Registry's translation, the French text alone being authoritative.

EIGHTY-FIRST SESSION

In re HAENNI and PERRUCHI-HAENNI

Judgment 1530

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Pierre-Pascal Haenni and Mrs. Françoise Perruchi-Haenni against the Intergovernmental Organisation for International Carriage by Rail (OTIF) on 22 September 1995, OTIF's reply of 10 November, the complainant's rejoinder of 29 November 1995 and the Organisation's surrejoinder of 12 January 1996;

Considering Article II, paragraphs 5 and 6, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A.The complainants are the children and heirs of the late Joseph Haenni, a Swiss citizen born in 1904 and former Director of the Central Office for International Carriage by Rail (OCTI), the Organisation's secretariat. Joseph Haenni joined OTIF on 1 January 1959. At that time there were Rules on the organisation and operation of the Central Office and the conditions of employment of its staff. The Rules had come into force on 17 April 1956. Article 25, headed "Savings and Survivors' Insurance Fund", read:

"1.Each year the Office shall enter in its budget a sum equivalent to 15 per cent of the basic salary of its serving permanent employees and the amounts of the insurance contributions set by the competent authority at the date of retirement of permanent employees. Those sums shall constitute and add to the insurance funds available for each employee ...

2.With the exception of certificates for mandatory social insurance, the insurance funds so constituted shall be deposited in the Swiss National Bank in portfolios bearing the official's name. After his death they shall be paid out to his statutory heirs and legatees upon authentication of their status by the authorities of the official's home country ..."(Registry's translation)

New Rules came into force on 1 December 1966. They replaced the scheme established by Article 25 of the 1956 Rules with a scheme of invalidity, old-age and survivors' insurance under the Swiss Federal Insurance Fund for permanent staff and members of their families. But anyone who had joined the Organisation before 1 December 1966 might opt to remain in the old scheme. Joseph Haenni did so.

At its 32nd Session on 3 February 1970 OTIF's Administrative Committee allowed him to claim his retirement entitlements as from 1 July. At its 33rd Session, held from 20 to 22 May 1970, it decided that after his retirement the Office would continue to pay the equivalent of 15 per cent of his salary into the savings fund constituted on his behalf in accordance with the 1956 Rules.

On 1 January 1980 Staff Regulations superseded the 1966 Rules. By a letter of 11 July 1980 the Director General of the Office informed the complainants' father that the new Regulations included transitional provisions to maintain the rights acquired by officials under the former Rules; so Article 25 of the 1956 Rules, appended to the new Regulations, continued to apply to him.

By a letter of 20 November 1991 the Director General informed him that in view of the Tribunal's ruling in Judgment 1125 of 3 July 1991 (in re Lehmann-Schurter) the amount of the insurance contributions paid into the fund on his behalf would be reduced from 15 to 8 per cent of basic salary.

New Staff Regulations which took effect on 1 January 1993 reproduced in Article 5 of Annex IV the transitional provisions of the 1980 Regulations.

Their father having died on 11 January 1995, the complainants asked the Organisation in a letter of 18 February to pay them the full amount of the savings fund constituted on his behalf, which came to 618,457.85 Swiss francs. On 23 May the Administrative Committee offered them a compromise which amounted to a decision within the meaning of Article 58.1 of the Staff Regulations and which it adopted at its 83rd Session. It revised its decision of May 1970 and set the amount of the fund at the time of Joseph Haenni's retirement at 113,891 francs, adding yearly interest at 5 per cent, which made a total of 385,675 francs to be paid to the complainants. On 20 June 1995 the complainants appealed to the Committee against that decision.

On 25 August 1995 the Committee rejected their appeal. It stated that a teleological construction should be put on Article 25 of the 1956 Rules and that the Committee's decision of 1970 was unwarranted and arbitrary since by then Joseph Haenni had no dependants. It accordingly informed the complainants that it upheld its decision of 23 May 1995. It also told them that Article 5 of Annex IV to Article 69.2 of the 1993 Regulations would be amended: the scheme established under Article 25 of the 1956 Rules would not apply "where it is clear that the former official has no dependants"; in such cases statutory heirs or legatees would be paid only the amount that was in the Fund at the date of the official's retirement. That is the decision they are impugning.

B.The complainants submit that Article 25 of the 1956 Rules will bear a literal construction only and that what it sets up is unmistakably a provident fund to serve as survivors' insurance in the event of a former official's death.

They contend that the Administrative Committee's decision of 23 May 1995, confirmed by its decision of 25 August 1995, impairs their acquired rights as the successors of Joseph Haenni. The successive versions of the Staff Rules and Regulations, including the 1993 Regulations, contain transitional provisions to ensure observance of those rights. The impugned decision is therefore arbitrary and has no basis in law. What is more, it offends against the Committee's decision of May 1970 to continue to pay 15 per cent of their father's basic salary into the insurance fund after his retirement. It disregards the Director General's letter of 20 November 1991 telling him that the Organisation would reduce its insurance contribution to 8 per cent, and the letter of 11 July 1980 assuring him that his acquired rights would not be impaired.

OTIF may not plead that it decided to revise the amount of the insurance fund on the grounds that there were no dependants: in May 1970 it already knew that there were none. To rely on a mistake it made at the time and apparently perpetuated until 1994 amounts to a breach of good faith in the light of the Committee's decisions and its communications to Joseph Haenni and later to his children. There is breach of the Organisation's practice of contributing annually to the fund. And applying the amendment of the Staff Regulations retroactively to the complainants offends against general principles of law.

The complainants seek payment of the 618,457.85 Swiss francs, interest at the rate of 5 per cent a year as from 18 January 1995, and costs.

C.In its reply the Organisation contends that, though the text of Article 25 of the 1956 Rules is plain, it is to be given a teleological construction. The purpose of the scheme is not to constitute a lump sum for the family but to provide a substitute for the widow's and orphan's benefits that Articles 21.1 and 24.1 of the 1956 Rules preclude. Besides, Article 25 must be read together with Article 24.3, which lists those who come under the term "survivor" to include "other persons for whose maintenance the employee was responsible and from whom he received care". If Article 25 were taken literally, any natural or legal person designated in the will of the deceased might claim payment from the fund. So the Committee's decision of May 1970 was arbitrary and unwarranted and its compromise decision of May 1995 corrected past mistakes.

As to the Director General's letter of 11 July 1980, OTIF asserts that the acquired rights it refers to arise out of its own interpretation and reasonable application of Article 25. The article was amended merely to clarify the draughtsman's intent; so it cannot be retroactive.

D.The complainants rejoin that OTIF's reply offends against general precepts of law.

Citing Judgment 1125, they submit that where a text is clear it is wrongful to let any teleological construction prevail over the literal one.

E.In its surrejoinder OTIF pleads doubt about the exact meaning of Article 25, if only the term "insurance funds": if a retired employee has no dependants the fund amounts to capital for the statutory heirs or legatees.

It cites Judgment 1125: "the Administrative Committee has wide discretion under Article 25 to take account of personal circumstances before reaching a decision in the general interest".

CONSIDERATIONS:

The main issues of fact

1.Joseph Haenni, who was born on 28 May 1904, served in the Swiss Civil Service as Deputy Director of the Federal Transport Office, then in the Central Office for International Carriage by Rail, the secretariat of the Intergovernmental Organisation for International Carriage by Rail (OTIF). He was Director from 1 January 1959 to 30 June 1970, when he retired.

2.Judgment 1125 (in re Lehmann-Schurter) of 3 July 1991 describes the Organisation's retirement scheme for staff appointed before 1 December 1966. The parties cite the judgment, which has a bearing on this case. Under a scheme of social security that OTIF adopted in 1966 its staff were affiliated to the Federal Insurance Fund which provides retirement and survivors' insurance for Swiss federal civil servants. But any OTIF official recruited before 1 December 1966 was free to stay with the old scheme. Under that scheme a fund was set up for the official's statutory heirs or legatees, to be made over to them after his death. OTIF paid into the fund each year a sum equivalent to 15 per cent of the serving official's salary and after retirement an amount set by the Organisation. Joseph Haenni opted for the old scheme.

3.At its 33rd Session, held from 20 to 22 May 1970, the Administrative Committee of OTIF decided to go on contributing each year to the fund set up on Joseph Haenni's behalf a sum equal to 15 per cent of his yearly salary of 96,200 Swiss francs. It so informed him. Such amounts were paid each year into an account set up for him at the Swiss National Bank. After retirement he got yearly statements of account which he endorsed and returned. The last such statement, which he duly signed, was sent on 9 February 1994. The covering letter spoke of "your insurance fund"; the actual statement reported a "credit balance corresponding to assets in savings account at 15.2.1994" and totalling 618,457.85 Swiss francs.

4.After the new scheme had come in OTIF had difficulty in applying the rule about payment of capital to heirs of staff recruited before 1 December 1966 who had opted for the old scheme. The difficulty arose because under the new scheme the purpose of survivors' insurance is to make good the loss of expectation of maintenance benefit for any widow or dependent child. The issue was raised in Mrs. Lehmann-Schurter's case and Judgment 1125 resolved it in part. The gist of that judgment was as follows. The Tribunal acknowledged in 2 that under the old scheme the retired official was entitled to challenge OTIF's decision about its contributions after retirement. The text of Article 25 of the 1956 Rules was plain and not open to an interpretation contra legem. It required the Organisation to contribute 15 per cent of the salary for a serving official and to make contributions for retired staff as well, though the amount was not set, the Organisation being allowed some discretion on that score. The Tribunal further held in 10 that the official's having no spouse or dependent child upon retirement afforded no grounds for the Organisation's declining to contribute. The Organisation and Mrs. Lehmann-Schurter thereupon agreed that its contribution would amount to 8 per cent of her salary for the duration of her retirement.

5.On the strength of that judgment and the agreement with Mrs. Lehmann-Schurter OTIF made a proposal to Joseph Haenni, who had neither wife nor dependent child: its contribution would thenceforth amount to 8 per cent of his salary, in line with a decision the Administrative Committee had taken on 14 November 1991, at its 76th Session. He agreed, and the Director General acknowledged as much in a letter of thanks written to him on the Organisation's behalf on 20 November 1991. So in the ensuing years OTIF paid its contributions for him at the lower rate of 8 per cent of basic salary.

6.On 11 January 1995 Joseph Haenni died at Sion, in Switzerland. His heirs are the complainants: his daughter Françoise Perruchi, born on 4 July 1931, and Pierre-Pascal Haenni, born on 18 October 1939. They asked OTIF to make over to them the lump sum deposited in the account on their father's behalf at the Bank. On 23 May 1995, at its 83rd Session, the Administrative Committee decided to pay them an amount equivalent only to the contributions paid at the rate of 15 per cent of salary while he was a serving official, plus interest at the rate of 5 per cent a year, or a total of 385,675 Swiss francs. The sum did not include contributions paid into the account at the Bank after his

retirement. His heirs made an appeal against that decision, but the Administrative Committee rejected it by a decision of 25 August 1995. In the Committee's view Article 25 of the 1956 Rules was to be construed in the light of the new rules, which reflect up-to-date thinking on social security, benefits being paid to survivors - widow or widower and dependent child - only if the official was actually maintaining them. The earlier decisions about payments into Joseph Haenni's account, being wrong, should be reversed and replaced with a decision in keeping with the rules.

The heirs claim payment of the 618,457.85 Swiss francs, i.e. the amount held at 18 February 1995 in the account in their father's name at the Bank, plus interest reckoned at the rate of 5 per cent a year from that date. They rely on a literal construction of Article 25 of the 1956 Rules which they say reflects the draughtsman's intent and squares with the agreements between their father and OTIF about the amounts to be paid into his account at the Bank.

The merits

7.Under OTIF's former scheme of social security sums were paid into the official's account at the Swiss National Bank on the strength of the decisions in force at the time and agreements reached with the official. As was held in Lehmann-Schurter, the Organisation's contributions were eventually to go to the official's statutory heirs or legatees but were paid into an account opened on his behalf and he was free to challenge any decision the Organisation took about that account. So such decisions were not internal measures but binding on the Organisation and subject to revision only if requirements for such revision were observed.

There is no need, however, to go into those requirements here. The decision that the Administrative Committee took at its 33rd Session was revised at its 76th Session, with Joseph Haenni's approval. The arguments that OTIF put forward at the time were those it offered in answer to Lehmann-Schurter and that it is submitting again in this case. OTIF followed Judgment 1125 in reaching agreement with the complainants' father. There have since been no new facts, and it may not plead any mistake it discovered afterwards. So it is in bad faith in trying to discard the compromise to which it and the official on behalf of his future heirs had consented: see by way of analogy Judgments 767 (in re Cachelin) and 1053 (in re Beetle and others).

8.Besides, even if there could be formal revision of that decision there would obviously be no substantive reasons for it.

The impugned decision is a wilful departure from Judgment 1125 and does not even address the reasoning therein. What that judgment says is that under Article 25 of the 1956 Rules the Organisation must go on contributing after the official's retirement, though it may at discretion determine the rate of contribution, and the official's having no spouse or dependent child does not allow it to stop contributing. There is no reason not to follow that precedent. OTIF was well aware of the consequences of letting staff choose between two schemes, and one of them was that it promised to respect the choice. Its promise was indeed a determinant of contractual relations between the parties. It is not free to go back on its promise to its former officials and their heirs just because the old system is no longer in tune with ideas of social security that have of late won widespread favour. Its earlier decisions which it wanted to change were therefore in any event quite lawful and it may not revise them on the grounds that they were not.

By the impugned decision of 25 August 1995 the Administrative Committee said that, to put paid to discussion on how to construe Article 25, it had amended Article 5 of Appendix IV to Article 69.2 of the 1993 Staff Regulations by way of "clarification": henceforth an official's heir who had not been his dependant would get no payment from OTIF into the account set up for the heirs after the date of the official's retirement. Contrary to what OTIF makes out in its reply, the purported "clarification" is not in line with any proper construction of the material rules and may not retroactively affect the complainants' entitlements.

The complainants are therefore entitled to full payment of the amount that OTIF deposited in the account at the Bank.

They are also entitled to costs.

DECISION:

For the above reasons,

1.The impugned decision being set aside, the Organisation shall pay the complainants collectively the sum of

618,457.85 Swiss francs, plus interest to be reckoned at the rate of 5 per cent from 18 February 1995.

2.It shall pay the complainants collectively 8,000 Swiss francs in costs.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

Michel Gentot
Julio Barberis
Egli
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.