No. 04-55594

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MANUEL MORA, on his own behalf and on behalf of all persons similarly situated,

Plaintiff / Appellant,

vs.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Defendant / Appellee..

United States District Court
Central District of California
Docket No. CV-SACV-03-0471-JVS

BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF APPELLEE'S OPENING BRIEF

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INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The National Coordinating Committee for Multiemployer Plans ("NCCMP") is a nonprofit, tax-exempt organization that has participated for over a quarter of a century in the development of employee benefits legislation and regulations promulgated to implement the Employee Retirement Income Security Act of 1974 ("ERISA" or "Act"), 29 U.S.C. §§ 1001-1169, as amended, and other laws affecting multiemployer plans, including the participation standards mandated by ERISA and the regulations promulgated by the Secretary of the Department of Labor ("Secretary"). Currently, 311 multiemployer pension plans are affiliated with the NCCMP. These affiliated plans cover a majority of the participants in multiemployer plans throughout the nation and are representative of the multiemployer plan community generally. The NCCMP has frequently participated as *amicus curiae* in the United States Supreme Court and the federal courts of appeal.

Multiemployer plans provide pension, medical, savings plans, vacation, and other benefits for millions of American workers. Multiemployer pension plans alone cover some ten million workers, one-fifth of all American workers with pension plans.[1] By law, these plans are administered by boards of trustees comprised of individuals appointed half by labor and half by management; each trustee owes a duty of loyalty to plan participants and beneficiaries. The well-being and security of employees, retirees and their dependents are directly impacted by multiemployer pension plans, and interference with the maintenance, growth, and actuarial soundness of such plans is deemed to be contrary to the national public interest. 29 U.S.C. §§ 1001(a)(1), (3) and (c)(2).

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[1] *See*, Harriet Weinstein and William J. Wiatrowski, *Multiemployer Pension Plans, Compensation and Working Conditions*, 23 (Spring 1999).

The NCCMP and its members have a strong interest in urging the Appellate Court to affirm the judgment of the District Court in this matter. Multiemployer pension funds nationwide and the unions and employers that sponsor them have, for decades, interpreted the Department of Labor's hours of service regulations in the same way as has the Construction Laborers Pension Trust for Southern California ("CLPT" or "Pension Plan") and have never provided pension vesting or benefit credits for "vacation" benefit distributions from related multiemployer vacation savings trust funds. These pension funds and the unions and employers that sponsor them have therefore never required employers to fund for the liability that would accompany a requirement that the plans do provide such pension benefit or vesting credits.

The estimated unfunded liability of the CLPT that would be created by providing hours of service credit for distributions from the Construction Laborers Vacation Trust for Southern California ("Vacation Trust") is nearly $100 million. Appellant's Opening Brief, at 8. Nationwide, the unfunded liability of funds which would be similarly impacted could be billions of dollars.

The damage to these funds and the collective bargaining parties that maintain them cannot be overstated. Years of increased hourly contributions into the pension funds would be required to meet these new unfunded liabilities. Because employers making such contributions are "for profit" enterprises competing in an open marketplace against employers who do not sponsor such plans, they cannot simply pay the extra millions necessary. The employers will negotiate to take the money from funds that would have gone to the wages or to medical or other benefits of their current employees. If increases in contributions are not negotiated, the pension funds will have to reduce benefits by reducing future accruals. Again, the burden will fall on current employees. Either benefits would have to be reduced, future benefit increases delayed, or additional contributions required. The impact of

any of these options will be entirely on those working today and on their current employers who are paying for their current labors. Of course, to the extent the unions ask contributing employers to shoulder the burden, this will increase the costs of doing business, the result being a disincentive for employers to join or remain with these plans. Any reduced employer participation further increases the costs of maintaining these multiemployer plans on participating employers and, in turn, the longevity and long-term stability of these plans are put at risk.

ARGUMENT

I.

The CLPT's Treatment Of Benefits From The Vacation Trust As Not Requiring The Award Of Hours Of Service Credits Is In Accord With The DOL Regulations, The Understanding Of The NCCMP And Its Multiemployer Plan And Plan Sponsor Members, And Thirty Years Of Practice Within The Multiemployer Plan Community.

The Construction Laborers Vacation Trust for Southern California ("Vacation Trust") was established in 1965 through the joint collective bargaining efforts of employer associations and the Southern California District Council of Laborers and the Laborers International Union of North America AFL-CIO (collectively, the "Union"). Appellee's Opening Brief, at 5. While the Vacation Trust referenced the goal of providing Union members with funds to provide for vacation leave or use as the members otherwise saw fit, the source of the funds was to be drawn not from employer contributions but from the members' wages paid for hours worked. Thus, when employees contribute to the Vacation Trust, they contribute a portion of their own wages which the employees have determined through their collective bargaining representatives to set aside until these sums are returned later in the year along with any investment income. As such, the benefits distributed from the

Vacation trust to participating employees is a return of their wages already paid and is not monies paid to the employee by the employer for the nonperformance of duties. The fact that the Vacation Trust is funded by employee contributions was spelled out in the Vacation Trust itself and subsequently validated by determinations of the Internal Revenue Service and state taxing authorities. *Id*., at 5.

More than a decade after the Vacation Trust was created, the Department of Labor ("DOL") promulgated its "hours of service" regulations pursuant to ERISA. The regulations relevant to these matters state:

> (1) An hour of service is each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer during the applicable computation period.
>
> (2) An hour of service is **each hour for which an employee is paid**, or entitled to payment **by the employer** on account of time during which no duties are performed (irrespective of whether the employment relationship has terminated) due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence.

29 C.F.R. § 2530.200b-2(a) (emphasis added). Having previously determined that the benefits from the Vacation Trust are not payments to employees by employers but are, instead, returns to employees of a portion of wages already paid for hours worked, the CLPT determined that hours of service credit under the Plan of the CLPT were not required for benefit distributions from the Vacation Trust.

The NCCMP believes that the interpretation of the hours of service regulation by the CLPT is correct. Employee participants contribute to the Vacation Trust for each hour they work. The contributions come out of the wages for that hour. Thus, the wages, although perhaps expected to be used at some later time when an employee is not working, are monies that have been paid to the employee for hours in which the employee worked. Nothing in the hours of service regulations or ERISA negates this arrangement.

The NCCMP has been the principal national voice of multiemployer pension plans for approximately thirty years and is familiar with the operation of these

funds. The NCCMP's experience has been that the accepted understanding nationwide of the hours of service regulations is that the regulations would not cause pension plans to award hours of service credits for distributions from related vacation or savings trusts funded by employee contributions. Instead, the general view has been that the hours of service regulations would be interpreted in the same manner as the interpretation of the CLPT. Accordingly, multiemployer pension plans across the country have not interpreted the hours of service regulations as requiring the award of pension credits based on distributions from a related vacation trust. This remains unchanged for nearly thirty years.

Plaintiff attacks the application of the hours of service regulations by the CLPT and the multiemployer pension plan community primarily on the grounds that an "hour of service" was intended to be construed broadly. Yet, even if this is so, this does not mean that an "hour of service" should be construed to include payments to employees which simply do not fall within the definition of the regulation or permit the same wage payment to be counted twice. The benefits paid from the Vacation Trust are the result of employee contributions from wages already paid for hours the employee worked. The CLPT provides hours of service credit for those hours worked or paid. To award additional service credits would not be the result of a broad construction of the regulation but would be a departure from the language of the regulations altogether.

II.

Vacation Trust Payouts of Benefits Cannot Be Considered To Be Employer Payments For Hours Where No Work Is Performed Because The Vacation Trust Functions As A Savings Account Funded By Employee Contributions.

In addition to asking for an overly broad interpretation of the hours of service regulations, Appellant and the class claim they are entitled to hours of service for benefits distributed from the Vacation Trust because the language of the plan of

the Vacation Trust refers to payments made for "vacation". This argument is unpersuasive. First, it lacks any precedential support. But more importantly, it ignores the actual functioning of the Vacation Trust as a savings account funded by employee contributions.

In enacting ERISA, Congress declared that the private employee benefit system is "affected with a national public interest," and determined that the regulation of private employee benefit plans would be exclusively a federal concern. 29 U.S.C. § 100(a). ERISA, together with the Multiemployer Pension Plan Amendments Act, Pub. L. 96-364, Stat. 1209-1210, evidence an intent by Congress to occupy the field of employee pension plan regulation. Integral to this national regulatory framework is the assignment to the Secretary of responsibility to promulgate regulations covering various aspects of ERISA, including the regulations defining an "hour of service" for purposes of the minimum participation requirements under ERISA, the application of which is the primary consideration in this matter. 29 U.S.C. § 1052(a)(3)(C); 29 C.F.R. § 2530.200b-2.

To meet Congress' goal of providing a unitary regulatory scheme to govern employee benefit and welfare plans, it is necessary to ascertain how the plan actually functions when determining whether a pension plan conforms to the requirements of ERISA and the DOL regulations. Consideration of language from the plan itself or its governing trust agreement is only the starting point of that analysis. The number and manner in which written plans can differ is virtually endless. Terms of a plan can be ambiguous, and inevitably are. Accordingly, most trust agreements which establish multiemployer plans grant the plan trustees the power to interpret the language of the plan. The courts, in turn, are required to give great deference to plan trustees in applying the plan in a manner that conforms with ERISA's minimum requirements, generally deferring to trustee plan interpretations unless they are

arbitrary or capricious. *See, Firestone Tire & Rubber Co. v. Bruch* , 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed. 2d 80 (1989).

Thus, the national regulation of these plans intended by Congress is not limited to just the language of the plans, but instead, focuses on the functioning of the plan. Unless the language of a plan clearly contradicts the requirements of ERISA, courts must go further than a simple plan language analysis. It is the substantive manner in which employee benefit plans function that Congress intended to regulate with the passage of ERISA, and therefore, it is the substantive manner in which the plan functions that reviewing courts should consider.

If courts looked no further than the plan language to determine whether a pension plan was in compliance with ERISA, as Appellant would have this Court do, a myriad of negative consequences would result. Plans would be overwhelmed by litigation and inundated by claims of participants seizing on snippets of plan language to support their claims. The likely result would be that plans would adopt language that has been tried and tested or otherwise approved by the DOL and plan sponsors would lose all flexibility to fashion plans that meet the requirements of their particular industries.

Congress did not intend to create a singular form of multiemployer pension plan, only that plans comply with certain "minimum" participation and vesting standards. 29 U.S.C. §§ 1052-53. After the minimum standards are met, Congress left to the collective bargaining parties the power to design their employee benefit plans.

In this case, the bargaining parties have indicated through the manner in which the Vacation Trust operates that the contributions to the Trust are contributions for hours already worked by or paid to employees, not employer payments for hours where no work is to be performed. Accordingly, the language of the Vacation Trust should not impose upon the CLPT the requirement that additional hours of service be

awarded pursuant to 29 C.F.R. § 2530.200b-2(a)(2). References in the Vacation Trust to the goal of providing participants with funds for vacation do not supercede the fact that, as noted, the Vacation Trust functions as a savings plan funded by employees.

To the contrary, when considered in light of the negotiation process that resulted in the establishment of the Vacation Trust, it becomes more clear that the benefits distributions from the Vacation Trust were merely a component of the compensation paid to employees for hours they work. In general terms, Union and employer representatives engage in ongoing negotiations wherein the Union seeks to persuade employers to increase the compensation to their employees, whether it be in rate of pay, benefits, or some other form of compensation, while employers oppose that effort. A way in which Union representatives can and do seek to obtain greater compensation from employers is to couch a pay increase in other terms. Thus, if other industries and employers provided employees with paid vacations, the Union could claim that employees in the construction industry were entitled to greater hourly pay than employees in other industries to enable them to save for a "vacation." Using the term "vacation" was simply a mechanism in the collective bargaining context for identifying the rationale under which the Union asked for a greater hourly wage package. As a result, in this case, the parties created the Vacation Trust.

Thus, it is not contradictory for the Vacation Trust to indicate that the benefits are intended to provide for vacations. Indeed, the rationale supporting the wage package increase that included the establishment of the Vacation Trust was undoubtedly, in part, due to the desire of the Union and employers to permit employees to have leftover pay to use to take vacations.

However, whether the monies contributed to the Vacation Trust were for hours where work was performed and for which pension credits were given or whether the monies contributed to the Vacation Trust were for hours where no work was performed is a determination that must be made by considering how the Trust

actually functions. In the case of the Vacation Trust, the contributions came from the employees out of their hourly wage which reflects the intent of the employers that the benefits be attributable to the hours worked by employees. Thus, employers may have provided additional compensation to employees, but the employer compensation was for hours worked, not a later period of time when no duties were performed.

Ten years later, when ERISA was passed and the DOL regulations were issued, analysis of the design of the Vacation Trust and similar multiemployer plans nationwide lead to the conclusion that additional hours of service were not required. And for thirty years, this has remained the interpretation on which multiemployer pension funds have operated and been funded.

III.

Requiring Hours Of Service Credit For Distributions of Employee Savings From Vacation Trusts Will Affect The Actuarial Soundness Of Pension Plans Nationwide And Result In A Significant, Adverse Impact.

Appellant asserts that a forfeiture will occur if the Court does not interpret the hours of service regulation to require an additional award of pension benefits to Appellant. But as Appellant's Opening Brief makes clear, there is no forfeiture because, on the one hand, class members received their Vacation Trust distributions, and on the other hand, pension benefits from the CLPT have been provided in accordance with the minimum participation requirements of ERISA. Appellant therefore makes, essentially, an equitable argument, one that is eclipsed by the harm that will result if the Court requires the CLPT to award hours of service credits for distribution from the Vacation Trust.

ERISA plans like the CLPT are pooled arrangements. Some participants benefit, others do not. In this manner, ERISA contemplates that Plans will have forfeitures. For instance, pension plans are not required to award a year of service in any year where an employee is not credited with at least 1,000 hours. *See*, 29 U.S.C.

§ 1054(b)(4)(C) and 29 C.F.R. § 2530.200b-1(1). (The average participant in the CLPT works more than 1500 hours per year.) Contributions of participants who fail to qualify for a pension remain with the plan and are used to help fund vested pensions of other participants.[2] Accordingly, redrawing the line between participants who receive a particular benefit and those who do not based only on a sense of fairness would be inappropriate.

Even with a pooled arrangement and risk of loss, employees have good reason to utilize collectively-bargained plans as a mechanism for managing employee benefits. Foremost is that employees could not achieve comparable benefits negotiating on their own and without the assistance of union negotiating strength.

The NCCMP appreciates that Mora and the class argue an interpretation of the DOL hours of service regulations based upon their individual perspectives. However, other group perspectives exist that must be considered, i.e., the pool of participants in the CLPT as a whole and in multiemployer defined benefit pension plans generally; the pool of employees the Unions represent in each multiemployer negotiation and their intentions in agreeing to a periodic settlement of their wages, fringe benefits and working conditions; and, finally, the pool of employers in each multiemployer negotiation who agree to negotiated increases in their costs of doing business with the expectation that the terms of the collective bargaining agreement will be honored. That is, the compensation the employers agree to pay is compensation for the hours worked and the payment to the Vacation Plan is an employee payment from wages already paid.

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[2] If, instead, all contributions were fully vested, funds like the CLPT would be nothing more than savings accounts. Indeed, because the Vacation Trust at issue in this case is funded by employees and because their employee contributions are fully vested at the time of contribution, the Vacation trust is a kind of savings account.

If successful in their efforts to require the Pension Plan to credit hours of service for benefits received from the Vacation Trust, Mora and the appellant class will cause the Pension Plan to incur an unfunded liability of nearly $100 million. This liability must be met, either through reduced benefits or increased employer contributions. Current and future retirees will find that they receive fewer and smaller benefit increases as the CLPT adjusts its funding assumptions to account for the new liabilities imposed by any required award of increased hours of service credits. Because the Appellant class would receive increased benefits, other participants would either be denied future benefits they might otherwise receive or receive reduced benefits.

The increased liabilities of the Pension Plan will also affect contributing employers. Like the CLPT, *amici* fully understands that distressed multiemployer pension plans do not attract new employers and pose a strong disincentive for current employers to continue contributing after their collective bargaining agreements expire. Any employer contemplating participation in a multiemployer defined benefit plan must account for the fact that the contributions it makes to the plan will fund not only the pension of its own workers but the plan's entire accumulated liabilities, including the benefits of other employers' active employees, inactive employees, and retirees like the named plaintiff in this case – retirees who will not bear any of the burden of contributing to the costs of the increased plan liability. These employers must also incorporate the increased benefits costs into their costs of doing business and the resulting impact on the employers' capability to compete for construction jobs and maintain market share, especially against "non-union" employers who are not required to contribute to such plans. If employers leave the CLPT and/or new employers do not join, the CLPT will be further burdened in trying to meet the increased unfunded liability this Court's decision may impose.

More importantly, if the Appellants are successful, the Court would be establishing a precedent that would result in hundreds of millions of dollars of unfunded liability to pension plans nationwide. For the past thirty years, the industry practice of pension plans has been the same as the CLPT; they have not awarded hours of service credit for benefit distributions from related vacation trusts. *See*, Excerpts of Record (E.R.), at 557 (Declaration of Judith Mazo, Senior Vice President and Director of Research for the Segal Company, a national actuarial, benefits and compensation consulting firm serving approximately 25% of the nation's multiemployer plans).[3]

Each of these pension plans would also experience the same effects as the CLPT since current and future employees and employers would be saddled with the responsibility for funding the increased liability. The actuarial soundness of these plans will be negatively impacted. Benefits will be reduced. Employers will refuse to join or otherwise withdraw from plan participation.

In contrast, participants like Appellant will not be damaged by the Court affirming the District Court judgment in this case. This is because Appellant and the class received exactly what they paid for and were promised. They benefited from increased wages obtained through collective bargaining, wages they would not have been able to achieve through individualized negotiations with employers. They received their Vacation Trust distributions based on the amounts they contributed to the Vacation Trust. Lastly, they received pension benefits based on the amount of

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[3] Ms. Mazo conducted an inquiry of 110 Compliance Managers, Actuaries and Benefits Consultants as to whether they were aware of any pension trusts nationwide which credit hours of service for benefit distributions from an associated vacation trust. Of the 29 responses, only one indicated that such benefit or vesting credits were given. Moreover, in that one case, the hours of credit were awarded not because of the requirements of ERISA or the DOL's hours of service regulations, but because an arbitration award in 1955 resulted in such practice. E.R., at 558.

employer contributions to the CLPT and based on actuarial assumptions which did not include the award of hours of service credits for Vacation distributions. Appellant and the class have benefited greatly from their participation in the Laborers trust funds.

Thus, the relatively small increases in monthly pension benefits sought by the Appellants are not due as a matter of "fairness" or "equity." And they will come at a great and potentially grave cost if the Court adopts Appellant's application of the DOL hours of service rules.

IV.

Construction Employees Like Appellant Have Elected To Set Aside A Portion Of The Hourly Wage They Receive To Save For Periods Of No Employment.

Multiemployer plans are of particular benefit in industries like construction which are characterized by irregular employment and frequent shifts of employees between employers. Workers who would otherwise not be able to participate in a single employer benefit plan because of the brevity of their employment with any single employer have access to pension, health and welfare, and additional benefits through multiemployer trusts.

The construction industry is also generally characterized by frequent periods of down time and shortened periods of employment. Workers typically experience a "lay off" period between the completion of their trade's work on one project and the commencement of work on the next project. Because of this, wages in construction have generally been higher than other similar industries in order to compensate for periods of unemployment. Multiemployer plans such as the Vacation Trust serve a purpose here as well. The Vacation Trust, as a form of savings account, enables participants to set aside a portion of this higher wage in expectation of a period of unemployment.

In general, employers that pay vacations do so for workers who work year around. Employers understand that they benefit from motivated employees. To

maintain the motivation of employees who work all year, time off is needed. In contrast, employers who employ workers for short periods of time do not face the same need to provide their employees time off for rest, and because there is no legal obligation to provide vacation benefits, they do not.

Thus, because of the frequent periods of down time and short term employment in the construction industry, employees through their unions took it upon themselves to establish for themselves their own savings plan through funds like the Vacation Trust. Construction employees elected to create these funds with their own money, diverted by them through their own collective bargaining agreement into a type of forced savings plan.

The Appellant class should not be permitted now to complain of the collective action in which they participated through their duly designated representatives. Through a democratic process, the workers elected their union leaders, and a result of that process is that union representatives negotiate terms and conditions of employment for the Appellant and the class, including the establishment of the CLPT and Vacation Trust and the manner in which each would be funded and the benefits each would provide.

Thus, construction employers, who have no obligation to provide vacation benefits to their employees, have not done so. Instead, employers pay a higher wage for the hours worked and leave to the employees the decisions as to how to save for periods of unemployment. Indeed, as detailed by the co-chair of the CLPT and Vacation Trust, employers contributing to the CLPT have always left to the Union representing the employees the decision of how to allocate pay increases among employee wages, the Pension Trust, the Vacation Trust, health and welfare, or otherwise as the Union sees fit. However, they have not allowed the Union to increase pension benefits unilaterally. E.R., at 532.

Employers have also never agreed to provide hours of service credits above the credits given employees for the hours they work or are otherwise paid. In sum, benefits distributed from the Vacation Trust are not pay for the performance of duties. Distributions are a return of savings from a savings plan established by construction workers to meet their particular needs. Determining that hours of service be awarded for these distributions would ignore their function and alter the manner in which employers and employees mutually have chosen, through collective bargaining, to meet those needs.

CONCLUSION

For the foregoing reasons, the NCCMP respectfully urges the Court to affirm the judgment of the court below.

Dated: January 11, 2005

Respectfully submitted,

O'DONOGHUE & O'DONOGHUE

By:_____

Donald J. Capuano
Counsel for the National Coordinating
Committee for Multiemployer Plans

TABLE OF CONTENTS

PROOF OF SERVICE AND CERTIFICATION

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2049 Century Park East, 28th Floor, Los Angeles, California 90067-3284.

✶ (For messenger) my business address is 1533 Wilshire Boulevard, Los Angeles, CA 90017-2210.

On January 12, 2005, I served the foregoing document(s) described as BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF APPELLEE'S OPENING BRIEF on ALL INTERESTED PARTIES in this action by placing ✶ the original ♉ a true copy thereof enclosed in a sealed envelope addressed as follows:

Richard A. Weinstock, Esq.
Law Office of Richard A. Weinstock
353 San Jon Road
Ventura, CA 93001

On the above date:

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I hereby certify that the above document was printed on recycled paper.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 12, 2005, at Los Angeles, California.

_____
Ann Gillespie

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Page

Cases

Statutes

Other Authority