ERISA Claim Takeaways From 7th Circ. Union Pension Ruling

By **Douglas Darch, William Dugan and Virginia Mohr** (September 18, 2020)

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It is customary to read of employees claiming retaliation against their employer. The U.S. Court of Appeals for the Seventh Circuit's recent decision in Bator v. District Council 4, Graphic Communications Conference[1] represents the almost unheard of — employees claiming retaliation at the hands of their union instead.

In Bator, union members simply wanted fellow union members working for a competitor to make an equal pension plan contribution, since they would all be entitled to the same pension benefits. The request cost them dearly. The union saw it as an affront, and the union members' attempt to rectify the inequities in contributions led to their expulsion from the union, as well as the loss of an early retirement option, disability pensions and a death benefit.

Not surprisingly, the expelled whistleblowers sued both the trustees of the pension plan and their local union to redress the retaliation, bringing claims under the seemingly aptly named Employee Retirement Income Security Act. The Seventh Circuit, however, held the expelled union members had no claim under ERISA against either the trustees of the pension plan, which was underfunded, or the local union itself for permitting the union members at the competitor to pay less for the same pension benefits.

In doing so, the court sidestepped both a union rule and a pension plan rule requiring all union members to pay contributions at the same level. It found that the trustees' decision to ignore the rule was not arbitrary or capricious, and that the local union was not acting as an ERISA fiduciary when it expelled the employees.

How the Case Arose

Donald Bator and his co-workers were represented by Teamsters Local Union 458-M, an amalgamated local, representing employees at several printing companies. The plaintiffs worked at Bell Litho Inc., a graphic communication company, and participated in an employee-funded defined benefit pension plan funded exclusively by contributions from employees who were members of the 69 unions that participated in the pension plan.

No employers contributed to the plan or participated in its management or administration. Nonetheless, like many multiemployer pension plans, it was and is underfunded.

In 2008, the members of Local 458-M voted to increase employee contributions from 6% to 8% of their weekly wages. In 2016, the collective bargaining agreement covering Bator and his co-workers at Bell Litho expired.

During the ensuing bargaining, the employees sought a lower contribution rate from Local 458-M, but the union rejected the request. Bator and his co-workers then learned that fellow union members who were employees at a competitor were making contributions at a lower level — or, in some cases, not making contributions at all — while remaining entitled to the same pension benefits.

After this fact came to light, Local 458-M threatened Bator and his co-workers with expulsion from the union if they did not continue to make contributions to the plan at the 8% level. When matters reached an impasse, Local 458-M disclaimed interest in representing Bator and his co-workers, effectively making them nonunion employees, and then expelled them from the union.

Expulsion vested the employees in the underfunded plan but also eliminated an early retirement option, a disability benefit and a death benefit. Bator and his co-workers then sued both the trustees of the pension plan and the Teamsters union under ERISA.

The Court's Decision

The Seventh Circuit affirmed the U.S. District Court for the Northern District of Illinois' decision to dismiss the complaint for failing to state a claim. As to the claim against the trustees, the court noted the trust agreement for the pension plan granted the trustees discretion to interpret the terms of the plan.

Under established case law, when a pension plan grants the trustees the authority to interpret the plan a court must defer to the trustees' interpretation unless the court finds the trustees' interpretation plainly ignored the language of the plan. The language of the plan may be interpreted to allow segments of a local union to participate in the plan at different contribution levels. The plan defined a "segment" as being within a recognized industry.

The court deemed the "different contribution levels" language sufficient to support the trustees' decision to allow the two bargaining units, albeit working at competitors, to contribute at different levels. Wholly absent from the court's decision is any discussion of the trust agreement's definition of a segment. Presumably, a competitor is within the same recognized industry.

The court dismissed the claim against the local union because it was not acting in a fiduciary capacity. To be an ERISA fiduciary the defendant must have responsibility in managing a plan or its assets. Setting contribution levels is neither.

On this point, the court deemed its 1994 decision in Johnson v. Georgia-Pacific Corp.[2] dipositive and faulted Bator for not addressing that decision. The court's reference to Johnson is puzzling.

Johnson involved a claim by retirees against an employer because it had increased the earned benefit amount for the active employees but not retirees. Central to the Seventh Circuit's analysis in Johnson was that the employer would be responsible for any shortfall in funding — a reap-what-you-sow analysis.

In contrast, in Bator the employees, and not the union, were responsible for any shortfall in funding, which would seem to be an obvious and significant distinction; but as noted by the court, Bator did not address the Johnson decision. The court also noted there was no argument by Bator and his co-workers that the Teamsters local was acting as a fiduciary when it disclaimed interest in representing them, and thus the court did not address this possible argument.

Takeaways

There are union members at 68 other unions which participate in this plan who may want to examine the contribution levels at their employer's competitors. Paying to supplement a competitor's workforce is rarely desirable.

Attorneys representing complaining union members may consider bringing claims other than ERISA claims. It appears claiming the trustees are breaching their fiduciary duties will be hard to prove, as they have so much discretion. A stronger record on a defining a "system" or a "recognized industry" could prove fruitful in another court.

But regardless, Bator and his co-workers' plight stands as a stark reminder that union representation is not necessarily a panacea for perceived workplace injustices. Bator's decision to pursue a claim under ERISA instead of a claim under the National Labor Relations Act or the Landrum-Griffin Act may reflect the fact that ERISA has a fee-shifting provision, but the latter two statutes do not. Thus, this decision may serve as a rallying cry for access to justice reform and may be addressed in the next session of Congress.

Bator and his colleagues can take little solace in the vesting of their benefits in an underfunded plan as the Pension Benefit Guaranty Corporation is slated to go bankrupt in 2025. The PBGC is funded by the contributions pension funds pay into the PBGC on a per capita basis and was established by Congress to ensure employees received the benefits they were promised if a plan was unable to pay the benefits.

The Butch Lewis Act has been introduced in Congress to bail out underfunded pension plans. It has been stalled and its passage will have to await a new Congress. Until then, the insurance Bator and his coworkers purchased as a hedge against a loss of benefits is likely to be worthless as well.

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[1] Donald Bator v. District Council 4, Graphic Communications Conference, Teamsters, No. 19-2626 (7th Cir. Aug. 27, 2020).

[2] Johnson v. Georgia-Pacific Corporation, 19 F.3d 1184 (7th Cir. 1994).