,[23] but there may be different clauses for each,[24] or even separate promotion clauses for differently rated jobs.[25]

B. *"Relative Ability" Clauses*

"Seniority shall govern where ability and physical fitness are relatively equal."[26] This clause, or one of its many variations, is preferred by management because, theoretically[27] it permits the selection of the "best" man for the job. Clearly, under this clause management may

20. This term is typically used to describe the clauses dealing with the criteria for promotions.

21. *E.g.*, Agreement between Dravo Corp., Union Barge Line, and Marine Engineers, *quoted in* BNA, CBNC, at 68:62; Dana Corp., 27 Lab. Arb. 203 (1956) (Mittenthal).

22. Although there are numerous names used for these various types of clauses, this writer has chosen those used in the most influential work in this area. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS (rev. ed. 1960) [hereinafter cited as ELKOURI].

23. The argument has been made that, while a relative ability clause may be appropriate with respect to promotions, strict seniority should govern layoffs because: (1) this is in line with the views of employees on the matter, *see* Selznick & Vollmer, *Rule of Law in Industry: Security Rights*, 1 IND. REL., No. 3, at 97 (1962); and (2) older workers should receive maximum protection against layoffs because of their greater family responsibilities and their greater difficulty in securing and adapting to new jobs. There are two basic arguments for applying some criterion which takes ability into consideration for layoffs. First, when the test is not the same, employees desirous only of holding a job perform at a minimum level. Fairweather, *Seniority Provisions in Labor Contracts: Social and Economic Consequences*, 1 DE PAUL L. REV. 191, 199 (1952). Second, it is during the stresses and strains of periods of layoff that the need for efficiency to meet competition is of maximum importance. Howard, *The Interpretation of Ability by Labor-Management Arbitrators*, 14 ARB. J. (n.s.) 117, 127 (1959).

24. *E.g.*, Advanced Structures, 37 Lab. Arb. 49 (1961) (Roberts).

25. *E.g.*, General Controls Co., 33 Lab. Arb. 213 (1959) (Thompson).

26. Lukens Steel Co., 46 Lab. Arb. 1005, 1006 (1966) (Roek).

27. *See* notes 41 & 42 *infra* and accompanying text.

compare the capabilities of the several applicants with respect to all the qualities which relate to their capacity to perform the open position.[28] The fact that the senior is fully qualified and possesses the ability to perform the work in a satisfactory manner is not sufficient to upset management's decision.[29] But if the evidence establishes that the senior has approximately equal ability, he is entitled to the vacancy since under these circumstances, seniority becomes controlling.[30]

Whether these clauses are phrased "approximately equal,"[31] "relatively equal,"[32] "reasonably equal,"[33] "substantially equal,"[34] or just "equal,"[35] they are interpreted the same. The problems arise from the fact that since all of these terms are inherently ambiguous, the arbitrator must proceed to define them. Thus, in one case where the contract read "relatively equal," the arbitrator elaborated by saying that "where a fair and objective appraisal establishes that the qualifications of a junior candidate . . . are *significantly, measurably* and *demonstrably* superior, the senior applicant cannot be said to have 'relatively equal' qualifications."[36] Another arbitrator in construing a "relatively equal" clause said "seniority shall apply unless *compelling, manifest inequality of ability requires otherwise.*"[37]

Even after completion of this circuitous defining process, whether or not the evidence shows one employee to be "relatively equal," or "significantly, measurably and demonstrably superior" to another, is largely a personal, subjective judgment. The evidence considered in

28. Bristol Steel & Iron Works, Inc., 47 Lab. Arb. 263, 265 (1966) (Volz); American Meter Co., 41 Lab. Arb. 856, 860 (1963) (DiLeone).

29. Bristol Steel & Iron Works Inc., 47 Lab. Arb. 263, 264 (1966) (Volz); International Nickel Co., 36 Lab. Arb. 343, 348 (1960) (Teple).

30. Monsanto Research Corp., 39 Lab. Arb. 735, 739 (1962) (Dworkin).

31. *Id.*; General Box Co., 35 Lab. Arb. 866, 867 (1960) (Caraway).

32. Lukens Steel Co., 46 Lab. Arb. 1005 (1966) (Rock); Dayton Steel Foundry Co., 38 Lab. Arb. 63 (1962) (Bradley).

33. Advanced Structures, 37 Lab. Arb. 49 (1961) (Roberts).

34. Semling-Menke Co., 46 Lab. Arb. 523 (1966) (Graff).

35. Scott Paper Co., 47 Lab. Arb. 552 (1966) (Wolff); North Shore Gas Co., 40 Lab. Arb. 37, 40 (1963) (Sembower).

36. Glass Containers Mfrs. Institute, Inc., 47 Lab. Arb. 217, 221 (1966) (Dworkin) (emphasis added).

37. Verona-Pharma Chem. Corp., 64-3 CCH Lab. Arb. Awards ¶ 9,203, at 7,176 (1964) (Rubin) (emphasis added). The futility of attempting to define one of these terms is illustrated by the following discussion in which the arbitrator uses *three* of the above terms to define the one in issue: " '*Relatively equal*' means equal in comparison with others .... It does not, however, mean absolute equality. . . . Where a comparison is involved, and the things to be compared are not identical, obviously a precise measurement cannot be made. As a practical matter, *substantial equality* would suffice, and if the qualifications seemed *reasonably* comparable, it would normally be held that the senior man would prevail." International Nickel Co., 36 Lab. Arb. 343, 348 (1960) (Teple) (emphasis added). Such an interpretation as this appears to negate completely the suggestion that "substantially equal" is more precise than "relatively equal." Note, *The Seniority Clause and Management's Right to Evaluate Ability*, 38 VA. L. REV. 655, 657 (1952).

this determination are those factors bearing on "fitness and ability." Since these terms are also vague, the parties on occasion attempt to define more explicitly their meaning of these concepts. For example, one clause read "[s]eniority dates shall govern in cases of promotions where physical fitness, knowledge, training, skill and efficiency are relatively equal between employees."[38] This adds nothing because such clauses are seemingly interpreted in the same manner as a simple "fitness and ability" clause.[39] The explanation for this is that management is permitted to consider all appropriate and relevant factors which bear upon the employee's qualifications for the job.[40] It would seem, therefore, that the parties should specifically exclude from the contract any factors they do not want considered.

Although a "fitness and ability" clause is the strongest from the standpoint of management,[41] the above discussion illustrates the Pandora's box which is opened when one attempts to compare employees, conceivably using over a dozen factors, under the guidance of clauses using vague, general words. Because of this uncertainty, management frequently promotes the senior employee even though there is serious doubt as to whether he is "relatively equal."[42] The need for objective, demonstrable evidence of differences in employees' abilities is therefore obvious; and in the past ten years, management has increasingly turned to the use of tests.

C. *"Sufficient Ability" Clauses*

"When ability to do the work and qualifications of the job are determined . . . as being *sufficient*, seniority will prevail."[43] "When two or more eligible employees bid on a posted job, the job will be granted to the employee with the greater seniority, provided he is *qualified*."[44] "The employee with the most seniority . . . shall be awarded the position bid on, providing he is *capable* of doing the work."[45] All three

38. Glass Containers Mfrs. Institute, Inc., 47 Lab. Arb. 217, 218 (1966) (Dworkin).

39. For a similar example, see S. SLICHTER, J. HEALY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 199-200 (1960).

40. John Deere Tractor Co., 16 Lab. Arb. 790, 792 (1951) (Levinson). The weighing process is further complicated, since several of these factors are incapable of exact measurement and the weight each should be given in a particular case is open to dispute. The factors include: test results, experience, trial period performance, supervisors' opinions, merit rating plans, education, production records, attendance record, disciplinary record, employee's physical and psychological fitness, personal characteristics and age. ELKOURI 391-409. Obviously, not all these are relevant in every case.

41. Whether this is true in practice has been questioned. *See* SLICHTER, HEALY & LIVERNASH, *supra* note 39, at 200.

42. N. CHAMBERLAIN & J. KUHN, COLLECTIVE BARGAINING 97 (2d ed. 1965); RANDLE & WORTMAN 505.

43. Equitable Gas Co., 46 Lab. Arb. 81, 82 (1965) (Wagner) (emphasis added.)

44. American Meter Co., 41 Lab. Arb. 856, 857 (1963) (DiLeone) (emphasis added).

45. R. D. Werner Co., 45 Lab. Arb. 21, 22 (1965) (Kates) (emphasis added).

of these clauses can be grouped in the "sufficient ability" category since under each the senior employee need possess only the minimum acceptable qualifications. Management may consider the senior's ability only in relation to the job itself, and the capabilities of the qualified senior bidder may not be compared with those of junior bidders, even though the latter are better qualified for the position.[46] However, a definition of "capable" or "qualified" must be determined. Some negotiators attempt to meet this problem by including a definition in the contract. Naturally, this definition may be worded so as to make it easy or difficult for the senior to qualify. For example, one agreement said " 'qualifications' and 'qualified' . . . shall mean with normal supervision, the factors necessary for the satisfactory performance of the work for which the employee is being considered."[47] This contract also provided for a period in which the senior bidder could demonstrate his qualifications, and further said that he need have only "the minimum basic qualifications" to be entitled to the demonstration period. The total effect of these provisions was to define "qualified" in a manner favorable to the senior employee and to provide a period clearly intended to allow him to prove he was qualified.[48] All of these provisions were still not enough to prevent a dispute, however, over the meaning of "normal supervision." The arbitrator interpreted this phrase to mean that the senior employee was entitled to some "orientation, indoctrination, and on-the-job experience to demonstrate" his ability.[49]

The following provision defines "qualified" in a manner which makes it more difficult for the senior bidder to meet the required standard:

> 'Qualified' . . . shall be deemed to consist of ability to perform satisfactorily the required duties of the job and to meet standards of quantity and quality without the need of further training. It is understood, however, that the employee will receive the usual and normal explanations to perform the work involved.[50]

Notice first that this contract uses the word "explanations" instead of "supervision." The apparent thinking was that "explanations" was less ambiguous, and also that it clearly suggested a very brief instruc-

46. American Meter Co., 41 Lab. Arb. 856, 860 (1963) (DiLeone); Nicholson File Co., 34 Lab. Arb. 46, 49 (1959) (Warns).

47. John Deere Chem. Co., 42 Lab. Arb. 443, 444 (1963) (Coffey).

48. Trial period clauses are often ambiguous as to whether they entitle the employee to the opportunity to show that he is qualified, or whether the trial period is for the company to "make sure" he can perform the job satisfactorily after it has already determined that he is qualified. *Compare* Trans World Airlines, Inc., 45 Lab. Arb. 267 (1965) (Beatty), *and* Dewey-Portland Cement Co., 43 Lab. Arb. 165 (1964) (Sembower), *with* R. D. Werner Co., 45 Lab. Arb. 21 (1965) (Kates), *and* Semling-Menke Co., 46 Lab. Arb. 523 (1966) (Graff).

49. John Deere Chem. Co., 42 Lab. Arb. 443, 445 (1963) (Coffey).

50. Martin Co., 46 Lab. Arb. 1116, 1119 (1966) (Gorsuch).

tional period. This latter expectation proved to be correct upon arbitration; the word was interpreted as entitling the senior employee only to a "clarification" or an "interpretation" of the job duties.[51] Secondly, this provision requires not only that the senior be able to perform "satisfactorily," but also that he be able to meet "standards of quantity and quality." Furthermore, this contract did not give the senior employee the right to a trial or demonstration period in which to demonstrate his competence.

The total effect of the provisions above was to impose a higher standard for the term "qualified" than that established by arbitrators when the contract does not define the term. For in these latter cases, while it is necessary that the senior man have a "present capacity" for the job, and not merely the ability to learn it,[52] this does not mean that he must be competent initially in all phases of the job.[53] Many times the arbitrator will grant the senior employee a trial or "breaking in" period in which he may demonstrate his capabilities, even though the contract does not provide for such trial.[54] Many contracts expressly provide for such a period, but even here the cases are clear that there is no duty to "train" the senior employee.[55] It is important to bear in mind that the meaning of "qualified" will vary with the nature of the job involved, and in some instances initial competence in all phases of performance might be reasonable.[56] Whether all the evidence shows the senior employee to be capable is again largely a personal judgment, but the problem is not as difficult as under the "relative ability" clauses, for here the senior is being measured only against the job, and there is no comparison of employees involved.

D. *Hybrid Clauses*

When negotiators are unable to agree on one of the more common seniority provisions, they may select a "hybrid" clause, which normally will not indicate whether seniority or ability is the more important factor.[57] As one would expect, there is no uniformity in the

51. *Id.* at 1122.

52. Nicholson File Co., 34 Lab. Arb. 46, 49 (1959) (Warns).

53. General Controls Co., 33 Lab. Arb. 213, 217 (1959) (Thompson).

54. *E.g.*, Perfect Circle Corp., 43 Lab. Arb. 817 (1964) (Dworkin); Southwest Air Motive Co., 41 Lab. Arb. 353 (1963) (Elliot); Nicholson File Co., 34 Lab. Arb. 46 (1959) (Warns).

55. *E.g.*, Babcock & Wilcox Co., 40 Lab. Arb. 1191 (1963) (Sherman); Nicholson File Co., 34 Lab. Arb. 46 (1959) (Warns).

56. *See* General Controls Co., 33 Lab. Arb. 213, 218 (1959) (Thompson).

57. Examples of such clauses include: "[I]n all cases of . . . promotion . . . the following factors . . . shall be considered: a. continuous service and ability to perform the work, b. physical fitness." Latrobe Steel Co., 34 Lab. Arb. 37 (1960) (McCoy). "The definition of seniority shall include ability to perform the required work of the job in a satisfactory manner . . . ." Trans World Airlines, Inc., 45 Lab. Arb. 267, 270

interpretation of hybrid provisions,[58] but the consensus is that this type of clause requires a comparison of both seniority and ability differences, with a marked advantage in either category determining the issue.[59] However, the ambiguity of hybrid clauses increases the likelihood of arbitration, and the arbitrator may interpret the provision as intending that one factor be determinative, although the parties actually intended no such priority. For example, a typical hybrid clause has been construed as intending that seniority be the primary consideration, partly because it was mentioned first.[60] On the other hand, there seems to be a tendency for arbitrators to interpret hybrid clauses as sufficient ability clauses.[61] Therefore, it appears that parties should not select a hybrid clause unless they are consciously doing so as a compromise, realizing fully that, should arbitration be necessary, the decision could go either way.

E. *Review of Management's Determination of Ability*

Under all three modified seniority clauses, management retains the right to make the initial determination of ability, with the union possessing the right to challenge the selection through the grievance procedure. Should the parties not resolve the disputes which arise, the ultimate decision lies with the arbitrator. It is the responsibility of the arbitrator, who is normally unfamiliar with the job requirements and the individuals involved, to decide chiefly on the basis of subjective factors, under vague standards, whether management's determination was correct. The problem which arises is: what is the quantum of proof necessary to upset management's decision and upon whom does the burden of proof lie?

Two detailed studies have been made of this problem and the findings in essence are as follows. Wayne E. Howard found two dominant schools of thought: "that which would upset company determination only if it had been proved to be arbitrary, capricious, or discriminatory; and that which would demand proof on the part of the company that the action they took was justifiable."[62] After analyzing cases espousing both views and finding "various shades of opinion expressed by different arbitrators within the [two] general

(1965) (Beatty). "[T]he Company shall be free to fill the Vacancy by selection of an employee . . . taking into account length of service insofar as the conditions of the business and the abilities of the employees permit." Southwestern Bell Tel. Co., 47 Lab. Arb. 475, 476 (1966) (Erbs).

58. Howard, *supra* note 23, at 123; Mitchem, *Seniority Clauses in Collective Bargaining Agreements* (pt. 2), 21 ROCKY MT. L. REV. 293, 310 (1949).

59. ELKOURI 386-87; Howard, *supra* note 23, at 123-24.

60. Southwestern Bell Tel. Co., 47 Lab. Arb. 475 (1966) (Erbs).

61. *E.g.*, St. Marys Kraft Corp., 40 Lab. Arb. 364, 366 (1963) (Duncan).

62. Howard, *The Role of the Arbitrator in Determination of Ability*, 12 ARB. J. (n.s.) 14, 17 (1957).

groups," he asks "whether they represent a basic difference in approach . . . or whether they are merely semantic differences which, in fact, lead arbitrators to the same conclusions under similar circumstances."[63] He concludes that there is a difference and that it does not lie in the quantum of proof, but rather in on whom the burden of proof rests. Those arbitrators in the first group start with the basic presumption that management decided correctly in the first instance, and place upon the union the burden of proving the company wrong. The other group assumes that the senior candidate possesses the requisite ability and requires the company to prove the contrary.[64]

Howard recommends that the company be forced to shoulder the burden for three reasons. (1) "Since management took the initial action in selecting a particular employee for a job vacancy, it is reasonable to expect that it should be able to justify its selection."[65] (2) "[I]t puts the burden of defending the determination of ability on that party which can best improve the procedures for carrying out the evaluation process."[66] (3) It is in accord with the scope of the arbitrator's authority in interpreting other contractual provisions where he can find a violation, even though there is no evidence the action was arbitrary, capricious, or discriminatory.[67]

Frank and Edna Elkouri approach the problem by grouping the cases under the type of seniority provision involved. Where there is a "relative ability" clause, their findings showed three basic approaches, with the majority apparently using the "arbitrary" test which places the burden on the challenging union.[68] A study of recent decisions by this writer reveals it is fairly well-established under "relative ability" clauses that the union will have to show the company's action was arbitrary, capricious or discriminatory.[69] In decisions involving "sufficient ability" clauses, the Elkouris found that arbitrators "placed the burden on the employer to show that the bypassed senior employee is not competent . . . ."[70] While this is generally the case,[71] strong recent support can be found for arguing that the "arbitrary" test should also be applied here.[72] As for "hybrid clauses," here the em-

63. *Id.* at 22.
64. *Id.* at 23-24.
65. *Id.* at 25.
66. *Id.* at 25-26.
67. *Id.* at 26.
68. ELKOURI 388-89.
69. *E.g.*, American Sugar Co., 46 Lab. Arb. 91 (1966) (Ray); United Fuel Gas Co., 45 Lab. Arb. 307 (1965) (Lugar); Roller Bit Co., 40 Lab. Arb. 939 (1963) (Autrey); General Box Co., 35 Lab. Arb. 866 (1960) (Caraway). *But see* Yuba Heat Transfer Corp., 38 Lab. Arb. 471, 475 (1962) (Autrey).
70. ELKOURI 389.
71. Atlas Processing Co., 46 Lab. Arb. 860, 863 (1966) (Oppenheim); American Meter Co., 41 Lab. Arb. 856, 861 (1963) (DiLeone).

ployer must show why ability was weighted more heavily than seniority.[73]

The Elkouris conclude, however, that regardless of the clause involved, in the final analysis:

> [A]s a practical matter, whether or not the arbitrator speaks in terms of burden of proof, in most cases when management's determination is challenged *both parties* are expected to produce whatever evidence they can in support of their respective contentions, and they ordinarily do so. The arbitrator in turn considers all the evidence and decides whether management's determination should be upheld as being *reasonably supported by the evidence* and as not having been influenced by improper elements such as arbitrariness, caprice, or discrimination.[74]

IV. Tests in the "Law" of Arbitration

A. *Introduction*

As has been discussed, a principal appeal of seniority is its objectivity. But in recognition of management's right to an efficient and productive operation, most contracts temper seniority with consideration of the employee's abilities. In balancing seniority and ability, management is permitted to consider a number of factors. Because several of these factors are subjective, management desires some objective, demonstrable evidence to support its claim that the senior employee was not "relatively equal" or that he did not have "sufficient ability" to perform the job. One such objective method of measuring employee qualifications is the use of tests.

B. *Right To Test*

In light of the fact that unions fought for the use of seniority in the name of objectivity, it is difficult to justify their resistance to testing. Nevertheless, most of the controversies over testing which have reached the arbitrators thus far have involved the company's legal right to use tests in determining employees' ability.[75] Notwithstanding a few early decisions which forbade the company's use of tests because the contract did not provide for them,[76] the arbitrators

72. Shenango Furnace Co., 46 Lab. Arb. 203 (1966) (Klein); R. D. Werner Co., 45 Lab. Arb. 21 (1965) (Kates); Emhart Mfg. Co., 43 Lab. Arb. 946 (1964) (Turkus).

73. Elkouri 390. For recent examples of this approach, see Southwestern Bell Tel. Co., 47 Lab. Arb. 475 (1966) (Erbs); Trans World Airlines, Inc., 45 Lab. Arb. 267 (1965) (Beatty).

74. Elkouri 391 (emphasis added). *See, e.g.* Glass Containers Mfrs. Institute, Inc., 47 Lab. Arb. 217 (1966) (Dworkin).

75. *See* Metzler & Kohrs, *Tests and "The Requirements of the Job,"* 20 Arb. J. (n.s.) 103 (1965).

76. Marquette Cement Mfg. Co., 25 Lab. Arb. 479 (1955) (Barnes).

have overwhelmingly approved their use if certain requirements are met. It seems remarkable, therefore, that unions have continued to contest management's right to test without questioning the validity or administration of the tests.[77] However, in more recent cases, the union briefly argues the right-to-test issue, but concentrates its attack on the company's alleged failure to meet the requirements arbitrators have established to protect against testing abuses.

Even though the right to test is now established, it is well to be aware of the arguments, all closely related to each other, presented by unions against testing. The most important is that testing for promotions involves a "condition of employment" and therefore must be the subject of prior negotiations.[78] Virtually the same argument, but somewhat different, is that promotion without testing through long practice has become a "working condition" or a right, much like a coffee break, which the company cannot change unilaterally.[79] Another contention often heard is that the subject of testing was not mentioned during negotiations[80] and, furthermore, the contract does not authorize their use.[81] Finally, the argument is presented that the use of test results is to add another condition to the seniority provisions,[82] or to substitute them for the qualifications listed.[83]

Management advances many persuasive reasons justifying the use of tests. For example, it is often argued that promotion clauses give management the right to determine employee qualifications,[84] and this necessarily contemplates the use of reasonable means and a variety of methods, including tests.[85] It can be argued that the company not only has the right, but the obligation, to use tests under clauses requiring consideration of ability.[86] Another provision of the agreement relied upon is the management prerogatives clause which reserves to management all rights not contracted away.[87] The rebuttal to the argument that tests are not provided for in the contract is that neither are they forbidden.[88] A past practice of promotion without testing

77. Capital Mfg. Co., 45 Lab. Arb. 1003, 1005 (1965) (Gibson); Perfect Circle Corp., 43 Lab. Arb. 817, 819 (1964) (Dworkin).

78. Armstrong Cork Co., 42 Lab. Arb. 349, 351 (1964) (Handsaker).

79. Latrobe Steel Co., 34 Lab. Arb. 37, 38 (1960) (McCoy).

80. Equitable Gas Co., 46 Lab. Arb. 81, 83 (1965) (Wagner); Capital Mfg. Co., 45 Lab. Arb. 1003, 1005 (1965) (Gibson).

81. Perfect Circle Corp., 43 Lab. Arb. 817, 819 (1964) (Dworkin).

82. Mead Containers, Inc., 35 Lab. Arb. 349 (1960) (Dworkin).

83. Perfect Circle Corp., 43 Lab. Arb. 817, 819 (1964) (Dworkin).

84. Capital Mfg. Co., 45 Lab. Arb. 1003, 1005 (1965) (Gibson); Mead Containers, Inc., 35 Lab. Arb. 349, 351-52 (1960) (Dworkin).

85. Trans World Airlines, Inc., 45 Lab. Arb. 267, 268 (1965) (Beatty); Pretty Prods., Inc., 43 Lab. Arb. 779, 783 (1964) (Nichols); Armstrong Cork Co., 42 Lab. Arb. 349, 350 (1964) (Handsaker).

86. *See* Kaiser Alum. & Chem. Corp., 33 Lab. Arb. 951, 952 (1959) (McCoy).

87. Capital Mfg. Co., 45 Lab. Arb. 1003, 1006 (1965) (Gibson).

88. Trans World Airlines, Inc., 45 Lab. Arb. 267, 268 (1965) (Beatty).

will not be controlling, even if the company has always voluntarily trained the senior employee on the job.[89] On the other hand, past use of tests without objection is very damaging to the union's position, particularly if subsequent contracts have not forbidden their use.[90] Wide usage of such tests in industry[91] and the soundness of testing in general[92] have also influenced the arbitrators. Arbitrators have recognized that today's shortage of skilled labor, forcing management to train its employees, has increased the desirability of using tests to determine which men have the required aptitude.[93] The need for a prior determination of ability by testing is even more obvious if the job involves possible danger to the public.[94] Finally, just as seniority is objective, so are tests.[95]

This last reason is undoubtedly one of the more, if not the most, important reasons why testing has been readily accepted. For in the words of Arbitrator Harry J. Dworkin:

> The results of the tests frequently serve as a diagnostic aid and have value in arriving at a reasonable, scientific and dispassionate conclusion of the fact in issue. The use of testing procedures frequently provide [sic] a basis for making a selection based upon a critical detachment as distinguished from preference resulting from considerations uurelated to the job.[96]

C. *Arbitrators' Requirements in Evaluation of Tests*

With the employer's right to test established, unions must question the validity and administration of the tests if they hope to upset management decisions. Through the years, various arbitrators have formulated the basic requirements which the tests should meet in rather indefinite terms. The essence of these ideas is contained in the following, oft-quoted statement:

> Arbitrators generally hold that tests used in determining ability must be (1) specifically related to the requirements of the job, (2) fair and reasonable, (3) administered in good faith and without discrimination, and (4) properly evaluated.[97]

It should be noted that these requirements are applicable to all types

89. John Strange Paper Co., 43 Lab. Arb. 1184, 1187 (1965) (Larkin).
90. Perfect Circle Corp., 43 Lab. Arb. 817, 822 (1964) (Dworkin); Caradco, Inc., 35 Lab. Arb. 169, 174 (1960) (Graff).
91. Pretty Prods., Inc., 43 Lab. Arb. 779, 783 (1964) (Nichols).
92. Armstrong Cork Co., 42 Lab. Arb. 349 (1964) (Handsaker).
93. Equitable Gas Co., 46 Lab. Arb. 81, 85 (1965) (Wagner).
94. Tri-City Container Corp., 42 Lab. Arb. 1044 (1964) (Pigors) (driving trucks on highways); Dayton Steel Foundry Co., 38 Lab. Arb. 63 (1962) (Bradley) (driving trucks on highways).
95. Glass Containers Mfrs. Institute, Inc., 47 Lab. Arb. 217, 222 (1966) (Dworkin).
96. *Id.*
97. ELKOURI 393.

of tests—oral,[98] written,[99] or performance,[100] and general aptitude tests,[101] or tests designed for certain types of jobs.[102] There are two additional requirements which are being imposed with increasing frequency: discussion of test results with the union; and a showing of reasonable necessity for the tests.[103] The following discussion sets each of these six requirements in its current application.

1. *Specifically Related to Job's Requirements.*—This requirement that the test be specifically related to the skill and knowledge required on the job is the most litigious issue with respect to testing. Sometimes the issue is expressed as whether the test is reliable and valid, meaning it must be consistent with requirements of the job and must predict job performance with reasonable accuracy.[104] Arbitrators have been criticized for applying this restriction only superficially, but this is partially understandable since most arbitrators are lawyers, untrained in the science of testing.[105] This criticism appears justified in light of the following approach: "This Board has no way of knowing the accuracy and value of the test. It will have to assume that management is not wasting its time giving useless tests."[106] Furthermore, the fact that a test is widely used and accepted does not necessarily mean it is appropriate for the job in issue, as where a general intelligence test is used in filling the job of machine operator.[107] In other cases, particularly where the tests are assigned to evaluate specific aptitudes, wide usage may justify acceptance of their validity.[108]

There are instances where it is fairly clear that the tests are not sufficiently related. Thus it was held that a company could not disqualify a man on the basis of his performance on an aptitude and

98. Linde Air Prods. Co., 25 Lab. Arb. 369, 370 (1955) (Shister).

99. Equitable Gas Co., 46 Lab. Arb. 81, 87 (1965) (Wagner); Wisconsin Elec. Power Co., 36 Lab. Arb. 1401 (1961) (Davis).

100. Tri-City Container Corp., 42 Lab. Arb. 1044 (1964) (Pigors) (drive truck); General Controls Co., 33 Lab. Arb. 213 (1959) (Thompson) (read instrument).

101. Equitable Gas Co., 46 Lab. Arb. 81 (1965) (Wagner) (Wonderlic Personnel); Wisconsin Elec. Power Co., 36 Lab. Arb. 1401 (1961) (Davis) (IQ).

102. Scott Paper Co., 47 Lab. Arb. 552 (1966) (Wolff) (mechanical comprehension); Glass Containers Mfrs. Institute, Inc., 47 Lab. Arb. 217 (1966) (Dworkin) (maintenance adaptability).

103. However, it has been suggested that even the four more traditional requirements receive only lip service from arbitrators in practice. Metzler & Kohrs, *supra* note 75, at 104.

104. National Cooperative Refinery Ass'n, 44 Lab. Arb. 92 (1964) (Brown); Nicholson File Co., 34 Lab. Arb. 46 (1959) (Warns).

105. Metzler & Kohrs, *supra* note 75, at 104-05.

106. Trans World Airlines, Inc., 45 Lab. Arb. 267, 268 (1965) (Beatty).

107. In one such case, the union argued to no avail that a mechanical aptitude test should have been given. Armstrong Cork Co., 42 Lab. Arb. 349, 351 (1964) (Handsaker).

108. *E.g.*, Equitable Gas Co., 46 Lab. Arb. 81 (1965) (Wagner); Fansteel Metallurgical Corp., 36 Lab. Arb. 570 (1960) (Marshall).

mechanical comprehension test when ninety per cent of the job's duties consisted of clean-up work.[109] On the other hand, there can be no question that a performance test involving the actual job duties satisfies this first requirement.[110] In the great majority of cases where it is unclear whether the test is valid, it would seem that arbitrators could make a reasonably accurate determination merely by comparing the questions with the job requirements.[111]

It is submitted that the employer faces a more difficult burden of proof when the issue is whether the test predicts job performance with reasonable accuracy, rather than whether it is specifically related to the job. For under this stricter requirement, management may have to introduce evidence that it has validated the tests by administering them to employees presently performing the job satisfactorily.[112] In this respect, a study has revealed that while mechanical aptitude tests can rule out definitely poor prospects, those scoring highest may prove inferior to those in the average range.[113] This is due to the tests' inability to evaluate motivation, attitudes, and imagination.[114] Also, tests may be clearly related to the job but held invalid and unreliable if the applicants involved are unable to read, write, or verbalize fluently.[115]

An obvious problem is *how* related the test must be. Must it be tailor-made for a specific job in a particular company, or need it only be reasonably related? Both views have been expressed. Several arbitrators insist that the test be "tailored" to the job,[116] and one went so far as to say "the sole question is whether a *second* electrician in *this* plant could . . . show his qualifications by his answers on this

109. Central Soya Co., 41 Lab. Arb. 1027 (1963) (Tatum). *See also* Latrobe Steel Co., 34 Lab. Arb. 37, 38 (1960) (McCoy) (test designed for office clerks was administered to storeroom clerk applicants).

110. *E.g.*, Tri-City Container Corp., 42 Lab. Arb. 1044 (1964) (Pigors); Dayton Steel Foundry Co., 38 Lab. Arb. 63 (1962) (Bradley).

111. Caradco, Inc., 35 Lab. Arb. 169 (1960) (Graff); Kaiser Alum. & Chem. Corp., 33 Lab. Arb. 951 (1959) (McCoy).

112. National Cooperative Refinery Ass'n, 44 Lab. Arb. 92, 95 (1964) (Brown); Nicholson File Co., 34 Lab. Arb. 46, 48 (1959) (Warns).

113. Metzler & Kohrs, *supra* note 75, at 110.

114. A recent study at Williams College reflects much the same findings. It involved the scores on college board Scholastic Aptitude Tests and showed that the student who worked hard in high school and earned high grades, but scored relatively low on the college board tests generally does better in college than the individual who did poorly in high school but had high scores on his college boards. *Education*, TIME, March 10, 1967, at 58. Both of these studies tend to show that motivation and work habits are very important.

115. "[I]t is quite conceivable that the best bricklayer a company had could not pass a written test on bricklaying." Latrobe Steel Co., 34 Lab. Arb. 37, 39 (1960) (McCoy).

116. Martin Co., 46 Lab. Arb. 1116, 1123 (1966) (Gorsuch); Latrobe Steel Co., 34 Lab. Arb. 37 (1960) (McCoy).

test."[117] A much broader position is reflected in the following statement: "It is generally agreed, however, that where ability to perform the job in question is a matter to be judged in selection, any test that has a *reasonable relation* to the performance of the work to be done may be used."[118] If a company can afford the expense, satisfaction of this requirement can be virtually assured by the hiring of an expert in the area of industrial testing to visit the plant, conduct interviews, observe the work and recommend established tests for the job.[119]

A closely related problem is whether the test must relate only to the skills necessary for the open position, or whether it may also evaluate the applicant's potential for further advancement. It has been said so often that the employer must determine employee ability solely on the basis of the present job's requirements, without regard to potential for subsequent upgrading, that perhaps this should be listed as a separate rule.[120] The reasons behind this statement are sound, since such a rule does not limit the opportunity of a worker to advance as far as his capabilities permit. Furthermore, ability with respect to one particular job can be more accurately measured than ability for possible future jobs.[121] Nevertheless, there are decisions which appear to indicate that if management can show that the position is a "helper" position and that the employee must spend part of his time on the higher job,[122] or must be able to advance to higher positions because of the job structure in the department,[123] then it may be permissible to establish somewhat higher standards for the low position. The reasoning behind this approach is also understandable. If a certain "assistant" position teaches skills which are absolute prerequisites for the next higher job, and if the "assistant" job becomes filled with men incapable of advancing further, the company has no economical way to train men for the higher position.

117. Nicholson File Co., 34 Lab. Arb. 46, 48 (1959) (Warns) (emphasis added).

118. John Strange Paper Co., 43 Lab. Arb. 1184, 1188 (1965) (Larkin) (emphasis added).

119. *See* R. D. Werner Co., 45 Lab. Arb. 21 (1965) (Kates). *See also* Glass Containers Mfrs. Institute, Inc., 47 Lab. Arb. 217 (1966) (Dworkin); Dayton Steel Foundry Co., 38 Lab. Arb. 63 (1962) (Bradley). The use of company-devised tests, such as that used in Martin Co., 46 Lab. Arb. 1116 (1966) (Gorsuch), will probably decrease sharply. *See* text accompanying notes 160 & 161 *infra*.

120. *E.g.*, Georgia Kraft Co., 47 Lab. Arb. 829, 830 (1966) (Williams); Martin Co., 46 Lab. Arb. 1116, 1123 (1966) (Gorsuch); Central Soya Co., 41 Lab. Arb. 1027, 1031 (1963) (Tatum); Ynba Heat Transfer Corp., 38 Lab. Arb. 471, 475 (1962) (Autrey).

121. *See* Howard, *The Interpretation of Ability by Labor-Management Arbitrators*, 14 ARB. J. (n.s.) 117, 131 (1959).

122. *See* Scott Paper Co., 47 Lab. Arb. 552 (1966) (Wolff).

123. *See* Glass Containers Mfrs. Institute, Inc., 47 Lab. Arb. 217, 223 (1966) (Dworkin). *See also* Pretty Prods., Inc., 43 Lab. Arb. 779, 781-82 (1964) (Nichols), where the company argued that the helper would, as soon as possible, be upgraded. The company's selection was upheld and the arbitrator did not reject the appropriateness of this argument.

Finally, it must be remembered that the testing requirements are in the conjunctive. It is possible, therefore, that the test may be valid and sufficiently related in every respect, but that the arbitrator may hold the applicant's failure should not disqualify him because the test was not necessary in the first place. This situation arises most frequently with respect to performance tests where the skill involved can be learned in a short period of time.[124]

2. *Fair and Reasonable.*—This rather general requirement is usually concerned with whether the applicants were given sufficient time on the test and understood the questions and instructions.[125] While there is normally no dispute over whether the questions were fair, the company can assure that there will be none by permitting the union to eliminate any questions which appear unreasonable.[126] And a test may be ruled unfair if the applicant's apparent lack of knowledge is found to stem from an inability to read or to express himself.[127]

3. *Administered in Good Faith and Without Discrimination.*—It is apparent there is some overlap among the six requirements, particularly between this and the "fair and reasonable" requirement discussed in the preceding paragraph. Under this requirement, however, most arbitrators are concerned with whether all the applicants were administered the same test under similar conditions.[128] In order to comply, management should announce the test when the job is first posted, and later should notify the unsuccessful applicants in time for them to file grievances.[129] The company can be confident it has satisfied this condition if a non-employee, unfamiliar with the applicants, administers and scores the tests.[130] Further, the company may have trained personnel administer the tests and permit the applicants to take them twice.[131]

Discrimination against a Negro applicant was found where the administrator of a performance test had previously made a remark showing racial prejudice. This statement, plus others during the test, made the Negro nervous and resulted in his being given a second test in the presence of a union representative.[132] A test devised and

124. General Controls Co., 33 Lab. Arb. 213 (1959) (Thompson); Acme-Newport Steel Co., 31 Lab. Arb. 1002 (1959) (Schmidt).

125. *See* Dayton Steel Foundry Co., 38 Lab. Arb. 63 (1962) (Bradley); Linde Co., 31 Lab. Arb. 757 (1958) (Shister).

126. Westinghouse Elec. Corp., 41 Lab. Arb. 902 (1963) (Stein).

127. *See* Latrobe Steel Co., 34 Lab. Arb. 37, 39 (1960) (McCoy); Linde Air Prods. Co., 25 Lab. Arb. 369, 372 (1955) (Shister).

128. Trans World Airlines, Inc., 45 Lab. Arb. 267, 268 (1965) (Beatty); Linde Co., 31 Lab. Arb. 757 (1958) (Shister).

129. Caradco, Inc., 35 Lab. Arb. 169, 174 (1960) (Graff).

130. Dayton Steel Foundry Co., 38 Lab. Arb. 63 (1962) (Bradley).

131. Glass Containers Mfrs. Institute, Inc., 47 Lab. Arb. 217, 222 (1966) (Dworkin).

132. Tri-City Container Corp., 42 Lab. Arb. 1044 (1964) (Pigors).

given after the promotion will be held in bad faith because of the possibility of its being slanted.[133] It is probable that if all the applicants had advance access to the test questions, with the consequent opportunity to secure outside assistance, the arbitrator would rule the test results inadmissable. Such was not the case, however, in a very questionable decision where the arbitrator merely remarked:

> In answer to the Union's charge, or implication, that two of the contestants may have gotten outside help in answering the questions, as the Company has pointed out, there was no great secret about the test questions. All contestants had the same opportunity; none finished the test at the first session, but each of them must have known what it was all about after having his first session.[134]

4. *Properly Evaluated.*—An obvious example of this requirement is that the company cannot compare employees' scores under a "sufficient ability" clause. Should the senior applicant achieve the minimum acceptable mark, he is qualified with respect to the test factor. The most troublesome problem arising under this requirement is the validity of the cut-off score. It is on this issue and that of the test's reliability and relation to the job's requirements[135] that unions will henceforth pitch most of their cases.[136]

Commentators have warned that even if a valid test has been selected and is administered to two individuals equal in whatever is being measured, there are factors which can cause differences in their scores, such as: (a) ability to verbalize, (b) ability to read and understand quickly, (c) experience in taking tests, (d) emotional and physical conditions of the individuals, (e) errors in scoring, and (f) appreciation of the importance of the test and degree of effort.[137] Furthermore, a score should not be considered as a specific point on a scale, but rather as a mid-point on a range. To illustrate, on a particular test, a score of 92 might properly be seen as representing a range of scores between 86 and 98; a score of 82, a range between 76 and 88. The two bands overlap, indicating there is no marked difference in the employees' knowledge.[138]

In light of these facts, it is apparent that cut-off scores should not only be established with great care but should also be used with flexibility. A recent case involving an established minimum acceptable score illustrates that both problems arise most frequently under

133. International Nickel Co., 36 Lab. Arb. 343 (1960) (Teple).
134. John Strange Paper Co., 43 Lab. Arb. 1184, 1188 (1965) (Larkin).
135. *See* text accompanying notes 104-24 *supra.*
136. *See* BNA, 63 LAB. REL. REP. 70 (1966). *See also* National Cooperative Refinery Ass'n, 44 Lab. Arb. 92 (1964) (Brown).
137. Metzler & Kohrs, *Tests and "A Marked Difference in Ability,"* 19 ARB. J. (n.s.) 229, 233 (1964).
138. *Id.* at 234-35.

"sufficient ability" clauses.[139] The cut-off scores for three tests were based on the fact that seventy per cent of all candidates for apprentice training achieved the minimum established score. The tests this time were used for the higher position of Process Inspector. The obvious question is whether these tests can be specifically related to both jobs. Furthermore, while these cut-off scores appear fair, one can raise the question whether experience had shown they did in fact exclude only candidates who lacked the required qualifications.[140] Even more doubt is cast upon the arbitrator's decision to uphold the company in light of the fact that the grievant exceeded the cut-off score on two tests and missed it by only one point on the third. Had prior experience shown that someone scoring 39 points as opposed to 38 possessed knowledge and skill which should set him apart from the grievant?[141] In support of the arbitrator, it should be mentioned that the other factors considered supported his decision. A reading of the opinion, however, suggests that considerable weight was given to the applicants' performances on the tests.

Another recent decision illustrates even more graphically an arbitrator's relying unquestioningly on the validity of cut-off scores.[142] Here the company administered a test and established 70 as the passing grade. The senior employee scored 47, and the other applicant, 33. Since neither passed, a second examination was given with 65 set as the passing grade. This time the grievant made 53; the junior employee, 68. The junior man received the job. There is no discussion of the validity of either 70 or 65 as cut-off scores, nor is there any explanation for the successful bidder's significant jump from 33 to 68 when the senior employee's scores remained relatively consistent. To make the decision even more questionable, there is little, if any, consideration of other factors bearing on their respective abilities. The questions raised about these two cases are not intended to infer that the arbitrators' ultimate decisions were incorrect, but only to suggest that the difficult problems presented by cut-off scores are not always fully appreciated and adequately examined.

A "rule" heard so frequently it perhaps should receive separate treatment is that test scores should not be deemed conclusive.[143] In one sense, this is a recognition of the problems raised above, but it is also a warning that test results are only one factor relevant in determining ability. This rule is one which cannot be overemphasized, for there is a great danger that test scores because of their relative

139. R. D. Werner Co., 45 Lab. Arb. 21 (1965) (Kates).
140. *See* National Cooperative Refinery Ass'n, 44 Lab. Arb. 92, 96 (1964) (Brown).
141. *See* Standard Oil Co., 31 Lab. Arb. 907, 910 (1958) (Warns).
142. Westinghouse Elec. Corp., 41 Lab. Arb. 902 (1963) (Stein).
143. *E.g.*, Glass Containers Mfrs. Institute, Inc., 47 Lab. Arb. 217 (1966) (Dworkin); Latrobe Steel Co., 34 Lab. Arb. 37 (1960) (McCoy).

objectivity and apparent preciseness may unduly influence the entire evaluation process.[144]

5. *Union Involvement in Testing.*—A requirement which is being incorporated into the arbitrators' decisions with increasing frequency is that management confer with the union following the tests.[145] It seems reasonable that the company should show the union the tests, explain why answers were wrong, discuss how the cut-off score was established, illustrate the method of grading, and reveal the weight given each part of the test. At least one arbitrator believes the company is obligated to discuss in advance with the union its intention to give a test, what it will cover, and what will be a passing grade.[146] Another arbitrator feels the union should participate in the selection of the tests.[147] Undoubtedly, unions will soon be entitled to all of these rights under the contract, since the subject of testing is just beginning to be a subject at the bargaining table.[148]

6. *Test Must Be Reasonably Necessary.*—An alternative manner of phrasing this rule is that the test may not be an unreasonable requirement. Perhaps the best exposition of this testing safeguard is the following statement:

> The test must be reasonably necessary to determine the qualifications of perform [sic] the specific job involved. Certainly this means [that] for most jobs where the work is routine or a man learns the work as a helper [or where he] is certified or [is] a journeyman, such a test would be improper as it would not be essential to the determination of a man's qualifications.[149]

A company would be well advised to be selective in its use of tests. If the job requires only a strong back, a quick look at the applicant's personnel record and a physical examination probably would be the only reasonable requirements.[150] Whenever the skills can be learned quickly or easily, tests for that skill may be held unreasonable.[151] Should the job, however, require that the employee be initially competent to prevent unreasonable expense[152] or to protect the public,[153] a

144. For two decisions where this may have been the case, see Westinghouse Elec. Corp., 41 Lab. Arb. 902 (1963) (Stein); Linde Co., 31 Lab. Arb. 757 (1958) (Shister).

145. Equitable Gas Co., 46 Lab. Arb. 81 (1965) (Wagner); Fansteel Metallurgical Corp., 36 Lab. Arb. 570 (1960) (Marshall); Latrobe Steel Co., 34 Lab. Arb. 37 (1960) (McCoy); Wisconsin Elec. Power Co., 33 Lab. Arb. 713 (1959) (Kelliher).

146. Martin Co., 46 Lab. Arb. 1116, 1123 (1966) (Gorsuch).

147. Acme-Newport Steel Co., 31 Lab. Arb. 1002, 1005 (1959) (Schmidt).

148. *See* BNA, 63 LAB. REL. REP. 70 (1966).

149. Martin Co., 46 Lab. Arb. 1116, 1123 (1966) (Gorsuch). *See also* Latrobe Steel Co., 34 Lab. Arb. 37 (1960) (McCoy).

150. *See* Kaiser Alum. & Chem. Corp., 33 Lab. Arb. 951, 952 (1959) (McCoy).

151. *See* General Controls Co., 33 Lab. Arb. 213 (1959) (Thompson); Acme-Newport Steel Co., 31 Lab. Arb. 1002 (1959) (Schmidt).

152. *See* General Controls Co., 33 Lab. Arb. 213, 218 (1959) (Thompson).

153. *See* Tri-City Container Corp., 42 Lab. Arb. 1044 (1964) (Pigors).

test would be permissible regardless of how readily the skill may be acquired. A test will also be an unreasonable requirement when the employee under a "sufficient ability" clause, has previously performed satisfactorily the job in question.[154] And finally, it is possible that an employee's record may so clearly indicate his right to the promotion that any testing of him would be unreasonable.[155]

V. Tests and the 1964 Civil Rights Act

A. *Introduction*

Employers in the past have often used tests for discriminatory purposes. Particularly in the South, Negroes are often fully qualified to perform the work but unable to pass a written test because of their educational deficiencies. Title 7 of the 1964 Civil Rights Act attempts to eliminate certain types of discriminatory tests.[156] Under this act, employers are still authorized to use tests to determine employee qualifications for employment or promotions, but their use is subject to the condition that the tests, their "administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin."[157]

Very few cases have as yet reached the Equal Employment Opportunity Commission involving this testing provision of the act. Employers, therefore, seeking guidance in the search for sound testing procedures appealed to the Commission, which in turn consulted a panel of outstanding psychologists. Based on the panel's recommendations, the Commission issued testing guidelines in September, 1966.[158] In its introductory remarks, the Commission warned that if facts indicate an employer has discriminated in the past on the basis of race, the use of tests by him will be scrutinized carefully. Because there have been so few reported decisions, the announced guidelines merit rather detailed treatment.

B. *Testing Guidelines and "Professionally Developed Ability Tests"*

The Commission advocates that the employer who wishes to ensure equal opportunity to all applicants and employees use a total personnel

154. Avco Mfg. Corp., 34 Lab. Arb. 71 (1959) (Gill).

155. American Meter Co., 41 Lab. Arb. 856 (1963) (DiLeone). The employee, however, would be wise to take the test, and then if he does poorly on it, argue one of the points this paper has discussed. In this respect, see Trans World Airlines, Inc., 45 Lab. Arb. 267, 269 (1965) (Beatty); Mead Containers, Inc., 35 Lab. Arb. 349, 353 (1960) (Dworkin).

156. 42 U.S.C. § 2000e (1964).

157. 42 U.S.C. § 2000e–2(h) (1964).

158. CCH Employment Practices, ¶ 16,904 (1966).

assessment system. This system places special emphasis on the following matters.

1. *Careful Job Analysis To Define Skill Requirements.*—An employer should not place unnecessarily restrictive requirements on jobs. For example, there are many jobs which should not be limited to "high school graduates only." The primary concern here is that the employer determine the essential requirements of the job before selecting tests.

2. *Special Efforts in Recruiting Minorities.*—The Commission urges employers to seek out minority group applicants and to hire and promote "qualifiable" applicants.

3. *Screening and Interviewing Related to Job Requirements.*—After determining the essential requirements of a job, the employer should have personnel sincerely committed to equal employment opportunity do the screening and interviewing. The interviewers should realize that minority group applicants usually appear less confident or less knowledgeable than they actually are.

4. *Tests Selected on the Basis of Specific Job-Related Criteria.*—Tests should be only one component of the personnel assessment system. Furthermore, there is the danger that tests designed for one situation may be improperly used in another situation. While the Commission will not recommend any particular tests, it adopts the *Standards for Educational and Psychological Tests and Manuals*, published by The American Psychological Association. This publication was prepared by recognized experts in the area to establish standards and technical merits of evaluation procedures.

5. *Comparison of Test Performance Versus Job Performance.*—The Commission urges that employers use job-related ability tests. Even if this is done, employers must realize that the scores of employees who have not enjoyed equal educational opportunities will not accurately reflect their job potential. The ultimate standard should therefore be performance on the job.

6. *Retesting.*—Employers are encouraged to allow "failure candidates" who avail themselves of more training or experience to retake the required tests. Testing regulations should be liberally construed to allow for retesting.

7. *Tests Should Be Validated for Minorities.*—The sample population used to establish "norms" should include members of minority groups, to ensure that the test is free from inadvertent bias. Employers presently using tests should check them to make sure that hidden discrimination is not present.

8. *Objective Administration of Tests.*—Because tests are only assessment tools, their value depends upon the skill of the administrator. It is essential that these persons be trained not only in the technicalities of testing, but also in maintaining proper testing conditions. Members of minority groups are particularly nervous during tests, and the administrator should be adept at alleviating as much of the anxiety as possible.

The Civil Rights Act places an additional limitation on company testing programs since it permits only a "professionally developed ability test." This has been defined by the Commission to mean

> a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.[159]

A recent Commission decision announced that this provision means "not only must the tests in question be devised by a person or firm in the business or profession of developing employment tests, but in addition, the tests must be developed and applied in accordance with the accepted standards of the testing profession."[160] This requirement would seem to eliminate completely the use of company-devised tests except where the company employs an individual fully qualified in the area of testing, or the company is confident no question of discrimination will arise.

This same decision also made it clear that the tests used must be structured in terms of the skills required on the specific jobs in issue and that the tests be validated accordingly. The Commission explained this to mean that it must be shown that those individuals passing the test have a greater chance for success on the jobs involved than those who fail. It will be noticed that this requirement is the more stringent of the two commonly used by arbitrators. As was discussed above,[161] some arbitrators require only that the test be specifically related to the job, without discussing its accuracy in predicting job performance. Also illustrated by this Commission decision is the danger of using "general intelligence" tests for promotional purposes. The Commission held this type of test did not measure the traits necessary for the successful performance of the available positions, here, laboring jobs in a paper mill.

While the testing requirements of the 1964 Civil Rights Act are applicable only in cases of alleged discrimination on any of the named

159. *Id.* at 7319.
160. CCH EMPLOYMENT PRACTICES, ¶ 17,304.53 (1966).
161. *See* text accompanying notes 135-44 *supra.*

bases, it is only reasonable to predict that unions will demand that these conditions be adhered to in all testing situations. For example, future collective bargaining agreements may well forbid the use of "general intelligence" tests, except for a few selected positions, because most industrial jobs do not require verbal facility and mathematical proficiency. The Commission's decisions involving proper testing procedures will undoubtedly influence arbitrators' awards.

VI. CONCLUSION

Many employers began testing in order to introduce more objectivity into the largely subjective process of evaluating employees' abilities under seniority provisions. Unions, which had fought for seniority in the name of objectivity, surprisingly contested management's right to test. After approximately ten years of waging a losing struggle on this issue, unions have recently switched their attack to the companies' alleged failures in meeting the requirements arbitrators have established to protect against testing abuses. The testing requirements enunciated by the 1964 Civil Rights Act and the Equal Employment Opportunity Commission to eliminate certain types of discrimination through tests will assuredly have application in the further development of sound, overall testing programs for all employees. While at present very few contracts have provisions with respect to testing, undoubtedly most future agreements will.[162] This development should reduce the number of disputes, since requirements now imposed by arbitrators will be written into bargaining agreements. While there will still be disagreements over whether the tests were properly evaluated,[163] controversies as to whether the tests are specifically related to the job's requirements[164] can, and should, be prevented at the bargaining table. This note was intended to provide some guidance for both management and unions in the hope that tests may be properly utilized, because the objectivity they offer the selection process complements the traditional seniority system and will clearly contribute to a reduction of disputes over promotions.

AUBREY L. COLEMAN, JR.

162. *See* BNA, 63 LAB. REL. REP. 70 (196).
163. *See* text accompanying notes 135-44 *supra.*
164. *See* text accompanying notes 104-24 *supra.*