In the

# Supreme Court of the United States

WALTER J. FLECK, ET AL.,
Petitioners,

V.

WARREN SPANNAUS, ET AL.,
Respondents.

No. 77-747

April 25, 1978

Pages 1 thru 37



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Washington, D. C.

Tuesday, April 25, 1978

The above-entitled matter came on for argument at 11:39 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

GEORGE B. CHRISTENSEN, ESQ., Suite 5000, One First National Plaza, Chicago, Illinois 60603, for the Petitioners.

BYRON E. STARNS, ESQ., Chief Deputy Attorney General, State of Minnesota, 515 Transportation Building, St. Paul, Minnesota 55155, for the Respondents.

# C O N T E N T S

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-747, Fleck, et al., v. Spannaus, et al.

Mr. Christensen.

ORAL ARGUMENT OF GEORGE B. CHRISTENSEN, ESQ.

ON BEHALF OF THE PETITIONERS

MR. CHRISTENSEN: Mr. Chief Justice, and may it please the Court:

I had hoped that someday I would have the pleasure of arguing an appeal and not have to confess an inadvertent typographical error in a brief. In our reply brief we refer to the New Jersey case, Raybestos-Manhattan v. Glaser, as being in 156 Atlantic 2d. It should be 165 instead of 156. We have it correct in our main brief. But it may give your clerks a little annoyance if they work from our --

QUESTION: What's the name of the case again?

MR. CHRISTENSEN: Raybestos-Manhattan.

QUESTION: We should change that to -- What's the correction again?

MR. CHRISTENSEN: It appears in your brief as 156 A. 2d. It should be 165.

QUESTION: Well, in mine it appears 365.

MR. CHRISTENSEN: 365, yes.

QUESTION: That should be 165?

MR. CHRISTENSEN: 365. I still haven't got it right.

Now, I have, I hope.

MR. CHIEF JUSTICE BURGER: Well, between us we'll get it straightened out. Very well.

MR. CHRISTENSEN: The Court may recall that this is sort of a companion case to the White Motor case you decided recently, involving the Minnesota Pension Protection Act. You there decided that until ERISA the subject of patent regulation was not preempted by the federal labor laws. And you didn't touch any constitutional issues.

QUESTION: You said "patent" regulation. I think you mean pension.

MR. CHRISTENSEN: Oh, I've been listening too much here this morning, I'm afraid.

Now, the same pension statute is before you in this case that you had before you in the White Motor case. And, in substance, what Minnesota did, anticipating that ERISA was coming on which eventually would preempt the field, it passed this 10-year vesting provision that added to the substantive obligation of Allied Structural Steel's pension plan, thereby conferring an unexpected windfall on employees. It did this retroactively. In effect, gave a retroactive wage increase because contributions to a pension plan are a form of compensation for the employee. And, as we try to demonstrate and think we do in our reply brief, in the face of no importance for vital public need that would authorize such an

intrusion into private contracts.

We take the position that if it is -- what was done here is not impermissible, if it is upheld, then the Impairment of Contracts Clause is virtually gone from the Constitution and there would be no limit upon what states could do in important business contracts, whether they be leases, insurance policies, deeds, pension plans, or whatnot. They could play havoc with them and destroy the stability in private arrangements that the Constitution is designed to procure.

You will find, as you go through the briefs, Your Honors, that New Jersey had a somewhat similar notion, a little before Minnesota, and that's the Raybestos-Manhattan case that we referred to. There, they made a statute somewhat similar to this imposing, in effect, vesting requirements much earlier than the plan provided for. And they limited it to employers of 500 persons or more.

New Jersey has a statute that -- I don't know whether it is common to many states -- provides special legislation. The New Jersey Superior Court struck the statute down as unconstitutional as special legislation under their New Jersey statute and as denying equal protection of the laws under both the State and the Federal Constitution. And that has been affirmed by an opinion that came out in late March or early April -- I forget which -- which is yet unpublished but it attached as an appendix to our reply brief.

The State of Minnesota, before Your Honor, doesn't deny, as I read their brief, that this is a vital impairment of the contract. And you cannot imagine a much greater one. In our case because we represent a smaller employer, there appears to be about $150,000 of additional burden imposed. You can't tell precisely the amount until actuarial computations are made.

And in the White Motor case, where far more people were involved, there was a difference of some $8 to $10 million beyond the funds that White had committed itself or had reserved to pay its terminated employees.

QUESTION: I suppose in the strictly technical sense, there isn't an impairment of contract, insofar as Allied is concerned here, in the sense that a contractual expectation that it had was taken away from it. Very likely the sense of the provision is involved, but don't you ordinarily think of impairment of the obligation of a contract as thinking you had a right to receive something under a contract and then the state says, "No, you don't have a right to receive it"?

MR. CHRISTENSEN: I think the term has been expanded over the years by the courts, but there is a very definite impairment, Mr. Justice Rehnquist, in the sense I believe you are talking about. Because Allied had a right to terminate this pension plan, with no penalty. And Minnesota said, in effect, "You cannot terminate this plan, even though the contract gives

you an unlimited right so to do. You cannot terminate it unless you pay this ransom money into the state fund to buy annuities for these people."

QUESTION: Well, it imposes new obligations, is that your argument?

MR. CHRISTENSEN: Well, you can call it a new obligation. You can say depriving us of our right to terminate. It is pretty much, Mr. Chief Justice, a matter of semantics. But here was a plan which prescribed how it should be funded. It was funded according to actuarial principles and, of course, it assumed that not all of the employees would be present to receive pensions. They would either die, be discharged, quit, any number of --

QUESTION: Do you think the state -- If a company had no bargained for plan or no voluntary plan, do you think a state statute could require the company to adopt a plan, a statutory type plan? Suppose in the statute they had a forumula, a pattern, and they just required all companies to start putting their money into these funds.

MR. CHRISTENSEN: Well, that, Your Honor, I do not think would involve the obligation of the Contracts Clause. It's more a question of due process.

QUESTION: Is that very far away from what the Social Security Act is? Was that Mr. Justice White's suggestion?

MR. CHRISTENSEN: Well, it's not too far away from it

but, Your Honor, your point now is addressed to the powers of the Federal Government and it is not directed to destroying or altering or changing a private contract.

QUESTION: What you are suggesting is that the Federal Government is not bound by the Impairments Clause the way the states are.

MR. CHRISTENSEN: That's correct. And there is no doubt about that, Your Honor.

QUESTION: Are you also suggesting that a state could not have adopted what is essentially the Social Security statute independent of federal action?

MR. CHRISTENSEN: I don't know if I am prepared to answer that question. It would depend now when the Federal Government got to ERISA, its second regulation of penseion plans. It moved quite carefully. It brought the plan in under a five-year implementation plan. It gave various options for vesting or it permitted you to abandon a pension plan entirely with no penalty. It's a very complicated statute and I don't mean to speak with great authority upon it.

Now, if you go to whether a state could have adopted a Social Security plan, I don't think I am prepared to answer that.

QUESTION: Mr. Christensen, if I understood your argument, it would make a difference whether it was for the future or the past, wouldn't it?

MR. CHRISTENSEN: Oh, yes, certainly. But you are now talking about a thing unconnected with service, just at a certain age they put in a tax. If you follow Social Security, a state would tax individuals and employers, in some prescribed amount, to build retirement payments at age 65, or with the permission of this Court, now 70, whatever it may be. That's quite a different problem, Mr. Justice, than retroactively saying to employees who have worked and who have received every dime they were entitled to, either in direct wages or in the written promises of fringe benefits, such as this pension plan, "You will go back and pay more money to those people," by a sort of retroactive vesting.

QUESTION: Aren't there really two parts to the retroactive aspect of this case? Mr. Justice Rehnquist's question brought this to mind. On the one hand, you have to put more money into the fund, and secondly you are prevented from getting back that which you would have been able to recover, over and above the vested rights of those who are entitled to some money. I take it there would have been a surplus, that under the contract you would have had the right to return.

MR. CHRISTENSEN: No. On the second assumption, I beg to differ with you. What went in there was for all times and purposes. Of course, contributions made five years ago on behalf of Employee A, who died in the interim, stay in the

fund and help the fund provide money for Employee B, C, D, and so forth. It doesn't revert back to the employer.

QUESTION: But if you terminate the plan --

MR. CHRISTENSEN: No, sir.

QUESTION: -- you are asserting that -- In answer to Mr. Justice Rehnquist, you pointed out that the contractual right to terminate the plan had been impaired.

MR. CHRISTENSEN: That's correct. You could --

QUESTION: Well, how did that hurt you, if all the money was in there to stay anyway?

MR. CHRISTENSEN: Because Minnesota has imposed this pension funding charge --

QUESTION: I understand the requirement that you put more money into the pot, that hurts you. But that is not an impairment of an existing obligation. That's the creation of a new obligation.

MR. CHRISTENSEN: Or it's a condition --

QUESTION: And your answer to Mr. Justice Rehnquist was that, "Well, they have destroyed"-- "They have impaired our right to cancel the plan."

Now, how did that hurt you? No longer being able to cancel the plan. I thought that meant that you would have gotten some money back.

MR. CHRISTENSEN: I don't think a conditional right to cancel -- I think they have destroyed the right to cancel.

You say they have created an additional obligation. I phrase it and, again, you and I may be engaging in semantics, but when I have an unqualified right to terminate a plan without liability -- and Minnesota says you can terminate that plan only if you will pay more money -- I think they have destroyed my unlimited right of termination.

QUESTION: What you want is the right to terminate without paying additional money.

QUESTION: Did the state prevent you from terminating the plan with respect to any newly hired employees?

MR. CHRISTENSEN: Well, no, that wouldn't arise, Mr. Justice, because this Act goes into effect only when you are closing a plan, so that the question of new employees coming in can't arise in Minnesota.

QUESTION: What about the employees transfered to another plan? Do you have to go on paying for them if you don't want to?

MR. CHRISTENSEN: I'll have to go off the record and my colleagues can -- They had such a thing here, one of these cases that they thought applied. Employees were transfered and Minnesota didn't levy its tax.

QUESTION: You go ahead. I am sorry to interrupt.

QUESTION: Well, it is clear that this Act requires the employer to pay some money for an earlier period. It is retroactive in that sense, isn't it?

MR. CHRISTENSEN: Oh, very retroactive.

QUESTION: So that it is not just altering an existing contract with respect to the future, you say? It requires a deposit of payment covering a period elapsed before the statute was passed.

MR. CHRISTENSEN: Oh, yes. This plan had an elaborate vesting schedule that was a combination of years of service plus age. And the Minnesota statute says, "You have got to fund your plan so that all contributions made at ten years are vested." They put in a ten-year vesting period. And it is stringently retroactive. It's the equivalent of giving these employees a retroactive wage increase.

Now, Minnesota, or the District Court, makes some point which we have endeavored to answer in our brief that the employees anticipated they would get their pensions. That, with all due respect to the court below and my brethren here, is fanciful. Employees -- everyone goes on thinking he is going to live forever, but every man knows in his heart that he may not, and he buys an insurance policy. Employees anticipate and have a right to anticipate pensions only in accordance with the terms of their plan.

The doctrine created by the District Court here which if permitted to stand, that if you can invade and change contracts to make them work as someone may have anticipated they would work, would destroy contracts completely.

Now it is pretty near lunch time and I will reserve the balance of my time, if I may.

I will answer any questions right now, if there are any more at the moment.

MR. CHIEF JUSTICE BURGER: Mr. Starns.

ORAL ARGUMENT OF BYRON E. STARNS, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. STARNS: Mr. Chief Justice, and may it please the Court:

First of all, the Minnesota Act applies in two situations, a planned termination by an employer and a plant closing. This case involved the closing of a plant, not a planned termination. I think that point should be clarified.

QUESTION: Is the plan being terminated because the plant is closing?

MR. STARNS: No, Your Honor, the plan is still in effect as of this date. It has been amended twice by the company to freeze the benefit levels and to freeze the ability of anyone to get into the plan in the future and the amounts have been vested with respect to the people covered by the plan prior to those amendments.

Our position, Your Honors, is that the heart of Appellant's argument is that the situation addressed by the Pension Act was the subject of a preenactment contract, and that as applied to Allied the Act has changed those established

contractual rights. To the contrary, our position is that there is no established contract between Allied and its Minnesota workers, with respect to their earned interest in the pension benefits based upon the circumstance of a plant shutdown, and further that the Act is not retroactive in effect, since no preenactment established contractual rights are affected.

I think this can be illustrated by examining the nature of the contractual relationship we are dealing with here. The creation of a pension plan constitutes a unilateral offer by the employer which is subject to the acceptance by the employee. And that acceptance is only complete when he has satisfied both the length of service requirements and the attainment of the minimum age requirement. So that we have no fully completed contract in the context of this case, since we are dealing with people who have --

QUESTION: Mr. Starns, are you saying there has been no impairment?

MR. STARNS: I think that is the sense of our argument, Your Honor.

QUESTION: I had read the District Court's opinion to say that you, in effect, conceded there was impairment but that it was justifiable.

MR. STARNS: Your Honor, I think I can clarify that point. I think the District Court has said that the state seems to concede that there has been no impairment. The only statement

in the record below was a statement in our brief, pretrial brief, on the summary judgment aspects of the case, where we stated that to the extent --

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

(Whereupon at 12:00 o'clock, noon, the Court recessed, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Starns, you may continue.

ORAL ARGUMENT OF BYRON E. STARNS, ESQ., (Resumed)

ON BEHALF OF THE RESPONDENTS

MR. STARNS: Mr. Chief Justice, and may it please the Court:

At the recess, the state was arguing about the contractual relationship involved in this particular case. I thought that a brief recitation of the procedural history relating to this point might be in order to help clarify our position before the Court.

The challenge was brought by Allied Steel in District Court to the application of the state statute here in question. As a result of that action, the state ultimately filed a motion for the Federal District Court to abstain in order that the state courts could construe the null and void provision of the Act, which is the final section of the Act. At the same time, there was a cross-motion for summary judgment brought by Allied Steel. In the context of that motion, we filed a brief in June of 1976 which stated that to the extent that the Act -- to the extent that the pension plan allowed Allied to cause the forfeiture of accrued benefits for those not qualified under the plan, there might be impairment. Of course, subsequent to that

brief, there was an argument before the District Court. The District Court denied both motions, certified instead of abstaining on the question of interpretation of state law, certified that to the Minnesota Supreme Court and appointed a special master to find fact. The special master found as a finding of fact that the pension plan as originally adopted did not take into account a plant shutdown as one of the conditions for the actuarial calculations associated with it. Those findings of fact were stipulated to by all the parties and constitute findings of fact in this case.

In any event, we think that there is before the Court the issue of whether or not there is impairment to this contract. Now, the relevance of the impairment issue, of course, goes to the reasonableness test under United States Trust and the extent of impairment.

Our point is that it is established that a pension plan constitutes a unilateral offer by the employer to the employee of a form of deferred compensation. The law is, and the Appellants have admitted, that employer contributions constitute a form of compensation. However, the cases have held that an employee is not entitled to receive that form of deferred compensation, or any part thereof, unless he has satisfied the eligibility requirements of the plan. And those eligibility requirements are typically the attainment of a minimum age and the service for a minimum period of time, whatever it

might be under the particular plan.

Consequently, in such a situation, we submit, that if there is no contract for the employees' benefit to enforce in this situation, there can be none to be impaired by state law.

QUESTION: Was this a bargained for plan?

MR. STARNS: No, Your Honor, it was not.

QUESTION: You might not be able to make this argument in a bargained for plan?

MR. STARNS: I think that argument might not be made in that context.

The Act does not affect the subject of preenactment bargaining, much less agreement, in our opinion. And that takes it out of the scope of retroactivity, in our opinion.

QUESTION: When you say it doesn't affect the subject of preenactment -- Maybe not in this case, but doesn't the statute apply to bargained contracts?

MR. STARNS: Yes. I am only talking about this case, Your Honor.

QUESTION: What is your view as to its constitutionality as to bargaining contracts?

MR. STARNS: I think it is constitutional.

QUESTION: You just say that it is not even an impairment of contract here?

MR. STARNS: Right. I think that, of course, whether

or not there is an impairment, whether or not the statute is retroactive under the decisions of this Court, a valid police power enactment is constitutional. And I think that for all the reasons set forth in our brief this law would be constitutional whether or not it applied to a collectively bargained or non-collectively bargained plan. I think the distinction between the plans would relate to what the expectations of the parties are. And, of course, that's one of the factors that this Court has identified to be analyzed in terms of determining the extent of impairment. And, of course, I think in examining expectations of the parties, the nature of the contractual relationship is an important factor. It may impact upon the breadth with which the Court can go outside the document, itself.

QUESTION: Mr. Starns, do you have any offhand, top-of-the-head knowledge as to how many bargained for employees would be covered by this and how many non-bargained for employees?

MR. STARNS: Because of the enactment of the Employee Retirement Income Security Act of 1974, the number of Minnesota people is limited. The vast majority are the subjects of collectively bargained contracts. The White case is 1200 people, I believe.

QUESTION: So, if we were to decide it just on the basis that this was a non-bargained for pension plan, we would leave undecided, I take it -- if our decision applied only to those facts -- the vast majority of the people to whom the plan

applied.

MR. STARNS: Your Honor, I think the answer to that is that might be the result of your decision. It would depend upon the basis for your decision. If it was solely on the basis for the contractual nature of the relationship. Yes, if it was based upon the police power analysis --

QUESTION: So far, you've only given us the contractual argument. I guess you will get to the other one.

MR. STARNS: Yes, I will, Your Honor.

QUESTION: But also it is limited in the sense there haven't been too many instances for you to apply the plan, between the time it went into effect -- the Act -- between the time it went into effect until the time it has been preempted by ERISA.

MR. STARNS: That's correct.

Our Minnesota Supreme Court held that the Act was preempted by ERISA effective January 1975, or the plan years to which ERISA applies. However, I think that there may be applications in the future, depending upon what the fact situation is. I admit that they are limited and maybe nonexistent, but there conceivably could be some application of the Act in the future.

QUESTION: To a bargained-for plan?

MR. STARNS: To a bargained-for and a nonbargained-for plan.

Now, the state's position is also that the statute is

not retroactive in effect. The express language of the pension plan, itself, indicates that there was no meeting of the minds on the plant shutdown situation. For example, the length of service for vesting under the pension plan is a lengthy period of time, twenty years. Secondly, there is an express covenant not to compete in the plant. It seems to us that this implies that a person reading that document could anticipate that the plan would continue in existence and the plant would continue in operation for at least the minimum period of vesting, twenty years, plus a lengthy period of time thereafter, since retirees would forfeit their benefits if they engaged in any competition with a company. That presumes a continuing enterprise.

And we note that the court below took special notice of the fact that the company's actuaries didn't take into account the plant shutdown. And Judge Haney noted at the argument on the merits that, in light of that fact, there is a question as to whether you really have an impairment of contract.

Now, the Act is also not retroactive, in our opinion, because it applies to transactions which are completed after its date of enactment. Generally, a law is retroactive, considered retroactive for constitutional purposes, if it reaches back to alter already completed transactions. Here the triggering event of the statute occurs after its effective date.

QUESTION: To what point of constitutional law is your retroactivity argument directed?

MR. STARNS: That would be, essentially, a due process argument, I think, Your Honor.

QUESTION: There is no specific prohibition in the Constitution against the enactment of retroactive law, is there?

MR. STARNS: No. I think I am trying to address the points raised by Appellants in their brief.

QUESTION: Mr. Starns, may I ask, the only question that is presented in the jurisdictional statement, even as rephrased in your brief, is the contract clause question. Do we have anything else to decide here?

MR. STARNS: No, Your Honor.

QUESTION: Well, isn't this discussion of due process, police powers, isn't that rather irrelevant to the question presented?

MR. STARNS: I think it is, if you construe it in that way, Your Honor. The only relevance of the question of whether or not there is impairment would go to the degree of impairment analysis under the Contract Clause. We don't quarrel that the result of the statute has been to change the overall employment agreement involving these employees. The court below, in a footnote, I think, at page A-90 of the Appendix, noted that employment agreement includes the wage agreement, the pension plan, any other fringe benefits. Now, our understanding is that the Contract Clause issue raised by the Appellants

relates solely to the pension plan. Now, in the context of that argument, I think our point that there is really no contract there is relevant. However, if the Court is going to view the entire employment agreement as a contract, then I think these arguments are relevant to the matter before the Court, as are the retroactivity arguments.

Our position is also that the Act is not retroactive because it causes no change in the benefit levels provided by the plan, and therefore it does not impair the contract itself. As a general matter the Act is tied to the specific benefit levels that are provided by the plan to which it applies. And it should be noted that the Allied plan, itself, would provide more liberal benefits in a planned termination situation than our Act requires. If you look at the termination article of that pension plan, it states that "When the plan is terminated all covered employees have a right to their earned interest in their pension plan."

QUESTION: In this case, in the facts of this case, it is going to cost the country more money to close down this plant than it would have if the Act hadn't been passed, quite a bit more money.

MR. STARNS: Yes, it will cost them some more money. And our position is that the money that it costs them is in the form of the wages that they have owing to the employees for the work rendered up to this point. Because they admit that the

pension benefits are wages. And so, from that point of view, the statute really becomes a form of wage and hour protection, really. It is not a retroactive wage increase.

QUESTION: Mr. Starns, if that argument is valid, you didn't need the statute, you already owed the money.

MR. STARNS: No, Your Honor, the reason -- I think that's a good point in terms of logical consistency, but unfortunately the decisions hold otherwise.

QUESTION: They didn't owe the money, then.

MR. STARNS: They hold that the companies, that the employees cannot enforce any quasi-contractual obligations --

QUESTION: Then don't you have to acknowledge that the statute is the source of the company's obligation to pay higher wages?

MR. STARNS: Yes, but our point is --

QUESTION: Doesn't it impose, then, a new obligation -- a new and different wage obligation than existed before?

MR. STARNS: Our point, Your Honor, is that it is not a new obligation. It may be somewhat different.

QUESTION: It's a bigger one.

MR. STARNS: Well, I am not so sure.

QUESTION: Well, the difference between zero and quite a bit of money, maybe.

MR. STARNS. Yes, there is the difference between what may be left in the balance of the plan upon termination.

QUESTION: When did the obligation come into being?

MR. STARNS: The obligation to pay came into being, I think, with the passage of the law.

QUESTION: Well, haven't you just contradicted yourself? You said it wasn't new. If it came into being with the passage of the law, then it's new isn't it?

MR. STARNS: I think the point I am trying to make, Your Honor, is that the obligation is not new in terms of the expectations of the parties. It may be new in terms of the express language of the agreement. But under the decisions of this Court relating to the Contract Clause, one of the things to be analyzed in terms of studying the reasonableness of the legislation that is being challenged is the extent to which it promotes, rather than undercuts, the original expectations of the parties.

QUESTION: But don't you have to decide which party's expectation you are going to look at? It is the same expectation from the employees but different from the employer. And if you look at it that way, supposing there hadn't been enough money in the company and the legislature decided the only way to satisfy the expectations of the junior employees would be to take some of the vested compensation away from the senior employees on the ground that they had been over paid over the years and they are going to get Social Security anyway, and so forth. And their expectations would be frustrated, but the

juniors' would be fulfilled. Could you do that?

MR. STARNS: I think there might be a problem with that, and of course --

QUESTION: What's the difference?

MR. STARNS: Well, our Act does not have any effect upon the vested -- the funds in the trust.

QUESTION: Is there a difference as far as the impairment of contract law is concerned whether it's an employer or a group of old employees that is affected by it? What is the distinction?

MR. STARNS: I think, Your Honor, in the concept of this case, if we analyze what the expectations of the parties are, the employer has, in effect, created an impossibility situation for performance by the employees. In other words, he has reneged on his expectation that he would achieve, as a result of this plan, continuity of employment. He has voluntarily reneged on that. And the person that suffers is the employee who is denied the continuing opportunity to qualify for a pension.

QUESTION: You say he has voluntarily reneged. What specific do you rely on?

MR. STARNS: He has reneged by removing the work place as a place to work and he has made that decision consciously for business reasons, or whatever. But it seems to me, in terms of the original underlying bargain, it was that

the employer expected to get out of his pension plan continuity of employment. It would help his situation, in terms of the competition for labor. He expected, presumably, to get some decrease in wage demands, because it is a form of compensation.

QUESTION: What's the basis for any expectation that this company was going to stay in Minnesota forever?

MR. STARNS: I think the basis would be, Your Honor, the express language of the plan, which I noted earlier that contains a covenant not to compete, for example, which would seem to make no sense --

QUESTION: You mean you would read that as a contract, "continue to do business in Minnesota in perpetuity"?

MR. STARNS: No, Your Honor, I would read it as an indication of what are the reasonable expectations of the parties to this original agreement. And, as I understand the decisions of the Court, the expectations of the parties are an important factor in determining the degree of infringement, and therefore whether a statute has violated the Contract Clause. And, that's assuming we have a contract. We are already beyond the initial --

QUESTION: Why would the employer have any expectation other than that his contract was to be executed exactly as it was originally drafted until it was changed with his consent?

MR. STARNS: Well, I think that's true and our point is that the original contract is at best ambiguous on this point.

It doesn't address --

QUESTION: Suppose he has been paying into a pension plan for ten years and there were one hundred employees that have come at different times. At the end of the ten years -- let's assume there is vesting in ten years -- some have vested and some haven't. Can he terminate -- If he terminates the plan then, under these particular contracts, can he get all of the money back out of the fund that he has been paying in, or any?

MR. STARNS: Under the Allied pension plan, every employee could get a share, if the plan were fully funded. If it were not --

QUESTION: He has been paying for ten years and he just wants to quit, and so quits, he terminates the plan.

MR. STARNS: No, he cannot get anything out.

QUESTION: No. Under this plan, then, there is a contract with the employees to the extent that he has paid into a fund.

MR. STARNS: Only if he maintains, only if he meets the two conditions for vesting. And those are --

QUESTION: Yes, but he can't get his money back if he terminates the plan.

MR. STARNS: This doesn't involve an employee contribution. It's --

QUESTION: I understand. I mean the employer can't

get his money back.

MR. STARNS: That's correct.

QUESTION: So once he pays into the fund, it's gone, as far as he's concerned.

MR. STARNS: Right.

QUESTION: Whether he terminates the plan or not.

MR. STARNS: Correct. Except I would point out, Your Honor, that there is one provision in the plan that if there is an excess after the money has been distributed, it does go back to the employer. It is a minor point. But there is the possibility to receive money back.

QUESTION: Do you think the State of Minnesota could pass a law and say that the employer may terminate and get his money back?

MR. STARNS: No.

QUESTION: That would be an impairment?

MR. STARNS: Yes. I think that in the context of the facts of this case, though, Your Honor, that the way this would work --

QUESTION: If what your saying, in effect, is you can impair so far as the employer is concerned, but not so far as the employee is concerned.

MR. STARNS: That may be the case, Your Honor. I think we are talking about that the public purpose of the statute is the first bench march of analysis. What is the public purpose

here?

QUESTION: What if the Minnesota Legislature had decided that most Minnesota manufacturing companies had put much too much money into pension funding for their financial stability. And, therefore, it was of great importance for the state to enable them to reduce these commitments. And, therefore, it adopted this other provision that Justice White proposed to you. Do you think that would be an impairment?

MR. STARNS: I think it may not, if the Court were to accept those situations as constituting --

QUESTION: You mean you could deny the employee his vested rights for a good reason, right?

MR. STARNS: I think that is what the doctrine and the teaching of this Court's decisions are, that you can't impair contracts. You can't enact retroactive laws.

QUESTION: But wouldn't that be a difference between the situation I gave you and the law which, instead of doing what I suggested, had said to the employer, "You must now double your contributions to the pension fund, despite what your bargained for contract was, or your voluntary contract with your old employees, you must now fully fund your plan and you must double, Allied you must double your payment to the plan"?

MR. STARNS: Well, of course, full funding of plans is what ERISA is all about.

QUESTION: Yes. That certainly would not be

inconsistent with his contract with his employees. He has promised them only to put in X and now it is two X.

MR. STARNS: Right. I think --

QUESTION: That's not an impairment, is it?

MR. STARNS: No, I don't believe it is. It is an added benefit. And I think that if you --

QUESTION: For that, do you need to go through any impairment analysis?

MR. STARNS: I don't believe so, Your Honor, because it is in the nature of a minimum wage type protection. If you accept the fact that the pension benefits are a form of compensation.

QUESTION: Well, what if a state passed a minimum wage statute and said it is to be effective as of two years ago?

MR. STARNS: I think that would be a problem. It would be unconstitutional. I think the distinction is that we have recognized by our decisions that the accrued pension -- that deferred pension rights are a form of compensation. So to that extent, the employee has an accrued or incurrent right to the amount that he has earned in those pension benefits. That's not the same as changing a $5 an hour contract to a $6 an hour contract and relating it back --

QUESTION: But, in your answer to Brother Rehnquist, do you mean it would be an impairment or would it be a due

process violation?

MR. STARNS: Well, I assume if there was a specific contract --

QUESTION: Well, the employer did promise to pay him and he had paid him what he had promised to pay him, $10 an hour. And now the legislature comes along and says, "We think you should have been paying him $15 an hour, and furthermore you should have been paying him that for the last two years, so pay it to him." Is that an impairment?

MR. STARNS: Well, it would probably be as well a due process point, Your Honor, like the Usery case which involved the black lung benefits and the requirement of payment of those benefits for employees who had terminated prior to the effective date of the Act. I think the example you pose is very similar to that one.

As we stated, even if it is found that there is contract impairment here, the Act is not unconstitutional. Public purpose to protect employees' accrued interest in pension, rights to establish full funding of pension plans is clear. ERISA is a monument to that fact. It is reasonable, judged by the extent of impairment, and it is necessary judged under this Court's decisions in the U.S. Trust case.

That completes my argument. I have nothing further.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Christensen?

REBUTTAL ORAL ARGUMENT OF GEORGE B. CHRISTENSEN

ON BEHALF OF THE PETITIONERS

MR. CHRISTENSEN: Briefly, if I may, Your Honor.

I am not sure that I understand this case any more. I have just heard counsel, I think, say that a minimum wage made two years retroactive would be unconstitutional. I think I heard him say earlier that they didn't think this statute was retroactive. I don't see how the two go together. The one thing we appear to be in agreement on is that contributions to a pension plan are a form of compensation, a form of wage. And there can be no doubt, no doubt whatsoever that retroactive wages are required by this statute.

Now, I could go on and argue, but I don't think I could make the matter any clearer than I have with that blunt assertion.

I would like, if I might, to talk about the line of distinction that counsel would draw between bargained plans and unbargained plans. These contracts, it seems to us, were as binding upon the employer as one bargained out with a labor union. And so long as that plan was in effect -- and about this there can be no doubt -- if the company failed to make the required contributions to it each year, the employer could be sued by all or any of these employees. They were a condition of his contract of labor or employment.

QUESTION: The suit would be in assumpsit? It would

be a suit in assumpsit under a contract?

MR. CHRISTENSEN: Yes, sir.

QUESTION: Illinois assumpsit. Minnesota assumpsit, excuse me.

MR. CHRISTENSEN: Yes, it would be a suit on a contract.

It is a long time since I dealt with assumpsit and I am not sure that I am speaking --

QUESTION: It is quite a while since I have, too.

MR. CHRISTENSEN: There was a question at noon: What was impaired here?

Specifically, there was the right to terminate the plan without penalty. And upon termination of the plan, whatever rights any employee had were fully vested. Now, under the plan, they wouldn't all get money, so there wasn't money there. But, if this had been an enormously successful plan, if we assume that the funds had been invested by the trustees in some wildly successful speculative venture, it very well might be that everyone would have been paid in full. And if, in the unlikely circumstance there would be a surplus, then the company would get it. But there would have been no forfeiture of any kind.

The plan further provided that benefits are payable only out of the trust. Now, Minnesota converted that, although we declared this trust, the corporate employer declared the

trust and is party to the trust, of course, they made that a direct corporate obligation. I cannot imagine a more direct increasing of the burdens. And that has been held. And over the noon hour, I have been informed, Mr. Justice Rehnquist, that in the Detroit Railway case, which was sometime in the teens or twenties, this Court has held that adding to the burdens of a contract impairs the contract.

I have seen other cases in my research in this thing, but I can't recite them to the Court right now, I am sorry to say.

The presentation that has been made orally is so different from the presentation made in the brief --

QUESTION: Do you think if an employer and a union have a collective bargaining contract that's going to last for the next three years that the legislature can't require the payment of a higher wage than is specified in the contract?

MR. CHRISTENSEN: Well, I think, yes, they can, assuming -- if it meets due process, as you do with minimum wages. They cut right through the Fair Labor Standards --

QUESTION: That's adding to the burden of a contract, making an employer pay more than he ever promised to pay. Is that an impairment?

MR. CHRISTENSEN: Oh, you say can the state do it?

QUESTION: Yes.

MR. CHRISTENSEN: Oh, I beg your pardon. I thought

you were talking of the federal government.

No, sir, the state could not do it.

QUESTION: Could a state do it prospectively? For the balance of the contract term. Say the contract's got three years to run and the state legislature says, "For the next two years, you must double the pay into the contract."

MR. CHRISTENSEN: I don't think so.

QUESTION: What about if a state were to say, "For every employee you hire from now on you will have to pay him $4 per hour."

MR. CHRISTENSEN: And what becomes of the $4, Your Honor?

QUESTION: Whatever the employee wants, I suppose.

MR. CHRISTENSEN: So you increase the wage?

I think the answer is the same. I would answer that question no, the state cannot do it.

QUESTION: If there were or were not a collective bargaining agreement, would it make a difference -- between the employer and the representative of the employees?

MR. CHRISTENSEN: In my judgment, no. I think the individually made contract is just as sacred and immune to state impairment as a collectively bargained type.

QUESTION: In my brother Rehnquist's case, you wouldn't have an individual contract with future employees. You would hire them only after the state had enacted this statute

requiring a minimum per hour of $4.

MR. CHRISTENSEN: If you had no contract, then --

QUESTION: You wouldn't because, by definition, these are new employees.

Suppose you have a contract with a union that says, "We'll pay $3." And the union says fine and it is a union shop. So there has been a promise to pay only $3.

MR. CHRISTENSEN: Yes, sir.

QUESTION: And the state says, "Sorry, but you must pay $4."

MR. CHRISTENSEN: I think that would violate the obligation of contract.

QUESTION: How about if there were no collective bargaining agreement, and the statute applied only to future employees subsequently hired?

MR. CHRISTENSEN: Then, I think you have a different question.

QUESTION: You certainly do, don't you?

MR. CHRISTENSEN: That's all I have. Thank you for your attention.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.)

(Whereupon, at 1:31 o'clock, p.m., the case in the above-entitled matter was submitted.