LAYOFFS IN THE SOUTH AFRICAN AND UNITED STATES MINING INDUSTRIES COMPARED

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Introduction

Insofar as labor relations are concerned, the mining industry in South Africa has much more in common with American mining than one might expect. It should go without saying that mining occurs where the minerals are located. In both countries this has meant the establishment of communities in the areas where minerals were located. Johannesburg is associated with mining because of its proximity to minerals, just as Charleston, West Virginia is closely associated with the coal mining industry in the United States.

Wherever commercial mining is done, mining enterprises have historically required large capitol investments and large numbers of employees. In both the United States and South Africa the organization of the workforce bore many similarities. In both countries mining organizations were hierarchical. Although different job titles may have been used in the two countries, the organization fundamentally consisted of mine manager who had overall responsibility for the operation. Below the mine manager were managers who were in charge of production and other managers who were in charge of maintaining the equipment in the mines. Below these individuals were a series of foremen who are referred to as foremen, shift bosses or section foremen. Typically, in the United States employees at and above the rank of section foreman were not members of a union. Typical underground mining jobs in both countries were miner operator, motormen, shuttle car operator, beltmen, bratticemen, general inside laborer, roofbolter and electrician. In both countries a distinction is typically made between underground and surface employees. Typically, surface jobs were held by more senior employees.

Historically in both countries many jobs in mining required little or no skill. Often miners worked a considerable distance from their homes. So called "*company towns*" were associated with many mining operations in both countries. "*Scrip*" and the "*company store*" are legendary in the mining communities of the United States. Even today, there are many communities in the United States that are essentially mining towns. Formerly, the housing in many of these towns was actually owned by the mining company. Much the same situation exists in South Africa today. A draft housing and accommodation agreement may be found on the web site of the NUM.

Mining is inherently dangerous. The governments of both countries have detailed mine safety legislation. The mining industries of both countries have a history of volatile labor relations which includes strikes and violence. Historically race has been a large factor in the labor relations of the South African mining industry. Although not as widely publicized, both race and nationality have been important in the labor relations of the mining industry in the United States.

During the past 20 or 30 years changes have occurred in mining technology which have caused employers in both South Africa and the United States to change their organizations. Mining companies in both countries have withdrawn from *non-core* activities and are more directly focusing on the management of their mining operations. For several years mining companies in the United States have been selling off their residential holdings in former "*company towns*". Similar developments are occurring in South Africa. These changes affect labor relations. Socially and economically employees are less dependent on the company than they formerly were.

Another similarity of the mining industries of the United States and South Africa over the past twenty or twenty five years has been the great number of layoffs or redundancies. In both countries vast numbers of employees have lost their jobs either because of market conditions or technological changes in mining methods. The details of how these layoffs, redundancies, or reductions in force, are carried out is what this paper is about. In both countries layoffs are generally carried out against the back drop of public law and collective labor agreements. Despite the similarities noted above, there are significant differences between the two countries in the manner in redundancies or layoffs are carried out.

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The public law applicable to redundancies in South Africa will be discussed first. This is followed by a discussion of some recent decisions of the South Africa Labor Court in the mining industry that involve redundancies. The federal and state public law of the United States that relates to layoffs is discussed next. This will be followed by an analysis of the relevant provision of the National Bituminous Coal Wage Agreement and a decision of the Arbitration Review Board regarding layoffs. The paper concludes with some comparisons and conclusions follow that section.

South African Law

Layoffs or "*redundancies*" as they are referred to in the South African Labor Relations Act of 1995 are governed by in large measure by section 189 of that Act as amended. Section 189 is reproduced in the Appendix. Redundancies occur when an employer terminates employees "*based on the employer's operational requirements*" or as is said in the United States "*for economic reasons*". The phase *operational requirements of an employer* is defined in section 213 of the Act to mean "*based on the economic, technological, structural or similar needs of the employer"*. Several cases arising in other industries have generally established that any circumstance that calls into question the continued viability of the company can give rise to redundancies based on the operational needs of the employer. Cases from other industries also permit employers to adopt new terms of employment in such circumstances.

The role of the judiciary in redundancy cases has been a matter of some controversy. It has been argued that when the employer decides to terminate employees based on operational requirements, the courts should not second guess the employer. This view holds that if there is a commercial rationale for the employer's decision, judicial intervention should be limited to dismissals in bad faith or for improper motives. Others have advocated a broader role for the courts. For example, in the case of ***UPUSA the East Rand Proprietary Mines LTD***, NH(11/2/18608) unreported 45, the court said "*management should 'consider every outstanding issue before taking the final decision'."* This approach has been criticized as coming "*coming close to recognizing a property right in a job*." However, it has also been argued that employees have a real contribution to make in the decisionmaking process and there should be the greatest degree of consultation between employers and employees in order to assure a result that is most beneficial to all. It is generally agreed that the labour court has an obligation to assure that there has been compliance with the Act. Butterworth makes the point at page 370: *"In the present context the employer is required to prove such dismissals are fair (§ 192)(2). Fair means that a reason for dismissal based on the employer's operational requirements is, in fact, present*."

The employer may be required to consult pursuant to the terms of a collective bargaining agreement [CBA]. In the absence of a CBA requiring consultation, the employer must consult with a workplace forum if there is one. In the absence of a workplace forum the employer must consult with a registered trade union that is likely to be affected by the dismissals. If there is no such union then the employer must consult with the employees likely to be affected by the dismissals. The duty to consult arises when the employer contemplates a retrenchment. The Act contemplates that consultations will take place before the employer reaches a final decision to terminate employees. The employer is also obligated to consult with regard to measures that the company might take to avoid the dismissals §189(2)(a)(1).

Employers are also obligated to consult about appropriate measures to mitigate the adverse effects of dismissal. These measures include finding alternative employment and giving retrenched workers priority for reemployment. The Act does not require these or any other forms of assistance, exclusive of severance pay, but merely imposes a duty to consult.

One of the purposes of the earlier Act was to induce the employer and union or employee representative to reach agreement on the criteria for dismissal and absent an agreement to encourage the employer to apply fair and objective criteria. The 1995 Act restates this policy. Where the parties do not agree on criteria § 189(7)(b) requires the employer to select the employees to be dismissed according to criteria there are fair and objective.

Under the previous Act, there was controversy whether the employer was required to offer retrenched employees any severance pay. As a rule the old industrial court claimed the power to award severance pay in certain situations. Under section 196(1) of the Act of 1995 an employer is required to pay severance pay equal to at least one week's pay for each year of continuous service. At the time this paper was being written revisions to section 196 were under consideration. Statutory entitlement to severance pay does not affect the employees' rights to a payment due him/her according to any other law or in terms of a contract of employment.

The South African Labor Court has issued several recent decisions involving redundancies in the mining industry. These decisions are summarized next.

DELIHAZO SIGWALI & OTHERS and ***LIBANON ado KLOOF GOLD LMINE LTD,* J3137/98,** arose out of a retrenchment or layoff at the employer's mine. The employer and the union entered a "*retrenchment avoidance*" agreement which contained the following provisions.

> *. . . employees who are more than 55 years in age must retire with full benefit. Employees between the age of 50 and 54 will be approached to volunteer for early retirement with full benefit where applicable. This will be done through a committee of four persons, two from management and two from labor.*
>
> *. . . employees who proceed on early retirement will receive one weeks pay for every completed year of service. Such payment will be over and above the benefit to which the employee is entitled in terms of the rules of the Mineworkers Provident Fund.*

The agreement was concluded after the company "*detected a need to retrench and consulted with the NUM in this regard*." After the agreement was made, the company implemented it. The complaining employees in this case were terminated because they had reached a retirement age. They made two basic arguments. First, they argued they were not MUN members and are not bound by the agreement. Second, they alleged they should have been consulted individually prior to their retrenchment. The court rejected both arguments.

The employer involved in ***NATIONAL UNION OF MINEWORKERS and ELIZABETH NGWENYA & 38 OTHERS et al,* D 751/99,** was in the business of polishing diamonds. It terminated several employees for economic reasons. The dismissals were challenged on both substantive and procedural grounds. The company produced evidence that it needed to reduce production. A meeting was held with the union on February 5, 1999 at which time the issue of retrenchment was discussed. The parties discussed the notice of retrenchment, whether it would be done by LIFO or FIFO as well as severance compensation. The union requested financial information about the company, but the company was only agreeable to providing it to the auditors. The union proposed job sharing and early retirement. The company introduced evidence that there were no volunteers for retrenchment and that the union failed to put forward any workable suggestions. Further, the company denied that the retrenchment decision had been made prior to the time consultations were commenced. The company also denied telling the union that retrenchment was the only option.

A union witness testified about the February 5 meeting. He said that the company informed the union that there was no need to accept retrenchment and that the company only wanted to discuss how the workers were to be retrenched and the selection criteria. He said there were no discussions about avoiding retrenchment or reducing it. He denied that the parties reached an agreement on the selection criteria. He testified that the union did come forward with the idea of job sharing but the company did not accept that proposal. The union requested that the company's financial statements sent to its research department. There was also disagreement between the company and the union regarding whether redundancies should be done on a LIFO or FIFO basis. The union did not challenge the company's evidence regarding market conditions or the need for retrenchment.

The court held "*The employer is in my view entitled to make a decision about his business and what he perceives to be the best method to follow in its operations which includes the reduction of staff.*" The court cited with approval the following from ***Fletcher v Elna Sewing Machine Center*** regarding the purpose of consultation:

> *What I consider to be a legitimate purpose of consultation with employees who might be affected therefore, is not to assist them in making up their minds, but to determine, by way of consensus, whether there is any practical and viable basis for changing them. There is to my mind nothing unfair in that concept. In its broad context it is a realistic and prevailing phenomenon of commercial life.*

The court then stated its agreement with this idea and that "*The economics dictates that if it is necessary to shed jobs so the enterprise may survive, it can legitimately be done.*"

The court stated that it thought that there were consultations regarding the methods of retrenchment. The suggestions made by the union were not accepted by the company and they were not workable. The court said "*In my view to compel the employer to implement proposals which are not workable will have the effect of further damaging the business instead of saving it. I reject the suggestion that alternatives to retrenchment were not considered*." The union argued that the company did not suggest any means by

which the retrenchments could be reduced. The court noted that the company did not want to put the retrenchment on hold. The court did not think that this was unfair to the employees in that the company was entitled to take steps to reduce costs.

The court thought that the LIFO method is a sensible business method for retaining skills when reducing staff to see to it that the business operation did not grind to a halt and then close down for lack of skills. The court thought that LIFO was properly applied in this case. The union also argued that consultations were approached in bad faith by the company. The court responded

> *I find it difficult to accept that respondent could train employees and retrench them in order to reduce union membership. I therefore reject suggestions that the retrenchment was aimed at reducing membership. This is so because some of the employees have been reemployed. It is not suggested that those reemployed are not union members or that only union members were retrenched.*

The court noted if there is no consensus, the company is entitled to proceed with the retrenchment. If there is no agreement on certain issues all that the respondent had to do was follow a fair procedure. It is not a legal requirement that a mechanical check list be followed. The court also said "*The employer draws the process of retrenchment and has to see that the business is not placed in jeopardy*." The union never suggested that the information provided to it is insufficient.

The employer in ***JAN GRAHAM STEYN et al v DRIEFONTEIN CONSOLIDATED LIMITED,*** **J1568/99,** was composed of three divisions. The employees (applicants) had varying lengths of service with the different companies falling within the Gold Fields of South Africa Limited Group. In 1997 the companies which formed this group reorganized. The purpose of the restructuring program was to make the operation *internationally competitive and to ensure its survival into the new millennium*. Several thousand employees were affected. Lengthy discussions were held between the company, the unions and an employee forum.

The court summarized the issues before it as follows:

> *29. The disputed issues which fall to be determined on the evidence before this Court are defined in a pre-trial minute filed by the parties, as being*
>
> *29.1 whether there was a need to retrench the applicants;*
>
> *29.2 whether the series of 8 meetings, traversing the period 3 March 1998 to 16 April 1998 'constituted part of the process of consultation as far as the applicants' retrenchments are concerned'; and*
>
> *29.3 whether the retrenchment agreements concluded on 26 March 1998 and 21 April 1998 were applicable to the retrenchment of the applicants and if so, whether there was compliance by the respondent with the terms of those agreements.*

The court noted that in this case neither union successfully challenged the company's need to achieve a more cost effective deployment of its personnel in the face of a reporting structure that it considered traditional and prehistoric. The court also thought that there was "*an acceptable level of transparency and broad statement of intent regarding the company's need to restructure*." The possibility of the need for retrenchments was raised as early as March 3, 1998. The meeting of that day was specifically recorded as being the first in the process required by section 189 of the Act. The court also noted that the unions were involved from the outset.

The court also stated "*each of the applicants . . . was an employee in the D-Band category and there can be no doubt in my view, that the retrenchment agreement concluded by the respondent on 26 March 1998 with the various unions and associations therein defined, including UASA, was in its broad terms applicable to all of them*." Furthermore, that agreement provided for subsequent consultations specifically directed toward the company car drivers. There were subsequent consultations between the company and the D-Band forum before the agreement between them was concluded on April 7, 1998.

The court thought that the mine manager's letter to the employees in November 1998 justifiably lulled them into the belief that whatever was taking place in the broad environment around them, they were not being affected. The testimony regarding a company briefing on December 31, 1998 indicated that the company gave the affected employees no earlier direct indication of their demise as employees of the company. The

court concluded that the company failed to provide a meaningful opportunity to consult and thus violated the Labour Relations Act of 1995. However, the court considered the issue of whether the dismissal of these employees was unfair to be a separate question.

The court concluded that the employer violated section 189 of the Act as to the D-Band employees. The court thought that the D-Band agreement was not compliant because the decision to terminate the employees had already been made prior to consultation. The remedy ordered by the court was 12 months remuneration without reinstatement.

United States Law

In the United States the rights of employees regarding termination are found in both public law and in labor contracts between employers and unions. The requirement of various public laws applicable to layoffs are discussed first. This is followed by a discussion of the National Bituminous Coal Wage Agreement.

Employee Rights under Public Law

As discussed above, section 189 of the South African Labor Relations Act of 1995 requires an employer contemplating dismissing employees for operational reasons to consult with various entities depending on the nature of its relationship with its employees or a union. No such obligation is found in American public law, either state or federal. Employers in the United States have substantially greater freedom in terminating employees for economic reasons than is the case in South Africa. The National Labor Relations Act does not require employers to consult with either the employees or an employee representative regarding the decision to reduce the size of or close a plant.

The legal duties of a company under the National Labor Relations Act regarding plant or mine closures where the employer and the union are parties to a CBA must be divided into two parts, the duty to bargain in good faith and the duty to provide information to a union. Section 8(d) of the National Labor Relations Act obligates employers to bargain with a certified union about "*wages, hours and other terms and conditions of employment*". A decision to discontinue or curtail an operation and the effect of such a decision on the employees could be said to be a term or condition of employment about which a company must bargain with a union representing the employees. However, the Supreme Court held in ***Textile Workers v Darlington Manufacturing Company***, 380 US 263 (1965) that a company was free to go out of business for any reason and was not required to negotiate with the union about that matter. It was not an unfair labor practice for a union to go out of business for economic or any reasons, including antiunion animus. However, the Court has made it clear that the same concept does not apply to a partial closure or moving a business from one location to another. The case of ***First National Maintenance Corp v NLRB***, 452 US 666 (1981) involved the question of whether an employer had a duty to bargain in good faith with a certified representative of the employees over its decision to close a part of its business. The court held that the company did not need to bargain with the union over the decision to discontinue a portion of its operation but that it was required to bargain with the union about the effects of that decision on the employees.

The second aspect of an employer's duty to a union under the National Labor Relations Act concerns its duty to furnish information to the union that it might need in order to perform its function as the collective bargaining representative of the employees. If an employer makes a decision that is not subject to collective bargaining with the union (one not involving wages, hours or other terms or conditions of employment), it is not required to furnish information about this subject. However, with respect to the effects of a plant closure, the employer is obligated to provide relevant information to the union. ***Challenge v Cook Brothers of Ohio***, 282 NLRB 21, 123 LRRM (1986) enforced 843 F.2nd 230 LRRM 3181 (6th Cir 1988). If the employees of a company are not represented by a union, the company has no obligation under the National Labor Relations Act to furnish employees information about the decision to curtail operations.

The Worker Adjustment and Retraining Notification Act, 29 USC, § 2301 *et seq.* popularly known as the "*WARN Act*" was enacted by Congress following a number of plant closings and mass layoffs which occurred during the late 1970s and 1980s. The Act requires that companies give sixty days advance notice of a "*plant closing*" or a "*mass layoff*". The notice must be given to the affected employees, a collective bargaining representative, if there is one, and to certain local government agencies. WARN Act notices must be given by employers employing 100 or more full time workers or 100 or more full and part time workers who work a total of 4000 hours or more per week. If the plant closure or mass layoff occurs in connection with the sale of a business, the seller is responsible for providing WARN Act notices to employees through the effective date of the sale. Thereafter the purchaser is required to provide the WARN Act notices. Notices need not be given to temporary project employees who were hired with the understanding that their employment was limited to the duration of the specific project or undertaking. 29 USC § 2103(1). An example of temporary

project employees is construction workers who are hired to work on a particular construction project. This exception would not normally include regular employees of a mining organization. WARN Act notices are not required if a plant closing or mass layoff is caused by a natural disaster such a flood, earthquake or draught. Neither is a notice required for a relocation of part or all of the employer's business if prior to the plant closing the company offers the employees the opportunity to transfer to the new work location. Regulations issued under the WARN Act contain the specific requirements for the notices to be given to employees, labor organizations and to government offices.

Aggrieved employees who suffer financial loss when the employer fails to comply with the WARN Act may maintain a civil action for backpay for each day of the violation. The employee's right to compensation is limited to an amount no less than the higher of the average regular rate received by the employee during the last three years of employment or the final regular rate of pay received by the employee for each day the employer is in violation of the Act. In addition, the employer may be liable to the employees for the cost of fringe benefits during the period of the violation. A company's liability is limited to a maximum of sixty days but cannot exceed one half of the total number of days the plaintiff was employed by the company. The United States Circuit Court for the Fifth Circuit held in ***Williams v Phillips Petroleum Co***, 23 F.3^{d} 930 (1994) that employees who sign releases waiving all claims against the employer in connection with a layoff were not entitled to maintain an action based on WARN Act violations. A firm's liability to an aggrieved employee is reduced by wages paid to the employee during the period of the violation, any voluntary payment to the employee that is not required by any legal obligation and any payment made by the employer to a third party or trustee such as premiums for health insurance or pension plan contributions which are attributable to the employee for the period during the violation.

Several American states have statutes which require employers to provide employees or a state agency notice of a plant closure. (Hawaii Rev. Stat. § 394B-1 to 8; Me. Rev. Stat. Am. Tit. 26 § 625-B(1)-(7)) There is little uniformity among these statutes. Each imposes different obligations on employers. Other states have laws which suggest that employers provide advance notice of a decision to close a plant. Massachusetts requests companies voluntarily to provide the employees and the state division of employment security with advance notice of proposed plant closings (Mass. Stat. Ann. Ch. 149, § 179B, ch. 151A, § 71A-G). A Michigan statute encourages employee owned businesses to provide its employees and the state department of labor with advance notice of plant closings. A Minnesota statute instructs the state commissioner of jobs and services to encourage businesses to provide advance notices of plant closures to employees, unions and units of local government. (Minn, Stat. § 268.975 to .979. Montana has a statute that is applicable to public employers but not private employers (Minn. Code Am. §§ 39-2-1001 to 1004). In Oregon a statute requires employers covered not by the Federal Worker Adjustment and Retraining Notice Act to provide advance notice of plant closures to the state economic development department (Ore. Rev. Stat. § 285.453 to 285.463). A South Carolina statute requires firms that require their employees to provide advance notice of quitting to post written notices regarding proposed plant closures not less than two weeks prior to the length of time required by employees before they resign (S.C. Code § 41-1-40). A Tennessee statute requires companies having between 50 and 99 full time employees to provide advance notice of a plant closure to the employees and the to state department of labor (Tenn. Code §§ 50-1-601 to 50 –1-604). Wisconsin has a statute requiring employers to give 60 days notice of a plant closure to the employees and the department of industry labor and human resources (Wis. Stat. Am. § 109.07). None of these statutes impose on the employer an obligation to consult with either the employee or an employee representative about the decision to close or curtail operations, or lay off employees.

Employers in the United States are required to comply with Title VII of the Civil Rights Act of 1964 when terminating employees. This Act prohibits discrimination on account of race, sex, age, national origin and religion. The major problem that concerns American employers in the layoff situation is discrimination because of age. In many businesses older employees make much more money than young employees. An employer may be able to save more money and disrupt its operations the least by laying off the older employees. This is not a major problem in the mining industry because employees in the same classification make the same amount of money regardless of length of service.

Unemployment compensation in the United States has its origin in the Social Security Act of 1935. That Act imposed a three percent payroll tax on covered employers. In addition, there was a tax credit of 90% for amounts paid by employer into qualified state unemployment compensation funds. The basic concept of unemployment compensation in the Social Security Act of 1935 was carried forward into the Federal Unemployment Tax Act, 26 USCA §3301 *et seq*. This Act imposes a 6.2% payroll tax on the first $7000 paid annually by covered employers for each employee. Employers in states having federally approved unemployment compensation programs receive a tax credit of up to 90% of the basic federal unemployment tax. All states have approved unemployment compensation programs. Coverage is very broad. In order for an individual to qualify for unemployment compensation benefits, there must exist an employer/employee

relationship. In the United States this relationship is generally considered to exclude independent contractors. Although section 220 of the Restatement of Agency uses the words “master” and ”servant”, it is often used as a basis for distinguishing employees from independent contractors in many contexts. However, most states have unemployment compensation statutes that are more inclusive than the common law distinction between the master/servant independent contractor distinction .

In order to be entitled to unemployment compensation, an individual must be able to work. An individual who cannot perform any kind of remunerative work is ineligible for unemployment compensation. In addition, for an employee to be eligible for unemployment compensation benefits the individual must be available for work. This means that applicants for benefits must demonstrate that they are ready and willing to work. Most states require employees to actively seek work in order to obtain unemployment compensation benefits. This is frequently done through the state office that administers the unemployment compensation program.

Employees who are discharged for misconduct that arises out of the employment relationship are not eligible for unemployment compensation benefits. This type of misconduct includes all of the kinds of conduct for which employees are normally subject to discharge. A list would include offenses such as dishonesty, theft from the employer, disloyalty, insubordination, fighting on the job, falsifying employment applications, poor work performance, all types of attendance infractions and in some cases, off duty misconduct. Finally employees who voluntarily quit their employment are not eligible for unemployment compensation. Employees are not eligible for unemployment compensation if their unemployment is a result of labor dispute.

The amount of benefits employees are entitled to receive generally varies between 50% to 55% of their average weekly earnings. The minimum benefits range from a minimum of $5 to a maximum of $50 to $570 per week. The maximum length of time an employee may receive unemployment compensation benefits is 26 weeks. The foregoing statutes are applicable to mining operators throughout the United States.

Employee rights under CBAs

In the United States in the unionized sector, layoffs for business or economic reasons are generally covered in two sections of the CBA, the management rights article and the seniority article. It should be emphasized that these provisions are part of what is usually a multiyear CBA. The CBA may have been signed as much as three years before a layoff.

First, the management rights article in the typical CBA gives the employer the right to manage the business, including the right to determine the products to be made, the number of people to be employed, what they will do and the right to terminate the employment of some or all of the employees for legitimate business reasons. These general powers must be exercised in a manner that is consistent with the remainder of the CBA. The management rights article of the current National Bituminous Coal Wage Agreement [NBCWA] provides:

MANAGEMENT OF MINES

> *The management of the mine, the direction of the working force, and the right to hire and discharge are vested exclusively in the operator, and the United Mine Workers of America shall not abridge these rights. It is not the intention of this provision to encourage the discharge of Mine Workers, or the refusal of employment to applicants because of personal prejudice or activity in matters affecting the United Mine Workers of America.*

Second, the typical American CBA contains either a seniority article, or a provision that specifically deals with layoffs and recall, or both. A typical concept widely in use in CBAs in the United States provides for laying off the workers with the least company seniority first, provided senior employees have the ability to perform the remaining work for the employer. This approach is referred to as “*LIFO*” in some of the South African Labor Court decisions and redundancy agreements. There are numerous variations on this general approach in American labor contracts. Seniority is generally determined on a plantwide basis under most United States labor agreements. However, in some plants seniority is earned in individual departments within the plant and an employee will lose seniority by transferring from one part of the operation to another. For example, the two major unions having contracts with the United States Postal Service are the American Postal Workers Union and the National Association of Letter Carriers. If an employee works 20 years in the carrier classification (NALC) and transfers to the clerk craft (APWU), the employee goes to the bottom of the APWU seniority list and loses his/her 20 years of seniority in the carrier classification.

The definition of seniority in the most recent NBCWA provides:

> *Seniority at the mine shall be recognized in the industry on the following basis: length of service and the ability to step into and perform the work of the job at the time the job is awarded.*

This definition of seniority is used for purposes of both layoffs and job bidding. It has remained unchanged in the National Agreement for at least 20 years.

The rights of employees in a layoff situation under the NBCWA can be subdivided into two categories of rights. First, the agreement contains detailed provisions with respect to employees to be laid off from the mine or "*to the street*", as well as the relative rights employees who are retained. Second, the agreement deals with the procedures which must be followed by the company and the union in the case of a layoff. The contractual provisions of the NBCWA dealing with "*reduction realignment*" and the "*layoff procedure*" are set forth in the Appendix.

Perhaps the easiest way of describing how the layoff or realignment procedure works under this agreement is by way of an example. Suppose that a company had five continuous miner operators on each of the three shifts, day shift, evening shift and midnight shift. Suppose further that the company needed to reduce the number of continuous miner operators on each shift by one operator. This means that three continuous miner operators would be realigned to other jobs or possibly be laid off to the street if they lack sufficient seniority to claim an open job. Generally, the day shift is considered the most desirable shift, followed by the evening shift and finally, the midnight shift. Under the NBCWA the four senior continuous miner operators would be retained on the day shift. The next four senior operators would be assigned to the evening shift and the next four most senior continuous miner operators would be assigned to the midnight shift. In the end the three least senior operators would be realigned to different job classifications.

Under the NBCWA a miner operator helper would be a classification where a displaced miner operator could be placed. In all likelihood all of the displaced miner operators could qualify as miner operator helpers and would be assigned to miner operator helper jobs on the basis of their seniority. Within the classification of miner operator helper, the shift preference would be made on the basis of mine seniority. This process would continue down through the lower classifications until all of the needed jobs were filled and the most junior employees would be laid off from the mine.

Article XVII of the NBCWA obligates the company to notify the mine committee of the union at least 24 hours prior to a reduction or realignment of the workplace. At this meeting the company and the union review the available jobs and the employees to be laid off, realigned or retained. It should be emphasized that the employer comes to this meeting with a listing of how the mine will be staffed after the realignment and a list of names of employee who will be laid off from work. This is quite different from the practice in South Africa under article 189.

The decision to discontinue or curtail operations is often a closely guarded secret in the United States mining industry. The reason given for doing this is a fear of the company that if it announces a layoff well in advance, it would increase the risk of the employees sabotaging the mine, thereby making it impossible to close down the mine, either permanently or temporarily. One company officially told the author that some of its employees deliberately caused a large rockfall in an underground coal mine and that federal authorities required the company to clean up the area before the mine could be closed.

All employees who are laid off are to be required to fill out a document known as a "*panel form*". This document contains the employee's years of service at the mine, years of service with the employer, previous mining experience with other employers and a list of jobs the employee thinks he/she can perform and for which he/she wishes to be recalled.

The NBCWA OF 1974 provided for the resolution of disputes arising under the contract by arbitration. The agreement provided a mechanism to appoint individual arbitrators to hear and decide disputes at the local level. It also established the Arbitration Review Board (ARB) which heard appeals from local arbitrators and made decisions which were binding on all signatory companies and the entire union.

The form also includes a listing of other mines of the employee's employer within the United Mine Workers of America district on whose panel the laid off employee wishes to be placed. This concept has continued under successive contracts and the decisions of the ARB are still binding on the parties.

The leading ARB decision applying article XVII in a layoff situation is referred to as "*ARB Decision 78-19*". In this decision the ARB resolved a number of issues regarding layoffs and recalls that arose at several different coal mines. In one case appealed to the ARB Consolidation Coal Company wished to reduce the number of production shifts from three to two and change the third production shift to a maintenance shift. This required the layoff of several employees who normally performed production work and who were not qualified to perform maintenance work. What ultimately happened was that a number of employees were laid off work while a number of other employees were forced to change jobs.

The second case arose at the Sewell Coal Company. In this case the company reduced the number of coal producing units from fifteen to six. It laid off 157 employees and retained 128 employees. It laid off the 157 most junior employees and retained the 128 most senior employees. The remaining jobs were reposted and filled by job bidding on the basis of seniority and ability by retaining the most senior qualified employees in the classification up to the total number needed in each job classification. Available vacancies remaining were filled by appointment by the employer in accordance with the employees' highest classification and ability to perform the remaining work. The grievants contended that these vacancies should be filled under the contractual job bidding procedures. The district arbitrator ruled that seniority was to be applied in the case of layoff and realignment pursuant to article XVII, section (b) of the National Agreement only and that the job bidding procedures found in article XVII, section (i) were inapplicable.

The third case arose at the Sugar Loaf Mining Company. The company laid off 36 employees. Most of the employees with the least seniority had skills that none of the senior employees possessed. The employer retained in classification and on shift those employees most senior in the classification and assigned the displaced/retained employees to other jobs. The union grieved complaining that senior employees were placed in lower paying jobs and less preferred shifts than those to which their seniority entitled them. The district arbitrator ruled that this was really a claim for bumping rights on behalf of the senior employees over the junior employees and that such bumping is an acceptable way to recognize and apply seniority in layoffs and realignment under article XVII.

The summary of the ARB decision or as the ARB referred to it the "***Principles of Decision"*** stated**:**

> *Seniority rights are dependent upon the specific grant of such rights in the provisions of the Agreement and are dependent for their exercise upon the terms and conditions expressed in the Agreement as to the nature, scope, and time and manner of exercise of the seniority rights.*
>
> *Section (a), Article XVII, establishes an industry-wide principle that seniority includes two elements: length of service and ability to perform the work; and seniority, where granted, is to be exercised in seniority units, generally 'at the mine'.*
>
> *Section (a), Article XVII, also establishes the principle that when comparisons for seniority applications are to be made, all employees in the unit, and all jobs on all shifts are to be considered in the particular comparison, and for such comparison, greatest seniority at the mine or in the unit is the measure, rather than seniority in a particular job or classification or on a shift, except where ability to perform the work of the job makes a difference between employees.*
>
> *Seniority applications in the event of layoff are governed by section (b) of Article XVII, by which seniority is granted in the for of a right to be retained in the work force, provided the employee has the ability to perform the available work, on the basis of the 'greatest seniority at the mine' or in the unit.*
>
> *Section (b) directs its job retention seniority to be applied after the employer determines: the 'available work' in the form of the projected operation following the layoff; the 'available work' in terms of the needs of the numbers of employees, jobs, classifications, and skills and organization of the projected needs in the curtailed operations following layoff; and thus, the 'available work' in terms of the number of employees to be retained. Then, on the basis of all the jobs on all shifts in the seniority unit in which the layoff is to take place, the determination of which employees are to be retained is made on the basis of the 'greatest seniority at the mine'.*

Section (i), Article XVII, is construed to mean that job preference or selection seniority is granted to be applied only when 'permanent vacancies' or 'new jobs' are to be filled in an operation where the work force is to be maintained at 'normal operating levels' or is to be expanded. Moreover, such seniority rights are to be exercised only at such times and in accordance with the job bidding procedures there specified. Thus, upon being awarded a job via the job bidding procedures, an employee is protected from subsequent exercise of seniority rights by senior employees, and 'bumping' is not authorized.

Shift preference, tied as it is by section (n), Article XVII, to the section (i) job bidding procedures, is also limited in application and exercise, as well as the protection once exercised, by the terms and conditions applicable to the job bidding procedures.

Accordingly, section (b) also directs that, in cases of layoff, as a second step in the application of its job retention preference, retained employees who held their jobs in classification and on shift by bid-award pre-layoff, are to be retained in their classifications, and to the extent practicable, on shift in accordance with their mine seniority, in comparison with other retained employees in the classification.

It should be noted that the NBCWA does not provide for severance pay in case of layoff or permanent termination. In the United States an employer has no legal obligation to pay severance pay although it is frequently done, perhaps more frequently in the non union sector. However, some CBAs do provide for severance pay. Employees laid off for economic reasons are entitled to unemployment compensation as above described.

Similarities and Differences

In all likelihood the most significant difference between the way redundancies are accomplished in South Africa as opposed to the United States is in the duty to consult. In South Africa the decision to terminate employees is done in consultation with a union or some other appropriate entity. In the United States mining industry, as in most other industries, the decision to reduce the work force is a unilateral management decision. Meetings of the employer and union such as are described in the National Union of Mineworkers and Jan Graham Steyn cases would never occur in the American mining industry. In the United States if the employees of a company are represented by a union, the company has a duty to negotiate with the union about the effects of its decision and has a duty to furnish the union with information so the union can fulfill its statutory functions.

Another significant difference between the two countries is that in the United States, at least in the unionized sector, the understandings about which employees will be laid off are found in the CBA which may have been negotiated long before the layoff. In South Africa decisions about how to effect a layoff are made shortly before the layoff occurs. In the United States in the non union sector there are no restrictions on which employees an employer may terminate, so long as the employer complies with the non discrimination laws and the WARN Act. The United States has no statute that is comparable to § 189(7)(b) of the South African Act.

In the United States employers are not legally bound to pay severance pay. The NBCWA contains no such requirement. Many employers offer severance pay in the non union setting and some labor agreements provide for severance pay.

An American employer would never enter a labor agreement containing language like that in the Delihazo Sigwali case. Such an agreement would place both the company and the union in violation of Title VII. There is no statutory age for mandatory retirement in the United States.

APPENDIX

Section 189—South African Labor Relations Act of 1995

(1) *When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult—*

(a) any person whom the employer is required to consult in terms of a collective agreement;

(b) if there is no collective agreement that requires consultation, a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum;

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals.

(d) If there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

(2) *The consulting parties must attempt to reach consensus on*

(a) appropriate measures—
- *(i) to avoid the dismissals;*
- *(ii) to minimise the number of dismissals;*
- *(iii) to change the timing of the dismissals; and*
- *(iv) to mitigate the adverse effects of the dismissals*

(b) the method for selecting the employees to be dismissed; and

(c) the severance pay for dismissed employees.

(3) *The employer must disclose in writing to the other consulting party all relevant information, including, but not limited to—*

(a) the reasons for the proposed dismissals;

(b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;

(c) employees affected and the job categories in which they are employed;

(d) the proposed method for selecting which employees to dismiss;

(c) the time when, or the period during which, the dismissals are likely to take effect; the severance pay proposed;

(g) any assistance that the employer proposes to offer to the employees likely to be dismissed; and

(h) the possibility of the future re-employment of the employees who are dismissed.

(4) *The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3).*

(5) *The employer must allow the other consulting party an opportunity during consultation to make a representations about any matter on which they are consulting.*

(6) *The employer must consider and respond to the representation made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.*

(7) *The employer must select the employees to be dismissed according to selection criteria—*

(a) that have been agreed to by the consulting parties; or

(b) if no criteria have been agreed, criteria that are fair and objective.

Article XVII—SENIORITY

Section (b) **Reduction: Realignment**

(1) Reduction in Work Force

In all cases where the working force is to be reduced, employees with the greatest seniority at the mine shall be retained provided that they have the ability to perform available work.

(2) Realignment Procedure

When the number of employees within a job title is to be reduced or employees are to be realigned, the following procedure shall apply.

(a) The senior employees (mine seniority) in each job title shall be retained in their respective job title, regardless of shift or portal, up to the number needed in that job title.

(i) If, after such reduction of jobs within a job title, there is an excess of jobs on any shift, that excess number of junior employees (mine seniority) on that shift will be displaced as to shift but retained within the job title.

(ii) Any employee who is displaced as to shift within a job title will, to the extent his seniority permits, be reassigned a shift on the basis of shift preference, and for this purpose may displace any employee junior to him (mine seniority) on any shift within the job title. Any employee so displaced will be reassigned in the same manner. Any employees not displaced as to shift under this procedure will retain their pre-alignment shifts.

(b) Those employees displaced from their job title shall be assigned available jobs on the basis of mine seniority and ability to step in and perform the work of the job at the time, using the following procedure:

(i) The senior employee in each instance shall e assigned to the job grade having the greatest standard daily wage rate and within which there is an available job. However, if, and only if, by the end of the meeting required by section (c) of this article XVIII, the union informs the employee in writing that any such displaced employee wishes to waive the opportunity for the greatest standard daily wage rate in favor of a particular shift, that preference shall be followed to the extent the employee's seniority permits. In order to be prepared to so inform the employer of such preference at any such meeting called by the employer, it is the responsibility of the union to predetermine employee preferences.

(ii) Assignment of classifications and job titles within a job grade is within the exclusive discretion of the employer. However, where there is more than one available job within that job grade, such assignments to the employee to be assigned within that grade will be made on the basis of retaining in that grade the maximum number of employees being so assigned who have the ability to step in and perform the available work at that mine.

(iii) Shift assignment, except as provided for by subparagraph (i) above, shall be considered only after assignment of job titles has been completed. If within a job title there are two or more shifts available, displaced employees assigned such job title shall be given shift preference based upon mine seniority.

LAYOFFS IN THE SOUTH AFRICAN AND UNITED STATES MINING INDUSTRIES COMPARED

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