UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2515

ROBERT M. AUS, and DAVID L. POPE,

Plaintiffs-Appellees,

versus

ARMCO, INC., ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-87-2258)

(November 10, 1993)

Before JONES AND DeMOSS, Circuit Judges and KAZEN[*], District Judge.[**]

EDITH H. JONES, Circuit Judge:

Armco, Inc. and three other defendants[1] associated with Armco's pension plan appeal a district court order awarding plaintiffs Robert M. Aus and David L. Pope pension benefits which

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[*] District Judge of the Southern District of Texas, sitting by designation.

[**] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] The primary defendant-appellant is the Noncontributory Pension Plan of Armco, Inc. For the sake of clarity and convenience, we shall refer to the fiduciary and administrator of that Plan, the Benefits Plan Administrative Committee (BPAC), as the entity representing the interests of defendants-appellants.

had been denied by Armco's pension plan administrator. The district court found that the administrator's denial of benefits to Aus and Pope was an abuse of discretion. We reverse.

BACKGROUND

Plaintiffs Aus and Pope are former employees of Armco, Inc., a domestic manufacturer of various steel products sold domestically and abroad. Aus and Pope began working for the company in the early 1960s. In 1980 Aus was named the general manager of Armco International Sales (AIS), the division responsible for marketing Armco's products internationally. Pope became Manager of Construction Products for AIS in 1981. Around this time, Aus oversaw a staff reduction from 100 employees to 60 employees concurrent with an office relocation from Ohio to Texas. These actions were consistent with downsizing occurring throughout the company in the early 1980s. In 1984, Armco transferred AIS from its Manufacturing and Services Division to Corporate Services, and renamed AIS as Armco Trading Services (ATS). The name change and reorganization contemplated expanded activities, including the marketing of some non-Armco products overseas and a greater role in the coordination of international transactions for Armco's various operating divisions.

Armco's international business proved to be less profitable than hoped. In 1985 Armco's management decided to terminate 17 of AIS's 31 salaried (exempt) employees and transfer the remaining employees from their corporate staff positions to

three Armco entities which were apparently operating as separate profit centers. Aus's and Pope's employment ended in May 1985.

BPAC characterizes these events as a "decentralization of ATS into the operating divisions," and insists that Armco continued to utilize the remaining 14 employees to market their products internationally within the operating divisions. BPAC maintains that the international marketing functions formerly performed under ATS remain virtually unchanged within Armco.

Aus and Pope contend that Armco's actions resulted in ATS's being "shut down," with the retained people employed mainly to conclude some international projects. Aus testified that the ongoing business was not merged, and that his duty at the time was "to eliminate the activities, the business." Aus acknowledged, however, that eight of the 14 retained employees, having skills in trade finance and international shipping, were transferred to Armco's Specialty Steel Division, and that that division continues to perform many of the functions formerly handled by ATS. Although the evidence at trial is conflicting, it appears that most, if not all, of the 14 retained employees continued to perform activities related to international sales within the operating units, even physically remaining at their old ATS offices until a 5-year lease expired.

The characterization of the disposition of ATS is important because it dictates whether Aus and Pope are entitled to accelerated pension benefits under Armco's noncontributory pension plan ("Plan"), an "employee pension plan" subject to ERISA. 29

U.S.C. § 1000(2). The appellees claimed benefits under section 3.8(d) of the Plan, a provision known as the Rule of 65, which entitles vested nonexempt employees immediate access to full pension benefits under certain specified circumstances.[2] The fiduciary and administrator of the Plan, the Benefits Plan Administrative Committee (BPAC), acknowledged that the plaintiffs have satisfied all of the requirements of section 3.8(d) except the unwritten requirement that BPAC must first declare that the termination resulted from a "shutdown." The terms of section 3.8(d) of the Plan do not explicitly reference "shutdown."[3]

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[2] That provision reads:

Section 3.8 Rule-of-65 Pension

> Any participant (1) who shall have had at least 20 years of Continuous Service ..., (2) who has not attained the age of 55 years, and (3) whose combined age and years of continued service shall equal 65 or more but less that 80, and
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> > (a) whose Continuous Service is broken on or after August 23, 1984 by reason of a Layoff or physical disability, or
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> > (b) whose Continuous Service is not broken and who on or after August 23, 1984 is absent from work by reason of a Layoff resulting from his election to be placed on layoff status as a result of a permanent shutdown, or
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> > (c) whose Continuous Service is not broken and who is absent from work by reason of a physical disability or a Layoff other than a layoff resulting from an election referred to above and whose return to active employment is declared unlikely by the Administrative Committee, or
> >
> > (d) who considers that it would be in his interest to retire, and his Employing Company considers that such retirement would likewise be in its interest and the Administrative Committee approves an application for retirement under mutually satisfactory conditions,
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> and who has not been offered suitable long-term employment as defined by the Employing Company, shall be eligible to retire on or after August 23, 1984, and shall upon his retirement (hereinafter "rule-of-65 retirement") be eligible for a pension . . . .

[3] Section 3.8(b) refers to shutdown under conditions different from those at issue here.

Nevertheless, the parties agree that a shutdown determination is a prerequisite to obtaining an early pension under the Rule of 65.

Aus and Pope separately requested retirement benefits under the Rule of 65 shortly after their termination.[4] BPAC denied them benefits, maintaining that it had consistently interpreted the provision to require a "permanent shutdown" or "complete closure." BPAC reasoned that ATS was not shut down, but simply merged into other existing divisions, especially into its Specialty Steel Division.

Aus and Pope appealed the initial administrative denial of benefits, prompting BPAC to assemble an internal committee to study the shutdown issue and issue a report. The study committee recommended that BPAC "continue to restrict use of the provision to situations involving significant reductions in force or in shutdowns of a major steel manufacturing or fabricating facility." BPAC subsequently denied Aus's and Pope's appeals. BPAC concluded that the Rule of 65 "has been used exclusively in shutdown situations. . . . The Rule has not been used in a job elimination or to implement a force reduction." (emphasis added). Evidence presented at trial confirmed that the Rule of 65 had not been used in the case of normal job elimination or reductions in force. Evidence also showed that BPAC had declared shutdowns for purposes of § 3.8(d) in two or three situations involving departments or divisions that were not major steel manufacturing or fabricating

[4] Aus and Pope are vested and would otherwise receive full pension benefits in the year 2001.

facilities. Finally, in letters to Aus and Pope, BPAC stated: "The Committee feels that the Rule of 65 is intended to protect salaried employees who lose employment because of the closing of a major steel making facility or steel fabrication facility or a significant department within such a facility."

After losing their appeal to BPAC, Aus and Pope brought the present lawsuit for wrongful denial of benefits under ERISA, 29 U.S.C. § 1132(a)(1)(B). The trial judge formulated a shutdown definition under the Plan's Rule of 65 and used that definition to conclude that BPAC had inconsistently granted Rule-of-65 benefits in the past. The judge decided that the Plan envisioned that § 3.8(d) be applied exclusively in situations where there has been a shutdown of a major steel making facility or steel fabricating facility or of a significant department within such a facility. Based on this conclusion, he ruled that the denial of benefits was arbitrary and capricious because BPAC had "inconsistently" granted § 3.8(d) benefits in cases of shutdowns where no major steelmaking or fabricating facility was involved. Consequently, the court ordered BPAC to pay full pension benefits to the plaintiffs retroactive to their termination.

On this appeal, the appellants forcefully dispute the judge's definition of "shutdown." They also contend that their defense was handicapped by the district judge's misplaced concern that the Plan possibly granted BPAC illegal "unfettered"

discretion.[5] In particular, the appellants argue that these concerns led the district judge to erroneously exclude the testimonies of two important defense witnesses who would have testified that international marketing operations continued after the alleged shutdown and that BPAC's decision-making process in the plaintiffs' case was proper, fair, and consistent with past BPAC determinations.

DISCUSSION

Appellants brought their claim for wrongful denial of Plan benefits under ERISA. 29 U.S.C. § 1132(a)(1)(B). When an ERISA plan gives its administrator discretionary authority to determine eligibility for benefits or to construe its terms, a court reviews the administrator's denial of benefits under an abuse of discretion standard. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S. Ct. 948, 956-57 (1989). On appeal, this Court, like the district court, applies the abuse-of-discretion standard to the administrator's decision. Jones v. Sonat, Inc. Master Employee Benefits Plan Admin. Comm., 997 F.2d 113, 115 (5th Cir. 1993).

Application of the abuse of discretion standard is a two-step process. First, a court must determine whether the

[5] The district judge was especially concerned with the portion of the Plan which, after naming BPAC as the fiduciary with general responsibility and administrative powers, stated that "[BPAC] shall endeavor to make consistent determinations in cases involving the same circumstances, but shall not be required to do so. [BPAC may not] exercise its discretion in an arbitrary or capricious fashion . . . ." The judge, although troubled with the inconsistency possibly built into the grant of broad discretion, held that the grant was nevertheless valid under ERISA. The plaintiffs do not contest the Plan's validity.

administrator's interpretation of the plan is legally correct, considering (1) whether the administrator has uniformly construed the provision at issue in the past; (2) whether the administrator's interpretation of the provision is consistent with a fair reading of the plan; and (3) whether the interpretation results in an unanticipated cost. Wildbur v. Arco Chemical Co., 974 F.2d 631, 637-38 (5th Cir.) reh'g denied, clarified, modified 979 F.2d 1013 (5th Cir. 1992). If a court finds that the administrator's decision was not legally correct, the second step requires that it determine whether the administrator abused his discretion. Courts examine four factors in connection with this analysis: (1) whether the administrator's interpretation is internally consistent with the remainder of the plan; (2) whether the administrator's interpretation comports with any relevant regulations formulated by the appropriate administrative agencies; (3) whether the factual background supports the administrator's determination and (4) whether there are inferences of an administrator's lack of good faith. Wildbur, 974 F.2d at 638.

A. "Legal Correctness"

The "legal correctness" of BPAC's decision is not resolved by the plain meaning of the Plan because requiring a "shutdown" as a criterion for § 3.8(d) benefits is not a written term but a concept applied by the administrator.

The first Wildbur factor in assessing "legal correctness," whether BPAC has uniformly construed the Rule of 65 in the past, is clearly the most important in this case. The

district judge based his ruling primarily on his finding that BPAC's past interpretation of what constituted a shutdown was not uniform. The appellants vigorously contest the shutdown definition that the judge used in his analysis: "a shutdown [involving] a major steel making facility, or steel fabrication facility or of some significant department of such a facility." Appellants argue that this definition misrepresents BPAC's understanding and usage of the term, and unfairly excludes from Rule-of-65 benefit consideration situations where Armco totally and permanently closed facilities or departments that did not make steel. The district judge emphasized, and BPAC readily admits, that it had in the past declared shutdowns under circumstances outside of this narrow definition. But whereas the district judge concluded that this proved BPAC's inconsistency, the appellants counter that these closures of Armco facilities (all of which occurred in 1982) demonstrate that the district judge's definition is fundamentally flawed because it is too narrow. The appellants claim that BPAC analyzed scalebacks, plant idlings, closures, etc., for Rule-of-65 eligibility based on independent factors.[6] They insist that BPAC consistently limited Rule-of-65 benefits to participants who were terminated as a result of a facility or business being "totally and permanently closed in a physical sense." Under this criterion,

[6] The appellants assert that BPAC inquired at one time or another into the following four factors in assessing whether a shutdown occurred: (1) whether there was a permanent cessation of operations; (2) whether a facility was vacated and physically closed; (3) whether the property and equipment was sold or salvaged; and (4) whether all employees were terminated.

they assert that ATS was different from past shutdown determinations involving non-steel facilities.

Our review of the record persuades us that the court erred in adopting a narrow definition of "shutdown," a definition that pertained exclusively to steelmaking or steel fabricating facilities. We do not think BPAC's study committee report, which recommended that BPAC "continue to restrict use of the provision to situations involving significant reductions in force or in shutdowns of a major steel manufacturing or fabricating facility," or the similar sentence in BPAC's letters to Aus and Pope, merit the emphasis on the specific line of business apparently placed on them by the district judge. The parties all agree that BPAC occasionally accorded shutdown status to terminated non-steel facilities. It was incumbent on the trial court, in assessing the consistency of BPAC's practice, to defer to BPAC's reasonable interpretation of a "shutdown." From past practice involving steelmaking and non-steelmaking facilities, it appears that BPAC focused not just on the line of business in which the facility engaged, but on whether it actually shut down, i.e. ceased to exist. Viewed from this perspective, BPAC's actions reasonably defined a "shutdown." Further, the sentence in BPAC's letters to the appellees, which stated that BPAC "feels that the Rule of 65 is intended" for closures of major steelmaking or fabricating facilities, can reasonably be read as a guidepost for its determinations of closure rather than as a strict definition of the kinds of facilities involved.

We conclude that the first factor, whether BPAC uniformly construed the shutdown provision, weighs in the appellants' favor. Appellants presented credible evidence that distinguishes the appellees' claims from earlier BPAC determinations that granted shutdown status to entities or departments in areas other than steel making. We emphasize that where there is no explicit guidance in the plan as to the meaning of a "shutdown;" where the parties agree that it is reasonable to require a "shutdown" as a condition of receiving early retirement benefits under § 3.8(d); and where BPAC's benefit determinations are consistent with its proffered definition of a "shutdown" -- the district court ought to have deferred to that definition.

The second factor, whether BPAC's interpretation is consistent with a fair reading of the Plan, argues in favor of BPAC. Appellants presented persuasive evidence that the Rule of 65 was adopted to give exempt employees the same retirement options as union employees in the prototypical shutdown of a large facility, e.g., a large steel plant in a one-factory town. BPAC detailed how the provision dovetails with other parts of the Plan, explained how the Plan's goals would be severely compromised by the district judge's ruling, which effectively stripped § 3.8(d) of a meaningful shutdown requirement, and pointed out that the district judge's construction of the Plan would make the highly attractive and expensive benefits available under the provision a "first-resort" for many terminated employees. For these historical and pragmatic reasons, a fair reading of "shutdown" under the Plan would not

encompass most internal corporate reorganizations or reductions in force.

The third factor in the "legal correctness" analysis is whether appellees' interpretation would burden the Plan with unanticipated costs. The Rule of 65 embodied in § 3.8(d) permits an extraordinary acceleration of benefits for which BPAC cannot actuarially plan. BPAC must pay such pensions immediately upon the occurrence of a shutdown, but given the uncertainty of current American corporate life, BPAC cannot anticipate the incidence of such benefits. Accordingly, if at all possible, retirement benefits must be determined under one of the other provisions in the Plan. Contrary to the appellees' assertions, there was substantial evidence that liberally granting Rule-of-65 benefits under the district court's relaxed definition of shutdown would significantly drain the assets of the Plan, jeopardizing the security of retirees awaiting deferred pensions.

In light of the above analysis, we conclude that BPAC denied Rule of 65 benefits to the plaintiffs under a "legally correct" interpretation of the Plan.

B. Abuse of Discretion

Even if BPAC's denial was legally incorrect, however, the three factors under the second step of the Wildbur analysis would lead us to conclude that BPAC did not abuse its discretion in this case. First, for many of the reasons noted above, BPAC's interpretation of the Plan is internally consistent, both historically and pragmatically. Second, the plaintiffs here

presented no administrative regulations that would conflict with BPAC's interpretation. Third, BPAC devoted considerable time to the appellees' claims prior to this lawsuit, even ordering that a review committee study the shutdown provision preparatory to deciding the appellees' internal appeal. BPAC's factual findings support its decision. Finally, Aus and Pope have presented little, if any, evidence of bad faith.

In light of our judgment, we need not address the exidentiary issues raised on appeal by BPAC.

For these reasons, the district court's judgment is **REVERSED** and **RENDERED**.