Labor and the Supreme Court: significant issues of 1989–90

In contrast to its 1988 term, the High Court's new term presents less controversial, though still important, labor issues

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On October 2, 1989, the Supreme Court opened its 1989 term. If the trend of recent years continues, the Court can be expected to hear arguments in approximately 170 of the more than 5,000 cases in which its review is sought.[1] The Court has wide discretion in determining which cases it will hear, and justices need not explain why they have agreed to hear or not to hear any particular case, although sometimes they do. Generally, a case is more likely to be reviewed if (1) it raises an issue that lower courts have decided in conflicting ways, (2) the lower court has decided an important question of Federal law that the Supreme Court has not yet had an opportunity to consider, (3) the lower court has decided a Federal question in a way that conflicts with a previous Supreme Court decision, or (4) the case presents an issue so substantial that the Supreme Court decides that its review is required.[2]

The Court has agreed to hear several labor-related cases in the new term. Although these cases do not present issues as controversial or emotionally charged as many of the labor cases decided in the Court's previous term, they include a wide range of significant labor issues.[3]

Traditional labor relations

Under the National Labor Relations Act, an employer may not withdraw recognition of a union unless the employer can show either that a majority of employees do not support the union or that it has a reasonably based good-faith doubt about the majority status of the union.[4] In *National Labor Relations Board* v. *Curtin Matheson Scientific, Inc.*,[5] the Supreme Court will decide whether an employer may presume that replacement workers it hired during an economic strike do not support the union. Lower courts are split on this issue. Some, including the Fifth Circuit in *Curtin Matheson*, hold that employers are justified in assuming that strike replacements do not support the union.[6] Others, along with the National Labor Relations Board, reject this approach and require employers to substantiate their doubts of the union's majority status through objective evidence rather than through legal presumptions.[7] The Supreme Court's decision in *Curtin Matheson* could have a significant effect on future economic strikes.

In 1986, the Court held, in *Golden State Transit Corp.* v. *City of Los Angeles*,[8] that the National Labor Relations Act[9] "preempted" an attempt by the City of Los Angeles to interject itself into the collective bargaining process of two private parties.[10] In other words, only the Federal Government, through the National Labor Relations Act, can regulate this process. Thus, the Court held that the city could not require a taxi company to settle a labor dispute as a condition for renewal of its franchise.

On remand, the taxi company sought damages from the city under 42 U.S.C. § 1983, which imposes liability on governments and their officials for causing a "deprivation of any

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rights, privileges, or immunities secured by the Constitution and laws."[11] The Ninth Circuit denied such relief, holding that section 1983 liability may be imposed only for "direct violations" of the Constitution or laws.[12] The court held that the city's actions, although preempted by the National Labor Relations Act, did not violate any direct prohibition of that act, which directly regulates only employers and unions. It is this ruling that will be reviewed by the Supreme Court in *Golden State Transit Corp*.[13]

The Court also will decide two important cases involving the rights of employees to challenge certain actions of their unions. In *Chauffeurs and Teamsters, Local 391* v. *Terry*,[14] a group of truckdrivers filed a "hybrid § 301/duty of fair representation"[15] lawsuit against the group's union and employer. The drivers claimed that the employer breached the collective bargaining agreement, thus violating section 301 of the Labor Management Relations Act,[16] when it manipulated job recall procedures to the drivers' detriment. They also claimed that the union did not adequately protect their interests in the ensuing grievance proceeding, thereby breaching the union's duty of fair representation under the National Labor Relations Act.[17] When the district court ruled that the drivers were entitled to a jury trial in their claims against the union, the union filed an interlocutory appeal with the court of appeals, which also ruled against the union. The union now has asked the Supreme Court in *Terry* to decide whether these courts were correct in holding that the Seventh Amendment right to a trial by jury[18] grants the truckdrivers the right to present their duty-of-fair-representation case to a jury.[19]

In *Breininger* v. *Sheet Metal Workers, Local 6*,[20] the Court has been asked to decide whether a worker's duty-of-fair-representation claim against his or her union may be brought in Federal district court or whether it must be brought before the National Labor Relations Board.[21] The court of appeals held that the worker's allegation that the union failed to refer him for employment through the union hiring hall was a matter within the exclusive jurisdiction of the Board.

The Court, in *Breininger*, also has been asked to decide whether the alleged discriminatory hiring hall practice can be considered improper "discipline" under the Labor-Management Reporting and Disclosure Act.[22] The court of appeals rejected the worker's claim, ruling that the practice is not prohibited under the act because the act is intended to secure only the rights of members in their status as union members. Because hiring halls may be used by union members and nonmembers alike, the court said that discriminatory hiring hall practices do not affect union membership rights.[23]

Public-sector labor relations

According to a U.S. Office of Management and Budget document, "Circular No. A-76," Federal agencies must rely on commercial products or services, unless doing so would cost more than if the agencies supplied the products or services themselves. The circular also requires agencies to establish administrative appeals procedures for resolving disputes raised by affected parties. Because its members could be affected directly by decisions to contract out for products and services, the National Treasury Employees Union asked the Treasury Department to negotiate over a union proposal to establish a grievance and arbitration process as the required internal administrative appeals procedure for resolving issues relating to contracting out. The Treasury Department refused to bargain over this proposal, and when the Federal Labor Relations Authority required it to do so, the Department appealed. In *Department of Treasury* v. *Federal Labor Relations Authority*,[24] the court of appeals accepted the union's position, holding that its proposal is not inconsistent with a statutory management rights clause giving management officials the authority to "make determinations with respect to contracting out."[25] By agreeing to decide the case, the Supreme Court will have the opportunity to resolve a split in the circuit courts on this issue.[26]

The Court will also decide whether the Department of the Army must negotiate over wages and other related benefits of some of the few Federal employees whose pay is not directly set by law. In *Fort Stewart Schools* v. *Federal Labor Relations Authority*,[27] the Army will argue that under the Federal Service Labor Management Relations Act, it has a duty to bargain only over "conditions of employment," which it will say do not include wages.[28] The Army also will argue that bargaining over wages would be improper because it would interfere with both the Army's statutory right to set its own budget[29] and a regulation that requires salaries to equal those for similar jobs in the local community. The Army did not prevail in the court of appeals.

In *Crandon* v. *United States*[30] and *Boeing* v. *United States*,[31] the Supreme Court will decide whether an employer can pay, or an employee receive, severance pay that is calculated so as to offset the financial loss the employee will incur after leaving to take a high-level Government job. The employees in these cases each received

severance pay from The Boeing Co. before beginning to work for the Department of Defense or NATO. Under Federal law, a Government official may be paid for his or her official duties only by the Government.[32] The Court thus must determine whether payments made before Government service began can be considered "compensation for . . . services as an officer or employee of the executive branch of the United States Government."[33]

If the Court decides that the Federal law applies to preemployment severance payments, it must then decide whether Boeing's payments were intended to serve as compensation for its employees' future Government service. The court of appeals found that the method Boeing used to calculate severance payments—which was tied to salary, benefits, and cost-of-living differences for Government service—and the company's stated purpose, namely, to encourage public service, showed such intent.[34] The appellate court also held that the Government does not need to show that it suffered any actual injury in order to prevail.

Pensions

The Employee Retirement Income Security Act states that pension plans "shall provide that benefits . . . may not be assigned or alienated."[35] In *Guidry* v. *Sheet Metal Workers National Pension Fund,*[36] the Supreme Court will decide whether this antialienation provision prevents a pension fund from using a former trustee's benefits to recoup money the trustee embezzled from the fund.[37]

In *Guidry,* the court of appeals held that the provision does not prohibit the assignment or alienation of a trustee-beneficiary's benefits if the fraudulent activities of the trustee-beneficiary damaged the pension fund. The court maintained that to reach a contrary result would mean that the interests of the embezzling trustee-beneficiary would be protected at the expense of the financial security of workers who rely on the pension plan, a result it said that the Congress did not intend. This issue has divided the courts of appeals that have considered it.[38]

Occupational safety and health

On November 6, 1989, the Supreme Court heard arguments in *Dole* v. *United Steelworkers,*[39] a case involving the scope of the U.S. Office of Management and Budget's authority under the Paperwork Reduction Act[40] to prevent Department of Labor workplace safety and health regulations from taking effect. The regulations in question require employers on multiemployer worksites to exchange Material Safety Data Sheets, which identify and provide information about hazardous workplace products.[41] The Office of Management and Budget rejected these regulations under its authority to determine whether they require the "collection of information" that is necessary for the proper performance of the agency's function.[42]

The court of appeals held that the Office of Management and Budget's actions were improper because the regulations required, not the "collection of information," but only its exchange, and because they amounted to "substantive policy decision making entrusted to the [Department of Labor]."[43] Because of the important role played by the Office of Management and Budget in Federal rulemaking, particularly in highly regulated areas such as workplace safety and health, the Supreme Court's decision interpreting the somewhat obscure Paperwork Reduction Act could have far-reaching consequences.

Employment discrimination

Hoffman-La Roche, Inc. v. *Sperling*[44] deals with the question of whether a Federal district court may authorize and facilitate notice to potential class members of an Age Discrimination in Employment Act[45] class action case. Under this statute, which incorporates certain powers, remedies, and procedures of the Fair Labor Standards Act, similarly situated persons may participate in a suit only if they "opt in," or consent to join the suit.[46] A court's assistance in facilitating notice can be crucial in identifying potential class members and obtaining their consents.

In *Hoffman-LaRoche,* the court of appeals held that the Fair Labor Standards Act, and thus the Age Discrimination in Employment Act, does not prohibit court-authorized notice. Such notice, the court said, gives meaning to the broad remedial purposes of the Fair Labor Standards Act. Although *Hoffman-La Roche* was brought under the Age Discrimination in Employment Act, the Supreme Court's decision in this case will have ramifications beyond age-discrimination-in-employment cases because it will also affect minimum wage, overtime, equal pay, and other cases that are brought under section 16(b) of the Fair Labor Standards Act.[47]

Workers' compensation

Two decisions of the Virginia Supreme Court construing the Longshore and Harbor Workers' Compensation Act[48] will be reviewed by the U.S. Supreme Court in *Chesapeake and Ohio Railway Co.* v. *Schwalb*[49] and *Norfolk and Western Railway Co.* v. *Goode.*[50] Because the

Longshore Act is a Federal workers' compensation law, it usually is construed by Federal, not State, courts. However, in the two cases in question, the employees, who worked on a coal-loading pier as a janitor and a mechanic, had brought cases in State court under the Federal Employers' Liability Act.[51] The Longshore Act became important only when their employers argued that the workers met the definition of an "employee" under that act, which, if that argument were accepted, would mean that they could pursue only Longshore Act remedies. The Virginia Supreme Court rejected this argument, as well as pertinent Federal appellate case law,[52] and construed the Longshore Act to cover only workers whose jobs bear a significant relationship to traditional maritime activities.[53]

The Migrant and Seasonal Agricultural Worker Protection Act[54] is a Federal law that protects the safety and health of migrant and seasonal farm laborers. Under certain circumstances, the act permits a farm laborer to sue for damages caused by his or her employer's failure to comply with its provisions.[55] In *Adams Fruit Co., Inc.* v. *Barrett*,[56] the Supreme Court has been asked to decide whether the act preempts a State workers' compensation law that purports to provide a worker's exclusive remedy for an on-the-job bodily injury.[57]

In the case at issue, several farmworkers were injured in a work-related traffic accident. Although they received State workers' compensation benefits, they also filed suit for damages against their employer under the Migrant and Seasonal Agricultural Worker Protection Act.[58] In the suit, they claimed that their employer violated the act by transporting them in an unsafe vehicle, which caused the accident and their injuries. The employer sought to have the suit dismissed, arguing that the workers were entitled only to receive State workers' compensation benefits. The trial court agreed with the employer, but the court of appeals reversed the decision, holding that the "full purposes and objectives of Congress" in enacting the Federal law would be frustrated if workers were afforded only State law remedies.[59] Thus, the appellate court held that the Migrant and Seasonal Agricultural Worker Protection Act preempted Florida's restrictive statute. The Supreme Court will decide whether this decision was correct.[60] □

Footnotes

[1] See 58 U.S.L.W. 3144 (Aug. 29, 1989); see also, *The Supreme Court, 1987 Term—Leading Cases*, 102 Harv. L. Rev. 143, 350–58 (1988).

[2] See Sup. Ct. R. 16, 17.

[3] While this article was in preparation, the Court agreed to hear arguments in two more labor cases: *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 875 F.2d 1008 (2d Cir.), *cert. granted*, 58 U.S.L.W. 3288 (U.S. Oct. 30, 1989) (No. 89–390) (raising complicated bankruptcy, labor, and pension issues); and *Yellow Freight Sys., Inc.* v. *Donnelly*, 874 F.2d 402 (7th Cir.), *cert. granted*, 58 U.S.L.W. 3304 (U.S. Oct. 30, 1989) (No. 89–431) (raising the issue of whether Federal courts have exclusive jurisdiction to hear cases under Title VII of the Civil Rights Act of 1964).

[4] See *Retired Persons Pharmacy* v. *NLRB*, 519 F.2d 486 (2d Cir. 1975); and *Terrell Machine Co.* v. *NLRB*, 427 F.2d 1088 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970).

[5] 859 F.2d 362 (5th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3841 (U.S. June 26, 1989) (No. 88–1685). Oral argument was held on December 4, 1989.

[6] *Id.*; *Soule Glass & Glazing Co.* v. *NLRB*, 652 F.2d 1055, 1109–10 (1st Cir. 1981); and *National Car Rental Sys., Inc.* v. *NLRB*, 594 F.2d 1203 (8th Cir. 1979).

[7] See *NLRB* v. *Windham Hosp.*, 577 F.2d 805 (2d Cir. 1978); *NLRB* v. *Pennco, Inc.*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982); and *Buckley Broadcasting Corp. (Station KKHI)*, 284 N.L.R.B. No. 113, 125 L.R.R.M. (BNA) 1281 (N.L.R.B. July 27, 1987), enforced *sub nom. NLRB* v. *Buckley Broadcasting Corp*; Daily Lab. Rep. (BNA) No. 241, at D-1 (Dec. 7, 1989).

[8] 475 U.S. 608 (1986).

[9] 29 U.S.C. § 151 (1982).

[10] According to the Court, the National Labor Relations Act "preempts," or overrides, State and local governments' actions in two types of labor situations: where the act specifically prohibits or permits certain conduct, and where the act leaves the labor-management relationship to be controlled only by "the free play of economic forces." 475 U.S. at 613–14.

[11] 42 U.S.C. § 1983 (1982).

[12] 129 L.R.R.M. (BNA) 2401 (9th Cir. Sept. 15, 1988), *cert. granted*, 57 U.S.L.W. 3550 (U.S. Feb. 21, 1989) (No. 88–840).

[13] Shortly before this article was published, the Supreme Court issued a decision in this case. See *Golden State Transit Corp.* v. *City of Los Angeles*, 58 U.S.L.W. 4033 (U.S. Dec. 5, 1989) (No. 88-840). In its decision, the Court reversed the court of appeals and held that the city could be sued under 42 U.S.C. § 1983 (1982) for improperly intruding into the collective bargaining process. This decision will be summarized in a future issue of the *Monthly Labor Review*.

[14] 863 F.2d 334 (4th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3826 (U.S. June 19, 1989) (No. 88–1719). Oral argument was held on December 6, 1989.

[15] See *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151, 164–65 (1963).

[16] 29 U.S.C. § 185 (1982).

[17] The Supreme Court has recognized that a union's duty of fair representation is implicit in the union's role under the National Labor Relations Act, 29 U.S.C. § 151 (1982), as the exclusive representative of all bargaining unit employees. See *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

[18] "In Suits at common law...the right of trial by jury shall be preserved...." U.S. Const. amend VII.

[19] *Terry* presents a somewhat unusual hybrid § 301/duty-of-fair-representation case because the employer will not be

a party in the Supreme Court. This is because the employer filed for protection under the bankruptcy laws after the *Terry* lawsuit was initiated. See *Chauffeurs and Teamsters, Local 391* v. *Terry*, 863 F.2d 334, 335 n.1 (4th Cir. 1988).

[20] 849 F.2d 997 (6th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3550 (U.S. Feb. 21, 1989) (No. 88–124).

[21] The duty-of-fair-representation claim in *Breininger* is different from the "hybrid § 301/duty of fair representation" claim in *Terry* because in *Breininger* there is no allegation under section 301 that the employer breached the collective bargaining agreement. "Hybrid" cases may be brought in Federal district courts because those courts have jurisdiction to try cases involving breaches of collective bargaining agreements. *See* 29 U.S.C. § 185 (1982).

[22] 29 U.S.C. § 401 (1982).

[23] After this article was prepared, the Supreme Court issued a decision in this case. See *Breininger* v. *Sheet Metal Workers, Local 6*, 58 U.S.L.W. 4023 (U.S. Dec. 5, 1989) (No. 88-124). In this decision, which will be summarized in a future issue of the *Monthly Labor Review*, the Court reversed the court of appeals on the duty-of-representation issue, holding that Federal district courts may exercise jurisdiction over these claims. The Supreme Court agreed with the court of appeals, although for different reasons, that the hiring hall practices of the union did not constitute "discipline" under the Labor-Management Reporting and Disclosure Act.

[24] 862 F.2d 880 (D.C. Cir. 1988), *cert. granted*, 58 U.S.L.W. 3212 (U.S. Oct. 2, 1989) (No. 88–2123).

[25] 5 U.S.C. § 7106(a)(2)(B) (1988).

[26] As the court of appeals indicated in *Department of Treasury* v. *FLRA*, the Fourth and Ninth Circuits reached a different result on this issue in *Department of Health and Human Serv.* v. *FLRA*, 844 F.2d 1087 (4th Cir. 1988) and *Defense Language Inst.* v. *FLRA*, 767 F.2d 1398 (9th Cir. 1985), *cert. dismissed*, 476 U.S. 1110 (1986). See 862 F.2d at 882. Nevertheless, the *Department of Treasury* v. *FLRA* court felt constrained to follow *EEOC* v. *FLRA*, 744 F.2d 842 (D.C. Cir. 1984), *cert. dismissed*, 476 U.S. 19 (1986), which it considered binding precedent in the District of Columbia Circuit.

[27] 860 F.2d 396 (11th Cir. 1988), *cert. granted*, 58 U.S.L.W. 3212 (U.S. Oct. 2, 1989) (No. 89–65).

[28] 5 U.S.C. § 7103(a)(14) (1988).

[29] 5 U.S.C. § 7106(a)(1) (1988).

[30] *Sub nom. United States* v. *Boeing*, 845 F.2d 476 (4th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3653 (U.S. Apr. 3, 1989) (No. 88–931). Oral argument was held on November 6, 1989.

[31] 845 F.2d 476 (4th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3653 (U.S. Apr. 3, 1989) (No. 88–938). Oral argument was held on November 6, 1989.

[32] 18 U.S.C. § 209 (1982).

[33] *Id.*

[34] The trial court found that Boeing had not intended that the severance payments serve as compensation for Government service. Ordinarily, an appellate court will not disturb such factual findings unless they are clearly erroneous, which is what the court of appeals found. The Supreme Court has been asked to decide whether the appellate court's ruling on the issue was proper.

[35] 29 U.S.C. § 1056(d)(1) (1982). In general, to assign or alienate means to transfer title or ownership rights to another person or entity.

[36] 856 F.2d 1457 (10th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3841 (U.S. June 26, 1989) (No. 88–1105). Oral argument was held on November 29, 1989.

[37] The Court may also address the question of whether the court of appeals correctly held that the trustee-beneficiary did not raise, in a timely manner, the argument that under the Consumer Credit Protection Act, 15 U.S.C. § 1673 (1982), only 25 percent of the pension benefits could be garnished.

[38] Two courts of appeals reached results similar to *Guidry*. See *Crawford* v. *La Boucherie Bernard, Ltd.*, 815 F.2d 117 (D.C. Cir.), *cert. denied*, 484 U.S. 943 (1987); and *St. Paul Fire and Marine Ins.* v. *Cox*, 752 F.2d 550 (11th Cir. 1985). Two others reached contrary results. See *Ellis Nat'l Bank* v. *Irving Trust*, 786 F.2d 466 (2d Cir. 1986); and *United Metal Products v. National Bank of Detroit*, 811 F.2d 297 (6th Cir. 1987), *cert. dismissed*, 108 S. Ct. 1494 (1988). For a discussion of how the *Guidry* court distinguished the latter two cases, see 856 F.2d at 1460 n.3.

[39] 855 F.2d 108 (D.C. Cir. 1988), *cert. granted*, 57 U.S.L.W. 3752 (U.S. May 15, 1989) (No. 88–1434).

[40] 44 U.S.C. § 3501 (1982 & Supp. V 1987).

[41] See 29 CFR § 1910.1200(e)(2) (1988).

[42] 44 U.S.C. § 3504(c)(2) (1982).

[43] 855 F.2d at 112.

[44] 862 F.2d 439 (3d Cir. 1988), *cert. granted*, 57 U.S.L.W. 3619 (U.S. Mar. 20, 1989) (No. 88–1203). Oral argument was held on October 2, 1989.

[45] 29 U.S.C § 621 (1982).

[46] 29 U.S.C § 626(b) (1982), incorporating 29 U.S.C § 216(b) (1982).

[47] 29 U.S.C. § 216(b) (1982). On December 11, 1989, the Supreme Court issued its decision in *Hoffmann-LaRoche*. 58 U.S.L.W. 4072 (U.S. Dec. 11, 1989) (No. 88-1203). Writing for a 7–2 majority, Justice Anthony Kennedy agreed with the court of appeals. He ruled that Federal district court judges have discretionary authority to authorize and facilitate notice in age discrimination, as well as other, cases brought pursuant to 29 U.S.C. § 216(b) (1982).

[48] 33 U.S.C. § 901 (1982 & Supp. V 1987).

[49] 365 S.E.2d 742 (Va. 1988), *cert. granted*, 57 U.S.L.W. 3550 (U.S. Feb. 21, 1989) (No. 87-1979).

[50] No. 870252 (Va. Apr. 22, 1988), *cert. granted*, 57 U.S.L.W. 3550 (U.S. Feb. 21, 1989) (No. 88-127).

[51] 45 U.S.C § 51 (1982).

[52] See *Price* v. *Norfolk & W. Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980).

[53] A decision was issued in these two combined cases on November 28, 1989. See *Chesapeake & Ohio Ry. Co.* v. *Schwalb*, 58 U.S.L.W. 4015 (U.S. Nov. 28, 1989) (Nos. 87-1979 and 88-127). In its decision, the Supreme Court held that the workers in question should be considered to be employees that are covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1982 & Supp. V 1987). The decisions of the Virginia Supreme Court were therefore reversed.

[54] 29 U.S.C. § 1801 (1982 & Supp. V 1987).

[55] 29 U.S.C. § 1854 (1982).

[56] 867 F.2d 1305 (11th Cir.), *cert. granted*, 58 U.S.L.W. 3213 (U.S. Oct. 2, 1989) (No. 88–2035).

[57] Fla. Stat. Ann. § 440.11 (West 1981).

[58] 29 U.S.C. § 1854 (Supp. V 1987).

[59] 867 F.2d at 1310.

[60] The Court's decision will resolve a split in the courts of appeals. Contrary to the 11th Circuit's decision, the Fourth Circuit held that State workers' compensation laws may restrict the right to receive damages under the Migrant and Seasonal Agricultural Worker Protection Act. See *Roman* v. *Sunny Slope Farms, Inc.*, 817 F.2d 1116 (4th Cir.), *cert. denied*, 484 U.S. 855 (1987).