REVISED

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-231 & 86-253

TITLE PENSION BENEFIT GUARANTY CORPORATION, Appellant V. YAHN & McDONNELL, INC., ET AL.; and UNITED RETAIL AND WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN, ET AL., Appellants V. YAHN & McDONNELL, INC., ET AL.

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

PENSION BENEFIT GUARANTY CORPORATION, Appellant, v. YAHN & McDONNELL, INC., ET AL. and UNITED RETAIL AND WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL No. 115 PENSION PLAN, ET AL., Appellants, v. YAHN & McDONNELL, INC., ET AL.

No. 86-231

No. 86-253

Washington, D.C.

Monday, April 27, 1987

The above-entitled matter came on for oral argument before the Supreme Court at 1:51 o'clock p.m.

APPEARANCES:

GARY M. FORD, ESQ., General Counsel, Pension Benefit Guaranty Corporation, Washington, D.C.; on behalf of the appellants.

CARL L. TAYLOR, ESQ., Washington, D.C.; 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 REHNQUIST: We will hear argument next in No. 86-231, Pension Benefit Guaranty Corporation versus Yahn and McDonnell, Inc., et al, and related case.

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

ORAL ARGUMENT BY GARY M. FORD, ESQ.,

ON BEHALF OF THE APPELLANT

MR. FORD: Thank you, Mr. Chief Justice.

Mr. Chief Justice, and may it please the Court, at odds with the decisions of five other Courts of Appeals, including the Court of Appeals for the First Circuit sitting en banc for the second time in its history, a divided panel of the Third Circuit has struck down a rebuttable presumption enacted by Congress --

QUESTION: The Court of Appeals for the First Circuit not too long ago sat en banc all the time, didn't it?

MR. FORD: I understand this was the second time -- well, that is true, Your Honor. A small court.

QUESTION: They got all four judges in one room?

MR. FORD: Right. The question here is

whether in striking down the rebuttable presumption the Congress enacted for use in withdrawal liability arbitrations the Court of Appeals for the Third Circuit in a divided panel decision committed error.

Now, when Congress enacted withdrawal liability in 1980 it knew that there are literally thousands of withdrawals from the thousands of multiemployer pension plans in the United States every year, and that it would be difficult if not impossible to set up a Federal bureaucracy to assess and collect these amounts, so it assigned to the trustees of the pension plans the practical task of formulating the initial claims for this liability.

Briefly, the trustees take the value of unfunded vested benefits in the plan, certified by the enrolled actuary of the plan, and divide it up using a statutory formula or a formula approved by the Pension Benefit Guaranty Corporation. They then send out a bill after determining if any of the exemption or forgiveness provisions in the statute apply. If the employer disputes the bill, the plan and the employer are required to try to resolve that dispute without litigation, but if they can't --

QUESTION: What is the bill supposed to represent, Mr. Ford?

MR. FORD: It represents an initial claim of the pension plan for liability for the employer's withdrawal.

QUESTION: And how is that measured?

MR. FORD: The statute starts out with the amount of benefits that the plan is legally bound to pay but which are unfunded as of a date before the employer's withdrawal and then the statute has four detailed rules which the plan may choose among for dividing up that unfunded vested benefit amount based generally, Mr. Chief Justice, on the level of the employer's prior participation in the plan.

So the employer gets a share that is based generally upon what he contributed when he was a contributing employer under the pension plan.

QUESTION: (Inaudible) facial challenge?

MR. FORD: This is a facial challenge. That's correct, Mr. Justice Blackmun.

QUESTION: I think that is important for both sides in the argument. Go ahead.

MR. FORD: Yes, sir. Now --

QUESTION: How come it is ripe? I mean, he is saying these procedures that you are about to subject me to deny me due process, but you don't know.

MR. FORD: That's right.

QUESTION: Had he gone through them, he might have come up with something that was totally satisfactory.

MR. FORD: It is possible that he could have had this case mooted had he gone through the procedures. Two responses, Justice Scalia. First, the parties themselves, before we were a part of this action, agreed to proceed under the ruling of the Third Circuit at that time and circumvent arbitration to bring the facial challenge to the Court.

QUESTION: Oh, that's nice. What is the second reason?

MR. FORD: This Court in Thomas against Union Carbide held that where the procedures themselves are objected to is fundamentally unconstitutional, that ripeness is a prudential matter in essence, and here the Third Circuit having struck down a provision of law enacted by Congress, the appeal being mandatory to this Court, and there being considerable uncertainty among the courts and the arbitrators who are dealing with these disputes, we would suggest to the Court that it exercise its prudential judgment to decide this matter.

QUESTION: It is only prudential? Why is it only prudential?

MR. FORD: Because there is an objection to

the fundamental fairness on the part of the appellees and perhaps counsel would address that as well, as to the procedures that they are being asked to go through. Now -- so I --

QUESTION: Was that the same situation as you have here where the only thing being objected to is not the taking of any property but the procedure? The procedure is the gravamen of the claim?

MR. FORD: I am hesitant to characterize the appellees' position on that, but I think it would be as follows, that the procedures themselves inculcate or perpetuate a bias that predated the arbitration hearing, so they are being asked to go through a biased proceeding, and the Court has held in other contexts -- another would be Gibson against Berryhill -- that a party need not do that. Obviously, if the Court --

QUESTION: Well they are claiming a biased decisionmaker, in effect.

MR. FORD: That's correct, and again --

QUESTION: And they argue that in every case the decisionmaker, as structured here, is inherently biased.

MR. FORD: That is how I understand the argument. Yes, Justice O'Connor. Now, once the trustees have sent the bill and they have failed to

resolve it amicably if there is a dispute, they proceed to what we consider the first adjudication in this case, and that is arbitration. It is mandatory under the statute, and it is worth noting how it works in practice. It is a plenary proceeding. There is full prehearing discovery. There is the first occasion on which there is the calling and cross examination of witnesses, the first occasion on which a record is made. It is before a neutral arbitrator chosen by the parties or appointed by a Federal District Judge. And it is the first occasion in which a written decision is entered. It is the first adjudication.

Congress chose arbitration as the forum for these disputes because it is inexpensive, quick, and therefore accessible, unusually accessible even to small employers that have a substantial disagreement with the claim of the pension plan. Congress was not seeking to foreclose substantial challenges and it chose to enact rebuttable presumptions for use in the arbitration for three equally sound reasons. In both the House and the Senate Congress noted that its judgment was that it would be unworkable and an invitation to abuse to assign the burden of proof in the arbitration to the pension plan. Why? Because the plan's calculation involves a large number of steps, and the plan would have to come

forward and establish the reasonableness of every actuarial assumption, the accuracy of every underlying data, and inapplicability of every exemption provision set forth in the statute.

Congress was concerned that that would be an invitation to employers to lodge vague or nominal challenges or general challenges just to put the plan through the many days, perhaps even weeks of expensive testimony, documentary evidence, and the like that would be necessary to establish the reasonableness of the original claim. Congress decided it would make more sense to have the claim serve essentially as a target at which the employer could take aim at those issues which we had a substantial disagreement, and I should note that in the arbitration proceeding there is no limitation on the issues the employer can raise, no limitation on the facts he may adduce. It is a plenary proceeding where the employer comes forward with a substantial challenge.

QUESTION: Under 1401(a)(3)(A), which is the section dealing with things like determination when the withdrawal takes place and whether it falls within an exception and so forth. The language is a little curious. It says that the determination by the trustees is presumed correct unless the party contesting it shows

by a preponderance that the determination was unreasonable or clearly erroneous.

MR. FORD: Yes, it is.

QUESTION: Which one, and why is it phrased that way, do you think?

MR. FORD: Justice O'Connor, let me state at the outset my agreement that the language is at least curious. It is ambiguous in our view and internally inconsistent, and not merely for the reason that you refer to, but also because the language, and this is at Page 65A of our jurisdictional statement, melds a trial type standard, preponderance of the evidence, which is generally understood to mean greater weight of the evidence or more probable than not, with words which appear in Rule 52, an appellate standard, clearly erroneous, which is generally understood again to this Court's decisions in Anderson against the City of Bessemer and so on, to mean that the Appellate Court has a firm and definite conviction that error has been committed.

Now, we consider, first of all, the melding of the trial type standard with the appellate standard to be an inconsistency in itself, and second, the preponderance standard, to show that something is more likely than not, is a somewhat lower standard in

suggesting that the Appellate Court had a firm and definite conviction that error has been committed.

We suggest in view of the legislative history, also in view of the related provisions of the statute which this must be interpreted alongside, and in view of the possibility of avoiding a somewhat more difficult constitutional question, that the Court construe that language to require the employer to establish by a preponderance of the evidence that the plan's determination was unreasonable or incorrect, in other words, that it not give the clearly erroneous language, the strict Rule 52 gloss.

QUESTION: How does that differ from simply having to prove by the preponderance of the evidence that your own view of the matter is correct?

MR. FORD: That is essentially what it stands for, or that the plan was unreasonable. Let me, if I may, note how we got there.

QUESTION: The things that are covered under 1401(a)(3)(A) are not simply policy determinations, are they, like the decisions under (a)(3)(B)?

MR. FORD: No, Your Honor, they are not. They are a mixture of decisions that Congress required the trustees to perform.

QUESTION: They might be matters of historical

fact.

MR. FORD: Right. That's correct. In fact, we believe that this presumption goes to factual determinations only, and that the trustees' determinations of law or interpretations of law, which after all they are not necessarily expert on, reside where they have always resided, the authority for making those, in the Federal courts, and if one looks at the next provision, related provision in 66(A), which is Section 1401(c), that is the standard for the trial court's review of what the arbitrator did, and it provides that there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

Now, two important things there. One, it makes clear what we are talking about are factual determinations, not legal determinations, and in fact the PBGC's regulations enjoin the arbitrator to apply all controlling precedent, the regulations, opinions, and so on in reaching its determination on issues of law.

The other thing that is important there --

QUESTION: Is that any different from saying the burden shall be upon the party who brings the action in the District Court to prove his case?

MR. FORD: It suggests -- I think that is correct. It says the burden is a clear preponderance, which again is a less than clear choice of words on Congress's part. This is a confused set of legislative drafting. There is no way around it. What makes sense about interpreting the preceding provision to require a mere preponderance showing by the employer of error is that the District Court in 1401(c) is reviewing for whether something is correct or not and it would make no sense to have the District Court look for mere error if the arbitrator is applying a clearly erroneous standard, which is a much narrower scope of review. Your scope of review on appeal would be expanding instead of decreasing, and that makes no sense to us.

Now, there were two other policy reasons that Congress had in mind when it enacted these presumptions besides the preventing abuse. The second was, as it noted in the legislative history, on these exemption provisions which were made much of in the papers. It is the employer that has the evidence. The facts are in the employer's control. This Court has noted in other decisions when you claim an exemption from the statutory provision it is traditional that you have the burden of proof and it makes a lot of practical sense if the employer has the evidence that is relevant to that

exemption.

And finally, Congress wanted at least modestly to encourage uniform treatment of similarly situated employers. These pension plans are amalgamations of a lot of different employers who may many of them be competitors, and the glue that holds them together is the sense that everyone in the plan is being treated the same, evenhandedly, and the presumption, while not guaranteeing that in every case, goes some distance in discouraging arbitrators from issuing inconsistent compromise awards that could undo the basic cohesion of the multiemployer pension plan.

QUESTION: (Inaudible) you say achieves that now?

MR. FORD: The presumption in the arbitration that assigns the burden of proof to the employer discourages the arbitrator from essentially allowing an employer to slip a marginal case by and discourages employers from feeling they can succumb to that temptation. If the employer is right on the law or the facts or the combination he ought to win, but the arbitrators ought not to do what Congress was concerned in some other areas they do, which is enter compromise awards just to get along and get to the next case. They wanted them to act more like judges. And so the

preponderance of the evidence burden encourages them to do so.

QUESTION: Mr. Ford, it seems to me that you are pointing out that their competitors, that the trustees may be employed by competitors of the withdrawing employer makes the bias argument greater rather than lesser.

MR. FORD: Let me note at the outset, Justice Stevens, that normal civil litigants to whom burdens of proof are assigned, both defendants and plaintiffs -- for example, fraud is provable by defendants by clear and convincing evidence -- are by their nature biased in their own interests, so even if one accepted the argument of the appellees here that trustees are biased doesn't change our conclusion about how fairly this statute works, but -- and we don't accept that argument, but --

QUESTION: Well, if one did, why should there be a presumption of correctness for their factual determinations?

MR. FORD: Simply to accomplish the several important practical policy goals that I have enumerated, preventing abuse, making the party with the evidence come forward, encouraging uniformity, and second, looking at the same factors that courts look at when

they order the burden and weight of evidence, order and weight of evidence in judicial proceedings at common law, who is changing the status quo? In this case the employer is leaving the pension plan. He has had an ongoing relationship with the plan. It is the employer who is changing the status quo.

Where is it more convenient to have the burden? Well, again, the facts. There are at least partially in the possession of the employer. Courts often say let's assign the burden of proof to the parties seeking to prove the less likely proposition. Congress could very reasonably have concluded that the plan with its expertise, including an ongoing actuarial consultant, may be the more likely to prevail and assign the burden of proof on that basis.

QUESTION: Well, it just looks like there are different categories of things, though, under the statute, and as to things like the actuarial assumptions and which method of allocation is going to be used, that perhaps that isn't even an adjudicative decision. But when you get to the things covered by the first subsection, and purely factual questions, I just wonder how much sense it makes to give a biased decisionmaker a presumption of correctness for that kind of thing.

MR. FORD: We don't believe that they are

biased or that they are decisionmakers in the constitutional sense. They bring a claim to the arbitration. They --

QUESTION: No, but aren't they for some historical facts on questions of when the withdrawal took place and whether the exceptions are called into play, and so forth?

MR. FORD: They do make decisions about the application of the law to specific facts, but we would submit, Your Honor, that it proves far too much to say that any time a party in a proceeding makes those kinds of decisions he becomes an adjudicator. Every plaintiff under Rule 11 in the Federal courts makes the same sort of decision about the application of the law to the facts.

QUESTION: But a plaintiff in an ordinary civil case doesn't get any burden of proof assigned to him just because he made a particular choice.

MR. FORD: It may depend, Your Honor. In tax cases the burden is on the taxpayer. This Court has upheld statutes such as in New York, Dick against New York Life, where there were state laws that had the effect of assigning the burden of proof to the insurance company on whether a death was accidental or suicide. There is nothing exotic about assigning a burden of

proof --

QUESTION: After the fact? After the fact? Have we done that? I mean, after the insurance contract was entered into? I have much less difficulty with these things if the government is just saying these are the rules that are going to apply to these contracts that you enter into in the future.

MR. FORD: This employer withdrew after this law was passed, over a year later.

QUESTION: Withdrew --

MR. FORD: That's correct.

QUESTION: -- but had he joined after it was passed?

MR. FORD: He joined well before that. That's correct. But he made a decision to withdraw in November, I believe it was, of 1981, a year and two months after the statute --

QUESTION: Well, that is just like saying, you know, the government can change the attributes of insurance policies and say it is fair enough so long as you die after the law is passed. I mean, it seems to me the relevant moment is the moment you bought the policy, not when you died.

MR. FORD: I think, Justice Scalia, that the Court has grappled with already the question of an even

more -- an overt form of retroactivity in its decision in the R.A. Gray case, and upheld the original version of the statute which imposed liability for withdrawal events that occurred before September 26th, 1980, when the statute was enacted. Congress has since repealed that express retroactive feature.

QUESTION: Would you tell me again how do you want us to read 1401(a)(3)(A)? What do you want us to -- I mean, what does it really say when it says: shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous? What does it mean?

MR. FORD: We would suggest that the Court read it to assign to the employer the burden of proof of showing by a preponderance of the evidence that a determination was unreasonable or erroneous or read the words "clearly erroneous" to be satisfied where he preponderance of the evidence establishes it, and I would --

QUESTION: Now, that still gives me some problem. It seems to me it is a fairly manageable standard, if you say the burden is on the employer to establish by the preponderance of the evidence that his view of the facts are correct. But when you say it is the preponderance of the evidence to prove that the

trustees' view is unreasonable, that just melds, as you say, questions of fact and questions of law.

MR. FORD: The unreasonable standard, I would note that the language is disjunctive, going back to Justice O'Connor's earlier question. The employer may choose -- prove either error or unreasonableness. The unreasonableness presumably was included by Congress --

QUESTION: Okay, but then the -- to say that the burden is on the employer to prove by a preponderance of the evidence that the determination was clearly erroneous, I mean, that isn't the easiest thing when you start parsing it down. Is that any different than saying the burden is on the employer to prove by a preponderance of the evidence that the employer's view is correct?

MR. FORD: I think it is not. What we are suggesting, in other words, is that the strict Rule 52 gloss on the words "clearly erroneous" not be adopted in this context because it simply in our view doesn't work. For one thing, this is not an appellate proceeding. It is the first trial. Why have an appellate standard? I would refer the Court to a case which we found after we filed our briefs but I notified opposing counsel of, and that is the Court's decision in United States against First City National Bank, 386 US

361, where the Court was faced with some other language about the word "clearly" and noted that it could fairly be construed to be consistent with the preponderance of the evidence burden, and there are a couple of other points in that case that are helpful here as well.

QUESTION: You are saying the word "clearly" is just -- less than superfluous, you are just saying it doesn't mean what it says.

MR. FORD: Justice Scalia, I think that in reading this language and rationalizing it, one must either deemphasize preponderance of the evidence which would be inconsistent with the legislative history, with 1401(c) on the next page, and would present the Court with a more difficult question, or it must deemphasize the word "clearly," and that is consistent with what Congress said it was concerned about, which is the order and weight of proof at the hearing, and also would work well with 1401(c).

QUESTION: Mr. Ford, can I ask you a question? You may have answered it, but I am a little lost in the case. One of the questions I suppose that can come up is whether there was actually a withdrawal, and in this case is there any dispute as to whether there was a withdrawal?

MR. FORD: No dispute here.

QUESTION: So that really is a question that may not have to be faced up to?

MR. FORD: That's correct. There's no dispute in this case as to whether there was withdrawal.

QUESTION: Or whether an exception applies?

MR. FORD: There was raised, prior to arbitration, claims by the company for treatment under certain exception provisions. They did not press those claims in their arguments either to the District Court or to the Court of Appeals, and in our view the Court of Appeals should not have as a matter of prudence relied on those exception provisions in reaching its decision given that they weren't briefed to it, and we see no reason for this Court to reach the exception issue either.

QUESTION: Does the statute contain a definition of when a withdrawal occurs?

MR. FORD: Yes, it does, and the definition of a withdrawal is an employer's permanent cessation either of the obligation to contribute or of covered operations under the plan. In most cases that is the same thing, obligation to contribute --

QUESTION: What section is that definition in?

MR. FORD: That is in 29 USC 1383.

QUESTION: Thank you.

MR. FORD: Now, the conclusion that -- the importance of the whole entire discussion of the operation of the presumption is that the Third Circuit concluded that it insulates the decision of the trustees made in formulating a claim, a civil claim from effective review by the arbitrator. We respectfully submit it does nothing of the sort, and that that indispensable -- that it merely allocates a burden of proof, and that that indispensable element in the Third Circuit's decision was in error, and that the decision was therefore in error. We submit further that the Third Circuit erred when it concluded that the trustees prior to this arbitration, which proceeds very promptly, are functioning as adjudicators merely because they formulate a claim. They don't decide a dispute between two parties. They are one of the parties and they bring a claim, and that is all they do.

And finally, that they erred when they concluded that the same Congress that they believed appointed the trustees as adjudicators required them to be biased in the exercise of that function. Congress, the simplest refutation of that argument is that Congress itself said in the legislative history it was requiring no such thing.

I would reserve the balance of my time for

rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ford. We will hear now from you, Mr. Taylor.

ORAL ARGUMENT BY CARL L. TAYLOR, ESQ.,

ON BEHALF OF THE APPELLEES

MR. TAYLOR: Mr. Chief Justice, and may it please the Court, I would like first to address the question why is this case ripe, because it seems to me that should be addressed at the outset. There are three answers in sequence.

The first is that this challenge is facial and systemic. The second is that because it involves a standard of proof, Santosky v. Kramer, decided by this Court in 1982, applies, where this Court said, "Respective case by case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard." That is at Page 1397 of 102 Supreme Court.

QUESTION: (Inaudible) writing it down facially, but it is not a justification for allowing a challenge where there has not yet been any harm from the process.

MR. TAYLOR: What I read that as saying, Your Honor, is that the -- how the statute works in one particular case cannot inform us when we are looking at

a constitutionally defective evidentiary standard. The rare case, the exceptional case, as the Santosky decision goes on to point out in a footnote, cannot decide the constitutionality of an evidentiary standard. We must look at the statute, and we must look at the statute in a facial way, much as this Court has looked at this statute before in determining the substantive due process constitutionality of this statute in a facial context both in Gray and in Connelly.

We must look at it here in a facial way to determine the constitutionality of this presumption from a procedural due process point of view, and I might add that where the claim is lack of an an impartial decisionmaker, where that is the procedural due process violation, that is precisely what this Court has done in cases like Gibson versus Berryhill, where the Court upheld a Federal District Court enjoining the proceedings of the State Board of Optometry before those proceedings had concluded, before any decision was rendered on the ground that the members of that board were inherently biased because they were competitors and had a pecuniary interest and therefore the proceedings shouldn't even start.

QUESTION: Hadn't the license been denied or suspended then, and the proceeding was whether to

reinstate it? Are you sure there had been no harm suffered?

MR. TAYLOR: I don't recall that that was the case, Your honor. I think the proceeding was to determine whether the optometrists who were on trial, as it were, should be disbarred, if you want to use that phrase, for being employees of a corporation practicing optometry. I think that was the context in which that arose. And they sued in District Court to enjoin the proceedings. Now, in a facial challenge you must look at the language of the entire statute, we suggest, which gets to the next preliminary question of can we look at exceptions; can we look at decisions, at determinations made by trustees that may not specifically apply to this employer? And the answer is, if this is a facial challenge, of course we can, just as in Gray and --

QUESTION: Well, of course -- but you can only challenge facially things that apply to your clients.

MR. TAYLOR: Your Honor, I suggest that again under the standard in the Santosky case that that -- that restricts this Court too much.

QUESTION: Well, the Santosky case certainly didn't purport to restate settled principles as I understood them that outside of the area of the First Amendment there is no such thing as overbreadth. You

challenge what is applicable to your people and you let somebody else challenge things that aren't applicable to your --

MR. TAYLOR: Perhaps the Court misunderstood me or I misunderstood the Court. We are only challenging the presumption of correctness in arbitration. That is all we are challenging. But to see how that presumption works --

QUESTION: But as to what? As to things under (a)(3)(B) only? What are you really concerned about?

MR. TAYLOR: Under both (a)(3)(A) and (a)(3)(B), Your Honor.

QUESTION: Well, it doesn't look like there's anything that your client has raised under (a)(3)(A), is there?

MR. TAYLOR: Our client did in fact raise --

QUESTION: Is there a dispute about the date of withdrawal?

MR. TAYLOR: Our client did in fact raise a contest under 1405 of the statute, 29 US Code 1405, as to whether as a liquidating employer it was entitled to a reduction. It also raised the point that its net liquidation value would be essentially zero so that it was entitled also to a reduction under 29 US Code Section 1405(b). The PBGC points out that those were

not pressed in District Court. The PBGC's brief, its reply brief concedes that particular exceptions don't need to be pressed even in review, even in requesting plan review in order to be raised in arbitration.

The PBGC says expressly, clearly, succinctly in its reply brief that you can -- that an employer can raise in arbitration things that it has not previously raised, so that to return to where I was, I do suggest to this Court that in determining how this presumption works, the Court needs to look at the provisions of the statute to which it applies, and the kinds of decisions, the kinds of determinations that the trustees must make, and it needs to look at those also to see why the trustees have a conflict of interest and how that conflict of interest translates through into the presumption.

Now, this case essentially involves the constitutionality of ex parte adjudicative determinations made by the trustees with a conflicting legal, financial, and personal interest, without a de novo review of any sort. Now the thing that blocks that de novo review is this presumption.

QUESTION: What are the kinds of things that the trustees decide in your client's case? What kind of decisions would they make?

MR. TAYLOR: The trustees would decide, first of all, the facts producing the liability.

QUESTION: Are those disputed here?

MR. TAYLOR: Yes, they are. Among the disputes in terms of what this employer specifically raised below are whether it is a liquidating employer and what its net liquidation value is and whether, as the plan replied, it is not entitled to those because there are other employers in the control group who are -- who have assets. Now, to go beyond that and look at the kinds of things that the plan has the authority to determine in determining whether liability should be assessed, there are questions of whether the employer has withdrawn, when it has withdrawn. As was pointed out earlier in this argument, those are historic facts.

QUESTION: Are either of those disputed here, when and whether there has been withdrawal?

MR. TAYLOR: Not that I am aware of, Your Honor. The date is not a critical date -- is not a critical question here, and the whether as I understand it is not an issue either. It is the how and whether some of these, these ameliorating provisions apply.

Now, if I might take one of the ameliorating provisions as an example, the plan says or the PBGC says that these are really just exceptions, and therefore the

employer should have the burden on them because people that are trying to take advantage of an exception usually have the burden on that anyway.

One of the provisions of the statute, 29 US Code Section 1398, says that notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn because he is in a labor dispute.

Now, that language, it seems to me, clearly enjoins the plan from assessing if there is a labor dispute, and therefore that the plan has to bear the burden of showing that there is no labor dispute. Now, another provision, 29 US Code Section 1398.1, enjoins the plan from making an assessment because of a change in corporate form such as where a parent company sells the stock of a subsidiary and the subsidiary continues for a while and then fails. The plan says that is all very fine but we allege alter ego. We allege that you really continued to control that company after you sold the stock of it. That's the sort of an allegation --

QUESTION: But Mr. Taylor --

MR. TAYLOR: Yes, sir.

QUESTION: -- is it clear the presumption applies to those issues?

MR. TAYLOR: Yes, Your Honor, it is.

QUESTION: I know courts have held that, but I don't think the statutory language is all that clear.

MR. TAYLOR: Yes, Your Honor, in 1401. In the presumption itself in 1401(a)(3)(A), it says that any determination made by the plan sponsor under Sections 1381 through 1399 must be determined in arbitration, and that this presumption applies to those.

QUESTION: You cite to 1401(a)(3)(A). What page is that on? I am having -- 65A?

MR. TAYLOR: It is the -- I was citing the statute, Your Honor, the US Code section.

QUESTION: It is 65A.

MR. TAYLOR: In the jurisdictional statement.

QUESTION: Where it reads "for purposes of any proceeding under this section, any determination by the plaintiff?"

MR. TAYLOR: That's it, Your Honor. That's it.

QUESTION: Okay.

QUESTION: Obviously the (3)(B) does not cover this kind of issue.

MR. TAYLOR: (3)(B) is a particular subset.

QUESTION: I don't understand why you needed (3)(B) if you read (3)(A) correctly.

MR. TAYLOR: Well, I think that decisions

under (3)(A), because they deal with historical facts, are either correct or not correct. You know, they are either true or not true. The withdrawal is either one date or another date. There is not a range of reasonable dates. When you come to things like actuarial assumptions there can be a range of reasonable dates as it were, so that --

QUESTION: No, but it seems to me still true that if your broad reading of (3)(A) is correct everything in (3)(B) would already have been included within (3)(A) because the actuarial assumptions and the rest are determinations made by the plan sponsor.

MR. TAYLOR: I think the difference is the word "reasonable in the aggregate." We don't quarrel with those words. The effect of vacating the presumption here would simply be --

QUESTION: Where are the words "reasonable in the aggregate?"

MR. TAYLOR: In (3)(B).

QUESTION: I must say I dismiss them.

MR. TAYLOR: It's a difference --

QUESTION: Oh, I see, reasonable -- all right.

MR. TAYLOR: It's a difference, not --

QUESTION: And you don't really quarrel with the approach then in (3)(B) for actuarial assumptions?

QUESTION: We don't quarrel with the words "reasonable in the aggregate."

QUESTION: And the burden can be placed on withdrawing employer as far as you are concerned in arbitration then to prove --

MR. TAYLOR: No, Your Honor, I would distinguish between the words "reasonable in the aggregate" and who has the burden of proving that. And I would suggest that for the same reasons that the (3)(A) must fail, the (3)(B) must fail as well, which leaves --

QUESTION: But that is so different from an historical fact. How -- what standards could the arbitrators or a court possibly employ --

MR. TAYLOR: The only difference, Your Honor --

QUESTION: -- to determine whether the actuarial assumptions are valid other than --

MR. TAYLOR: The only difference, Your Honor, would be that the plan must prove that the assumptions are reasonable in the aggregate rather than the employer having to prove that they are unreasonable in the aggregate because 29 US Code Section 1393 independently says that the assumptions must be reasonable in the aggregate. We are not contending that there is a right

or wrong answer when it comes to actuarial assumptions, and that suggestion on the part of the plan, on the part of the PBGC is erroneous.

Now, when we get to the second kind of question that the plan has to determine ex parte it is the amount of the liability, and among the key ingredients there are things like what is the interest rate going to be for return on investments in the future. Now, these are arbitrable assumptions. These are arbitrable matters and not legislative matters and not policy matters because Congress has made them arbitrable under the statute. That is the short and simple answer. It is clear under 1401 that these matters go to arbitration. That is why we have a presumption on it.

QUESTION: Yes, but in these matters isn't it a fact that if the actuary makes an interest assumption for purposes of computing unfunded liability and the rest they are going to make the same assumptions for purposes of filing their reports and for purposes of making claims like this and all the rest. There isn't much chance to juggle that kind of an assumption.

MR. TAYLOR: If the Court would turn to Page 9A of the appellee's brief, we have set forth in the appendix the actual assessment made by this plan to this

employer. Page 9A under Subparagraph 7A, the Court will see that current assets are valued at market value. If the Court will then look at Subparagraph (C)(1) the Court will see that the interest assumption for the future is 6 percent. Now, to the extent, for example, that the present assets are held in let's say 30-year government bonds at 14 percent, bought back in 1982 with good foresight, those bonds are already -- their current market value takes into account that 14 percent, and we suggest it is nonsense to assume that the future income stream on those is going to be 6 percent, but that is precisely what this plan is doing when it says that the blanket assumption on the return on all investments is 6 percent, which is the lowest you could possibly get and still stay within the range of reason.

QUESTION: Well, do you think that in a withdrawal proceeding they could come up with one interest assumption and then use entirely different assumptions in running the plan and computing their annual unfunded liability and the like?

MR. TAYLOR: If the circumstances call for a difference, Your Honor, then the law requires a difference.

QUESTION: I am glad I am not a trustee of one of those plans.

(General laughter.)

MR. TAYLOR: Now, there is an issue in the brief as to -- by the way, before I leave that, we do concede, we agree with the PGBC that the allocation method, the presumptive or one of the other three or four methods for determining how the unfunded vested liability is going to be allocated is not an arbitrable matter. Congress has not provided for that to go to arbitration.

QUESTION: That doesn't go to arbitration at all?

MR. TAYLOR: That doesn't go to arbitration at all. That simply determines what formula they are going to use to divide up whatever liability they come up with, and that does not go to arbitration. Now, I would like to turn to why the trustees have a conflict of interest. First of all, they have an adverse legal duty. The plan, the plan involved in this case concedes that the trustees are biased. It says at Page 30 of its main brief that "The bias of the trustees is permissible because the trustees are obligated by Congress to be biased in favor of pension plans."

Now, that may be -- that may be all to the good, but the plan concedes that they are biased, but the plan goes on to say at the same page, Page 30 of

their main brief, "By its very nature an assessment of withdrawal liability is intended to benefit the interests of the plan over those of a withdrawing employer."

What that amounts to is nothing more than this Court has said in Amax Coal, which is that the trustees owe an exclusive duty to the beneficiaries, which excludes any consideration of anyone else, including employers.

Now, the trustees also have a duty to ensure full funding, and while it is quite true, as the PBGC points out, that they may not get sued in any individual withdrawal liability case for having failed to collect the maximum, if they don't perform their duty over a period of time to ensure full funding they have got a risk, and they have got a risk of personal fiduciary liability. That is what they are there for, is to protect the beneficiaries by ensuring full funding. And in that sense this case is just like Ward versus Monroeville, were the mayor had executive responsibility for the finances of a town. These trustees have executive responsibility for the finances of the plan.

Now, second, the employer trustees have an adverse financial interest, and the PBGC concedes that. The PBGC at Page -- at -- I am sorry, it is not in its

brief, it is in a Federal regulation which is cited in our brief at Page 14, it is 50 Federal Register 34680, PBGC says, "Interests of employers that will withdraw in the future are materially different from those of employers who will not withdraw." Now, it is not hard to see why. The more that the staying employers can assess from the leaving employers, the less the staying employers are going to have to pay of that liability. There is 100 percent of the liability. If they can collect a greater percentage of it from the leavers then they will have less to pay in the future.

QUESTION: Mr. Taylor, even if you are right on the bias question, explain to me again if you would why it is unconstitutional for Congress under 1401(a)(3)(B) to place the burden of proof on the withdrawing employer on the unreasonableness of actuarial assumptions --

MR. TAYLOR: Precisely because --

QUESTION: -- before the arbitrators.

MR. TAYLOR: Precisely because, Your Honor, the determination of those assumptions is made ex parte by individuals who lack impartiality.

QUESTION: Yes, but I don't understand why Congress couldn't place the burden of proof of unreasonableness on the withdrawing employer. Now, I can

understand your argument under (a)(3)(A) if there is some fact issue being decided by a biased decisionmaker, but I frankly don't understand it under B as to the actuarial assumptions.

MR. TAYLOR: Your Honor, I will agree with the Court's suggestion that the harm under B is less than the harm under A. That certainly is a permissible view of it. But the harm is still there. And the harm is that -- the harm is less because of this range of reasonableness which certainly is reasonable for Congress to have imposed.

QUESTION: May I ask this, Mr. Taylor?

MR. TAYLOR: Yes.

QUESTION: Would you still be complaining if you had entered this plan after the statute was passed so that you knew, every employer knew when he went in if I am the first one out this is what is going to happen? It seems to me, you know, that is a contractual risk you have taken, just as if you went into a private contract in which there were some provision that penalized in one way or another the first member of the contract to depart.

MR. TAYLOR: Your Honor, I think that analysis applies. The answer is, yes, I would still be complaining, and I think the reason is that that

analysis applies only if you can say that we are trying to get the benefits of this statute and therefore must take its burdens as well, as in, for example, Arnette v. Kennedy, involving Civil Service dismissal. We would be happy not to have the statute at all. We are not trying to claim the benefits of it, and we would not be trying to claim the benefits of it even if we had joined it after the effective date, which we did not. We were predecessor -- we were -- this employer was part of this plan before this statute was enacted, and renewed its contract, by the way, in December of 1980, but that makes no difference because it couldn't have withdrawn without getting the liability.

QUESTION: I don't know what you mean when you say you are not trying to get the benefits of it.

MR. TAYLOR: We are not trying to get -- no employer is trying to get the benefits of this statute. If an employer joins one of these plans he joins it because the union insists and he faces a strike if he doesn't. In other words, it is something that comes out of --

QUESTION: Well, but you know, people always enter contracts for reasons of economic necessity. That is why people enter contracts.

MR. TAYLOR: Yes, but what I am suggesting,

Your Honor, is that this is not a contractual liability. It is a statutory liability.

QUESTION: It is a statutory description of what happens if you enter a certain kind of contract, and if you choose to enter that kind of contract, it seems to me it is no worse having what you consider unjust procedures attached to your departure than it would be to have, let's say, a penalty attached to your departure, and when you go into the contract you say, well, that is bad for me if I am the first out, but it is good for me if I am the last out, and you know, I will take it.

MR. TAYLOR: I think what the Court is suggesting is either a consent or a waiver argument, and I would invite --

QUESTION: Well, this pertains to your facial challenge. You are asking us to strike the whole thing down. Maybe it is valid as to those who entered into these agreements after the statute was passed but not invalid as to everybody else.

MR. TAYLOR: This Court's opinions, Overmeyer v. Freckam and others, say that a waiver of procedural due process rights must be clear and unmistakable. It must appear on the face of the contract. It must not be a contract of adhesion. The Court said that in Fuentes

v. Chevon. If this is consent at all, if this is waiver at all, it is a waiver of adhesion.

QUESTION: Oh.

MR. TAYLOR: It is not a knowingly --

QUESTION: All provisions you enter into under coercion of strike threat are adhesion contracts?

MR. TAYLOR: Exactly. Exactly.

QUESTION: Wow.

MR. TAYLOR: Exactly. This is not a clear -- there is no clear and unmistakable waiver that you can apply to all employers who first enter a plan after the statute was passed, I suggest, unless they say that more explicitly than simply signing a union contract that calls for contributions to a pension plan. Again, this is not like Arnette v. Kennedy, which describes a very narrow exception, that you waive your procedural due process rights to have your liability fairly determined and impartially determined when you take the benefit of a government job. This is not like that at all. There is no benefit to the employer in this statute.

QUESTION: No, but it is a contract. I mean, whether there is a benefit or not, the government said, look, in the future, when you enter into this kind of a contract, this is what happens, and you have fair notice, and you chose to enter into that kind of a

contract.

MR. TAYLOR: I would respectfully suggest the clear and unmistakable waiver analogy ought to apply here.

QUESTION: Clear and unmistakable.

MR. TAYLOR: Yes, and also the contract of adhesion is important in Fuentes and in Overmeyer v. Shick.

Just briefly, the Union has an adverse -- the Union trustees have an adverse personal interest because they have very often been embroiled in the underlying controversy that has led to the withdrawal, such as a strike or a decertification of the Union by the employees. And therefore they are like the judge in Aetna v. Lavoie decided here last year. Now, under those circumstances there is no need for a special showing of bias. As Aetna said, you don't need to decide whether in fact someone is biased; whether in fact there is a conflict of interest, but only whether there is a possible temptation by the average person. Withrow v. Larkin said that bias or conflict of interest is systemic where experience teaches that probability is too high.

Now, let me suggest that labels do not save this presumption. The critical defect in this

presumption is ex parte determination by a person who is not impartial without any de novo review. An ex parte bias is not a substitute for evidence, no matter what sort of a presumption label you put on it. If you say that it simply establishes a prima facie case, it is still a biased or conflict of evidence prima facie case.

If you simply say it shifts the burden of persuasion, it shifts it because of bias or conflict of interest, and that is not permissible either.

QUESTION: Is it unconstitutional for the Revenue Code to give the government a presumption that assessments are valid?

MR. TAYLOR: Your Honor, that is a different case. The IRS is collecting tax for the government as a whole, not for the IRS, so it is not like Jericho, Marshall v. Jericho. The agents, the IRS agents by IRS regulation are not evaluated on results. That is prohibited. And finally, finally --

QUESTION: No, but their client has the same interest as the trustee's client has here. The client wants the money. He wants a presumption to shift the burden to the other side.

MR. TAYLOR: Well, Your Honor, the IRS is one agency. The distinction that this Court made in

Marshall v. Jericho was that even though the money was going to the agency, it was not going in any particular proportion to results. Here the money isn't even going to the agency. In Marshall v. Jericho the Court found that distinction to be important. I am suggesting here that Jericho certainly solves the tax case.

QUESTION: Yes, but supposing you had a statue that said in big stores like Woodward and Lothrop when they send out their bill we will presume it is correct but the customer has to pay it unless he can prove it is wrong. Would that be unconstitutional?

MR. TAYLOR: I think it would.

QUESTION: You do?

MR. TAYLOR: I certainly think it would.

QUESTION: You think the burden must fall -- the Constitution requires in all civil litigation the burden must be on the plaintiff?

MR. TAYLOR: Unless Congress adjudicatively determines some particular presumption, such as in Usery v. Turner Elkhorn --

QUESTION: Or in here they say --

MR. TAYLOR: -- where Fact A can be presumed from Fact B. Here Congress has determined nothing in particular. Congress has not exercised a legislative policy judgment at all that any particular fact flows

from any particular other fact. It is whatever the trustees of this plan decide to determine, that is presumed correct. That is all that Congress has said here. Congress has not looked at any particular fact situation.

Now, to get back to the tax question, the final distinction there is that the IRS regs provide for an impartial internal appeal to the Office of Appeals which is managed completely separate from the field agents. They are an entirely different chain of command, and by regulation says it must be impartial.

QUESTION: But if it didn't have that would it be unconstitutional?

MR. TAYLOR: If they didn't have that?

QUESTION: Yes. Is that your position?

MR. TAYLOR: In order to finish going through a couple more points I would like to say that since they have it and since that reg itself points out, I think maybe the best answer is the reg itself. I am looking at 26 CFR, Section 601.106, Rule 1, which says, "An exaction by the United States Government which is not based on law, statutory or otherwise, is a taking of property without due process of law in violation of the Fifth Amendment to the United States Constitution. Accordingly you must be scrupulously careful to be

impartial."

I think the IRS regs suggest that it would otherwise be unconstitutional.

QUESTION: Touche.

(General laughter.)

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Taylor. Your time has expired.

MR. TAYLOR: Thank you.

CHIEF JUSTICE REHNQUIST: Mr. Ford, you have four minutes remaining.

ORAL ARGUMENT BY GARY M. FORD, ESQ.,

ON BEHALF OF THE APPELLANTS - REBUTTAL

MR. FORD: Thank you, Mr. Chief Justice.

Let me note at the outset an important concession that counsel made, and that is that one of the three fundamental bases of the Third Circuit's decision, that is, that the allocation method selection by the trustees was an adjudicative decision, was incorrect, and the appellees agree with the PBGC that it is not an adjudicative decision.

Also, the appellees have largely conceded the actuarial matter. They have noted that the standard, the substantive standard enacted by Congress was reasonable. They have noted further that in answer to a question that there may be a case by case determination

of the actuarial interest rate. We respectfully disagree. This case does not present those facts. We are aware of no plan in which the actuarial work has been anything other than planwide and applied evenhandedly to all withdrawn employers.

And the statute itself says that they may use the same assumptions for withdrawn employers as they use for ongoing employers, and the Controller General's report states that about two-thirds of them do just that.

Now, as to the application of exemption provisions in formulating the initial claim of the plan we would respectfully suggest that this case involves much more limited discretion on the part of the trustees than, for example, the administrator in Marshall against Jericho, who applied broad standards in formulating, determining whether there had been a violation of the child labor laws in formulating claims under the child labor laws.

There are detailed provisions set forth in what the Court has called before this comprehensive and reticulated statute, and the suggestion that in merely formulating a civil claim, not deciding one, but formulating one, that they are transformed into judges or like judges, would surprise both the trustees and

most of the parties to these plans as well as the agency.

Now, finally, as to bias, there is no full funding requirement for these plans. There is a mechanical rule set forth in Section 412 of the Internal Revenue Code, and if they meet that mechanical rule or if they obtain a waiver from the rule from the IRS, they have satisfied the basic funding requirements for a pension plan. So standing alone, full funding is not a requirement for a fiduciary under one of these plans and therefore there is not -- that may explain why in all the life of the statute there has not been a single suit brought challenging the decisions of the trustees and formulating these withdrawal liability claims.

The notion that they are somehow exposed to suit as fiduciaries for funding or other reasons in formulating a withdrawal liability claim is something that occurs entirely in the realm of theory.

Now, they have no pecuniary or personal interest of the sort this Court has found offensive in the past. They receive salaries if they are paid at all that are not contingent upon their performance in collecting withdrawal liability claims. Withdrawal liability is typically a very small percentage of the revenues of the plan. They have an interest and bias,

if you will, in carrying out faithfully the provisions of law that Congress has assigned them to carry out. No different from the school board in the Hortonville School District case, and no different from the optometric board in Freeman against Rogers, where this Court has upheld the choice of the state legislatures in assigning that task to people who believe in that law and will faithfully carry it out.

And the suggestion that they bring to their job as trustees, as fiduciaries, personal interests as employers or as unions is unsubstantiated on this record, and reads into oblivion this Court's decision in the Amax Coal Case, which in fact trustees generally truly endeavor to follow.

CHIEF JUSTICE REHNQUIST: Thank you., Mr. Ford. The case is submitted.

(Whereupon, at 2:51 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

derson Reporting Company, Inc., hereby certifies that the tached pages represents an accurate transcription of lectronic sound recording of the oral argument before the preme Court of The United States in the Matter of:

86-231 - PENSION BENEFIT GUARANTY CORPORATION, Appellant V. YAHN & McDONNELL, INC., ET
and

86-253 - UNITED RETAIL AND WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION P
Appellants V. YAHN McDONNELL, INC., ET AL.

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BY Paul A. Richardson

(REPORTER)