LAW REVIEW 1025

Union Tries To Make Returning Veterans Pay Back Dues upon Reemployment

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1.3.2.2—Continuous Accumulation of Seniority-Escalator Principle
1.8—Relationship Between USERRA and other Laws/Policies

On Jan. 7, 2010, the Association of Professional Flight Attendants (APFA) completed a mail-ballot union referendum on five proposed amendments to the APFA constitution. Item 5 was listed on the ballot as "change the dues obligation of members in an unpaid status." This amendment passed by a vote of 3,991 to 3,156. The practical effect of this amendment is to require that a flight attendant returning to work from military service must make up the union dues missed during a military-related absence from work, as a condition precedent to being able to vote in intra-union elections. The APFA is the union that represents flight attendants for American Airlines (AA), our nation's third-largest airline (after Delta and Southwest).

Imposing this requirement upon flight attendants returning to work after military service was by no means unanimous within the APFA. One union member from Texas voiced support for troops and stated that charging them for their absence was not congruous with such support.

An ROA member brought this situation to my attention and asked me if what the APFA is trying to do is a violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). I believe that the APFA would be violating USERRA as well as the Railway Labor Act (RLA) if the union tries to make payment of missed dues a condition precedent to reemployment by AA, but the union can lawfully make this dues payment a condition of "full membership" in the union.

The Railway Labor Act and the National Labor Relations Act

The RLA governs labor relations in the railroad and airline industries. The RLA predates by a decade the National Labor Relations Act (NLRA), which governs labor relations in private industry generally, except for the railroad and airline industries. The RLA is codified in Title 45, United States Code, sections 151-188 (45 U.S.C. 151-188). The NLRA is codified at 29 U.S.C. 141-187.

Under either the RLA or the NLRA, a union can seek recognition as the exclusive collective bargaining representative for a group of employees—such as all the non-supervisory employees in a particular craft (like flight attendant) or at a particular location or for a corporation as a whole. If the employer has a good-faith belief that the union in fact has majority support within the proposed bargaining unit, the employer may but is not required to recognize the union and bargain with it. If the employer does not recognize the union voluntarily, the Federal Government will conduct a secret ballot election to determine if the union has majority support. If the union wins the election, the Federal Government certifies the union as the exclusive bargaining representative and requires the employer to bargain with the union. Under the RLA, the responsible agency is the National Mediation Board (NMB), and under the NLRA it is the National Labor Relations Board (NLRB).

There is no time limit on union recognition or certification. Many employees today find themselves in bargaining units represented by labor unions based on decisions made by their predecessors decades ago, before today's employees were even born.

Once a union is recognized or certified, it has a "duty of fair representation" (DFR) to all employees in the bargaining unit, including those who may have opposed the union and who may not wish to pay union dues for an organization they do not support. A union typically characterizes non-members in the bargaining unit as "free riders." These non-members supposedly benefit from the union's efforts on their behalf, but they pay no part of the costs of this service.

To address the "free rider" issue, unions typically seek to include "union security" clauses in the collective bargaining agreements (CBAs) that they negotiate with employers. A union security clause requires the individual employee to join, or at least to pay money to, the union, after the union security clause goes into effect or after the individual goes to work for the employer, whichever is later.

The RLA provides as follows concerning union security clauses:

"Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, *any carrier or carriers* as defined in this chapter *and a labor organization* or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted (a) to make agreements, requiring, as a condition of continued employment, that *within sixty days following the beginning of such employment*, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

45 U.S.C. 152 (Eleventh) (emphasis supplied).

The NLRA also provides for union security clauses in CBAs, but with some significant differences. Section 14(b) of the NLRA permits a state to enact and enforce a "right-to-work" (RTW) law, and 21 states have enacted such laws. A state RTW law makes it unlawful for a union and an employer to agree to and enforce a CBA that requires individual employees to join and pay dues to the union, as a condition of employment. The quoted RLA language specifically overrides state laws. Thus, a state RTW law does not apply to an employer in the railway or airline industry, and employers in those industries are permitted to agree with unions to require employees to make payments to the labor union, even in a state with an RTW law.

In the United Kingdom and some other countries, the "closed shop" is lawful, but not in our country, under either the RLA or the NLRA. In a closed shop, an individual must be a member of the union to be eligible for hiring. In our country, such an arrangement is unlawful, but it is lawful for the CBA to require a new hire to join and pay dues to the union within a reasonable time after hiring. Such an arrangement is called a "union shop."

A certified or recognized union certainly engages in representational activity on behalf of all bargaining unit employees, to the benefit of all employees, but these representational activities typically represent a minority (sometimes a small minority) of the union's expenditures. Unions also engage in lobbying and political activities, attempts to organize other bargaining units elsewhere, and many other activities that are not germane to the union's representation of these particular employees.

The First Amendment of the United States Constitution is implicated, to the extent that a government (federal, state, or local) countenances and facilitates an arrangement whereby individual employees are required to pay dues to a labor organization as a condition of employment, and to the extent that the union uses compulsory dues income for political or other communicative activity with which the individual employee may disagree. Requiring me to finance a communication in favor of Candidate A is just as unconstitutional as preventing me from making a communication in favor of Candidate B.

In order to avoid finding it unconstitutional for a government to countenance union security clauses in CBAs, the Supreme Court has construed narrowly the union security provisions of both the RLA and the NLRA. *See International Association of Machinists v. Street,* 367 U.S. 740 (1961) (RLA); *Communications Workers of America v. Beck,* 487 U.S. 735 (1988) (NLRA).

Under these precedents, the union and the employer are permitted to agree to a CBA that requires "membership" in the union as a condition of continued employment with the employer, but the sort of "membership" that can be required is highly constrained. The individual employee can be required to pay

his or her fair share of the cost of collective bargaining activities from which he or she benefits, but the objecting employee cannot be required to pay for political and other activities that are not related to collective bargaining. The reduced dues for the objector may be far less than half of the dues paid by voluntary union members. The computation of the fair share of collective bargaining expenses is often highly contentious.

Because of the *Street* and *Beck* precedents, a union today likely has two classes of members. There are the full members, those who voluntarily pay full dues and meet all other conditions that the union may choose to impose on its members, and then there are the "I am a member only because I must be to work" members, who have exercised their right to pay something less than full dues. Individuals in this second category are probably ineligible to run for union office or vote in internal union elections, for the election of officers or the adoption of amendments to the union constitution.

Let's take the APFA as an example. On its website, the APFA reports that AA employs 19,000 flight attendants and that the APFA represents all of them. In the report on the Jan. 7 mail-ballot referendum on proposed constitutional amendments, the APFA reports that it mailed out 17,524 ballots to APFA members. It can be presumed that the union mailed out ballots to all members in good standing, but 17,524 is only 92.2% of 19,000. Thus, it is clear that not all AA flight attendants are full members of the APFA.

Let's take the hypothetical but realistic Mary Smith, an AA flight attendant who is also a member of the Army Reserve. She was called to active duty and deployed to Afghanistan in June 2009. She expects to be released from active duty and to return to work for AA in approximately September 2010. She has not been paying APFA dues while she has been on active duty. Indeed, she has not owed any dues. Under the APFA dues structure, the individual member's dues obligation is computed as a percentage of the compensation that the individual has received from AA. Ms. Smith has not been receiving compensation from AA while she has been on military leave from the company, so she owes nothing in dues.

If Ms. Smith wants to be a full member of the APFA, eligible to vote and run for office in the union, she will need to make up the APFA dues that she missed between June 2009 and September 2010. But if she simply wants to do the minimum that she must do to remain continuously employed by AA, she only needs to resume paying dues within 60 days after she returns to work. Under *Street* and *Beck,* she can become a "dues objector" and pay a reduced dues rate, representing her fair share of the costs of the APFA representational services for all AA flight attendants.

The Uniformed Services Employment and Reemployment Rights Act

Congress first enacted the reemployment statute in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War II. In 1941, as part of the Service Extension Act, Congress expanded the reemployment provision to make it apply to voluntary enlistees as well as draftees. This law has applied to the Federal Government and to private employers (regardless of size) since 1940, and in 1974 Congress amended the law to make it apply to state and local governments as well.

The reemployment statute had many formal names, but it came to be known colloquially as the Veterans' Reemployment Rights Act (VRRA). In 1994, Congress enacted USERRA as the long-overdue comprehensive recodification of the VRRA. Please see Law Review 104 (Dec. 2003) for a comprehensive history of the reemployment statute. You will find more than 600 articles at www.roa.org/law_review. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics.

At the end of World War II (Sept. 2, 1945), there were 12 million men and women on active duty. Within weeks, that number was reduced to 3 million. Millions of men and women who had signed up "for the duration" were demobilized and sent home as rapidly as possible. Under the VRRA, they had the right to return to their civilian jobs and to displace the employees who were hired to replace them when they enlisted or were drafted. Please see Law Review 0829 (June 2008), titled "USERRA Overrides the Interests of the Replacement Employee."

It only took eight months after Japan surrendered for the first reemployment rights case to make its way to the Supreme Court. *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946). I

discuss *Fishgold* and its implications in detail in Law Review 0803 (Jan. 2008), the first of 16 case notes about the 16 Supreme Court reemployment rights cases.

In its seminal reemployment rights case, the Supreme Court enunciated the "escalator principle" when it held, "The returning veteran does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold,* 328 U.S. at 284-85. The escalator principle is now codified in section 4316(a) of USERRA, 38 U.S.C. 4316(a).

The labor union is not always the ally of the returning veteran. In *Fishgold,* and in several later Supreme Court reemployment rights cases, the union [International Union of Marine and Shipbuilding Workers of America in *Fishgold*]intervened and sought to prevent the employer from making accommodations for the returning veteran, as required by the VRRA. The union contended that accommodating the returning veterans violated the CBA and that the CBA should control.

The Supreme Court rejected that argument, holding: "No practice of employers *or agreements between employers and unions* can cut down the service adjustment benefits that Congress has secured the veteran under the Act." *Fishgold,*328 U.S. at 285 (emphasis supplied). Section 4302(b) of USERRA [38 U.S.C. 4302(b)] codifies that principle in today's reemployment statute.

The CBA between the APFA and AA can grant returning veterans *greater or additional rights,* beyond the rights conferred by USERRA, but the CBA cannot limit USERRA rights and cannot impose an additional prerequisite upon the exercise of these federal statutory rights. Thus, the APFA cannot lawfully stand in the way of AA complying with its legal obligation to reemploy a flight attendant returning to work after military service. Even if AA were to sign on to a CBA that purportedly required the returning veteran to make up missed union dues as a condition precedent to reemployment, such a CBA would be unlawful and void under both USERRA and the RLA.

USERRA governs the relationship between the individual flight attendant and his or her civilian employer, AA in this case. USERRA does not apply to the relationship between the individual flight attendant and his or her union (APFA). The union cannot lawfully stand in the way of the flight attendant's reemployment, and the union cannot lawfully insist that making up missed dues is a condition precedent to reemployment. The union can lawfully condition "good standing" within the union (and thus the eligibility to vote and run for office within the union) upon making up the missed dues.

Even in the immediate aftermath of World War II, the returning veterans in any given workforce were outnumbered by the fellow employees who remained behind during the war. Today, the disparity is even greater. For example, the APFA represents the 19,000 AA flight attendants, according to the APFA website. In any given year, the number of AA flight attendants returning to work after military service is approximately 12, or less than 1/10th of 1% of the AA flight attendant workforce.

USERRA accords important rights to the 12 flight attendants who were called to the colors, often at considerable risk to life and limb, at the expense of the 19,000 who remained behind, enjoying the protection of those who have voluntarily signed up to serve our country. But if I am president of the union and want to be reelected, it does not make sense to adopt policies that make 12 people happy and 19,000 unhappy. Within a union, the interests of the handful of employees who serve in the reserve components of the armed forces will always get short shrift, when balanced against the interests of the much larger group of employees who are not serving. Accordingly, it is most important to maintain and insist upon the legal principle that the union, or the union and employer together, cannot override the valuable rights that Congress has conferred upon those who serve.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.