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From the Editor

Sixth Circuit Retiree Health Triptych (or 'As the Benefits World Turns')

A sophisticated union (United Auto Workers) and large manufacturers and their respective attorneys should be able to draft a collective bargaining agreement (CBA) clearly spelling out the terms of a retiree health benefits plan. Or, perhaps, this is sometimes impossible. On one April day, the US Court of Appeals for the Sixth Circuit issued three opinions interpreting three different CBAs; the union retirees won two to one. Each decision danced on the head of a verbal pin.

Recall that the Sixth Circuit famously (or infamously, depending on your viewpoint) "put a thumb on the scales" of justice in favor of retirees in disputes over health care: the *Yard-Man*[1] presumption in favor of lifetime benefits. The US Supreme Court removed the thumb in its 2015 *M&G Polymers USA v. Tackett* decision,[2] holding that CBAs should be read using "ordinary principles of contract interpretation," — that is, what do the words say. Since *Tackett,* courts can still struggle to find what the union and employer agreed. The struggle is especially apparent in the Sixth Circuit, where some judges are reluctant to part with *Yard-Man*.

The triptych also illustrates the tremendous changes in both the manufacturing industry (plant closings, job losses, and numerous corporate reorganizations) and health care (much better care for a lot more money). Yet, as the economics rapidly altered, the wording in the CBAs carried over, essentially unchanged, for decades of contract renewals.

Let's take a quick tour of the three decisions.

RETIREE WIN 1

The CBA in *Reese v. CNH Industrial* [3] stated that unionized employees who retired from 1994 to 2004 under the company pension plan "shall be eligible for the Group benefits" described in the CBA. But, besides indicating that the benefits were noncontributory, the CBA simply referenced the health benefit plan without describing the actual benefits. CNH wanted to modify the retiree health program; the UAW sought an injunction preventing any diminution in benefits. The dispute boiled down to whether retirees were promised lifetime benefits and, if so, what were those benefits. The litigation began when *Yard-Man* was still law, and the retirees initially succeeded. In a post-*Tackett* rehearing, they were able to repeat.

The key to victory was that although the CBA contained a general duration clause stating that the agreement expired on termination, the clause did not specifically refer to retiree benefits. The portion of the CBA covering benefits was silent on duration. The majority found this was vague because the retiree health section stated that benefits "continue into retirement," contradicting the general duration clause. Once vagueness was discovered, the court was able to examine the bargaining history, presentations by company representations and the like, concluding that the parties intended to provide lifetime benefits. However, while lifetime benefits were promised, the court found that reasonable changes in health benefits were allowed, and the dispute was sent back to the district court to figure out what those changes were. The Sixth Circuit instructed the lower court that "reasonable" depended not just on out-of-pocket costs to retirees but also on recognition that the quality of the medical care in 2017 was superior to the care available when the participants retired. (We'll have to see how the trial court compares, say, an ineffectual 10-day stay in a hospital to recover from a heart attack costing $800 with successful overnight bypass surgery for $48,000.)

A dissent authored by Judge Sutton pointed out that the general durational clause was clear and covered the entire CBA, and a specific reference to retiree health was not required. Absent any ambiguity, the dissent argued that the parties' intent and conduct was irrelevant, and the employer should be free to modify benefits as it chooses.

RETIREE WIN 2

Judge Gibbons also wrote the majority opinion in *UAW v. Kelsey Hayes Company*,[4] again finding a durational clause ambiguous and that extrinsic evidence showed the parties intended to provide

lifetime coverage. The case involved a 2001 plant closing agreement providing existing retirees with health care coverage. The employer continued the benefits for 10 years before unilaterally switching to a defined contribution health reimbursement account (HRA) model, allowing the retirees to purchase their own Medicare Wrap policies or pay uncovered bills. The HRA was arguably not as valuable, and the retirees sought an injunction stopping the changes.

Again, a general durational clause faced off against the benefit section of the agreement, which provided retiree health care coverage "shall continue," creating ambiguity for the majority. Then, looking at the "mountain of extrinsic evidence" and six decades of conduct and negotiations, the Sixth Circuit found that the parties intended to agree on lifetime benefits. Still, noting that health care and benefits plans are always changing, the court found that the employer had the right to make changes that preserved the "value" of the benefit.

The dissent, this time by Judge Gilman, argued that the durational clause clearly gave the employer the unfettered right to act, and nothing else mattered.

EMPLOYER WIN 1

Judge Gilman got to write for a unanimous court in *Cole v. Meritor Inc.*[5] *Cole* was another post-*Tackett* rehearing concerning retiree health benefits that the employer had been providing without cost to participants since 1965. Here, the CBA's retiree section said that on retirement health benefits "shall be continued thereafter" but, unlike *Reese* and *Kelsey-Hayes*, the durational clause specifically stated that insurance coverage "shall continue in effect until the termination of the [CBA]." Here there was no question of ambiguity; the retirees' rights expired with the CBA. In ruling that the four corners of the agreement governed, Judge Gilman noted that the parties may have expected that benefits would be continued for life, but as the business and health care worlds changed, the court must ignore such "loose talk" and stick with the document. A concurrence by Judge White, sadly mourned the loss of *Yard-Man,* reluctantly agreeing that words govern regardless of intent.

LESSONS LEARNED?

What does the triptych teach? First, the Sixth Circuit is still a friendlier place for retirees and less friendly for employers. Second, retirees make compelling litigants. With limited economic resources, mounting

health issues, and largely unable to return to the workforce, it's natural to wish to protect their benefits, especially if somebody else, like a large corporation, will be paying for it. Third, intent is amorphous. Did the parties 30 or 40 years ago think the US auto and industrial manufacturing sectors would be under extreme duress, or that health professionals would be able to provide miraculous care but that care would be incredibly expensive? And, if these issues eventually did arise during negotiations, did the parties realize that they could not agree on what the nature of the health care promise was and decide it was better to just keep repeating the same contract wording and let someone else deal with the problem? On top of that, many of the folks who did the actual negotiating have either retired themselves or passed to the Next World, so intent is a cold case.

Although there is no good solution, lawyers should, as always, make their documents clear. And judges should read those documents as they were written, not as they wish they were written. Truthfully, until the last retiree with health benefits dies or our nation figures out how to construct a world-class health system for all while controlling costs, the litigation will continue.

The views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which he is associated.

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NOTES

1. *UAW v. Yard-Man, Inc.,* 716 F.2d 1476 (6th Cir. 1983).
2. *M&G Polymers USA, LLC v. Tackett,* 135 S. Ct. 926 (2015).
3. *Reese v. CNH Indus. N.V.,* 6th Cir., No 15-2382, 4/20/17.
4. *United Autoworkers v. Kelsey-Hayes Co.,* 6th Cir., No.15-2285, 4/20/17.
5. *Cole v. Meritor, Inc.,* 6th Cir., No. 06 2224, 4/20/17.