OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-245

TITLE PENSION BENEFIT GUARANTY CORPORATION, Appellant

v.

R. A. GRAY & COMPANY; and

No. 83-291

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND, Appellant

v.

R. A. GRAY & COMPANY

PLACE Washington, D. C.

DATE April 16, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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PENSION BENEFIT GUARANTY :
CORPORATION, :
Appellant, :
v. : No. 83-245
R.A. GRAY & COMPANY; and :
OREGON-WASHINGTON CARPENTERS- :
EMPLOYERS PENSION TRUST FUND, :
Appellant, :
v. : No. 83-291
R.A. GRAY & COMPANY :

- -x

Washington, D.C.

Monday, April 16, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 o'clock a.m.

APPEARANCES:

BARUCH A. FELLNER, ESQ., Washington, D.C.; on behalf of the Appellants.

THOMAS M. TRIPLETT, ESQ., Portland, Oregon; on behalf of the Appellees.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Pension Benefit Guaranty Corporation against Gray and the consolidated case.

Mr. Fellner, you may proceed whenever you are ready.

ORAL ARGUMENT OF BARUCH A. FELLNER, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. FELLNER: Mr. Chief Justice, and may it please the Court, this case is on appeal from the Ninth Circuit holding an Act of Congress unconstitutional with respect to its brief retroactive period. We submit that in making the statute in question retroactive, Congress met the rationality standard under the Turner Elkhorn case, and acted in accord with tax law precedent.

The statute at issue, the Multi-Employer Pension Plan Amendments Act of 1980 was passed after approximately a year and a half of Congressional deliberation in order to improve the financial stability of over 2,000 multi-employer plans covering approximately eight million participants.

Congress perceived that the greatest threat to plan stability was employer withdrawals, particularly in declining industries. Such withdrawals cause what Congress called a downward spiral. They reduce the amount of contributions which support retirement benefits, necessitating higher contributions from remaining employers, and thereby cauterizing their withdrawals from these plans, obviously jeopardizing the plan's solvency.

Now, Congress was aware of the fact that as of 1978, 10 percent of all plans covering about 1.3 million participants were experiencing financial difficulties, and therefore, in order to achieve the goal of overall multi-employer plan stability, Congress rationally sought to eliminate what it observed were the incentives encouraging the flight from plans, and to cushion the financial impact of such withdrawals.

The Multi-Employer Act assesses against a withdrawing employer a reasonable share of the costs of funding retirement benefits. We submit --

QUESTION: What do we mean, exactly, Mr. Fellner, by the term "withdrawing employer?"

MR. FELLNER: A withdrawing employer is an employer who has contributed to a multi-employer plan and chooses to, as defined under the statute, cease his obligations, cease contributing to a multi-employer plan.

QUESTION: Well, now, how does that come about contractually? The next time the collective bargaining agreement is up, the employer just says, I won't agree to make any contributions to the pension fund?

MR. FELLNER: There are a variety of circumstances. One, the expiration of the collective bargaining agreement. A withdrawal can also be incurred as a result of simply closing a business or selling a business. A variety of different and I dare say complex circumstances under which withdrawals do in fact occur under the statute, not necessarily linked to the collective bargaining agreement.

Now, Congress, we submit, rationally concluded that withdrawing employers should pay their fair share of the unfunded liabilities they leave behind rather than shifting those liabilities to remaining employers, to employers who continue to contribute to multi-employer plans. Withdrawal liability therefore, we submit, was the cornerstone of the legislative recommendations submitted at the request of Congress by the Pension Benefit Guaranty Corporation on February 27, 1979.

From that date forward, every bill, every Committee report incorporated a retroactive date, and that was in order to eliminate the incentive to withdraw during the legislative process. Indeed, I would submit that it was the very openness and thoroughness of the legislative process which necessitated the retroactive period. Congress was rational in legislating retroactively where to do otherwise --

QUESTION: Mr. Fellner, may I ask one question? It is a little bit like Justice Rehnquist's in a way. Could you just, when it is convenient for you, kind of explain to me how the magnitude of the withdrawal liability is calculated?

MR. FELLNER: Withdrawal liability is calculated as follows, Justice Stevens. It is a proportion of the unfunded vested benefits. Unfunded vested benefits are defined as the actuarial present value of the retirement benefits that have to be paid over time.

QUESTION: Now, is that of the entire unfunded vested benefits or just the employees for whom the particular employers contributed?

MR. FELLNER: It is roughly equivalent to the contributions which the employer has made up to that point. If I may describe the manner in which it is computed, the amount by which this actuarial equivalent or the actuarial amount of unfunded vested benefits exceeds the assets available to pay them over time is multiplied by a fraction the numerator of which is the contributions which the employer has made over a five-year period, the denominator of which is the contributions made by all employers to this plan over the same five-year period.

And therefore, as we suggest in our brief, it is the rough equivalent of the contributions this employer has made up to that point.

QUESTION: What is the -- I may just show my ignorance here, but I might as well show it now rather than later, I guess. What is the typical collective bargaining agreement provision that an employer enters into with a union? It is not to ultimately pay a pension liability to a retired employee, but simply to pay a certain contribution per employee?

MR. FELLNER: The typical collective bargaining agreement I think is difficult to describe. Let me answer the question as follows. This Court decided the case Amex Coal. In Amex Coal, the trust agreement bound the trustees to the negotiated benefits in the collective bargaining agreement. In other words, collective bargaining agreements and trust agreements take different forms. Many of them are precisely as you have described, Justice Rehnquist, namely that employers do negotiate only the contributions which they ultimately make.

However, there are other trust agreements which bind the trustees to the negotiated for benefits in the collective bargaining agreements, one example of which is Amex Coal.

QUESTION: But now do those agreements also bind the employers?

MR. FELLNER: Clearly. They bind the employers with regard to the contributions which they make which support specific benefits either provided for in the trust agreements or provided for explicitly in the collective bargaining agreement.

QUESTION: But the typical collective bargaining agreement doesn't contain a provision whereby an employer promises to pay any individual employee a pension of so much at the time he retires.

MR. FELLNER: That is correct, but the realities of collective bargaining we submit, however, and describe in detail in our brief, are such that these contributions are clearly not negotiated in a vacuum. They are negotiated with an eye toward the benefits which they will support.

Now, we submit that Congress was --

QUESTION: May I ask just one other question if I could, because I think I have the concept in mind now. With respect to the amount that the -- the withdrawal liability that these three companies incurred, how did that amount compare with the total contributions they had made during the preceding five-year period?

MR. FELLNER: Let me first make one minor correction if I may, Justice Stevens. Before the Court this morning is one company.

QUESTION: Well, the three cases discussed in the Ninth Circuit opinion.

MR. FELLNER: That's correct. With regard to the company which is before the Court this morning, and then I will get to G&R and Shelter in a moment if I may, with regard to Gray Construction Company, Gray was assessed a $201,000 withdrawal liability. In the altnerative, it was offered the opportunity to pay $65,000 a year, which was almost the precise equivalent of the contributions which it had been making over the prior five year.

QUESTION: It had been making $65,000 a year roughly?

MR. FELLNER: That is correct.

QUESTION: So that in five years about $300,000 he had contributed, and he has to come up with another $200,000.

MR. FELLNER: That's correct. Now, we submit that --

QUESTION: And is that typical of the other two, also?

MR. FELLNER: Yes, it is.

QUESTION: They are roughly the same ratio?

MR. FELLNER: We submit that Congress was therefore rational in legislating retroactively where to do otherwise could indeed have precipitated the very conduct that Congress intended to restrain.

Now, under the Turner Elkhorn rationality doctrine, Congress's reasonable decision in this case to, as it were, protect the efficacy of this complex legislation through a brief retroactive period is entitled to judicial deference. Contrary to the court below, three circuit courts upheld that Turner Elkhorn controls the disposition of the constitutional issues before this Court, and furthermore, Congress carefully measured the liability imposed on withdrawing employers. It enacted numerous moderating provisions.

Just several examples. It lessened most employers' withdrawal liability by as much as $50,000, particularly aiming that provision at small employers. It enacted a net worth limitation on the liability of an employer which sells or closes its business. It specifically reduced the impact of retroactivity on certain employers, and it stretched out payments over as much as 20 years and made them, as Justice Stevens pointed out, the rough equivalent of prior contributions.

Moreover, under the Act withdrawing employers bear only a part of the cost of plan stability. Participants, the pensioners, the retirees suffer losses because the levels of benefits now guaranteed under the Multi-Employer Act are lower than the levels guaranteed under prior law. They, too, suffer losses. Remaining employers share the cost of plan stability as well, because the Multi-Employer Act provides for faster funding, necessitating higher contributions from those who continue to participate and contribute to multi-employer plans.

Covered plans in general shoulder the additional burdens of higher premiums which are phased in from a 50 cent per employee premium to $2.60, and as one court put it, Congress spread the pain around. Now, the rationality of retroactivity here is further supported --

QUESTION: Mr. Fellner, when you say that, it spread the pain around, it did keep advancing the date, didn't it?

MR. FELLNER: That is correct.

QUESTION: And what, under political pressure by organizations with clout? How do you apologize for that?

MR. FELLNER: I don't apologize for it, Justice Blackmun. I know that that is precisely how it is described by appellee and his nine amici. We submit that it was not political pressure, but it was a realization as described by Senator Bentsen on April 29th on the floor of the Senate. It was an attempt, a realization, rather, that it had done much of its work already retroactively. Retroactivity is part of the original package, was February 27, 1979. Between February 27, 1979, and April 28th, 1980, Congress concluded that retroactivity had done its job.

In addition, it underscores the rationality of Congress's decision, because Congress took into consideration the fact that some employers had embarked on a course of action prior to February 27th which would lead to their ultimate withdrawal, and Congress took that fairness factor into consideration, concluding that it would be unfair to retroactively attach liability to employers who even before this package was submitted to Congress and recommendations were submitted to Congress, that it would be unfair for them to have retroactive liability attached to them.

Now, there is some language with regard to political pressure. There were some grumblings on the part of some of the Senators to that effect, but we would submit that the two realities I indicated before are the real reasons for the advancement of the date.

Now, I would like to dwell, if I may, Justice Blackmun, a little bit more on this historical context, because we submit that it does support the rationality of what Congress did here. If one message came through loud and clear when ERISA was passed in 1974, it was that employers involved in defined benefit plans were responsible for the funding of those plans. No longer could employers walk away scott free, as Senator Matsunaga put it, leaving other employers holding the bag even where they had contractually limited their liability to specified contributions.

Now, the full extension of this principle to the multi-employer plan world was delayed by the Congress in order to allow thorough analysis of the special problems which are inherent in such plans, and therefore beginning in 1977, Congress passed legislation on four different occasions which delayed the full implementation of the existing program to multi-employer contributing employers, alerting those employers that changes in the existing program should be anticipated, and therefore even before withdrawal liability and its retroactive feature were considered by the Congress for a 17-month period, employers in this heavily regulated industry, in this heavily regulated area, were given a full opportunity to know that Congress was examining alternative legislative solutions to the problem of multi-employer plans' instability.

Now, once the legislative process began, we submit, employers were then on further notice that Congress was strongly considering changing their contingent liability under the old statute to a fixed liability, and that Congress was considering specifically making that liability retroactive.

Therefore, against this backdrop of six years of regulation under ERISA, of 17 months of considering the Multi-Employer Act, and given what we submit was the inexorability of the legislative process by April 29th, 1980, at a point when three Congressional Committees had already approved identical legislation and a fourth Committee headed by Senator Bentsen, who took the floor and said, we need a little bit more time to approve it, given all this historical context, withdrawing employers were in a position to know at least that they could no longer shift their responsibilities to remaining employers.

QUESTION: Is this argument critical to your winning this case?

MR. FELLNER: This argument is made last. It is not critical to winning our case.

QUESTION: You have certainly been giving it a lot of emphasis.

MR. FELLNER: I shall move from it immediately.

We suspect -- We submit that the legislative history, given this legislative history, given the considerations of Congress in terms of the need to remove incentives, that this case follows a fortiori from Turner Elkhorn, where the Court sustained a wholly new and unanticipated liability. From Turner Elkhorn's perspective, the transaction which generated its liability was entirely closed.

Indeed, as Justice Powell pointed out in his concurring opinion in Turner Elkhorn, the employment relationship in some instances in that case had ceased 50 years earlier, notwithstanding which liability was attached to Turner Elkhorn.

Now, the court below rejected the Turner Elkhorn standard. It relied instead on a contracts clause case, Allied Structural Steel versus Spanous, on a 1935 decision in Railroad Retirement Board versus Alton, and the latter case's continued vitality was questioned by this Court in Turner Elkhorn.

First, with regard to Allied, if I may for a few minutes, it is clear that the contracts clause by its terms is limited to state impairment of contract, but even if the contract's clause were somehow made applicable, its principles were somehow imported into a due process analysis, as the court below has suggested, we submit that Allied is distinguishable from the case at bar.

The lynch pin of the Court's decision in Allied was that the Minnesota statute there created new rights where none had existed before, and in addition, in the Energy Reserves decision which came down last term, it was clear that the Court narrowed the applicability of Allied, because Allied was entering -- Minnesota was entering an area it had never before sought to regulate.

Under these circumstances and under similar circumstances described in our brief, we submit that Allied is completely distinguishable from the case at bar, and similarly, the Alton Railroad decision created a new pension scheme for railroad employees again where none had existed before. Here, the expectations of the receipt of vested benefits is unmistakable.

And finally, appellees place their principal reliance on a 1928 decision in Untermeyer versus Anderson. We believe that that reliance is misplaced. There, as the Court knows, the Court invalidated a retroactive gift tax, but as explained in Welch versus Henry, there was no warning that such a tax would be imposed.

Here, as three Courts of Appeals and as numerous District Courts have held, notice was everywhere.

QUESTION: What will the -- What are the trustees free to use this money for? And let's take the case of the $200,000 liability. Under that plan, what can the trustees use the money for?

MR. FELLNER: The trustees can use the money to pay benefits.

QUESTION: So it can, instead of holding it to safeguard against unfunded liabilities, it could just increase the benefits and spend it all, I take it.

MR. FELLNER: That is correct, but there are some internal restraints upon the trustees from doing so. A responsible trustee with fiduciary obligations to his trust will be concerned about creating additional unfunded vested liabilities and discouraging new employers from joining his trust. If the trustees act in a profligate manner, they will essentially destroy the trust to which they owe a fiduciary obligation and the participants' reliance on it.

QUESTION: Yes, but, Mr. Fellner, what if it were a perfectly healthy trust? What if there were no unfunded liabilities that you know of? Or what if you think it isn't about to go broke?

MR. FELLNER: If there are no unfunded vested liabilities, then there is no withdrawal liability.

QUESTION: Yes. What if there is but it really isn't a -- it isn't in any kind of shaky condition?

MR. FELLNER: Well, the problem, Your Honor, and of course this is --

QUESTION: You never know. Is that it?

MR. FELLNER: That's the answer, and that's precisely why Congress had to legislate the complex statute that it did.

QUESTION: But you wouldn't say, would you, that every pension plan in the country is so questionable that every single one of them needs to be protected like this.

MR. FELLNER: That is correct. The multi-employer --

QUESTION: So that there are a lot of them that don't need this kind of protection.

MR. FELLNER: Congress was not in a position of legislating on the basis of need, that kind of a bright line, precisely because of what you have pointed out, Justice White, and that is the difficulty of defining where need begins and where it ends. We are dealing with actuarial guesses, actuarial guestimates, actuarial science or art, depending upon one's perspective.

And the precise amount of money that is needed in terms of funding benefits in the future is extremely complex and extremely difficult to prognosticate, and as the Seventh Circuit held in the Pike case, Congress need not wait until a crisis emerges before it legislates, and that is precisely what occurred here.

QUESTION: Let me go back to Justice White's case, if I may. You answered by saying the trustees have a fiduciary duty, but the trustees don't always set the level of benefits. You could have a new bargaining session a year later and the union and the remaining employers might decide to up the benefits and say we've got this extra money with which to fund additional benefits. No reason that couldn't happen, as long as the plan continued to be actuarially sound.

MR. FELLNER: That is correct.

QUESTION: And as I understand it, the amount that the withdrawing employer has to come up with is unaffected by the change in the size of the population of potential beneficiaries. In other words, it doesn't matter whether his employees continue to be beneficiaries hired by somebody else, or he goes out of business. That is not a factor.

MR. FELLNER: That is not a factor.

QUESTION: And that could make quite a difference in the future of the fund, depending, you know, what -- there are all sorts of withdrawals, is what I am saying, and they are all treated alike for this purpose.

MR. FELLNER: That is correct. There are all sorts of withdrawals. They are treated alike. But I would suspect in response to your question, Justice Stevens, that especially in a collective bargaining context, if benefits are going to be set as in fact the arrangement was in Amex Coal, if benefits are going to be set in the context of collective bargaining, I would suspect that they will be set low rather than high, because that is precisely the context in which the primary concerns are often with continuing employees, with active employees, with wages, and the primary concerns would be to keep those benefits if they are set in a collective bargaining context at a lower, more reasonable, if you will, level.

And in response to Justice White's question, I would suspect the trustees would be more likely to err on the side of their fiduciary obligations to participants than would the collective bargaining context, the participants in the collective bargaining context.

If I may, I would like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Very well.

Mr. Triplett.

ORAL ARGUMENT OF THOMAS M. TRIPLETT, ESQ.,

ON BEHALF OF THE APPELLEE

MR. TRIPLETT: Mr. Chief Justice, and may it please the Court, I would like to start by responding to the questions that were put to Mr. Fellner. One was whether these trusts are free to use the money that they receive from payments on withdrawal liability for any purpose. They are indeed free to do so. In fact, it is probably part of their fiduciary responsibility to utilize them to enhance benefits as opposed to reduce withdrawal liability.

Withdrawal liability is the obligation of a withdrawing employer. The moneys that are received by the trust are intended to be earmarked for the benefit of the beneficiary, and the larger the pool of money, the greater the benefits that can be produced.

These trusts, particularly the one that is before the Court today, make their own determinations independent of any third party as to what level of benefits they will sustain. They are not collectively bargained. The only thing that was bargained in this case was a rate contribution, and the only thing that was bargained was the corresponding promise that that is our sole responsibility in entering into a trust arrangement.

Another question that was put was, could Congress have based its actions upon the specific needs of trusts. In other words, counsel concedes that not all trusts are in trouble. In fact, the 1978 report of PBGC indicates that no more than 2 percent of the trusts in this country are in financial difficulty, serious financial difficulty that might lead ultimately, if corrective actions were not taken --

QUESTION: How do you know which ones they are?

MR. TRIPLETT: Apparently PBGC had this information based on reporting forms that were filed with it pursuant to the 1974 Act. Each of the trusts are required to file reports on an annual basis --

QUESTION: So you think it would be perfectly feasible to go around and in case of any particular trust make a sensible judgment about whether it was actuarially sound or not?

MR. TRIPLETT: I think that's right. In fact, in this very legislation there is a provision that applies to some segment of the trucking industry, and what it provides is that when an employer withdraws from a trust, PBGC will determine whether the withdrawal of that specific employer impairs the contribution base of the trust.

QUESTION: That may be so, but what if -- I suppose any trust that you would say is actuarially sound, if a lot of employers suddenly withdrew, your judgment might change.

MR. TRIPLETT: The actuaries are also obligated to forecast the population of the trusts, and they do this on an annual basis, and on an annual basis they prepare reports based on the contribution base and the number of employers and then project the cash flow needs of the trust on a year by year basis.

What I was saying about the exception that relates to a portion of the teamster trust is that the mechanism that was permitted there is for PBGC to make a determination at the time of withdrawal as to whether the withdrawing employer had materially injured the contribution base of the trust.

If it determined that, then withdrawal liability was imposed. If it did not make that determination, then the law provided that a bond would be put up by the employer in the amount of 50 percent of the potential withdrawal liability. If at the end of five years or prior to that time PBGC determined that there had been an impairment to the contribution base of the trust, then it would impose withdrawal liability. If at the conclusion of five years there was indeed no impairment, then the bond was exonerated.

So, indeed, there is a fashion by which Congress could have acted to limit this law to those trusts that required specific attention and where withdrawal was indeed a problem.

PBGC's basic argument in this case is that there was adequate public notice of the pendency of the Act and its possile retroactive application. Secondly, it urges that April 29 was a rationally chosen date to underscore the proposal to eliminate opportunists' withdrawal. On those two grounds, it concludes that due process has been satisfied.

This argument proceeds on some false fact assumptions. First, was April 29 chosen in order tc avoid opportunists' withdrawal? I think the answer is quite clear from the Congressional Record that it was not. Senator Javits on July 29, on the floor of the Senate, stated that the reason that that date was chosen was to favor certain employers who had already withdrawn, that it was not chosen to further the goal of preventing opportunistic withdrawal.

Secondly, there is a suggestion that there was a massive amount of public notice, and therefore in perhaps a procedural due process type of way, we were sufficiently alert to the prospect of retroactive application, that it indeed is fair to apply this law to us. We terminated on June 1.

In fact, there wasn't adequate public notice. Senator Armstrong, on the floor of the Senate, on July 29, commented, and I quote: "I wish only to make a simple point. The U.S. Senate can ill afford to legislate in this sloppy manner. No bill for markup, no Committee report, no three-day rule for Senators to consider this legislation. We are constantly told, let staff handle this, or staff will study this and work out the details. Well, I am very happy that we have such an able staff working on this bill. It is a shame that they cannot vote for it or against it, because they are about the only ones who know what is in it."

QUESTION: Well, of course, if that criticism were a ground for invalidating legislation, I don't know where we'd be.

(General laughter.)

MR. TRIPLETT: The point that I am making is, we urge this Court that there is a procedural due process issue involved in applying a statute retroactively, and that indeed, that under our concept of due process, the employer here was entitled to reasonable notice of a change in the law, and to be given an opportunity to adjust his conduct to what that law would be.

QUESTION: Mr. Triplett, that really -- the normal presumption of any Congressional Act is that it can be and is going to be applied as of the date that Congress says it is going to take effect, isn't it, even though that date may be before enactment. There are really remarkably few cases that have ever upheld a challenge to an Act of Congress because of its retroactive application.

MR. TRIPLETT: Your Honor, I respectfully disagree. Certainly the Untermeyer case is an instance in which this Court found that application of a law retroactively violated due process standards.

QUESTION: How good law do you think the

Untermeyer case is today? I mean, it was a sharply divided Court at the time, and I don't believe it has ever been applied since, has it?

MR. TRIPLETT: It has been cited with approval since. It, I think, does stand for the proposition that notwithstanding the pendency of legislation, that a person may conduct their activities in disregard of the pendency of that legislation, and that they will not be bound for the -- with respect to a closed transaction by a law passed subsequently.

QUESTION: What would follow from your analysis, I suppose, is that if Congress were to undertake a sweeping revision of the Internal Revenue Code and cut out a lot of tax shelters and that sort of thing, that it couldn't -- and everyone knew that it was debating that for six months, that it could not make that applicable to any transaction that was closed before the date that the President signed it?

MR. TRIPLETT: The income tax cases appear to me to be unique. The Derismont case that this Court decided did indeed permit for income tax purposes a retroactive application. In reaching that decision, the Court appears to have stressed the fact that on income tax matters historically they have been made retroactive. It stressed the fact that this was an income matter, a public fisk matter, and clearly had the public wellbeing in mind.

But if you -- every single gift tax case has come to a different conclusion, because they are dealing with closed transactions. If there is an articulated basis between gift tax cases on the one hand and the income tax cases on the other, the thesis is that a man will continue to earn an income, but that a person might not make a gift.

QUESTION: Mr. Triplett, getting away from taxes, don't we about once a year get a Congressional Act where there were no hearings, no notice, and it was written on the floor, and we have upheld them, haven't we?

MR. TRIPLETT: But I don't think those Acts have been upheld where they have applied retroactively to a transaction which has already been concluded.

QUESTION: What would you say about Turner Elkhorn under this thesis?

MR. TRIPLETT: All right. Turner Elkhorn --

QUESTION: I think you were just suggesting Turner Elkhorn was just wrongly decided.

MR. TRIPLETT: Turner Elkhorn, I think, is a completely different kind of case. Turner Elkhorn starts with --

QUESTION: Well, it's a law that was applied retroactively to supposedly close transactions.

MR. TRIPLETT: Turner Elkhorn did a couple of things which this law does not do. And it has underpinnings which are different. I think you start off with the premise in Turner Elkhorn that the employer contributed to the illness of its employees, the sole and complete control of the work place. It was known that these employees were becoming ill because of the conditions the employer created.

It was therefore felt not unfair with this knowledge, that they were profiting on the illness of their employees, to impose this rule of law.

QUESTION: That is just a fairness argument. I mean, as long as it is fair, you can make it retroactive?

MR. TRIPLETT: Well --

QUESTION: Is that it?

MR. TRIPLETT: What is, what is the basics of the Fifth Amendment due process clause? And we have debated among ourselves and tried to fathom a standard. We come down to the simple phrase, "fundamental fairness." And in the Elkhorn case, indeed, fairness was present because of the employer's activities or lack of activities that were involved there. Secondly, there was -- excuse me.

QUESTION: What would you say, then, about, in this case, what if your clients had -- one of your clients had been at the beginning of a three-year contract, and he contractually just couldn't withdraw when this law went into effect? Do you think prospective application of withdrawal liability could be applied to that client? I would think you would be making the same argument here.

MR. TRIPLETT: There are people here who are likely to make that argument. It isn't necessary for a resolution of this case, because we aren't here dealing with closed transactions. But indeed if the touchstone of the employer's rights are his expectations that arose out of the collective bargaining agreement that he signed --

QUESTION: Which might measure fundamental fairness.

MR. TRIPLETT: Yes. Then indeed it could be a logical conclusion that an employer who terminates subsequent in time but within the same collective bargaining agreement would be similarly circumscribed, and that only employers who signed a new agreement after the effective date would be held to the standard of withdrawal.

QUESTION: Yes.

QUESTION: Well, in fact, if your basic argument is one of fair notice to the citizen to make a choice while he still has the options available to him --

MR. TRIPLETT: That's right.

QUESTION: -- doesn't the logic of your argument apply to those employers just as well as it applies to the happenstance that your termination date happened to come in this interim?

MR. TRIPLETT: I suppose that it does, although the employer -- Maybe the best way of approaching that problem is to look at the specific facts here. This employer withdrew because it could not reach agreement with the union for a renewal contract. The issues that were involved were irradiation from this Court's Wilkie Romero decision. My client is a general contractor, and it was seeking freedom to subcontract to whomever it chose, and secondly, he was quarreling with the union security clause in the collective bargaining agreement. Those are the two issues that held the parties apart.

Now, had it known that indeed a massive liability would be imposed, it certainly would have had to reconsider whether to remain at impasse on the two issues which had absolutely nothing to do with a pension.

QUESTION: I am still not clear on how you differentiate that situation from one in which the expiration date was a couple of months later. Does the employer -- Do you contend the employer had the right to bargain out the renewal without having the thumb on the scale that is caused by this new statute?

MR. TRIPLETT: I am not certain that I understood your question.

QUESTION: Well, even if you knew about the statute, the statute has the effect of making the union's bargaining position much stronger than if the statute weren't there.

MR. TRIPLETT: No question.

QUESTION: And are you saying that -- you don't challenge the statute simply for that reason.

MR. TRIPLETT: No. I would like to, but we haven't. It has changed -- This statute has changed the entire chemistry of the collective bargaining table, and has placed tools in the hands of the labor side of the table which make renewal agreements very difficult. It has also with respect to new employers made signing up new employers to a collective bargaining agreement which contains a pension almost impossible. None of them want a part of what PBGC and Congress have wrought.

QUESTION: This isn't because of retroactivity. This is because of prospective --

MR. TRIPLETT: No, this is because of prospective withdrawal liability.

QUESTION: Yes.

MR. TRIPLETT: In terms of this notice question, this question which I view as a question of fundamental fairness, PBGC itself acknowledged the inability of certain employers to understand the effects of this law, even though it had already been passed. In 47 FR 34662, PBGC granted a class exemption to certain employers who entered into a transaction a day or two after September 26th, and it did so because, in its words, sales had occurred at a time when parties either did not know or could not reasonably be expected to know that sales transactions could be structured in such a way as to avoid immediate withdrawal liability.

PBGC acknowledges that the complexities of this Act were such that even for employers who withdrew after its effective date, perhaps some exceptions, are proper. Now, I have looked at the various cases that seem to control the disposition of this case here. The Usury case is obviously a critical case in reaching a proper resolution. I think it is important in looking atthe Usury case to bear a few salient differences in mind, because I think it bears on this fundamental fairness concept that I have been talking about.

Congress chose not to impose liability immediately upon employers. Rather, Congress granted a two and a half year moratorium, and during that period of time the federal government, not the employer, would pay the black lung claims. Thus, the employer was given lead time after Congressional notice of liability to adjust its affairs to deal with the imposition of this liability.

The other thing which I think it is very important to recognize is, the employer in those cases has the right to go to hearing to contest whether the employee had in fact been harmed, whether he had black lung disease. And so in that case it was incumbent in order to recover that it be demonstrated that this employee was harmed in his relationship with this employer. Now, why do I say that is important? Because this law, this 1980 Act, does not depend upon whether the trust has been harmed by the withdrawal of an employer. In fact, it may be a windfall.

Let me give you an example of that. In -- Assume an employer who for five years is covered under a collective bargaining agreement, and he is required to make contributions to a trust. At the expiration of five years, his employees decertify the union. Now, under that example, none of the employees would have vested. Ten-year vesting is required. None of those employees are taxed upon the fund. And yet that employer would be required not merely to have made his five years of contributions, but a withdrawal liability payment as well.

And the payments are not, as counsel would suggest, so modest because they are paid over time as not to have a terrifying impact upon employers. Bear in mind that this law --

QUESTION: Mr. Triplett, let me just go back to that hypothetical example. Wouldn't that be equally unfair if it occurred a year after the statute became effective?

MR. TRIPLETT: Yes. And part of the problem of the windfall is noted in a footnote in our brief, in which we represented to this Court that two years after we withdrew, the trust had paid all of its unfunded liabilities. It had none. The trust has our money, but the trust is fully paid.

Now, if indeed there is an implied condition within this statute that states that we are entitled to our money back, then the constitutional issue in this case is moot, but if indeed there is no such implied condition, it demonstrates the massive unfairness of the rules.

I think that in terms of dealing with the question of retroactive liability that this Court has come perilously close to adopting a contract clause type of analysis for legislation which deals with closed transactions. It has never held that the two are synonymous, but in attempting to distill the principles that appear to have been applied, they appear to closely parallel one another. I think that not surprising since under the contract clause what you are doing is disrupting a prior transaction.

And in consequence, it would appear to me under the Fifth Amendment that the analysis with respect to closed transactions should be the same.

QUESTION: But that is kind of a contradiction of the text of the Constitution, isn't it? I mean, the framers pretty well hashed this out, and they applied prohibition against impairment of contracts to the states and the denial of due process prohibition against the federal government.

MR. TRIPLETT: Well, what I am saying is that the analytical tools that underscore a contract clause analysis apply equally to a Fifth Amendment analysis with respect to retroactive application to a closed transaction.

QUESTION: Why should that be?

MR. TRIPLETT: I don't think that there is a restraint with respect to the language of the Constitution when it is borne in mind that when originally written it was thought that only the states would be in the business of regulating contracts, and secondly --

QUESTION: But I think that is a very good reason for bearing it in mind. If the framers thought that only the states are going to be in the business of regulating contracts, and therefore will apply this prohibition to them and not to the federal government, and the federal government later gets a lot more active and bigger, surely that doesn't mean that you simply say, well, I think the framers would have wanted this to apply to the federal government if they had only known how big it was going to get, so we as Judges will apply it.

MR. TRIPLETT: But they did subsequently enact the Amendments, and the Fifth Amendment, and what indeed does that due process concept mean? I have difficulty in my own mind believing that the Founding Fathers felt that a greater restraint should be imposed on the states than on the federal entity.

QUESTION: Well, certainly the contract clause is Exhibit A that would tend to contradict you, I think.

MR. TRIPLETT: Well, this Court in the Spanouse case dealt with a contract clause issue. I think that if you look to the Usury case and the types of things which were considered important in reaching the conclusion there, and you look to the Spanouse decision and the types of things which were considered important to the conclusion in that case, that you come out with a litmus test that is the same.

Unless there are any other questions, thank you.

CHIEF JUSTICE BURGER: Do you have anything further?

MR. FELLNER: We waive rebuttal, unless there are any questions.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 10:58 p.m., the case in the above-entitled matter was concluded.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:
#83-245 - PENSION BENEFIT GUARANTY CORPORATION, Appellant v.
R. A. GRAY & COMPANY; and
83-291 - OREGON CARPENTERS-EMPLOYERS PENSION TRUST FUBD, Appellant V. R. A. GRAY & COMPANY

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Karen K. Fleming [signature]
(REPORTER)