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SUPREME COURT  
OF THE STATE OF WASHINGTON

JACK M. NAVLET, ET AL, )  
INDIVIDUALLY AND ON BEHALF )  
OF A CLASS OF OTHERS )  
SIMILARLY SITUATED, )

Appellants, )

v. )

THE PORT OF SEATTLE, )

Respondent. )  
\_\_\_\_\_ )

No. 78866-9

SUPPLEMENTAL BRIEF  
OF  
PORT OF SEATTLE

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**I. Facts Relevant to Supplemental Brief.**

On June 26, 2006, the Court of Appeals determined that the above-referenced case involved an issue of public import, to wit:

Is a negotiated retiree medical plan for employees of a municipal corporation a “governmental plan” not subject to ERISA and are the benefits under the plan a form of deferred compensation that may not be unilaterally cancelled by the employer?

On July 5, 2006, this Court issued a ruling accepting Certification.

This case, however, involves issues that are much narrower than that presented by the Court of Appeals. For example, the Port of Seattle did not unilaterally cancel the negotiated retiree medical plan. Rather, the retiree medical plan, a third party Taft Hartley Trust, was terminated by the decision of its Trustees, a Board of Trustees comprised of employer and union representatives. CP 84. Moreover, retiree coverage was subsequently extended to the Plaintiffs under the Port of Seattle’s own retiree medical plan. *Id.* The Plaintiffs’ claim is, therefore, not about the cancellation of retiree coverage but rather the right to increase the cost to retirees for the retiree medical coverage provided.

The issues of whether the Board of Trustees could properly terminate coverage of a negotiated retiree plan and whether the Port of Seattle has any liability for such termination under the terms of the collective bargaining agreement are not before this Court and require

joinder of the Trust and Trustees as indispensable parties and also require exhaustion of administrative remedies and arbitration.

Similarly, the issue of whether the union retiree medical plan is an ERISA plan or a governmental plan involves a factual determination upon which the Plaintiffs have the burden of proof and based on the record presented, the Plaintiffs have not met their burden and the plan must be construed as an ERISA plan.

Finally, the issue before the Court is not whether a retiree medical plan is a form of deferred compensation but rather whether an employer, at the inception of the contract, can reserve the right to change the costs and/or duration of such benefits by unambiguous contractual language. It is the Port's position that the duration, as well as the cost, of the retiree medical benefits was properly limited by the union Trust and even if not so limited, the liability is the liability of the union Trust, an indispensable party to this litigation, and not a liability of the Port of Seattle. Moreover, the Plaintiffs' claim to retiree benefits was satisfied through the extension of the Port's own retiree medical plan to such participants. The Plaintiffs' claim, therefore, is a claim with respect to only the cost that can be charged for retiree coverage and, in this regard, the terms of the retiree medical plan also state that such costs can be changed at any time.

## II. Supplemental Legal Arguments.

### A. Neither Federal or State law requires the vesting of retiree medical benefits where the parties have agreed at the inception of the contract that such benefits are of limited duration.

Unlike pension benefits, which contain elaborate rules governing vesting, the general rule under ERISA is that welfare benefits are not vested for lifetime upon retirement and the employer has the right to amend the plan at any time. See, *American Federation of Grain Millers, AFL-CIO v. International Multifoods Corporation*, 116 F.3d 976, 979 (2<sup>nd</sup> Cir. 1997). Nevertheless, where the unambiguous language of the contract indicates that retiree medical benefits are guaranteed for lifetime, the courts will enforce the agreement of the parties.

The disparate treatment between pension and welfare plans is not accidental. Congress recognized the need for flexibility with respect to medical benefits because changes in medical practice technology and the cost and utilization of treatment are unstable variables that are not subject to accurate prediction and control by the employer. *Id.*

Under state law, the result is similar. Pension plans are subject to the general rule that pension promises vest at the time that services are first performed. See, *Bakenhus v. City of Seattle*, 48 Wash.2d 695, 296 P.2d 536 (WA. S.Ct. 1956). This rule is based on a contractual theory that absent words of limitation in the statute, the legislature intended to create a contract that was accepted by the employee on the first day of

employment. *See, Oregon Police Officers Assn. v. State*, 918 P.2d 765 769-70, 323 Or. 356, 364-365 (OR. S.Ct. 1996). However, there is no similar case law with respect to medical benefits. Employers in Washington State have always been free to change, amend or terminate medical benefits absent specific contractual language to the contrary. A contrary rule established in this case would subject employers to unlimited liability. Moreover, the Washington Legislature has specifically indicated that retiree medical benefits are not contractual and may be revoked or changed by the employer. *See*, RCW 41.04.208<sup>1</sup>. Thus, absent specific language to the contrary, retiree benefits are not vested for the lifetime of the participant<sup>2</sup>.

An examination of the employee's union medical plan and collective bargaining agreement indicate that the agreements unambiguously limit the duration and funding of retiree medical benefits and indicate that such benefits are not guaranteed for the lifetime of the

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<sup>1</sup> The legislature wanted to encourage employers to establish both health plans and retiree health plans for workers. Plaintiffs' position would discourage the establishment of any health plan for workers.

<sup>2</sup> Whether such retiree medical benefits continue beyond the duration of a collective bargaining agreement is also a matter of contractual interpretation. Courts have held that after a CBA expires the employer is free to modify or terminate retiree medical benefits. *See, American Federation of Grain Millers v. International Multifoods Corp.*, 116 f.3d 976, 979 (2<sup>nd</sup> Cir. 1997). The essential issue is whether the parties intended to tie the funding of the retiree medical benefits to the collective bargaining agreement or whether they intended the funding of the retiree medical benefits to extend beyond the terms of the collective bargaining agreement for the lifetime of the employee. *See Generally, Melbinger & Culver, The Battle of the Rust Belt: Employers' Right to Modify the Medical Benefits of Retirees*, 5 De Paul Bus. L.J. 139 (Fall/Winter 1992/1993).

participant. The relevant language of the collective bargaining agreement is as follows:

The Port shall maintain the current level of medical, welfare, dental and related benefits **during the duration of this contract** and shall continue to provide the same level of coverage currently provided to eligible employees, eligible retirees and dependents. The Port agrees to be party to the Agreement and Declaration of Trust of the ILWU Local 9 Warehouse Welfare Trust Fund, and to pay the premium necessary to maintain the current level of benefits to the Trust. CP 52. (Emphasis added).

The above language is known in the industry as a “maintenance of benefits” clause. Rather than the Port being obligated to contribute a set dollar amount per hour for welfare benefits during the duration of the collective bargaining agreement, the contract required that the Port contribute whatever dollar amount is necessary to maintain the current level of benefits. Therefore, if the experience of the group is adverse or the cost of medical care goes up, the Port would be obligated to increase the dollars paid per hour worked by an active employee to the welfare plan during the duration of the collective bargaining agreement. The phrase for “eligible employees, eligible retirees and dependents” indicated which participants were subject to the maintenance of benefits clause. The collective bargaining agreement made it clear that eligible retirees were subject to the maintenance of benefits clause during the duration of the

collective bargaining agreement. Thus, if the cost of retiree care went up, the cost that the Port paid into the medical plan per hour based on work performed by an active employee could be increased to satisfy that obligation.

The collective bargaining agreement also indicated that the amounts necessary to fund the level of benefits during the duration of the contract were to be paid into the ILWU Local 9 Welfare Trust Fund. The Trust Fund in turn specified that collective bargaining contributions were the sole source of funding:

All contributions shall be due by the date specified in the underlying collective bargaining agreement. CP 113.

Finally, the welfare plan document, distributed to participants indicated that all funding was made pursuant to the terms and duration of the collective bargaining agreements and that benefits may be terminated if funds were no longer sufficient:

**Funding Medium**

The Plan is funded through employer contributions, the amount of which is determined through collective bargaining agreements. CP 166.

**Retiree Eligibility**

....

**Benefits under this Retired Employee Program are not guaranteed for any definite period of time and benefits will be provided only to the extent that sufficient funds are available in the Trust. The**

**Trustees reserve the right to make any changes in this retiree plan they deem necessary, and to terminate the retiree plan. CP. 134**

Thus, the terms of the collective bargaining agreement, trust agreement and summary plan description all unambiguously indicate that from the date the contract was initially formed the participant was not guaranteed lifetime retiree medical benefits and that the Port's obligation to fund benefits was limited to the duration of the collective bargaining agreement. The Plaintiffs can point to no contractual language that supports their claim to lifetime medical benefits. Moreover, as discussed in more detail below, because Plaintiffs have been provided with retiree medical benefits, their claim is not a claim concerning the cancellation of such benefits, but rather whether the cost to retirees for providing such benefits can be increased.

**B. Plaintiffs rights to retiree medical were not guaranteed and were terminated by the Board of Trustees of the Union Welfare Plan, an indispensable party to this litigation.**

The essential issues in this case are whether the Plaintiffs' had a contractual right to unmodified lifetime retiree benefits under the terms of the ILUW Local 9 Welfare Trust and, if so, whether the Port of Seattle had an obligation to continue to fund or provide such benefits. The unambiguous language of the Union Welfare Plan indicates that the

Plaintiffs did not have the right to unmodified lifetime retiree medical benefits:

**The Retired Employee Program is not guaranteed.** The Board of Trustees is providing retiree health and welfare benefits to the extent that monies are currently available to pay the cost of such programs. The Board of Trustees retains sole and exclusive authority, at its discretion, to determine the extent, if any, to which monies are available for this program and to determine the manner of expenditure of the monies for the program. The program is not guaranteed to continue indefinitely. The Board of Trustees reserves the right to change the eligibility rules of the benefits, reduce the benefits, or eliminate the Plan entirely, as may be required by future circumstances. CP 166.

Consistent with the specific contractual language, the Plaintiffs have testified that no one from the Port or the Union ever informed them that they had the right to lifetime retiree benefits. (CP 171; CP 182; CP 198; CP 202-203; CP 219; CP 224; CP 232; CP 248; CP 255). Consistent with this contractual language, the Union Welfare Plan was terminated by the action of its Board of Trustees, a Board that was comprised of an equal number of employer and union Trustees. CP 84.

Moreover, in consideration for the Port of Seattle agreeing to pay all medical claims of participants, i.e. active, dependents and retirees through April 30, 2003, the Board of Trustees of the Union Welfare Trust entered into a Settlement Agreement with the Port of Seattle. CP 81.

Under the terms of the Settlement, the Union Trust agreed that the Port of Seattle had paid all required contributions to the Trust and all contributions required to “maintain the current level of benefits” provided by the Trust. CP 81.

Therefore, before the issue of liability of the Port of Seattle can be raised, the Plaintiffs must establish both: (i) a right to unmodified lifetime retiree benefits under the terms of the Union Welfare Trust, and (2) that the Trustees abused their discretionary authority by terminating the retiree medical plan and by entering into a Settlement Agreement with the Port of Seattle with respect to contributions to the Union Welfare Fund<sup>3</sup>. The Union Welfare Trust and Trustees are obviously indispensable parties to such litigation. *See, Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1324-25 (9<sup>th</sup> Cir. 1985); *Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279, 1287 (9<sup>th</sup> Cir. 1990), *Pecor v. Northwestern National Insurance Company*, 869 F. Supp. 651, 653 (E.D. Wis. 1994) (the plan is the proper defendant to a claim for benefits). In addition, the Trust has specific administrative steps that a beneficiary must take if the beneficiary has not “received the full amount of benefits to which he is entitled, or who is otherwise adversely affected by any action of the Trustees.” CP 115. Such claims must first be subjected to an

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<sup>3</sup> The union also entered into a similar Settlement Agreement. CP 75

administrative hearing and then are subject to binding arbitration. *Id.* Because the Plaintiffs have failed to exhaust administrative remedies and name indispensable parties, this cause of action was properly dismissed by the trial court.

Moreover, even assuming that Plaintiffs were somehow guaranteed retiree medical benefits for their lifetime by the Union Welfare Trust, and the Port was somehow obligated to assume such an obligation, Plaintiffs can point to no provision of the medical plan that would prevent the benefits or costs to the participants from being changed. In fact, the medical plan specifically indicates that benefits to retirees can be changed, reduced or eliminated. CP 134; CP 166. In addition, the retiree medical plan specifically indicates that the amount that retirees pay for such coverage can be increased at the discretion of the Trustees – “you must self-pay 20.35 per month (or such other amount as the Trustees may determine from time to time).” CP 134. Any rights that such retirees may have had to lifetime benefits were, therefore, satisfied by the Port of Seattle extending coverage to such retirees under the terms of its own retiree medical plan. The claim that such retiree medical benefits must be provided at the same cost to retirees is contrary to the specific language of the medical plan document and is without merit.

C. **Plaintiffs have not met their burden of proof to establish that the welfare plan was established and maintained by the Port of Seattle.**

The ILWU Local 9 Welfare Trust was not established by the Port of Seattle to fund retiree medical benefits. Rather, the ILWU Local 9 Trust was established by the union as a multiemployer trust. The Trust, as established, was intended to be subject to ERISA and Section 301 of the Labor Management Relations Act. CP 91; CP 110. As such, it accepted contributions from both governmental and non-governmental employers. For example, Plaintiff, Arthur Camp testified that when he worked for Fisher Mills and Salmon Terminal, private employers, contributions were made on his behalf to the ILUW Local 9 Welfare Trust. CP. 188. The employees of the Local 9 union, who were not Port of Seattle employees, also received contributions form the union and not from the Port of Seattle. The Plaintiffs have further admitted that the Trust is a Taft Hartley Trust. *See*, Appellants Reply Brief at P. 10.

Like all Trusts subject to the LMRA, the Trust was operated not by the Port but by an equal number of union and employer representatives. CP 93. Trust business is conducted by a majority vote of the Trustees. CP 96. The Trustees, not the Port of Seattle, terminated the retiree medical benefits.

The trust was also never administered by the Port of Seattle. Rather, the Trust was administered by Local 9 and then by Zenith Administrators, an independent third-party administration firm. CP 190.

The Trust is an independent entity that can sue and be sued in its own right. CP 91.

With respect to retiree medical benefits, years of service or active employment with the Port of Seattle are not a condition or requirement for receiving retiree medical benefits. Rather, the receipt of retiree medical benefits is conditioned upon retiring (at age 62 or age 65) with either 15 or 25 years of service under the Warehousemen Pension Trust and contributions having been paid into the Welfare Trust on the participant's behalf for at least 10 years. CP. 134. While the Plaintiffs have presented evidence that substantially all the active employees who were entitled to medical benefits were Port of Seattle employees, the Plaintiffs have presented no evidence as to who is or may be entitled to receive retiree medical benefits under the Trust. Thus, the Plaintiffs can not establish that all or substantially all the participants who are or may be entitled to retiree medical benefits under the Trust are governmental employees. There is simply no evidence as to the number of participants that may be entitled to retiree medical benefits or the employment history of such participants<sup>4</sup>. Without such evidence, the Trust must be construed in accordance with its terms as a multiemployer trust subject to both ERISA and the LMRA as

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<sup>4</sup> Plaintiffs could have easily obtained this information through discovery requests to Zenith Administrators, but they failed to do so.

the undisputed evidence in the record establishes that the Trust was not intended to be a governmental Trust and contributions were accepted on behalf of private employers – Fisher Mills and Salmon Terminal, as well as employees of Local 9, a non-governmental employer.

Where trusts have not been established exclusively for governmental employees and involve both governmental and private contributions, the Courts have found that such trusts are subject to federal law. In *Livolsi v. City of New Castle, Pennsylvania*, 501 F. Supp. 1146 (D.C. Pa. 1980), the City of New Castle contributed to a similar multiemployer trust. The Court held that where the parties selected a private welfare benefit plan for the benefit of its employees, such private plan was subject to ERISA. *Id* at 1150. *Accord*, In *Brooks v. Chicago Housing Authority*, 1990 WL 103572 (N.D. Ill. 1990), (Trust of which governmental entity was only one of a number of participating employers was subject to federal law).

Defendants reliance on *Feinstein v. Lewis*, 477 F. Supp. 1256 (S.D. N.Y 1979) is misplaced because *Feinstein* did not involve a trust that was established and maintained to hold both private and employer contributions. Rather, the trust in *Feinstein* was established exclusively for governmental employees and the only contributions made to the trust were for governmental employees. *Id.* at 1258. The holding in *Triplett v. United Behavioral Health System, Inc.*, 1999 WL 238944

(E.D. Pa. 1999) is the same, as the Court found that the welfare plan involved was established solely for governmental employees. *Id.* at 2. In contrast, the ILWU Local Trust was not established with the intention of providing benefits exclusively to governmental employees. It is undisputed that other private employers and the union, itself, made contributions to the Plan<sup>5</sup>.

### III. Conclusion.

The union negotiated through collective bargaining not to participate in the Port's retiree medical plan but to instead participate in a private third party union Taft Hartley retiree medical plan. The Port agreed to permit participation in such plan as long as its liability was limited to contributions to such Trust during the duration of the collective bargaining agreement. The union Trust was terminated by action of its Board of Trustees, not by the Port of Seattle. Now the union retirees are attempting to renegotiate a portion of the contract previously made. Public policy dictates that collective bargained employees should not be permitted to keep the benefits of the bargain previously made while renegotiating the concessions previously given. Plaintiffs' theory of the case that medical benefits can not be changed despite a specific

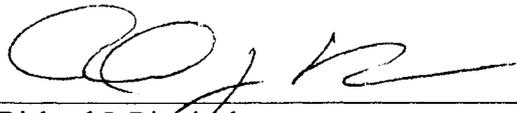
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<sup>5</sup> The fact that at all times at least two employers (i.e. the Port and the Union) contributed to the trust makes the trust a multiemployer trust and distinguishable from the case of *Hawkeye National Life Insurance Company v. Avis Industrial Corporation*, 122 F.3d 490 (8<sup>th</sup> Cir. 1997).

reservations of right clause would make it impossible for employers to maintain medical plans for either active employees or retirees. Moreover, the Plaintiffs in this case were not left without retiree medical benefits. The Port of Seattle permitted the retirees to obtain medical benefits under the Port's own nonunion retiree medical plan. The Plaintiffs' objection is not to the coverage provided but to the cost of such coverage. Therefore, the essential issue in this case is not the right to terminate coverage but the right to increase the cost of such coverage. The Plaintiffs have no contractual right to receive retiree medical benefits at a set specified cost for their lifetime.

Respectfully submitted, this 22<sup>nd</sup> day of August, 2006.

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