

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA FEDERATION, :
BROTHERHOOD OF MAINTENANCE :
OF WAY EMPLOYEES; WILLIAM E. :
BUCK; THOMAS J. PLUNKETT; :
STANLEY WOYTOWIEZ; GLEN NOLAN :
and ROBERT R. HOUSER, individually :
and on behalf of all persons similarly :
situated, :
Plaintiffs, : CIVIL ACTION
v. : NO. 02-9049
NORFOLK SOUTHERN :
CORPORATION THOROUGHbred :
RETIREMENT INVESTMENT PLAN :
OF THE NORFOLK SOUTHERN :
CORPORATION AND :
PARTICIPATING SUBSIDIARY :
COMPANIES; DAVID R. GOODE; :
HENRY C. WOLF; PAUL N. AUSTIN; :
JANE M. O'BRIEN; HAROLD W. POTE; :
J. PAUL REASON; GERALD L. :
BALILES; CARROLL A. CAMPBELL, :
JR.; GENE R. CARTER; ALSTON D. :
CORRELL; LANDON HILLIARD; :
STEVEN F. LEER; JAMES A. HIXON; :
THOMAS H. MULLENIX, JR.; L. IKE :
PRILLAMAN; and VANGUARD :
FIDUCIARY TRUST COMPANY, :
Defendants. :

MEMORANDUM

BUCKWALTER, S. J.

January 11, 2005

All parties have moved to certify certain questions of controlling law, and none of the parties oppose the motions for certification.

The proposed questions follow:

(a) With respect to Count I (Breach of Fiduciary Duty to Act in the Interests of the Participants): Did Plaintiffs adequately allege a breach of the duty of loyalty by the Defendants sufficient to defeat a motion to dismiss under Fed. R. Civ. P. 12(b)(6) in the absence of specific factual allegations as to how the Norfolk Southern Defendants acted in their own interests instead of the interests of the 401(k) Plan participants?

(b) With respect to Count I (Breach of Fiduciary Duty to Act in the Interests of the Participants): Did Plaintiffs adequately allege a breach of the duty to act for the exclusive purpose of providing benefits to Plan participants, as prescribed by ERISA, despite the specific terms of the 401(k) Plan?

(c) With respect to Count II (Breach of Fiduciary Duty to Act in the Interests of the Participants): Does ERISA require the fiduciaries of a 401(k) plan that offers employer stock as an investment option to disclose to plan participants non-public information, acquired by the fiduciaries in their capacities as directors and officers of the employer, about the employer's business operations and present and future weaknesses in the value of its stock that do not threaten the continued viability of the business?

(d) With respect to Count III (Breach of Fiduciary Duty by Non-Fiduciary Officers and Directors): Should a district court apply the legal presumption of prudence that attaches under Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995), to an ERISA fiduciary's plan-directed investment in employer stock when deciding whether a complaint challenging such an investment as imprudent states a claim under Fed. R. Civ. P. 12(b)(6)?

(e) With respect to Count IV (Breach of Fiduciary Duty by Non-Fiduciary Officers and Directors): Is a Harris Trust claim available for alleged breaches of fiduciary duty that do not involve prohibited transactions?

In the context of this case, all the above questions are controlling since, if the decision made with regard to each was in error, that error would be reversible on final appeal.

In preparing my opinions in this case dated February 4, 2004 and October 12, 2004, I found there to be substantial grounds for differences of opinion as ably set forth in the parties' briefs and repeated here for purposes of the pending motions for certification.

With respect to question (a) above, there has in my judgment been substantial differences in opinion as to the specificity required in pleading the facts that support a right to relief. In this case, I found that pleading conclusions rather than facts was not sufficient citing Doug Grant, Inc. v. Greater Bay Casino Corp., 232 F.3d 173, 183-185 (3d Cir. 2000, cert. denied, 532 U.S. 1038 (2001)). The ruling of the Supreme Court in Swierkiewicz v. Sorema, 534 U.S. 506 (2002), arguably supports Plaintiffs' argument that facts need not be specifically alleged to get by a motion to dismiss.

With respect to question (b) above, there is authority to support the Court's essential finding that the exclusive purpose duty is not breached when the fiduciary takes only those actions which are dictated by the plan. *See* Bennett v. Conrail Matched Savings Plan, 168 F.3d 671, 677 (3d Cir. 1999) and also Fultz v. U.S. News & World Report, Inc., 865 F.2d 364, 373 (D.C. Cir. 1989). Nevertheless, there are district court cases (*see* pages 11 and 12 of Plaintiffs' renewed motion to certify, Docket #40) which suggest awareness of decline in employer securities and failure to act may not shield fiduciaries from liability.

With respect to question (c) above, the Court determined that the allegations in the Complaint, at the motion to dismiss stage, may have set forth some material information that the fiduciary failed to provide, and therefore breached its duty to act in the interests of the participants. There appears to be a dearth of authority, however, as to whether a fiduciary that offers employment stock as an investment option has a duty to disclose to participants non-public information acquired by the fiduciaries in their capacity as officers and directors of the employer, about the employer's business operation and present and future weaknesses in the stock that threaten the continued viability of the stock. As related to this case, the question this Court obviously struggled with in its opinion of February 4, 2004 (*see* pages 8 through 11) was whether the allegations that Norfolk Southern's Officers and Directors had "superior knowledge and information, much of which was not known to the public or to TRIP participants, as to the present and future business operations of Norfolk Southern, the present and future weaknesses of Norfolk Southern stock prices and, consequently, the unsuitability of investment in NS Stock Fund" was, without more, sufficient to allege a breach of fiduciary duty to act in the best interest of the participants. On the sufficiency of the pleadings, the conflict seems to be similar to that raised in question (a).

As to question (d), the issue as to when a court should apply the legal presumption of prudence under Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995), appears to be very conflicted. Arguments are equally strong for applying it at the motion to dismiss stage as to decline to do so. Defendants have outlined the conflicting authority in detail at pages 7 - 9 of its Motion for Certification of Two Controlling Questions of Law (Docket No. 41).

Finally, as to question (e), there is a difference of opinion based on substantial grounds as to whether a Harris Trust claim is available for alleged breaches of fiduciary duty that do not involve prohibited transactions. The holding in Harris Trust & Savings Bank v. U.S., 530 U.S. 238, 245 (2000), can be construed as only applicable to prohibited transactions, although Plaintiffs cite district court opinions which suggest a less narrow reading of it.

In summary, as to all five questions, there are substantial grounds to question the legal analysis made by this Court.

Finally, the certification of these questions will materially advance the ultimate termination of this litigation.

For example, if this Court's analysis of Counts I and IV is correct (questions (a), (b) and (e)), the Plaintiffs claim (accurately, I believe) that a substantial portion of this case would be over. By the same token, if this Court's analysis of Counts II and III (questions (c) and (d)) is incorrect, what would turn out to be unnecessary discovery following that analysis will be avoided.

Based upon the foregoing, the Court grants the motions to certify (Docket Nos. 40 and 41) and enters the following amended order.

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PRILLAMAN; and VANGUARD :
FIDUCIARY TRUST COMPANY, :
Defendants. :

AMENDED ORDER

AND NOW, this 11th day of January, 2005, it is hereby ORDERED that:

1. The parties' cross-motions for certification pursuant to 28 U.S.C. §

1292(b) (Docket Nos. 40 and 41) are GRANTED.

2. Accordingly, this Court's Order of October 12, 2004, denying Defendants' Motions to Dismiss Plaintiffs' Second Amended Complaint with regard to Counts II and III of Plaintiffs' Second Amended Complaint and granting Defendants' Motions with regard to Counts I and IV of Plaintiffs' Second Amended Complaint, is hereby AMENDED to state that the five questions listed in paragraph 3 below are declared to be controlling questions of law on which there are substantial grounds for difference of opinion, the immediate appeal of which may materially advance the ultimate termination of this litigation.

3. For the reasons stated in the preceding paragraph, as explained in the Court's attached January 10, 2005 Memorandum, the following questions are hereby CERTIFIED, pursuant to 28 U.S.C. § 1292(b), to the United States Court of Appeals for the Third Circuit for immediate review:

(a) With respect to Count I (Breach of Fiduciary Duty to Act in the Interests of the Participants): Did Plaintiffs adequately allege a breach of the duty of loyalty by the Defendants sufficient to defeat a motion to dismiss under Fed. R. Civ. P. 12(b)(6) in the absence of specific factual allegations as to how the Norfolk Southern Defendants acted in their own interests instead of the interests of the 401(k) Plan participants?

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(e) With respect to Count IV (Breach of Fiduciary Duty by Non-Fiduciary Officers and Directors): Is a Harris Trust claim available for alleged breaches of fiduciary duty that do not involve prohibited transactions?

4. All proceedings before this Court in this case, including discovery, are STAYED until the Court of Appeals has either declined to exercise appellate jurisdiction over the controlling questions of law set forth in paragraph 3 or completed its review of all of those questions.

BY THE COURT:

RONALD L. BUCKWALTER, S.J.