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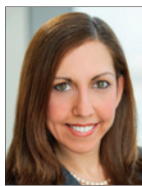
LABOR RELATIONS

Expert Analysis

Supreme Court Review: Agency Fees And Retiree Health Benefits



By **David E. Schwartz**
And **Risa M. Salins**

This column is the second of a two-part series discussing recent U.S. Supreme Court decisions impacting labor and employment law. This month we review decisions that address two traditional labor issues: whether unions may collect fees from non-union members who they represent, and whether explicit language is needed in a collective bargaining agreement to vest retiree medical benefits beyond the term of the contract.

Agency Fees

In a 5-4 decision viewed as a serious blow to organized labor, the Supreme Court in *Janus v. Am. Fed'n of State, Cnty. & Mun. Employees, Council 31*, 138 S.Ct. 2448 (2018), ruled that public sector employees who opt not to join a labor union may not be required to pay mandatory fees to the union to cover the costs of collective bargaining. The decision bars public sector unions from collecting so-called "agency fees" or any other involuntary fee from employees who do not join the union but still benefit from the contracts negotiated on their behalf. The ruling directly overturned *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and four decades of precedent.

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The *Janus* court held that forcing non-consenting public sector employees to pay "agency fees," which amount to a percentage of full union dues, or any other involuntary payments to a union violates the First Amendment because it forces them to support ideas they may find objectionable. Under the Supreme Court's ruling in *Abood*, employees who decline to join a union could be required to pay such fees to cover union expenditures attributable to those activities "germane" to the union's collective bargaining activities (chargeable expenditures), but such fees could not cover the union's political or ideological activities (nonchargeable expenditures). The *Janus* court recognized the importance of following precedent unless there are very strong reasons for not doing so, but found "[d]evelopments since *Abood* … have shed new light on the issue of agency fees" and no interests are "sufficient to justify the perpetuation of the free speech

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violations that *Abood* has countenanced for the past 41 years."

The majority in *Janus* found *Abood* was poorly reasoned, highlighting the line between chargeable and nonchargeable union expenses "proved to be impossible to draw with precision." Further, the majority rejected *Abood*'s two main justifications for agency fees: promotion of "labor peace," meaning the avoidance of conflict that might occur if employees in a unit are represented by more than one union, and minimizing the risk of "free riders" who enjoy benefits of union representation without shouldering the costs. In the majority's view, "labor peace" could be preserved through means significantly less restrictive of associational freedoms than assessing agency fees, as shown by the fact that millions of public employees in the 28 states that now have laws prohibiting agency fees are represented by unions that serve as exclusive representatives. In addition, the majority stated free-rider arguments are insufficient to overcome First Amendment objections, particularly here given that unions would not refuse to serve as exclusive representative of all employees in the unit if they are not given agency fees.

In a harsh dissent, Justice Elena Kagan argued *Abood* is now, as when it was issued, consistent with the court's First Amendment law and provided a workable standard for courts to apply. The dissent stated the majority overruled *Abood* "for not exceptional or special reason, but because it never liked the decision" and argued the majority's decision amounts to turning "the First Amendment into a sword, and using it against workaday economic and regulatory policy."

Although the *Janus* ruling applies to public sector unions, labor leaders have expressed concern that it will give momentum to efforts to abolish mandatory fees for private sector union members as well. Currently 28 states have adopted right-to-work legislation that prohibits individuals from being required to join labor unions or pay union dues. As a result of *Janus*, anti-union groups are likely to push harder for right-to-work laws in the 22 states that do not yet have them.

Preemptive Measures

In anticipation of the *Janus* ruling, in April 2018 the New York State Legislature enacted protections seeking to give public sector unions greater leverage over employees who might consider opting out of union membership. In particular, a new provision of the New York Civil Service Law requires public employers to notify the applicable union within 30 days of hiring an employee into a bargaining unit, provide the union with the employees' contact information and make the employee available to meet with union representatives, during work time, within 30 days of such notice. These requirements enable the union to contact the employee for purposes of encouraging union membership and signing of a dues deduction authorization card. An amendment to New York state law also provides that a public sector union's obligation to represent non-members is limited to the negotiation and enforcement of the contract, and the union is not required to represent non-members in various disciplinary processes when the non-member is authorized to get his or her own representation.

It remains to be seen how these preemptive measures will hold up following the *Janus* ruling.

Retiree Benefits

In a unanimous per curiam opinion, the Supreme Court in *CNH Indus. N.V. v. Reese*, 138 S.Ct. 761 (2018), held collective bargaining agreements, including those that establish ERISA plans, should be interpreted according to ordinary principles of contract law. The court reversed the decision of the U.S. Court of Appeals for the Sixth Circuit which had used a "*Yard-Man* inference" to infer retiree medical benefits vested for life. Rather, the court held as a matter of law that the only reasonable interpretation of the collective bargaining agreement at issue was that the retiree medical benefits expired when the collective bargaining agreement expired.

Three years ago, in *M&G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926 (2015), the Supreme Court similarly held collective bargaining

agreements must be interpreted according to ordinary principles of contract law. *Tackett* overturned Sixth Circuit case law that applied a series of *Yard-Man* inferences, named after the Sixth Circuit's decision in *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983). These inferences included presumptions of lifetime vesting whenever a collective bargaining agreement is "silent as to the duration of retiree benefits," and that a general durational clause (i.e., an expiration date) in a collective bargaining agreement "says nothing about the vesting of retiree benefits" in that contract. The *Tackett* court rejected these inferences and, in particular, found the inference of lifetime vesting absent durational specification of retiree benefits violated the ordinary principle of contract law that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." Similarly, the court took issue with the refusal to apply general durational clauses to provisions governing retiree benefits, finding it "distorted the text and conflicted with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties."

Like *Tackett*, the *CNH* case involved a dispute between retirees and their former employer about whether the retirees had a vested right to lifetime retiree health benefits under an expired collective bargaining agreement. The collective bargaining agreement at issue, executed in 1998, provided for health care benefits for certain employees who retired under a particular pension plan. The agreement further stated all other coverages would cease upon retirement and the term of the agreement would expire in May 2004. When the agreement expired, the retirees brought suit in district court, seeking a declaration that their retiree health benefits vested for life and an injunction prohibiting the company from changing those benefits.

Notwithstanding the Supreme Court's ruling in *Tackett*, which was decided while the *CNH* case was pending in district court, the district court granted summary judgment to the retirees. The Sixth Circuit affirmed after applying the *Yard-Man* inferences, once used to presume lifetime vesting, to create ambiguity as a matter of law, thereby permitting the court to consult extrinsic evidence about the parties' intent regarding vesting. The Sixth Circuit found such extrinsic evidence supported that the retiree health benefits vested for life.

On appeal, the Supreme Court noted the Sixth Circuit's decision amounted to "*Yard-Man* re-born, re-built and re-purposed for new adventures." The court stated a contract is not ambiguous unless, "after applying established rules of interpretation, it remains reasonably susceptible to at least two reasonable but conflicted meanings." The court found the Sixth Circuit's perceived ambiguity did not stem from any contractual provision; rather the ambiguity stemmed from the application of *Yard-Man* inferences. Finding that *Tackett* clearly rejected those inferences because they are not established rules of interpretation, the court concluded the *Yard-Man* inferences "cannot be used to create a reasonable interpretation any more than they can be used to create a presumptive one."

After *Tackett* and *CNH*, it is clear that explicit language is needed in a collective bargaining agreement to vest retiree medical benefits beyond the term of the collective bargaining agreement.

Class Arbitration

Next term, the Supreme Court is set to decide in *Lamps Plus v. Varela* (No. 17-988) whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements. Specifically, the court will consider whether the U.S. Court of Appeals for the Ninth Circuit erred by finding that the parties agreed to class arbitration despite the agreement's silence as to class arbitration. Oral argument has been scheduled for Oct. 29, 2018.

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