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Labor Law: Retirees' Benefits--A Permissive but not Mandatory Subject of Collective Bargaining

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lineal descendants survive. Florida courts, however, are now confronted with the problem of clarifying the new concept of an inherent right to devise,[49] implicit in the result of the instant decision. In addition, section 731.27 requires either renewed judicial scrutiny or attendant reconciliation with the constitution or legislative revision.

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LABOR LAW: RETIREE'S BENEFITS—A PERMISSIVE BUT NOT MANDATORY SUBJECT OF COLLECTIVE BARGAINING

Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971)

Upon enactment of Medicare,[1] appellant union sought midterm bargaining to renegotiate insurance benefits for retired employees under an employee health insurance plan. Maintaining that a retiree was not an "employee" within the meaning of section 8(a) (5) of the National Labor Relations Act,[2] appellee company refused to recognize retiree's benefits as a mandatory subject of collecting bargaining. The company, despite union objections, unlaterally offered the retirees supplemental Medicare coverage, and the union subsequently filed charges of unfair labor practices with the National Labor Relations Board (NLRB). The NLRB found that retirees were "employees" within the meaning of the Act and that their benefits were a proper subject of mandatory bargaining.[3] The NLRB's decision was overturned by the Court of Appeals for the Sixth Circuit.[4] On appeal

49. When viewed in conjunction with recent decisions in other areas of the law, the instant decision might be explained as another step in an evolving judicial philosophy that eschews the imposition of restraints on individual freedoms when there is no demonstrable necessity for governmental interference. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (right of marital privacy); Conyers v. Glenn, 243 So. 2d 204 (2d D.C.A. Fla. 1971) (right to wear long hair); *cf.* State v. Eitel, 227 So. 2d 489 (Fla. 1969) (governmental necessity found in upholding statute requiring motorcyclists to wear helmets).

1. Health Insurance for the Aged Act §§1801-1905, 42 U.S.C. §§1395-1400 (1970).

2. National Labor Relations Act §8(a)(5), 29 U.S.C. §158(a)(5) (1970) provides: "(a) it shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees . . . ."

3. Pittsburg Plate Glass Co., 177 N.L.R.B. 911, 915 (1969).

4. Pittsburg Plate Glass Co. Chem. Div. v. NLRB, 427 F.2d 936 (6th Cir. 1970).

the United States Supreme Court affirmed and HELD, retirees are neither "employees" within the meaning of the Act nor members of the bargaining unit and their benefits are permissive rather than mandatory subjects of collective bargaining.[5]

An employer's refusal to bargain collectively with the representatives of his "employees" constitutes an unfair labor practice under section 8(a) (5) of the National Labor Relations Act.[6] The Act obligates both employers and representatives for employees to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment."[7]

To determine whether an employer has violated his obligation to bargain collectively it is essential to determine whom constitutes his "employees."[8] The Act defines this term as "any employee."[9] This cryptic definition has led the United States Supreme Court to declare that a rigid definition of the term was not intended.[10] Instead, it is the duty of the NLRB to determine the term's applicability in doubtful cases by construing it broadly with reference to the Act's purpose and underlying economic facts, rather than adhering strictly to a predetermined legal classification.[11]

The NLRB, in keeping with this policy of broad construction, encompasses a wide range of individuals within the statute's operation who would not otherwise fit within the traditional concept of "employee." The NLRB has applied the term "employee" to applicants for employment,[12] regis-

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5. 404 U.S. 157 (1971). "Wages, hours, and other terms and conditions of employment" are mandatory items of collective bargaining under §8(d) of the NLRA. As the term connotes. a mandatory subject is one that must be the subject of good faith bargaining between management and labor if either party so desires. Mandatory subjects may be bargained to an impasse, however, without violating the unfair labor practice provisions of the Act. While unions may strike to obtain mandatory items in the labor contract, employers are authorized to refuse to sign a contract unless their version of items in that category is included in the agreement. The NLRB and the courts must ultimately decide what items fall within the mandatory category. Permissive or voluntary items, on the other hand, are not included in the mandatory category and may become the subject of collective bargaining if both parties agree. While permissive subjects may be discussed at the bargaining table, they may not be bargained to an impasse. Unions may not strike over the item and the employers may not make the item a condition precedent for signing a labor contract. If the NLRB finds that an item in the permissive category has been bargained to an impasse, it will assert a per se violation of §8(d) of the NLRA. B. TAYLOR & F. WITNEY, LABOR RELATIONS LAW 334 (1971).

6. National Labor Relations Act §8(a)(5), 29 U.S.C. §158(A)(5) (1970).

7. National Labor Relations Act §8(d), 29 U.S.C. §158(d) (1970).

8. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 192 (1941).

9. National Labor Relations Act §2(3), 29 U.S.C. §152(3) (1970), provides: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . ."

10. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 191-92 (1941).

11. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 129 (1944).

12. Phelps Dodge Corp. v. NLRB, 19 N.L.R.B. 547, *enforced*, 113 F.2d 202 (2d Cir. 1940), *modified*, 313 U.S. 177 (1941).

trants at hiring halls,[13] employees who have quit,[14] employees of a company taken over by a successor employer,[15] persons who have been "laid off,"[16] and those in active military service.[17] The instant case raised the issue of whether retirees are included within the term "employee."

Although pension and insurance benefits for active workers have long been held to be subjects of mandatory bargaining under "wages"[18] or "conditions of employment,"[19] the Court in the present case refused to extend the bargaining obligation to benefits of retired employees. Any determination by the NLRB that specified individuals are "employees" within the meaning of the Act must have warrant in the record and a reasonable basis in law.[20] The Supreme Court failed to find those requirements present in the instant case.

The Court's conclusion that no reasonable basis in law existed for the inclusion of retired workers within the collective bargaining obligation was based upon four considerations. First, the inclusion of retirees was not consistent with the purpose of the Act, which was to eliminate obstructions to the free flow of commerce caused by strikes and industrial strife.[21] Retired workers are no longer in a position to exert this type of economic pressure and their bargaining power was not intended to be protected under the Act.[22] Second, the legislative history of the term "employee" in section 2(3) of the Act reveals that Congress intended to restrict the term to its ordinary meanings.[23] The Court found that retired workers do not fit within the

13. Local 872, Int'l Longshoreman's Ass'n, 153 N.L.R.B. 586 (1967).

14. Goodman Lumber Co., 166 N.L.R.B. 304 (1967).

15. Chemrock Corp., 151 N.L.R.B. 1074 (1965).

16. American Cyanamid Co., 19 N.L.R.B. 1026 (1940).

17. Link Belt Co., 91 N.L.R.B. 1143 (1950).

18. W.W. Cross & Co. v. NLRB, 174 F.2d 875 (1st Cir. 1949).

19. Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied,* 336 U.S. 960 (1949).

20. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944).

21. *See* National Labor Relations Act §1, 29 U.S.C. §151 (1970). The Act had other purposes in addition to the prevention of industrial strife. Industrial strife was actually promoted to the degree that employers denied workers their right to self-organization and collective bargaining. Furthermore, it was hoped that the effect of economic depressions could be lessened by legal protection of the collective bargaining process, since this might mean more purchasing power for the nation's workers. B. TAYLOR & F. WITNEY, *supra* note 5, at 159.

22. 404 U.S. at 166.

23. The NLRA was amended by Title I of the Labor-Management Relations Act (Taft-Hartley Act) §§1-4, 29 U.S.C. §§141-44 (1970). In this amendment Congress expressly repudiated the decision in NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944), which held that independent contractors were included within the term "employee." The House of Representatives, in proposing the amendment, declared: "An 'employee,' according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. . . . Congress intended [when it passed the Act], and it intends now, that the Board give to words not farfetched meanings but ordinary meanings." H.R. REP. No. 245, 80th Cong., 1st Sess. 18 (1947). *See also* 93 CONG. REC. 6441-42 (1947); H.R. CONFERENCE REP. No. 510, 80th Cong., 1st Sess. 32-33 (1947).

ordinary meaning of employee as someone who works for hire.[24] Furthermore, past decisions that held a variety of individuals to be "employees"[25] were distinguished from the instant case in that those individuals were still members of the active work force with expectations of future employment.[26] A retiree, of course, is a person who has withdrawn from the active work force. The Court's use of this "expectancy test" is well established in past decisions of the NLRB.[27] Finally, the Court refused to accept as determinative the previous interpretations given to the term "employees" in section 302 (c) (5) of the Labor-Management Relations Act.[28] Unlike section 8 (a) (5) of the NLRA the inclusion of retirees in section 302 (c) (5) was contemplated by the terms of the statute, and contrary interpretation would make employer contributions to pension plans illegal.[29] The instant Court also concluded that the union's role as bargaining representative and as an administrator of pension funds involved considerations of a "far different order" that justified different interpretations of the term "employees."[30]

The employer is obligated under section 8 (a) (5) to bargain only with his "employees" or members of the bargaining unit described in section 9 (a) of the Act.[31] The instant Court, in addition to finding that retired workers were not "employees," found that they were not members of the bargaining unit represented by the union.[32] The NLRB had certified the bargaining unit in 1949, limiting it to "employees of the employer's plant . . . *working* on hourly rates, including group leaders who *work* on hourly rates of pay."[33] Since retirees do not work they do not come within this description. More

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24. 404 U.S. at 168.

25. *E.g.*, Goodman Lumber Co., 166 N.L.R.B. 304 (1967); Local 872, Int'l Longshoreman's Ass'n, 163 N.L.R.B. 586 (1967). *See also* text accompanying notes 12-17 *supra.*

26. 404 U.S. at 168.

27. *E.g.*, W.D. Byron & Sons, 66 N.L.R.B. 172 (1944); Van Brunt Mfg. Co., 45 N.L.R.B. 634 (1942). The NLRB in both of these cases found that whether one is an employee is a question to be determined by his reasonable expectation of employment within a reasonable time.

28. Labor-Management Relations Act §302 (c) (5), 29 U.S.C. §186 (c) (5) (1970). Section 302 prohibits employer payments to representatives of employees, but paragraph (c) (5) exempts payments to "a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer."

29. 404 U.S. 170. *But see* Note, *Retirees in the Collective Bargaining Process: A Critical Review of* Pittsburg Plate Glass Co. v. NLRB, 23 STAN. L. REV. 519, 525-26 (1971). The author suggests that the 6th Circuit opinion in Pittsburg Plate Glass Co. Chem. Div. v. NLRB, 427 F.2d 936 (6th Cir. 1970), undervalued the relevance of earlier interpretations of "employees" under §302 of the Act in analogizing the §8 (a) (5) question.

30. 404 U.S. at 170. The Court observed that the union as an administrator of pension plans merely applies the terms of an existing contract, while the union as bargaining representative negotiates for new contracts. Without elaborating further, the Court found that these two roles were functionally dissimilar.

31. National Labor Relations Act §9 (a), 29 U.S.C. §159 (a) (1970) provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . ."

32. 404 U.S. at 172.

33. Pittsburg Plate Glass Co., 177 N.L.R.B. 911 (1969) (emphasis added).

importantly, the Court concluded that retirees could not belong to the bargaining unit because retirees and active employees do not have common interests.[34] Active workers are interested in wages, working hours, insurance plans, pension benefits, fringe benefits, and a host of other matters. On the other hand, retirees are interested only in retirement benefits. If unions represented retirees in collective bargaining, there would be the potential for internal conflict between active and retired workers as well as the risk that active workers might trade retirees' benefits for more immediate benefits for themselves.[35]

The Court in the instant case relied not only on its assessment that retirees are not proper members of the bargaining unit but also on prior decisions of the NLRB itself. The NLRB has previously held that retirees lack a substantial community of interest with active employees and, therefore, cannot participate in the election of a collective bargaining agent.[36] Although the NLRB attempted to distinguish eligibility to vote from membership in the unit itself,[37] the Court refused to make such a distinction. The Court found that including pensioners in the bargaining unit without giving them a voice in choosing their representative would violate the majority rule principle of the Act.[38] The NLRB apparently ignored one of its earlier decisions in which it found that pensioners with little expectation of future employment were not only ineligible to vote but were also excluded from the bargaining unit as well.[39] The present Court also rejected the argument that retirees' benefits, were, by established industry practice, a mandatory subject for bargaining. Assuming such a practice existed "[c]ommon practice cannot change the law and make into bargaining unit 'employees' those who are not."[40]

Regardless of whether retirees are employees, the NLRB found that benefits of retired workers are proper subjects for mandatory bargaining because they "vitally affect active unit employees."[41] The NLRB's decision was predicated upon two grounds: (1) the inclusion of retirees in the bar-

34. 404 U.S. at 173.

35. *Id. See generally* M. BERNSTEIN, THE FUTURE OF PRIVATE PENSIONS 13-14 (1964). The author suggests that active workers, when given the choice between vested credits for future benefits upon reaching retirement age and cash-in-hand, choose cash in the overwhelming number of reported cases. If active workers are unconcerned about their own retirement benefits, it would seem unlikely that they would take greater interest in retirement benefits for others.

36. Public Service Corp., 72 N.L.R.B. 224, 229-30 (1947). In this decision the NLRB stated: "We have considerable doubt as to whether or not pensioners are employees within the meaning of section 2(3) of the Act, since they no longer perform any work for the Employers, and have little expectancy of resuming their former employment. In any event, even if pensioners were to be considered as employees, we believe that they lack a substantial community of interest with the employees who are presently in the active service of the employers."

37. Pittsburgh Plate Glass Co., 177 N.L.R.B. 911, 913 (1969).

38. 404 U.S. at 175 & n.15.

39. W.D. Byron & Sons, 55 N.L.R.B. 172 (1944).

40. 404 U.S. at 176.

41. Pittsburg Plate Glass Co., 177 N.L.R.B. 911, 915 (1969).

gaining unit might lower group health insurance rates; and (2) active workers would be able to insure their own bargaining power when they retired by bargaining over benefits for currently retired workers.[42] Admitting that matters involving individuals outside the employment relation might so vitally affect workers as to be mandatory subjects for bargaining,[43] the instant Court, nevertheless, found that retirees' benefits did not fall within this category.[44] Any insurance savings resulting from the inclusion of retirees in group health insurance plans would be speculative, especially because insurance companies might charge higher premiums because of the higher medical expenses of the elderly.[45] Furthermore, active workers cannot insure their rights to bargain when they retire, since the union is not obligated to continue to represent nonmembers of the bargaining unit, regardless of past practices.[46]

Since the Court in the present case held that retirees' benefits were a permissive rather than a mandatory subject of collective bargaining, the company did not commit an unfair labor practice when it made a unilateral modification of the health insurance plan. The Court found that a unilateral modification of a negotiated contract would constitute an unfair labor practice under section 8 (d) of the Act[47] only when a company changes a term that is a mandatory subject of collective bargaining.[48]

The consequences of the present decision are presently unclear. The instant case does not, of course, affect any legal remedies that retired workers possess to enforce their rights under previously negotiated health insurance and pension plans.[49] While retirement plans tend to be inflexible, the retiree-recipients must live in a society subject to constant change. The retiree shares this plight with others who must live on a fixed income within an inflationary economy. Retiree-representation by unions would undoubtedly facilitate the adjustment of retirement plans to economic changes as well as changes in public support programs and retirement fund practices.[50] For instance, unions have been instrumental in urging the adaptation of private

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42. *Id.*

43. *See, e.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); Local 24, Teamsters v. Oliver, 358 U.S. 283 (1959).

44. 404 U.S. at 182.

45. Health needs of the elderly are certainly greater than for the rest of the population. *See generally Hearings on Health Services of the Aged Under the Social Security Insurance System Before the House Committee on Ways & Means,* 87th Cong., 1st Sess. 28-39 (1961).

46. 404 U.S. at 181.

47. National Labor Relations Act §8(d), 29 U.S.C. §158(d) (1970) provides: "[W]here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract . . . ."

48. 404 U.S. at 185.

49. For an extensive discussion of the legal remedies or lack of remedies available to retirees to enforce their rights to pension receipts *see* Note, *Pension Plans and the Rights of the Retired Worker,* 70 COLUM. L. REV. 909 (1970).

50. *See* Note, *supra* note 29, at 537-39.

pension plans to Medicare benefits and the establishment of benefits to supplement Medicare in those companies that have no retiree programs.[51]

The NLRB found that bargaining over retirees' benefits had become an established industrial practice.[52] This may reflect a mutual interest in bargaining on such benefits.[53] If such a mutual interest does exist the instant decision may have little effect on the present practice. On the other hand, more employers may follow the lead of the present case and deal with retirees on a unilateral basis.

The number of retirees has grown rapidly and constitutes a substantial segment of our population.[54] At the same time there has been a marked growth in private pension plans.[55] Whatever the consequences of the present decision it is certain that many retirees will be affected. With such a large segment of the voting population involved, Congress should certainly be amenable to requests for increased protection for retired workers if some type of protective measures are required.

The Court in the instant case has refused to stretch the meaning of words to accomplish a purpose that it believes was never intended by Congress. No one can doubt the necessity for drawing lines somewhere, since words are valuable devices for communication only to the extent that they have certain defined and predictable meanings. In deciding who constitutes an "employee" the Court used the "expectancy test"—a test that the NLRB itself had formulated and used in past decisions. The instant decision is not revolutionary, but rather a well-reasoned opinion based upon solid precedent. Unfortunately, a pensioner may now have to tighten his belt a little tighter until the time that Congress acknowledges his pleas for aid.

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51. R. MUNTS, BARGAINING FOR HEALTH 92 (1967).

52. Pittsburg Plate Glass Co., 177 N.L.R.B. 911, 916 (1969).

53. *But see* R. MUNTS, *supra* note 51, at 90. The author indicates that both employers and insurance carriers were reluctant to provide for retired workers in their health insurance plans. Because of union pressure, however, retired workers have received these benefits.

54. The percentage of our population age 65 or older has grown from 8.1% in April 1950 to 9% in July 1968. U.S. BUREAU OF THE CENSUS, POCKET DATA BOOK 47, table 13 (1969).

55. About 2.5 million people had income from private pensions in 1964, and by 1980 about 6.5 million—almost one-fourth of the total aged population—will be getting private pensions that supplement their social security. PRESIDENT'S COMMITTEE ON CORPORATE PENSION FUNDS AND OTHER PRIVATE RETIREMENT AND WELFARE PROGRAMS, PUBLIC POLICY AND PRIVATE PENSION PROGRAMS 10 (1965). (Report to the President on Private Employer Retirement Plans).