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Labor Law—Unemployment Compensation—Work-Share Contracts.—Department of Labor & Indus., Bureau of Employment Security v. Unemployment Compensation Bd. of Review

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Judge McQuillin cites cases on the construction of pension statutes which disfavor a strained and unreasonable construction[40] and urge that the construction should protect *both* the municipality and the employee.[41]

> . . . the courts will consider the obvious purposes and objects sought to be attained and will construe the language used, . . . to the end of giving it vitality and efficiency in the accomplishment of such purposes and objects. [Citations omitted.] Pension acts should be so construed as to avoid an inequitable result . . . favoring one member over another.[42]

Pension planning is a long-range proposition. It seems unrealistic to expect social legislation of the type here in question to be effective and, at the same time, changeless and self-sustaining, over a period exceeding two decades. Such an expectation seems unmindful of the rapid advances in the social and economic order on which that legislation is founded. It seems strange and strained to require actuarial precision from policy legislation.

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Labor Law—Unemployment Compensation—Work-Share Contracts.—***Department of Labor & Indus., Bureau of Employment Security v. Unemployment Compensation Bd. of Review.***[1]—Claimant Lybarger, a chain machine operator for Talon, Inc., was represented by Local 591 of the International Ladies Garment Workers Union. The union employed a normal seniority system until 1961, when economic conditions required that Talon reduce its labor force. Instead of permanently releasing some chain machine operators, union and employer agreed, through the collective bargaining process, upon a "work-share"[2] plan under which the available work would be apportioned among all of the operators. The workers with seniority (seniors) would perform all the work until they earned $5,000, at which time the remaining workers (juniors) would replace them.[3] Lybarger had grossed $5,000 by October 1, 1961, when, pursuant to the plan, he was laid off despite his expressed desire to keep working. He then applied for unemployment

[40] McQuillin, supra note 24, § 12.143, at 596, citing Nelson v. City of Sioux Falls, 72 S.D. 73, 30 N.W.2d 1 (1947).

[41] Id. at 597, citing People v. Swedeberg, 351 Ill. App. 121, 113 N.E.2d 849 (1953).

[42] Ibid.

[1] 211 A.2d 463 (Pa. 1965)

[2] Theodore, Layoff, Recall, and Work-Sharing Procedures, 80 Monthly Lab. Rev. 329, 334 (1957).

[3] The contract provision read:

> Employees with sufficient seniority to remain at work shall be kept as operators until the pay period when their gross earnings received from the company since January amount to five thousand dollars ($5,000), plus-or-minus fifty ($50) dollars. Such operators will then go on lay-off for the remainder of the year or until all younger operators have been recalled, and additional ones are required in seniority order.

Supra note 1, at 464.

benefits under the Pennsylvania Unemployment Compensation Law.[4] The Bureau of Employment Security denied him benefits on the grounds that he was voluntarily unemployed[5] and unavailable for work.[6]

The Supreme Court of Pennsylvania, on a 4 to 3 decision, HELD: Lybarger's claim that he left work involuntarily was barred by the collective bargaining agreement provision that seniors be laid off upon earning $5,000. Since he was thus disqualified by the voluntary quit clause,[7] the issue of Lybarger's availability for work was not reached.

The majority considered the collective bargain in determining Lybarger's volition because it preferred an agency theory of collective bargaining.[8] Emphasizing the union's role as exclusive bargaining agent for all its members, the majority held the properly ratified agreement to be the voluntary undertaking of each union member.

The dissenters maintained that the "factual matrix"[9] at the time of separation, rather than the collective bargain, should be conclusive of the worker's volition—since Lybarger desired to continue working, he could not be classified as a voluntary quit.

The majority's determination of Lybarger's volitional status can be criticized on conceptual and precedential grounds. For a proper conceptual analysis, the opposing theories of the majority and dissenters should be examined.

Jurisdictions adhering to the agency theory of the majority, thus holding the bargain to be determinative, maintain that (1) since each member of the union has authorized it to represent him at the bargaining table, the resultant contract is his own undertaking,[10] (2) a refusal to bind an individual employee by a particular term would result in the destruction of the principle of collective bargaining,[11] and (3) the worker who accepts the bene-

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[4] Pa. Stat. Ann. tit. 43, §§ 751-882 (1964).

[5] Pa. Stat. Ann. tit. 43, § 802(b)(1) (1964) provides:
An employee shall be ineligible for compensation for any week—
. . . .
(b)(1) In which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature . . . .

[6] Pa. Stat. Ann. tit. 43, § 801(d) (1964) provides:
Compensation shall be payable to any employee who is or becomes unemployed, and who—
. . . .
(d) Is able to work and available for suitable work. . . .

[7] Pa. Stat. Ann. tit. 43, § 802(b)(1) (1964)

[8] 44 Va. L. Rev. 1343, 1346 (1958).

[9] Gianfelice Unemployment Compensation Case, 396 Pa. 545, 551, 153 A.2d 906, 909 (1959).

[10] Ball Bros. v. Review Bd. of Ind. Employment Security Div., 189 N.E.2d 429 (Ind. App. 1963); Standard Oil Co. v. Review Bd. of Ind. Employment Security Div., 119 Ind. App. 576, 88 N.E.2d 567 (1949); Kentucky Unemployment Ins. Comm'n v. Reynolds Metals Co., 360 S.W.2d 746 (Ky. 1962); Bergseth v. Zinsmaster Baking Co., 252 Minn. 63, 89 N.W.2d 172 (1958).

[11] Ball Bros. v. Review Bd. of Ind. Employment Security Div., supra note 10, at 431; Bergseth v. Zinsmaster Baking Co., supra note 10, at 70, 89 N.W.2d at 175.

fits of union membership should not be permitted to reject its occasional detriment.[12]

The minority factual matrix position finds support in jurisdictions which determine volition by looking to the actual intent of the employee at the time of separation.[13] These courts reject the agency approach in light of legislative intent that application of voluntary quit provisions be limited to separations where the decision to go or stay lies with the worker alone.[14] Since a mere majority of employees can determine what the collective bargain shall provide, these courts cannot conclude that the worker's "decision" was his own.

It is submitted that the factual matrix approach is proper in this case. The primary aim of unemployment compensation legislation is to aid unemployed workers.[15] The courts have long recognized this principle and have attempted to advance it by liberally construing benefit provisions and strictly construing disqualification provisions.[16] Thus, it can be said that there is a reluctance to deny, or a desire to grant, benefits whenever possible. Once this intent is recognized, a court should look beyond a disqualifying collective bargain to subjective intent, if it does not in the process disrupt the agreement as a means of promoting employer-employee harmony.

Not all of the provisions of a collective bargain are relevant to this harmony. If subjective intent were held to override the contract on such matters as wages and working conditions, the contract would be meaningless because of its very lack of collectivity. Such is not the case, however, with terms relating to unemployment compensation. The employer has no stake in one no longer in his employ and is comparatively indifferent to the individual's eligibility for benefits. Therefore the agency approach should be used by courts in most collective bargaining situations, but no reason can be seen for refusing to treat a term as exceptional when it relates to unemployment compensation and allowing subjective intent to control.

This conceptual analysis finds further support in the *Gianfelice Unemployment Compensation Case*,[17] a prior decision rendered by the present court. Gianfelice was subject to a collective bargaining agreement which provided that an employee, upon reaching age sixty-eight, could continue to work

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[12] Standard Oil Co. v. Review Bd. of Ind. Employment Security Div., supra note 10, at 581, 88 N.E.2d at 569.

[13] Reynolds Metals Co. v. Thorne, 41 Ala. App. 331, 133 So. 2d 709 (1961), cert. denied, 272 Ala. 709, 133 So. 2d 713 (1961); Employment Security Comm'n v. Magma Copper Co., 90 Ariz. 104, 366 P.2d 84 (1961); Campbell Soup Co. v. Board of Review, Div. of Employment Security, 13 N.J. 431, 100 A.2d 287 (1953).

[14] Id. at 435, 100 A.2d at 289.

[15] General Elec. Co. v. Director of Div. of Employment Security, 207 N.E.2d 289, 291 (Mass. 1965); Nunamaker v. United States Steel Corp., 2 Ohio St. 2d 55, 57, 206 N.E.2d 206, 207-08 (1965); Milwaukee Transformer Co. v. Industrial Comm'n, 22 Wis. 2d 502, 511, 126 N.W.2d 6, 12 (1964).

[16] Tennessee, Coal, Iron & R.R. v. Martin, 33 Ala. App. 502, 504-05, 36 So. 2d 535, 536 (1948), aff'd, 251 Ala. 153, 36 So. 2d 547 (1948); Nordling v. Ford Motor Co., 231 Minn. 68, 76-77, 42 N.W.2d 576, 581-82 (1950); Puget Sound Bridge & Dredging Co. v. State Unemployment Compensation Comm'n, 168 Ore. 614, 620, 126 P.2d 37, 40 (1942).

[17] Gianfelice Unemployment Compensation Case, 396 Pa. 545, 153 A.2d 906 (1959).

only with the employer's consent. Gianfelice applied for unemployment compensation when his employer refused this consent. The court awarded benefits, holding that the collective bargaining agreement was not determinative of the claimant's volition because the circumstances surrounding the collective bargain would not support a conclusion that Gianfelice intended to quit. It focused instead on his subjective intent at the time of separation and, since he had expressed a desire to continue working, concluded that he was an involuntary quit.[18]

The majority in the instant case attempted to distinguish *Gianfelice* on the purposes and effects of the collective bargaining agreements. It pointed out that in the present case unemployment is intentionally created, the employer and union are attempting to use the common fund to serve their own ends, and there is a recurrent systematic removal of capital from the fund.[19] Although these distinctions may exist, they do not avoid the thrust of *Gianfelice*. The problem with which *Gianfelice* was concerned exists in the instant case if the surrounding circumstances indicate that the terms of the collective bargain are being used to impute an intent to quit where none exists in fact.

Do the facts surrounding the collective bargain indicate that Lybarger intended to quit in accordance with the terms of the bargain? Clearly the answer is no. Lybarger could gain nothing by the agreement and in fact lost three months' work. Only a motive of magnanimity could support an intent to quit and no such motive can be inferred here. Since the facts fail to evidence an intent coextensive with the terms of the agreement, *Gianfelice* requires that the court ignore the bargain and focus on the individual's intent at the time of separation. Therefore Lybarger's expressed desire to continue working should preclude his classification as a voluntary quit.

However, Lybarger's status as an involuntary quit should not automatically lead to an award of benefits. A consideration of the unique policy problems presented by work-share plans is necessary.

Two problems embodied in work-share arrangements which weigh against awarding benefits are (1) an allowance of benefits may promote a scheme by which employer and union could use the fund for their own gain,[20] and (2) an award of benefits results in an added drain on the fund which may threaten its solvency.[21]

Unemployment compensation is not intended to subsidize the employer in the operation of his business nor the union in the protection of its members.[22] Payments to work-share participants may, however, have this result because both union and employer receive substantial benefits themselves. The employer retains the total work force and the latter is better trained because

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[18] Id. at 551-52, 153 A.2d at 910.

[19] Supra note 1, at 468-70.

[20] Supra note 1, at 469-70.

[21] Supra note 1, at 469; Walker, Unemployment Insurance and Current Unemployment Problems: Work-Sharing—An Answer, 16 Lab. L.J. 243, 250 (1965).

[22] E.g., Md. Ann. Code art. 95A, § 2 (1964); Pa. Stat. Ann. tit. 43, § 752 (1964); Wash. Rev. Code Ann. § 50.01.010 (1962).

the juniors, afforded a chance to work increase their skills.[23] The Union maximizes income from dues because its membership is not depleted.

Since the Pennsylvania Unemployment Compensation Law limits to thirty weeks the period over which an individual can collect benefits,[24] the work-share plan results in an added drain on the fund. If the normal seniority system were in effect, the seniors would be employed for the entire year and the juniors would become ineligible for benefits after thirty weeks. Under the plan, however, the juniors return to work shortly after they become ineligible. Thus, whenever the juniors exhaust their eligibilty, any payments to the seniors are over and above what normally would be exacted from the fund.

This added drain should be examined for its effect on other parties with interests in the fund: other employers who finance it, other workers who may in the future apply for benefits, and the community which depends on the payments from the fund to reduce the depressionary effect of unemployment on the economy.[25]

An employer's contribution to the fund is based on the amount of use *his own* employees make of it.[26] The amount collected by the employees of others would seem to have no adverse effect on him. If, however, the increased drain continues unchecked for any substantial period, all employers might be required to increase their contributions in order to preserve the fund.

It is clear, moreover, that disbursements affecting the solvency of the fund work to the disadvantage of both the workers who may later need benefits and the community which depends on the purchasing power of those workers.

A court in a work-share case may decide that the foregoing considerations militate against awarding benefits. On the other hand, it may be convinced that the claimant's need outweighs these considerations. If the court adopts the latter course, and the legislature wishes to continue awarding benefits to work-share participants, the problem inevitably becomes one of how to finance the plan. The burden of compensating for the excess outlay could be imposed on the business community or the employer and the union (separately or jointly).[27]

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[23] Supra note 1, at 469 n.15.

[24] Pa. Stat. Ann. tit. 43, § 804(e) (1964); United States Department of Labor, Bureau of Employment Security, Comparison of State Unemployment Insurance Laws as of August 1954, at 70 (1954). Maximum weeks of benefits vary from 16 to 26½ weeks, most frequently 26½ weeks.

[25] Walker, supra note 21, at 244.

[26] United States Department of Labor, Bureau of Employment Security, supra note 24, at 17:

> All state laws have in effect some system of experience rating by which individual employers' contribution rates are varied from the standard rate on the basis of their experience with unemployment risk.

See also Comment, 53 Mich. L. Rev. 849, 851-52 (1953).

[27] One writer has proposed that the employees who share the work divide the benefit that would have been paid to them if the employer had reduced his work force by permanent layoffs. Compare Wettick, Modifying Unemployment Compensation Acts to Remove Obstacles to Work-Sharing, 15 Lab. L.J. 702 (1964), with Walker, Unemployment Insurance and Current Unemployment Problems: Work-Sharing—An Answer, 16 Lab. L.J. 243 (1965).

There seems to be no good reason for increasing the contribution of all employers to offset payments which result from a plan intentionally created by one of them. A more equitable solution would be to assess the employer or the union, whichever was the proponent of the plan, for the deficit. However, legislation to this effect would be unworkable since, due to the complexities of the collective bargaining process, the proponent can seldom be ascertained.

Perhaps the cost could be borne by the employer on the theory that such a plan is a type of fringe benefit and that the employer is in a better financial position to bear the expense. By so excluding the union from contributing, this method protects the seniors from the inequitable burden of sharing in the cost of work-share. But, conversely, in many instances, this plan may result in the inequity of imposing the total cost upon an employer who did not favor the plan.

Alternatively, the cost could be divided between both the union and the employer. Under such a plan, the proponent of necessity would be bearing at least part of the expense, and the inequity of the opponent subsidizing a plan he did not want would be mitigated by the benefits he receives under work-share.

It seems that the court actually disqualified Lybarger because it was convinced that his need did not outweigh the policy problems inherent in work-share. If this is the case their *result* cannot be criticized. But a more direct and defensible approach would have been to admit that Lybarger was an involuntary quit and then to set forth the policy problems as their basis for disqualification.

DAVID T. GARVEY

Trade Regulation—Section 7 of the Clayton Act—Conglomerate Acquisitions—"Deep-Pocket" Theory.—*Smith-Victor Corp. v. Sylvania Elec. Prods., Inc.*;[1] *Ekco Prods. Co. v. FTC.*[2]—In the *Smith-Victor* case, Sylvania greatly enhanced its over-all size and wealth through a series of acquisitions commencing in 1936. In 1960, Sylvania entered the amateur photo-lighting equipment market, a line of commerce in which all the competitors were small. Smith-Victor, one of the competitors, brought this action under Section 7 of the Clayton Act,[3] alleging that the emergence of a deep-pocket competitor, Sylvania, in its line of commerce would substantially lessen

[1] 242 F. Supp. 315 (N.D. Ill. 1965).

[2] 347 F.2d 745 (7th Cir. 1965).

[3] 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), amending 38 Stat. 731 (1914). The pertinent part of § 7 provides:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.