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George S. King Jr.

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housing market, no construction of the statute should interfere with his right to do so.

The suggested statutory provisions would involve an extremely delicate balancing of the rights of the landlord and tenant. But if interpreted in light of the policies underlying existing municipal housing codes, the laws would not unduly restrict property rights. The end result would be more effective compliance with housing code standards, and for the landlord who maintains these standards, his common law rights against the tenant would be preserved.

CHRISTIAN NESS

Labor Law—Duty to Bargain About Changes in Benefits for Retired Employees

Suppose that employees, who are members of a collective bargaining unit, are permitted, pursuant to the terms of a collective bargaining agreement, to remain members of an employee group health insurance plan with the employer making monthly contributions for them when they retire. Congress thereafter enacts legislation that entitles these retired employees to certain health care benefits that duplicate some of the benefits of the group plan. The employer, concerned about the welfare of his former employees, wishes to substitute new benefits for those duplicated. Does he, under the Labor Management Relations Act (the Act),[1] have a duty to bargain with the union representing the employees about the proposed change? This question arose for the first time in the history of the Act in the recent case of *Pittsburgh Plate Glass Co., Chem. Div. v. NLRB.*[2]

Since 1949, Local Union No. 1, Allied Chemical and Alkali Workers of America, had been the exclusive bargaining representative of Pittsburgh Plate Glass Company's employees at the Barberton, Ohio plant and mine.[3] A contract was negotiated in 1950 that included provisions for a group health insurance plan for employees; there was also an oral agreement that retired employees could participate in the plan but would bear the entire cost of such participation. In 1959 an improvement in the

[1] 29 U.S.C. §§ 141-87 (1964).
[2] 427 F.2d 936 (6th Cir. 1970), *cert. granted*, 39 U.S.L.W. 3353 (U.S. Feb. 23, 1971) (Nos. 910, 961).
[3] *Id.* at 938.

coverage was negotiated and the participation rights of retirees was reduced to writing. In 1962 a contract was negotiated that required the company to contribute two dollars per month to the plan for employees retiring after the effective date of the contract; this contract also provided for mandatory retirement at age sixty-five. A contract signed in 1964 provided for an increase in the company's contribution for retired employees to four dollars per month with a stipulation that the company might rescind the increase should pending Medicare legislation be enacted. Shortly after the enactment of Medicare,[4] the union notified the company that it wished to engage in mid-term bargaining about the health plan for retired employees. When the parties finally met the company announced that it would, pursuant to the contract, discontinue the increased payments when Medicare took effect and that it would remove the retired employees from the group health plan, paying them three dollars per month for supplemental Medicare benefits in lieu of the two dollars per month contribution. Challenging the union's right to bargain about the matter at all, the company subsequently decided to offer the retirees, on an individual basis, the option of remaining in the group plan or electing to take the three dollar per month payment from the company. This offer was made to 190 retirees; fifteen elected to take the supplemental benefit payments. During this time the union continued to insist that the company bargain with it about any changes and finally filed charges with the NLRB alleging that the company's actions were unfair labor practices prohibited by the Act.

Specifically, the company was charged with violating section 8(a)(5) of the Act, which makes it an unfair labor practice for an employer "to refuse to bargain collectively with representatives of his employees, subject to the provisions of section 9(a)."[5] Section 9(a) provides that the bargaining representative chosen by the majority of the employees in an appropriate unit shall be the exclusive representative of all the employees in that unit for purposes of collectively bargaining about rates of pay, wages, hours of employment, or other conditions of employment. The company's actions were said to have violated its duty to bargain in three ways. First, the company's action was presumably a unilateral modifica-

[4] Health Insurance for the Aged Act, 42 U.S.C. §§ 1395-96 (Supp. III 1965-67).

[5] National Labor Relations Act [hereinafter NLRA] § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964). There was also a charge that the company had violated section 8(a)(1), which forbids interference, coercion, or restraint of the right of employees to organize and bargain collectively.

tion of an existing, valid collective bargaining agreement and thus was a per se violation of the duty to bargain.[6] Second, the retirement benefits in question were so inextricably bound up with the wages and other conditions of employment of the active employees that the company presumably had a duty to bargain with the representatives of the active employees about such changes. Third, the retirees were employees within the meaning of the Act, and the union was their collective bargaining representative. Therefore, since their benefits were wages, the company had a duty to bargain about any changes in their benefits.

The Board found the company guilty of the charged violations apparently on all three grounds and ordered the company to cease and desist from refusing to bargain with the union on the subject.[7] The company sought review of the Board's order in the Court of Appeals for the Sixth Circuit and the Board cross-petitioned for enforcement. The court, largely confining its decision to whether the company could be required to bargain with the union as the representative of the retried employees,[8] failed to agree with the Board on any theory and denied enforcement of the order.[9]

Reading the appropriate sections of the Act it appears that in order to find that an employer has a duty to bargain with a union about modifications in the benefits of retirees four conditions must be satisfied; (1) the retirees in question must be "employees" within the meaning of section 2(3) of the Act;[10] (2) they must be the employer's employees within the

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[6] NLRA § 8(d), 29 U.S.C. § 158(d) (1964), provides in part: "the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract [without bargaining about it] . . . ."

[7] 71 L.R.R.M. 1433 (1969).

[8] The court dismissed the theory that the company's action was a unilateral modification of the collective bargaining contract by implying that the retiree's benefits vest upon retirement as personal contract rights, and that it was the personal contract rights that had been modified by agreement of the parties. 427 F.2d at 942 n.9.

The court did not mention the possibility of upholding a violation of the duty to bargain with the active employees on the ground that the company's action unilaterally modified the base group of the employees' group health plan. *See* Combined Paper Mills, Inc., 70 L.R.R.M. 1209 (1969). No reason for this omission appears in the opinion, and the Board has reasserted this position in its petition for certiorari. 75 LAB. REL. REP. 284, 285 (Dec. 7, 1970).

[9] The Board has decided to adhere to its ruling pending resolution by the Supreme Court. See 75 LAB. REL. REP. 201 (Nov. 9, 1970).

[10] 29 U.S.C. § 152(3) 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

meaning of section 8(a)(5) of the Act;[11] (3) they must be members of the certified bargaining unit;[12] and (4) their benefits must be included in the phrase "wages, hours, and other terms and conditions of employment."[13]

The language of section 2(3) neither specifically includes nor excludes retired employees. It is settled that Congress did not use the word as a term of art having a definite meaning,[14] and apparently Congress did not anticipate this problem so that legislative intent provides little help in deciding whether the term is broad enough to include retirees.[15] There are numerous cases, dealing with other labor problems, which find that persons who would not ordinarily be thought to be described by the term "employees" are covered by the Act, but these cases deal primarily with workers who are likely to be employed in the near future.[16] There are a few cases, however, holding that "employees" as used in section 302(c)

> because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individal employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any person who is not an employer as herein defined.

29 U.S.C. § 152(3) (1964) (emphasis added). The italicized words appear in 612 Stat. 137 as "this Act."

[11] 29 U.S.C. § 158(a)(5) (1964), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions [of section 9(a)]."

[12] NLRA § 9(a), 29 U.S.C. § 159(a) (1964), provides in part:

> 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 employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

[13] There is a mandatory duty to bargain about subjects included in the phrase "wages, hours, and other terms and conditions of employment." NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958).

[14] NLRB v. Hearst Publications, Inc., 322 U.S. 111, 124 (1944).

[15] Legislative histories of the Wagner and Taft-Hartley Acts compiled by the Board give no indication that Congress in any way anticipated this problem. NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (1949); NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (1948).

[16] *E.g.*, Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) (applicants for employment); Whiting Corp. v. NLRB, 200 F.2d 43 (7th Cir. 1952) (men laid off not reasonably expected to return to work not employees); Goodman Lumber Co., 166 N.L.R.B. 304 (1967) (person who has quit); Local 872, International Longshoremen's Ass'n, 163 N.L.R.B. 586 (1967) (hiring hall registrants).

of the Act[17] includes retired employees.[18] One of these, *Blassie v. Kroger Co.*,[19] conceptualizes the term employee as referring to one being in an employment relationship with another. That relationship contemplates an exchange of work for wages with reciprocal performances normally occurring at the same point in time. Should the performances be separated in time however the relationship continues until performance by both sides is completed. Thus a retired employee retains, to some extent, the status of employee until all benefits—deferred wages[20]—due him are paid.

The court in *Pittsburgh* did not directly challenge the assertion that persons not currently in the active service of an employer could be covered by the term "employee." It chose to draw the line at section 8(a)(5), which speaks of "representatives of *his* employees."[21] The court noted that this language has not been given the same expansive reading accorded the word "employee" without the possessive pronoun. So far as the court was concerned retirement "is a complete and final severance of employment."[22] Thus, even if retirees are "employees" this severance from the employer means that they are not "his employees." The application of the *Blassie* rationale was rejected by the court because it viewed that case as an ad hoc decision necessary to carry out the obvious intent of section 302(c) of the Act. However, there seems to be no necessity for rejecting the rationale in *Blassie* to protect the obvious purpose of the restrictive language of section 8(a)(5)—limiting the employer's duty to bargain to persons he has employed as opposed to those he has not yet employed or those employed by others. Nevertheless, the Board, as the court pointed

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[17] 29 U.S.C. § 186(c) (1964). Section 302 of the Act is generally concerned with preventing the misuse of bargaining power for the personal or political purposes of union officials; it therefore restricts certain loans and payments by employers to, *inter alia*, employee representatives, labor organizations and their officials. Subsection (c) excepts certain types of payments including certain types of welfare funds; it provides in part:

> The provisions of this section shall not be applicable . . . with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the *employees* of such employer, and their families and dependents . . . .

Id. (emphasis added).

[18] *E.g.*, Garvison v. Jensen, 355 F.2d 487 (9th Cir. 1966); Blassie v. Kroger Co., 345 F.2d 58 (8th Cir. 1965).

[19] 345 F.2d 58, 68-71 (8th Cir. 1965) (Blackmun, J.).

[20] Benefits to be enjoyed upon retirement are considered deferred wages for the purposes of the Act. Inland Steel Co., 77 N.L.R.B. 1 (1948), *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

[21] 29 U.S.C. § 158(a)(5) (1964) (emphasis added).

[22] 427 F.2d at 944.

out, has never permitted retirees to vote in certification elections but has excluded them from the bargaining unit. However, the cases cited by the court[23] are of doubtful value. The most recent case involved a retired employee whose only connection with the employer was that he worked irregularly to make the maximum allowed by Social Security regulations; he was excluded because of the irregularity of his work.[24] The other cases were all decided before the Board determined that retirement benefits were a mandatory subject of bargaining with active employees.[25]

Since there is no duty to bargain about the interests of those not in the bargaining unit,[26] the continuing employment concept may be used to avoid that pitfall by stating that retired employees have never completely left the bargaining unit. The court, however, believed that retirees have left the unit and, furthermore, that they lack the economic credentials to reenter it. In the court's view retired employees are not included in the description of the certified unit,[27] and, in case the Board may be said to have changed the unit, such action would be inappropriate because the "appropriate unit has economic incidents which the Board simply cannot modify by fiat or enlarge by sympathy."[28]

Finally, the subject of bargaining—modification of the retirees' benefits—must be wages, hours or other terms and conditions of employment. Retirement benefits are deferred wages and are treated no differently than those of active employees if the continuing employment concept is accepted. In the court's view, however, they are no longer wages as such but vested contract rights,[29] outside the field of industrial relations.

On the basis of its textual analysis of the provisions of the Act, the

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[23] Taunton Supply Corp., 137 N.L.R.B. 221 (1962); Public Service Corp., 72 N.L.R.B. 224 (1947); J.S. Young Co., 55 N.L.R.B. 1174 (1944); W.D. Byron & Sons, 55 N.L.R.B. 172 (1944).

[24] Taunton Supply Corp., 137 N.L.R.B. 221 (1962).

[25] The Board decided in Inland Steel Co., 77 N.L.R.B. 1 (1948), that retirement benefits were actually a form of wages and therefore a mandatory subject of bargaining.

[26] Douds v. International Longshoremen's Ass'n, 241 F.2d 278 (2d Cir. 1957).

[27] The certified bargaining unit was "[a]ll employees of the Employer's plant and limestone mine at Barberton, Ohio working on hourly rates, including group leaders who work on hourly rates of pay, but excluding salaried employees and supervisors within the meaning of the Act." 427 F.2d at 938.

[28] *Id.* at 946. The court did not describe those incidents; it is presumed that they are not present here.

[29] For a discussion of how vested these benefits may, or may not be in various situations see B. AARON, LEGAL STATUS OF EMPLOYEE BENEFIT RIGHTS UNDER PRIVATE PENSION PLANS (1961).

court's position emerges as a defender of the plain meaning of language[30]—retired means no longer employed and retirement benefits are contract rights, not wages. The Board, on the other hand, is more liberal with the language and feels that retirement under a collective bargaining agreement providing retirement benefits is not a complete severance of the employment relationship, thus leaving room for a continuing obligation to bargain during the life of the benefits. Neither view is completely unreasonable, nor patently correct; therefore, recourse must be had to the purposes of the Act and the economic facts of the situation. The Board is the expert to which Congress has given the duty of making such decisions; it has broad discretion and should be overruled by reviewing courts only when there is no substantial evidence to support its position, or when it contravenes the provisions of the Act.[31]

The Act is primarily designed to promote industrial peace and stability by encouraging collective bargaining.[32] The adequacy of retirement benefits poses a threat to industrial peace in that retired employees have very few places to look, other than to the employer or the community, should their benefits prove to be inadequate. Particularly in this day of confrontation, it is not unlikely that industrial peace literally could be shattered by disgruntled pensioners; picketing alone could persuade many employees to refuse to go to work. The Act does not require the Board to await actual disruption or violence but allows it to be anticipated.[33] Additionally, the experience of the retired employees, viewed from the standpoint of the active employees, undoubtedly has an impact upon the willingness of active employees to accept mandatory retirement as well as a given pension plan; thus, their insecurity may well lead to industrial strife. Indeed Congress has recognized as much by stating that employee welfare and pension benefit plans are an "important factor affecting the stability of employment and the successful development of industrial relations."[34] Collective bargaining is "the framework established by Congress as most conducive to industrial peace."[35] The Supreme Court has also unanimously indicated that "[i]ndustrial experience is not only reflective

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[30] "There was nothing strained or unnatural in this interpretation." 427 F.2d at 943.

[31] NLRB v. E.C. Atkins & Co., 331 U.S. 398, 403-04 (1947); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-31 (1944).

[32] Fiberboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 211 (1964); Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 271 (1964).

[33] NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318, 326 (1940).

[34] Welfare and Pension Plans Disclosure Act, 29 U.S.C. § 301(a) (1964).

[35] Fiberboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 211 (1964).

of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process."[36] There is evidence that many industries do bargain about modification of retirees' benefits; indeed, the parties in the instant case did so for a number of years.[37]

The court adopted a somewhat different approach to the purpose of the Act, emphasizing the equalization of competing economic forces. The Act's "purpose is not artificially to create or manufacture new economic forces," and "[r]etired employees have no economic or bargaining power within this system."[38] This position is related directly to the court's textual analysis and can be reduced to a flat assertion that the court did not believe that retirees were intended to be protected by the Act. Such a view avoids rather than answers the assertion that this subject constitutes a threat to industrial peace. Further, the court doubted that the subject is suited to collective bargaining at all or, in any event, that the union is the appropriate vehicle for such collective bargaining. First, the court reasoned that collective bargaining would destroy the security that the retiree has with a vested contract right because benefits could be decreased through bargaining as well as increased; second, it feared that union negotiators would be likely to favor the interests of active dues paying members over those of the retired employees. It should be noted, however, that the security of a vested contract right may well be minimal, particularly where the enforcement of that right depends on the resources of the individual rather than the resources of a group.[39] Additionally, it should be noted that the representative of a bargaining unit has the duty to fairly represent the interests of all members of that unit.[40] Moreover, there seems to be no advantage to anyone in excluding retirees from the unit since the economic power of the retirees eventualy rests on the cooperation of the active employees and since it will certainly be simpler for the company to deal with one union rather than two.

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[36] *Id.*

[37] *See* Pittsburgh Plate Glass Co., Chem. Div., 71 L.R.R.M. 1433, 1437 (1969), and authorities cited there.

[38] 427 F.2d at 946.

[39] Even where the employer performs his obligation voluntarily, the security of a vested right to a fixed payment may be slight in periods of continuing inflation. Based on the Consumer Price Index, a worker who retired in 1959 with a food budget of one hundred dollars per month would have had to pay 129.80 dollars for the same food in October, 1969, and his health costs would be 56.9 per cent higher than when he retired. *See* U.S. BUREAU OF LABOR STATISTICS, MONTHLY LABOR REVIEW, Dec., 1969, at 100.

[40] Vaca v. Sipes, 386 U.S. 171, 177 (1967).

A determination that the retired employees in this case are covered by the Act and that their benefits are mandatory subjects of bargaining raises quite a few questions that neither the Board nor the court has answered. For example; does the principle apply to all industrial pensioners or only to those pensioned pursuant to a collectively bargained contract; will pensioners now be allowed to participate in certification elections, and, if so, to what extent; may the parties bargain for a decrease in benefits, and may the employer decrease them if there is an impasse in bargaining? No reason appears why these questions must be settled before they arise in an actual case and, thus, the existence of these and other questions should not prevent affirmance of the Board's decision.

The court set forth no convincing arguments that the Board's decision will not effectuate the policies of the Act unless one accepts the premise that retirees were never intended to be protected by the Act. It is difficult to say that the Board's position is unreasonable or even unsupported by substantial evidence. Therefore, in a close case such as this the court should defer to the policy determinations of the Board. If the Board has acted contrary to the will of Congress, Congress has the power to overrule the Board.

GEORGE S. KING, JR.

Workmen's Compensation—What Is the Range of Compensable Consequences of A Work-Related Injury?

The North Carolina Court of Appeals in *Starr v. Charlotte Paper Co.*[1] recently considered the extent to which an employer, liable for the first injury, may be held accountable under the North Carolina Workmen's Compensation Act for secondary injuries subsequently incurred by its former employee. On October 8, 1963, while employed by the defendant, Starr suffered a spinal injury causing total paralysis from the waist down. In lieu of weekly compensation benefits, Starr settled with the employer for thirty-five thousand dollars. The North Carolina Industrial Commission entered an order approving the settlement with the exception that it was not in satisfaction of subsequent hospital and nursing expenses incurred as a result of the injury.

Due to his condition, Starr could move about only with the aid of a wheelchair and had frequent muscle spasms in his legs. On March 17,

[1] 8 N.C. App. 604, 175 S.E.2d 342, *cert. denied,* 277 N.C. 112, — S.E.2d — (1970).