RECORD OF SOCIETY OF ACTUARIES
1975 VOL. 1 NO. 3

PENSION REFORM: THE NEXT STEP

An Address by
JOHN N. ERLENBORN*

Among the innovative programs in the Navy in World War II were the construction battalions, better known as the Seabees. They were skilled tradesmen who were sent to a hundred and one out-of-the-way places around the world to build docks and airfields and to repair yards and do a lot of other kinds of installations the Navy needed. Inasmuch as the younger men had already been drafted by the time the Seabees were organized, most of these battalions were made up of older craftsmen, nearly all of them volunteers. One of the craftsmen from my hometown in Illinois enlisted and was sent to the South Pacific. He worked, worked harder than he ever had before, worked more days per week and more hours per day. And, at least once, he was terrorized by an attack by Japanese fighter planes. Well, after about 18 months overseas, he got a 30-day leave and came back home. He persuaded his wife to type an official request for discharge from the Seabees. In this letter, he detailed all of the adversities that he had endured. He may even have exaggerated a little bit. But his last paragraph read, "Inasmuch as I enlisted, some may say that I asked for this. Well, I didn't ask for this much of it."

There is a similarity between his experience in the Navy and the experience of John Dent and me in pension reform. We enlisted, we worked long and hard, we were blitzed by a television documentary of dubious honesty, and we battled through a six-month conference with the Senate. You are right, we ran for Congress and so we asked for it; but we are finding that we have gotten a lot more pension law than we asked for. We have been holding oversight hearings in recent days to ascertain just how much more.

The truth is, of course, that the criticisms are not altogether unexpected. In letters to my constituents last August and September, I expressed the pride that I had in the part that I could play in developing ERISA; but I warned that it may have imperfections which would have to be ironed out as we go along. Some of these imperfections, I was sure, were merely draftsman's errors, e.g., sentences which didn't quite say what had been intended. Such mistakes inevitably creep into a bill as long and as complex as this. Other imperfections are not slips at all, but rather are compromises which we found necessary in order to get a bill passed. I hesitate to say this, because it sounds immodest, but we, in the House of Representatives, disagreed with the Senate bill on many points. In conference, the House viewpoint prevailed most of the time. Our view prevailed so much that, on some items, we simply had to yield to the Senate in order to keep the conference anywhere near friendly.

We, on the newly-named Labor Standards Subcommittee (formerly the General Labor Subcommittee), started to talk about oversight hearings almost as soon as our 1975 session began. I use the phrase "almost as soon" advisedly, for you may recall that, in January of this year, the majority in Congress was absorbed by concerns about who would be made Chairman and who would be made a former Chairman by the votes of some 75 freshmen Democratic Representatives. Nearly all of the criticism during our hearings focused on three sections of ERISA,

*The Honorable John N. Erlenborn, not a member of the Society, is the U.S. Representative for the Fourteenth Congressional District, State of Illinois, and was a member of the Conference Committee that finalized ERISA.

namely, prohibited transactions, reporting and disclosure, and employer liability.

PROHIBITED TRANSACTIONS

Nearly all of the public witnesses opposed the prohibited transactions provision. The lone exception was the spokesman for the United Automobile Workers. He finds this section not burdensome at all. We have learned that there is concern about the dual administration of the Act, by both the Treasury and the Labor Department. I dragged my feet over this part of the Bill when it was being considered in the House as I thought it would be one of the trouble spots. The compromise that was reached in conference, however, seemed as though it might work. But I think, at least in the section on prohibited transactions, the dual administration is still a trouble point.

As you know, the administrator of a pension plan may get an exemption if he has a good case; but he finds difficulty in satisfying both the Secretary of Labor and the Secretary of the Treasury. We were aware that Labor and Treasury had agreed earlier this year for a temporary exemption for the securities industry in the area of broker-dealer transactions; but other industries have been on pins and needles. Some corporate officers and some pension trustees have been placed in jeopardy, needlessly I think because they have not known what the procedures would be for getting exemptions. I think many just assumed, without being thoroughly familiar with the Act, that, if what they did in the past was honest, forthright, and arm's-length dealing, then it was still all right. But that just is not the case. It may be a prohibited transaction nonetheless. The regulations for applying for an exemption were published on April 25, eight long months after the Bill was signed into law. At least we now know the procedure for trying to get an exemption.

Robert Georgine, President of the Building Trades Department of the AFL-CIO, called this prohibited transactions section, "a time bomb, ticking away under the trustees of thousands of multiemployer plans throughout the country." The witness whose testimony I treasure, however, above all the others that we heard, was Mr. Georgine's colleague, Robert Connerton, Counsel to the Building Trades Department. In his testimony, he recognized that there was organized labor support of the Senate provision on prohibited transactions and he acknowledged that they had worked against the House provision when the Conference Committee was considering this subject. Now, he urges repeal and asks that the prohibited transactions section be replaced by the adequate consideration test that had been a part of the original House bill. As he testified that day, I began to understand how a missionary feels when he obtains a convert.

A short time later we heard from Louis H. Diamond, Attorney for the Council of Construction Employers. He joined with the union spokesmen in complaining about prohibited transactions. This section, if strictly interpreted, allows multiemployer plans in the construction industry to invest in nonunion construction and mortgages, but not in loans to contributing union employers. You may recall that the House bill placed its reliance on pension trustees and their basic honesty, governed by the prudent man rule. We believe that this rule and the requirement of adequate consideration in party-at-interest transactions would be our best assurance of good pension plan administration.

This prohibited transactions section, it seems to me, is a clear case of legislative overkill. It calls to mind an example which was cited to me a long time ago by Daniel Patrick Moynihan who is now going to the United Nations as Ambassador. Assume a big drug chain built a huge drugstore, appointed a manager, and then told that manager that he would be fired if there were any shoplifting. The manager could meet that condition by taking measures to assure no shoplifting loss. Of course, Mr. Moynihan added, the store wouldn't sell much merchandise. We can argue that the prohibited transactions section of the new law would stop any shoplifting by pension trustees and by employers. Sooner or later, however, it would discourage responsible men and women from serving as trustees; and it would discourage responsible employers from supporting employee benefit programs.

REPORTING AND DISCLOSURE

Early in our thinking about a pension bill, Chairman John Dent and I agreed that there is no such thing as an absolute guarantee that a worker will get his pension; but we also agreed that one of his best assurances is his own vigilance. Hence, we worked to get reporting and disclosure provisions into the bill which would tell the worker about his plan in language that he would and could understand. As a lawyer I understand legal phraseology; but I know it is like a foreign language to a machinist, or a coal miner, or an engineer, or a salesman.

As part of this disclosure, which we had hoped would be in simple language, the Department of Labor intended to require that employers file a pension plan description, called the EBS-1 form. It is about 20 pages long, more or less. The Labor Department had hopes that it could be used to cover all employee benefit programs, and there may be as many as two million of them. Now you may recall that, under the Welfare and Pension Plan Disclosure Act, all plans with over 100 participants were required to file. Some 50 or 60 thousand plans were filing at that time. At the request of a curious congressman a few years ago, the General Accounting Office looked into the administration of the Welfare and Pension Plan Disclosure Act. Their conclusion was that amendments to reports were some two years behind in being filed by the Labor Department. Now, what are we going to do with a 20-page EBS-1 form, which is supposed to be read, not just filed? And what if there are two million of them filed in the Department of Labor? I asked Secretary Dunlop those questions the other day and he turned white.

Some of the questions on the EBS-1 form require essay-type answers, which is, as you know, bad news in this computer age. Surely every red-blooded American read this month about Jubal Hale, Executive Director of the Federal Metal and Nonmetallic Safety Board of Review. You may not recall his name but you probably recall reading about the case. His agency has been in existence for four years and has not been asked to review a single decision. His only official acts, it appears, have been sending to Congress four annual reports. Mr. Hale has always been truthful. He always reported a total lack of business. I can only suspect that nobody in Congress was reading his reports.

Nobody really believes that he is the only such bureaucrat in our federal establishment; indeed, I suspect a lot of taxpayers suspect that he is typical. I have my suspicion, too. I suspect that Jubal Hale has made a greater contribution to the commonweal than he would have made if he had spent those four years reading essay-type reports from two million employee benefit plans.

Originally, the EBS-1 forms were due last January 1, but the deadline was extended to August 31, 1975, which sounded like a real piece of generosity on the part of the Labor Department. But it wasn't, really. The vesting, participation, and funding requirements of the law will become effective at the start of 1976, and the Labor Department was gearing itself up to demand that the new EBS-1 forms be submitted then as well, some four months after the first set. Spokesmen from all sorts of plans complained about these two reports, that it would be a chore to file them only four months apart. The complaints were particularly fervent from small pension plans. The expense, they told us, would be substantial; in some cases too much to warrant continuation of the plan.

Well, we now have proof that the Labor Department was listening. On May 14, the Department decided that only the first two pages of EBS-1 need to be filed by August 31, and, in the same directive, the due date of the full EBS-1 was postponed to May 30, 1976, a little more than a year hence. It was also indicated that they would consider the possibility of an alternative form for smaller plans.

This, I believe, is the first tangible result of our oversight hearings. It might be described as one small step for mankind--or actuaries--or lawyers.

In all candor, I must report to you that we were somewhat disappointed that our hearings produced almost no testimony from the business community. I surmise that the United States Chamber of Commerce and the National Association of Manufacturers have advised their members to work out their pension problems at the administrative, rather than the legislative, level. I believe business will suffer if it acts on the assumption that the legislative branch is less amenable to reason than the executive agencies. Many of the provisions of this pension bill that are regarded negatively by the business community were not vigorously opposed by the business community in the last year or two. I must concede that the political atmosphere in Washington these past many years may have sapped some of the confidence of business in its ability to cope with Congress. If business becomes too timid to tell its story, however, it can hardly expect Congress or Congressmen to serve as a surrogate in the cause of the business community.

Now, if the whole EBS-1 form is not due until the end of May next year, I assume that means that workers and retired persons will not get plan summaries before then. The Labor Department announcement said, however, that this postponement does not change these people's right to get information about their pension plans. When I first heard about these regulations, I was apprehensive that they would bring on an avalanche of papers which would guarantee that workers won't learn much about their pension plans. As I told you a few moments ago, I am a lawyer and make it my business to understand legalese. I now suspect that these statements, if they are to follow the forms established by the bureaucrats, will be written in bureaucratese, which is a related language--not necessarily more easily translated or understood by the kind of people who hope one day to live on a generous pension in retirement. I wish there were a commitment on the part of the people who will administer this Act to have these statements written so as to inform the working people, rather than confuse them.

EMPLOYER LIABILITY

Termination insurance was one of the few provisions in ERISA that I didn't like, that I wanted to kill, and that I have never become reconciled to. If we come to a time, 10 or 20 or 30 years from now, when there are few, if any, defined benefit pension plans, I believe the principal cause of that sad state of affairs will have been this insurance title. It requires that each employer who has a defined benefit pension plan place in jeopardy up to 30 percent of his net worth as a surety against the demise of his pension plan.

Robert Georgine of the AFL-CIO and Melvin A. Glasser of the United Automobile Workers gave us similar testimony, that their union negotiators are running into great resistance in arriving at new contract provisions relative to benefits. Companies are not willing to increase pension benefits because they keep thinking about that 30 percent.

Mr. Georgine urged that the Pension Benefit Guaranty Corporation be directed to offer insurance to employers in lieu of this contingent liability starting next January 1, instead of two or three years from now. I cannot help wondering how much that contingent liability insurance will cost. I cannot help asking how many companies will take this added cost out of their stockholders' hide and how many will take it out of their workers' pensions or salaries.

Other testimony has called to our attention that, under a strict interpretation of the law's language, each employer is liable for 30 percent of his net worth on each pension plan. With four pension plans under one employer, there would be a contingent liability of 120 percent.

Take the case of a major contractor doing work at many sites around the country. When he takes a job here in Cincinnati, for example, he may have to make contributions to four or five pension plans of four or five different unions. Each participation leaves him with an additional 30 percent liability. Unless it is a big contract with the prospect of a big profit, he probably won't even bother to bid, and less competition means, sooner or later, higher contract prices.

The Act created the Pension Benefit Guaranty Corporation and requires that it provide for employer contingent liability insurance within three years after enactment, that is, by September 2, 1977. The PBGC may have the insurance industry provide that insurance, or the PBGC may carry the insurance itself; so it can be either a private or a public organization. I do not know how the insurance industry looks upon this situation, and I doubt that anybody else does. The insurance companies, so far as I know, have been silent about their intention of moving into this area. It seems to me that this is an indefensible silence. These employers of whom I speak are among the best customers that insurance companies have; and, until 1977 or 1978, they are exposed to this possible liability. The people at PBGC tell me that they prefer to work through already-established insurers, but every day they wait for a signal from the insurance companies means another day those employers are going to remain exposed.

I urge the insurance companies, if they look upon termination insurance as a profitless risk in which they are not interested, to say so, or, if they can see a possibility of performing a service at a profit, to say so. Companies which have pension plans need to know, one way or the other.

ENROLLMENT OF ACTUARIES

ERISA requires some contribution by actuaries. As a matter of fact, there are those who say that it is the "Guaranteed Full Employment of Actuaries and Lawyers Act of 1974." That comes pretty close to the truth. However, since actuaries operate in diverse fields, we established the Joint Board for the Enrollment of Actuaries to determine when an actuary is competent to decide on pension matters. This Board has been somewhat more vigorous than some of the other elements which are assembling their resources to get this new law into motion. It has announced proposed regulations.

The Act itself sets forth the standards which ought to guide this Board. I am concerned lest the Board may have yielded to the inevitable temptation of bureaucrats and administrators, to go beyond their legislative mandate. Included in their regulations is a Code of Conduct for actuaries. I am not sure that Congress intended that such a code be established. After all, the government does not lay out a code of conduct for, say, accountants.

It seems to me there is room for some unnecessary confusion in this situation. If an actuary does not live up to the standards set forth in the law, the Act provides that he may be disenrolled. But suppose that he were to fall short of the standards set by the Joint Board for the Enrollment of Actuaries. Could an actuary then be disenrolled, even though he had scrupulously complied with ERISA's statutory provisions?

- - - - - - - - - -

At our oversight hearings, in addition to labor and employer spokesmen, we heard testimony from the Department of Labor (Assistant Secretary Paul Fasser and his aides), from the Internal Revenue Service (Commissioner Donald Alexander and some of his deputies), and from Steven Schanes, Director of PBGC. They are far less alarmed about the Act and its provisions than are the nongovernmental people. They admit to moving slowly but, they say, deliberately. They think the law is good, just as it stands. None of them had any recommendations for any legislative enactment to change the law. IRS Commissioner Alexander promised benign enforcement of prohibited transactions. I don't know how he can, but I hope he makes that promise good. I have every faith in Mr. Alexander, but if I were an employer or a pension plan trustee, I would prefer to rely on a change in the law.

Chairman Dent and I are fashioning a remedy to cure the ailments in Section 406, prohibited transactions. I believe that we are in general agreement about the other trouble areas. Your help will be needed, however, and I can not stress this too strongly. The word I get from the Senate is that they are so well satisfied that they do not even want to call oversight hearings. If that attitude is to be changed, you are going to have to tell the Senate your viewpoint, tell it loud and clear. If there are shortcomings in the Act, let your Senators know.

For my part, I intend to keep working away. I want to let that drugstore manager sell some merchandise.