

56766-7

78866-9  
56766-7

2006 MAR 20 AM 11:51  
COURT OF APPEALS  
DIVISION I

IN THE COURT OF APPEALS FOR THE STATE OF  
WASHINGTON  
DIVISION I

Jack M. Navlet, et al, individually  
and on behalf of a class of others  
similarly situated,

Plaintiffs,

v.

The Port of Seattle,

Defendant.

Court of Appeals  
No. 56766-7

**REPLY BRIEF OF APPELLANTS**

James D. Oswald  
Law Offices of James D. Oswald  
100 South King St., Suite 560  
Seattle, WA 98104-3844  
Tel: 206-264-8558  
Fax: 1-206-629-7657  
Counsel for Appellants



## TABLE OF CONTENTS

<b>I. CORRECTIONS TO PORT’S STATEMENT OF THE CASE.....</b>	<b>1</b>
<b>II. ARGUMENT .....</b>	<b>3</b>
<b>A. The Welfare Plan Is a Governmental Plan; Reference to “Construing” the Plan According to ERISA and Applicable State Law Does Not Make ERISA, Rather than State Law, Controlling .....</b>	<b>3</b>
<b>B. Decisions based on ERISA, or on the Law of Other States, Are Inapposite – Washington Law Requires that Plaintiffs Receive Retiree Medical Benefits They Earned .....</b>	<b>6</b>
<b>C. RCW 41.04.208 Is Inapplicable, as Plaintiffs Do Not Participate in PERS .....</b>	<b>6</b>
<b>D. The Existence of a Collective Bargaining Agreement Between Port and Local 9 Does Not Undermine Plaintiffs’ Right to Receive Benefits Earned by Service Prior to April 2003 .....</b>	<b>8</b>
<b>E. The Trust Is Not a Necessary Party; Because Claim Is Not Against Plan, Exhaustion Is Not Required .....</b>	<b>12</b>
<b>III. CONCLUSION .....</b>	<b>12</b>

**TABLE OF AUTHORITIES**

**Cases – Federal**

*Feinstein v. Lewis*, 477 F. Supp. 1256 (SD NY 1979) .....4

*Krystyniak v. Lake Zurich Community Unit District No. 95*,  
783 F. Supp. 354 (ND Ill. 1991) .....4

**Cases – Washington State**

*Bakenhus v. Seattle*, 48 Wn. 2d 695 (1956) .....7

**Cases – Other States**

*San Bernadino Public Employees Assoc. of City of Fontana*, 67  
Cal.App. 4<sup>th</sup> 1215, 79 Cal. Rptr.2d 634 (1998) .....11

**Regulatory Opinions - Federal**

*U.S. Dept. of Labor Op. Letter 95-27A* ..... 4

**Regulatory Opinions – Washington State**

AGO 1975-2 .....7

AGO 2005-16 .....7

## **I. CORRECTIONS TO PORT'S STATEMENT OF THE CASE**

The Port characterizes itself as a “participating employer” in the ILWU Local 9 Welfare Plan “the Welfare Plan”). In fact, as of a date prior to 1997, the Port was the sole employer sponsor of the Welfare Plan. The Agreement and Declaration of Trust dated 1997 was signed by three employer trustees (CP 88). The Summary Plan Description prepared in 1998 indicates that all three of those trustees are employees of the Port of Seattle. (CP 407) The Welfare Plan was simply the device by which the Port provided active and retiree medical benefits for its employees who were in the ILWU Local 9 bargaining unit at the Port.

Because the Port funded the Welfare Trust based on the hours of employment by its active employees (CP 342), when the Port ceased employing members of the Local 9 bargaining unit, the Welfare Trust received no more contributions, and no longer had the funds to provide retiree medical benefits for former Port employees. (CP 84)

The Port argues that, because it provided retiree medical benefits through the Welfare Plan, when the Welfare Plan was no longer able to provide benefits to retirees, the Port no longer had an obligation to provide those benefits.

But, under well-established Washington State law, the obligation to provide these benefits runs not to the Plan, but to the employer. As the employer, and especially as a public employer, the Port was obligated to provide its retirees the benefits they had earned by their service. Plaintiffs do not assert that the Welfare Plan has an obligation to provide benefits when it is receiving no contributions. Nor do they contend that the Port must create a new “Plan” to provide their benefits. Plaintiffs assert simply that the Port must provide for continuation of comparable benefits at a comparable cost to the retirees. How the Port achieves that result is up to the Port.

The Port did not dispatch this obligation by its offer to provide retirees with medical benefits on the same basis as Port retirees who never anticipated receiving retiree medical benefits at substantially no cost to them. The Port’s offer to the Plaintiffs was that they could have comparable coverage if they paid approximately \$1,000 per month for a retiree and spouse (CP 328), an increase of 4800% from the \$20 or less they were charged (CP 347-48) before the Port ceased contributing to the Welfare Trust.

## II. ARGUMENT

### **A. The Welfare Plan Is a Governmental Plan; Reference to “Construing” the Plan According to ERISA and Applicable State Law Does Not Make ERISA, Rather than State Law, Controlling**

The Port misstates the record in an attempt to artificially create an issue of fact as to whether the Welfare Plan was a governmental plan, and therefore outside the coverage of ERISA. First, the Port has asserted Plaintiffs are seeking to force the Port to continue the retiree medical plan, or create a new “plan” to provide for retiree medical benefits. Plaintiffs have not asserted that the Port should continue the Retiree Medical Plan, but only that the Port must provide medical benefits to its retirees on essentially the same terms on which retiree medical benefits were provided by the Welfare Plan.

The Port also asserts there is a factual issue as to whether Plaintiffs seek benefits for persons who were not employed by the Port. As the Complaint alleges, each named Plaintiff qualifies for retiree medical coverage based on service with the Port. (CP 2, at ¶1) The Port has taken and transcribed the deposition of each named Plaintiff. (CP 176-268) If there were record evidence creating a question of fact as to their service with the Port, the Port would certainly have provided it, rather than simply raising the red herring that such a situation might exist.

Although the Complaint is fashioned as a class action, no class has been certified. But the class description in the Complaint includes only persons who, like the named Plaintiffs, have qualified for retiree medical benefits based on their service with the Port of Seattle. (CP 4-6, ¶¶ 9-16)

The question of whether the Welfare Plan is a governmental plan is determined by the nature of the contributing employers and participants at this time. As was noted above, as of a date no later than 1997, the sole contributing employer was the Port. As was discussed in Plaintiffs' Opening Brief, at page 2, in recent years, all active participants in the Plan (with the sole exception of the Union representative of ILWU Local 9) were employees of the Port. (CP 88, ¶¶5-6)

The authorities cited in Plaintiffs' Opening Brief establish that under these circumstances, a multi-employer plan is a governmental plan not subject to ERISA. *See, e.g., U.S. Dept. of Labor Op. Letter 95-27A*, at 3-4.

The Port asserts that the parties can adopt ERISA law as controlling, even if the Plan is not subject to ERISA. There is no authority to support that assertion. To the contrary, both *Feinstein v. Lewis*, 477 F.Supp. 1256 (SD NY 1979) and *Krystyniak v. Lake Zurich Community Unit District No. 95*, 783 F. Supp. 354 (ND Ill. 1991) specifically reject the proposition

that a governmental plan can become subject to ERISA by reciting in the Plan document that it is to governed by ERISA. The authorities cited by the Port hold only that where the Plan language states that it is to be construed so as to qualify for preferred treatment under the Internal Revenue Code, ambiguities are to be construed in a manner that preserves tax qualification.

The situation in this case is quite different. The tax qualification of the Plan is not affected by whether the Port is required to protect the retirees' right to retiree medical benefits they earned by their years of service to the Port. Here, the Plan language indicates it is to be construed according to ERISA and applicable state law. Because the Plan is a governmental plan, state law is fully applicable, and ERISA has no legal force. The Port would like to import ERISA decisions, because ERISA characterizes retiree medical benefits as "welfare benefits," which do not vest, and therefore may be freely changed even after an employee has completed service and retired. But, because ERISA has no applicability here, that draconian outcome is not compelled. And the mere fact that Plan drafters expressed an intention that the Plan be construed according to both ERISA and applicable state law does not permit the Port to avoid the impact of controlling state law principles.

**B. Decisions based on ERISA, or on the Law of Other States, Are Inapposite – Washington Law Requires that Plaintiffs Receive Retiree Medical Benefits They Earned**

The Port repeatedly relies on decisions from federal courts, even though those decisions apply the ERISA framework, whereby retiree medical benefits are treated as “welfare benefits,” which do not “vest.” These decisions are inapposite, as this case is controlled by Washington State law, which does not incorporate a concept that an employee cannot earn a vested right to retiree medical benefits. The Washington court decisions discussed in Plaintiffs’ Opening Brief establish that under Washington State Law, retiree medical benefits cannot be eliminated after they have been earned.

**C. RCW 41.04.208 Is Inapplicable, as Plaintiffs Do Not Participate in PERS**

Defendant asserts that RCW 41.04.208 bars Plaintiffs’ claims. But Plaintiffs are not covered by that statute.

RCW 41.04.208, by its terms, applies only to public employees who are participants in PERS, and Plaintiffs are not PERS participants. RCW 41.04.208(1)(c) discusses the rights of “retired employees.” However, the definition of “retired employee” at RCW 41.04.208(1)(c) indicates that it encompasses only persons who are participants in PERS:

(c) “Retired employee” means a public employee meeting the retirement eligibility, years of service requirements, and other criteria set forth in the public employees’ retirement system. [PERS]

The Second Declaration of Tony Hutter confirms that Port employees in the Local 9 bargaining unit did not participate in PERS. (CP 456, ¶9)

To the extent that Plaintiffs’ Opening Brief relied, by analogy, on the reasoning of AGO 1975-2, that reliance is not undercut by the later passage of RCW 41.04.208. AGO 1975-2 explained that retiree medical benefits were properly regarded as an element of retirement income, and so were subject to the *Bakenhus v. Seattle*, 48 Wn.2d 695 (1956), prohibition on reducing pension benefits provided by statute. The new statute purports to avoid that conclusion by reciting that retiree medical benefits provided under that statute “are not considered a matter of contractual right.” The courts have not yet decided whether a recitation in a statute can remove benefits from the protections of *Bakenhus*. But the very fact that the legislature engaged in that exercise supports the reasoning of AGO 1975-2. That is, as a general proposition, retiree medical benefits are properly treated as a matter of contractual right for employees who have provided the requisite service.

The Port’s reliance on AGO 2005-16 does not advance its position. AGO 2005-16 articulates an analysis, which has not been adopted by any

court, that the legislature can render any promise, including a promise of retirement income, illusory, by stating that it reserves the right to rescind the benefit in the future. But the reasoning in AGO 2005-16 “proves too much.” Taken to its logical extreme, the Attorney General’s analysis would mean that the legislature could reserve the right to eliminate *all* pension benefits for all future public employees. Under that reasoning, no public employee could ever “vest” in any retirement right, and all such rights could be eliminated at the whim of the legislature, thus making state employees’ retirement rights uniquely *unprotected*. At the very least, such a right to eliminate a benefit should be recognized only when it unequivocally extends to the obligations of the entity against whom the obligation is asserted, which is not the case here.

**D. The Existence of a Collective Bargaining Agreement Between the Port and Local 9 Does Not Undermine Plaintiffs’ Right to Receive Benefits Earned by Service Prior to April 2003**

It is undisputed that, during the time Plaintiffs worked for the Port, the Welfare Plan provided that retirees who achieved the requisite years of service would receive retiree medical coverage at substantially no cost to them. The Plan was the document that recited the benefits to be paid to Plaintiffs for their work for the Port. And the Trust Fund was the device the Port utilized to deliver those benefits. The essence of Plaintiffs’ position is that, after they had provided the years of service required to qualify for retiree medical benefits, their right to those benefits vested, and could not be eliminated by subsequent actions of the Port or the Trust.

While the Plan document provided that the Welfare Trust did not guarantee the benefits, that limitation (a) could not defeat benefits that vested by virtue of length of service before benefits were terminated, and (b) did not eliminate the obligation of the Port to provide the benefits Plaintiffs had earned by their service, even if the benefits are provided by a mechanism other than the Welfare Trust.

The Port certainly did not negotiate any agreement that eliminated its obligation to provide the retiree medical benefits retirees had earned by their long service. The Port invokes the terms of the collective bargaining agreement, but does not recite that actual language of the agreement. In fact, the terms of the agreement do not clearly limit the obligation to provide retiree benefits to the term of the CBA. The actual language is as follows (see Exhibit 2 to Birmingham declaration):

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 and Trust of the ILWU Local 9 Warehouse Welfare Trust Fund, and pay the premiums necessary to maintain the current level of benefits to that Trust. . . .

The first sentence is reasonably read as containing two promises. The first is a promise to maintain the current level of benefits for the duration

of the agreement. The second is a promise to continue to provide the same level of coverage to retirees, among others, without limitation as to duration.<sup>1</sup> As the two clauses are very similar, the logical inference is that the second clause describes an obligation in addition to the first. That obligation is to continue coverage, for without regard to the length of the CBA.

Defendants apparently argue that the Court should consider every document related to the Trust as a negotiated agreement that binds the Plaintiffs. For example, it implies that the Resolution by the Trustees of Welfare Trust (CP 84) somehow defeats Plaintiffs' rights. The Welfare Trustees are not the bargaining representatives of the Plaintiffs. To the contrary, because the Welfare Trust is a Taft Hartley Trust, there are an equal number of union and Port trustees. The Plaintiffs are not bound by whatever resolution those trustees reached with the Port regarding cessation of Port contributions, whether or not it was the result of negotiations among the trustees, or between the trustees and the Port.

The Port also invokes the Settlement Agreement reached between Local 9 and the Port regarding a series of Unfair Labor Practices. (CP 76-81) But that document specifically provides that individual employees do

---

<sup>1</sup> To the extent that the second clause refers to employees, it would be subject to subsequent negotiations, and would expire if there were no employees.

not release any claims under this action. (*Id.*, at ¶1.2). The provision reciting that the Port does not owe any additional contributions to the Welfare Trust provides that it shall not affect any claims or defenses in this action. (*Id.*, at ¶1.4)

Presumably, the Port does not assert that the terms of its unilaterally implemented last and final offer can defeat Plaintiffs' rights. If that were the case, the rights of any represented employee could be defeated by the simple expedient of having the employer bargain to impasse and impose new terms.

This situation contrasts dramatically with the decision cited by Defendant for the proposition that permitting employees to enforce a prohibition against reductions in benefits would disrupt collective bargaining. *San Bernardino PEA v. City of Fontana*, 67 Cal.App.4<sup>th</sup> 1215, 79 Cal.Rept.2d 634 (1998). There, the union negotiated a wage increase in exchange for a reduction in benefits, and then brought suit to require that the former level of benefits be maintained.

Although the Port's Answering Brief refers to "concessions made in collective bargaining," the record is clear that the rights of Plaintiffs were reserved by specific language in the agreement related to closing the Port's warehouse. (CP 76-77) And the previously-negotiated collective

bargaining agreement was, at least, fully consistent with the Port's continued obligation to maintain retiree coverage at previous levels.

**E. The Trust Is Not a Necessary Party; Because Claim Is Not Against Plan, Exhaustion Is Not Required**

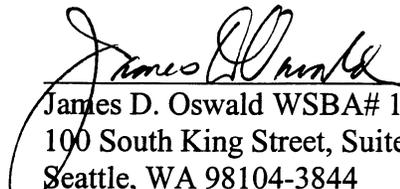
The Port's final argument is that Plaintiffs have failed to name the Welfare Trust, and have failed to exhaust the Welfare Plan's internal review procedures. The answer to both assertions is that this claim is not made against the Welfare Trust, which was the mechanism by which the Port provided retiree medical benefits, but against the Port as employer. Therefore, the Welfare Trust is not a party to this action, and there was no need for Plaintiffs to make their claim against the Port through the Plan's internal review procedures.

**III. CONCLUSION**

For the reasons stated above, as well as those stated in Plaintiffs' Opening Brief, the order of dismissal by the trial court should be reversed, and the matter remanded for further proceedings.

Respectfully submitted, this 20th day of March, 2006.

LAW OFFICES OF JAMES D. OSWALD

  
James D. Oswald WSBA# 11720  
100 South King Street, Suite 560  
Seattle, WA 98104-3844  
206-264-8558  
Attorney for Appellants Jack Navlet, et al