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Labor Law--Collective Bargaining--The Retirement Benefits of Retired Employees Are a Mandatory Subject of Bargaining Because Retirees Are "Employees" Under the NLRA and Because Active Employees Have an Interest in Such Benefits--*Pittsburgh Plate Glass Company, Chemical Division*

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RECENT DEVELOPMENTS

LABOR LAW—COLLECTIVE BARGAINING—The Retirement Benefits of Retired Employees Are a Mandatory Subject of Bargaining Because Retirees Are “Employees” Under the NLRA and Because Active Employees Have an Interest in Such Benefits—*Pittsburgh Plate Glass Company, Chemical Division**

It is well established that employee pension plans¹ and health insurance programs² are mandatory collective bargaining topics under the National Labor Relations Act (NLRA).³ However, the NLRA requires such bargaining by an employer only with respect to *his own employees*;⁴ no such duty is imposed in situations in which the union demanding the bargaining rights is doing so other than as a representative of “his [the employer’s] employees” within the meaning of the Act.⁵ Recently, in *Pittsburgh Plate Glass Company, Chemical Division*,⁶ the National Labor Relations Board interpreted the meaning of “his employees” in a case in which a union demanded that the employer bargain about the benefits of former employees who had retired.

* 177 N.L.R.B. No. 114, 71 L.R.R.M. 1433 (1969), *appeal docketed*, No. 19,875, 6th Cir., Sept. 23, 1969.

1. *Inland Steel Co.*, 77 N.L.R.B. 1, *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

2. *W.W. Cross & Co.*, 77 N.L.R.B. 1162 (1948), *enforced*, 174 F.2d 875 (1st Cir. 1949).

3. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1964) [hereinafter NLRA], states in part that

to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder

See also Note, *Pension and Retirement Matters—A Subject of Compulsory Collective Bargaining*, 43 ILL. L. REV. 713 (1948).

4. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964) (emphasis added), makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of *his employees* . . .,” concerning those topics which fall within the area of “wages, hours, and other terms and conditions of employment.”

5. NLRA § 2(3), 29 U.S.C. § 152(3) (1964) (emphasis added), states in part that “[t]he term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, *unless the Act explicitly states otherwise* . . .” As has already been shown in note 4 *supra*, § 8(a)(5) explicitly limits the use of the term “employee” with respect to an employer’s obligation to bargain collectively to cover only that employer’s own employees.

6. 177 N.L.R.B. No. 114, 71 L.R.R.M. 1433 (1969), *appeal docketed*, No. 19,875, 6th Cir., Sept. 23, 1969. This was the first case in the thirty-four-year history of the NLRA in which the Board faced the question of the status of retired workers for collective-bargaining purposes under the Act. 177 N.L.R.B. No. 114, at 5, 71 L.R.R.M. at 1435.

Since 1949, the union⁷ had been the exclusive bargaining representative of the hourly rated workers of the employer.⁸ Among the terms of the contract negotiated by the parties in 1964 was a provision continuing a previously established health insurance program which covered both active and retired employees. Under the plan, retirees were required to pay a part of the premiums for their coverage, and the employer paid the remainder. Following the adoption of the Medicare program in 1965,⁹ the union sought mid-term contract negotiations concerning those provisions of the health insurance program which had been supplanted by the new Medicare coverage.¹⁰ The employer rejected the union's request and challenged its right to bargain for retirees on the ground that they were not "his employees" within the meaning of the NLRA.¹¹ The company subsequently announced its intention to make a unilateral modification of the existing plan in order to provide coverage which would supplement Medicare. On account of union objections, however, the employer did not implement its announced plan, but instead offered retirees, on an individual basis, the option of adopting the proposed supplemental coverage in lieu of their present plan. Thereupon, the union filed an unfair labor practice charge with the NLRB, claiming that the employer's action constituted a refusal to bargain about a mandatory subject of collective bargaining in violation of section 8(a)(5) of the NLRA.¹² While recognizing the established precedent that employee health insurance plans are mandatory subjects of collective bargaining under the NLRA,¹³ the trial examiner concluded that there had been no violation by the employer because

pensioners and retirees are not employees as defined by Section 2(3) of the Act . . . and, therefore, are not employees within the meaning

7. The union in the instant case was Local 1, Allied Chemical and Alkali Workers of America.

8. The employer in the case was the Barberton, Ohio, Plant of the Pittsburgh Plate Glass Company, Chemical Division.

9. Act of July 30, 1965, Pub. L. No. 89-97, 79 Stat. 290.

10. For discussions of the effects of Medicare on collective bargaining contracts, see Foust, *Effect of Medicare on Privately Bargained Plans*, N.Y.U. 19TH CONF. ON LAB. 273 (1966); *Developments in Industrial Relations*, 89 MONTHLY LAB. REV. 420 (1966); *Medicare and Negotiated Health Insurance for Workers*, 88 MONTHLY LAB. REV., Sept. 1965, at iii.

11. During the 1959 negotiations, the employer had similarly challenged the right of the union to require it to bargain about health insurance benefits for retired workers, but it finally agreed to do so and continued to bargain with the union concerning such benefits in subsequent negotiations.

12. 29 U.S.C. § 158(a)(5) (1964); see note 4 *supra*.

13. Pittsburgh Plate Glass Co., Chemical Div., TXD-196-67, at 5 (April 14, 1967) (Constantine, Trial Examiner). For the differentiation of the three major types of collective bargaining topics—mandatory, permissive, and illegal—regulated by the NLRA, see NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

of Section 8(a)(5). . . . Therefore, their pensions and other benefits received as retirees and pensioners are not . . . mandatory subjects of collective bargaining, and [the employer] is not under a statutory onus to bargain thereon.¹⁴

The Board, however, disagreed. Before reaching the question whether retiree benefits are a mandatory subject of collective bargaining under the Act, it held that the employer, by unilaterally modifying the terms of the collective bargaining contract which was in effect, had violated section 8(a)(5).¹⁵ This ground, by itself, is sufficient to support the Board's decision in *Pittsburgh Plate Glass*.¹⁶

However, the Board also concluded "that retired employees' retirement benefits are embraced by the bargaining obligation of Section 8(a)(5)"¹⁷ because they are a mandatory subject of bargaining. The Board enunciated three grounds for this conclusion:

First, that retired employees are "employees" within the meaning of the statute for the purposes of bargaining about changes in their retirement benefits; second, that bargaining about changes in retirement benefits for retired employees is in any event within the contemplation of the statute because of the interest which active employees have in the subject; and, third, that bargaining about such benefits is fully consonant with the statutory requirement that "wages, hours, and other terms and conditions of employment" be subject to the institution of collective bargaining envisioned by the Act.¹⁸

This Recent Development will examine the substance and implications of the latter aspect of *Pittsburgh Plate Glass*, although it is only dictum in the case. The third ground of the Board's conclusion regarding retirement benefits was really only a general

14. TXD-196-67, at 6.

15. 177 N.L.R.B. No. 114, at 20, 71 L.R.R.M. at 1440-41. The Board also found a derivative violation of § 8(a)(1), which generally forbids employer interference with the rights of employees to organize and bargain collectively.

16. Section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1964), defines the § 8(a)(5) duty to bargain collectively. In addition to requiring bargaining about mandatory subjects (wages, hours, and working conditions), it requires bargaining about any question arising under a negotiated agreement, and it prohibits the unilateral termination or modification of an effective collective bargaining contract without compliance with the terms of that section. Thus, the Board's conclusion that the employer's unilateral modification of the medical plan for retired employees violated § 8(a)(5) appears to be sound. See *C & S Indus.*, 158 N.L.R.B. 454, 457-58 (1966). That the employer's action might also have given rise to arbitration proceedings or an action for contract enforcement does not deprive the Board of jurisdiction to remedy the unfair labor practice. *NLRB v. Huttig Sash & Door Co.*, 377 F.2d 764 (8th Cir. 1967). See generally Note, *Labor Law—Jurisdiction—Contractual Interpretation, Unfair Labor Practices, and Arbitration: A Proposed Resolution of Jurisdictional Overlap*, 68 MICH. L. REV. 141 (1969).

17. 177 N.L.R.B. No. 114, at 11, 71 L.R.R.M. at 1438.

18. 177 N.L.R.B. No. 114, at 5, 71 L.R.R.M. at 1435.

reiteration of the first two. It is therefore apparent that that ground is dependent upon the validity of either or both of the other two bases of the Board's conclusion.

Since the second ground appears to be the weaker of the two, it will be examined and disposed of before attention is focused on the first. In concluding that the retirement benefits of retired employees is a mandatory topic of collective bargaining between an employer and the representative of currently active employees, the Board emphasized the personal interest of active employees in the subject. The right of active employees to bargain about the retirement benefits which will affect them directly in the future is beyond question.¹⁹ However, the retirement benefits at issue in *Pittsburgh Plate Glass* were of a different nature; those benefits were being enjoyed by former employees who had already retired at the time of the dispute. Active employees cannot be said to have the same direct, personal interest in benefits of that nature. Consequently, it is considerably more difficult to bring such benefits within the scope of section 8(d) as "wages, hours, and other terms and conditions of employment"²⁰ with respect to the active employees.

In attempting to bring the retiree benefits within that definition, the Board noted that changes in retirees' benefits affect the amount of money available for active employees, thus placing retirees in competition with the active employees.²¹ Arguably, this consideration is similar to the one presented in *Local 24, International Brotherhood of Teamsters v. Oliver*,²² in which the competition was between drivers who belonged to the Teamsters Union and who worked for the various employers involved, and the independent "gypsy" drivers, who owned their own tractors which they "leased" to the same employers. To limit the competitive effect of the independent owner-drivers, the Teamsters Union negotiated with the employers an agreement regulating the minimum rates which could be paid to that group. In response, the owner-drivers brought a suit under the applicable state antitrust law. The Supreme Court held that the regulation of the owner-drivers' "leasing" rates was a mandatory subject for collective bargaining, and that hence state antitrust regulation was pre-empted by federal labor legislation.²³ The Court noted that such "regulations embody . . .

19. See *Inland Steel Co.*, 77 N.L.R.B. 1, *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

20. See note 2 *supra*.

21. 177 N.L.R.B. No. 114, at 14, 71 L.R.R.M. at 1438.

22. 358 U.S. 283 (1959).

23. 358 U.S. at 293-95. The basic standard for the doctrine of pre-emption was established in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), in which the Court stated: "When an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive com-

a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract,"²⁴ and recognized that such an agreement is so directly related to "wages, hours, and other terms and conditions of employment," that it is covered by section 8(d) of the NLRA.²⁵

Although applying the *Oliver* reasoning to the competition between retirees and active employees may seem to support the Board's position in *Pittsburgh Plate Glass*, the retiree competition is distinguishable. As the Court noted in *Oliver*, the threat of the owner-drivers to the union drivers was very direct, for lower "leasing" rates paid to the owner-drivers could have undermined the union wage scale or caused union drivers to be displaced. But a severe and direct threat is not present with respect to the benefits paid to retired workers. Increases in those benefits are unlikely to have such pervasive effects on the wage rates of active employees, and there is no threat at all that active employees would be displaced by retirees. It is therefore submitted that retirement benefits of retirees are not related to the wages, hours, and working conditions of active employees to such a degree as to require an employer, simply because of the subject matter, to bargain about them with the representative of the active employees.

The Board also noted the active employees' personal interest in seeing that the employer honors his obligations under retirement benefit programs—that is, that the employer neither breaches his contractual obligations nor unilaterally modifies them. But this concern can be accommodated without trying to raise the interest of active employees in retiree benefits to the level necessary to bring them within the scope of mandatory subjects of bargaining with respect to active employees. An action under section 301 of the Labor Management Relations Act (LMRA)²⁶ is available to remedy breaches of collective bargaining agreements; and section 8(a)(5), as the Board recognized in *Pittsburgh Plate Glass*, affords protection against unilateral modifications of collective bargaining contracts.²⁷

Since the Board's conclusion that retiree benefits are a mandatory subject of bargaining with respect to active employees is difficult to sustain, the real basis for the decision that retiree benefits are a mandatory subject of bargaining must be its conclusion that "retired employees are 'employees' within the meaning of the statute for the purposes of bargaining about changes in their retirement

petence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 245.

24. 358 U.S. at 294.

25. 29 U.S.C. § 158(d) (1964). For the Court's discussion, see 358 U.S. at 294-95.

26. 29 U.S.C. § 185 (1964).

27. See notes 15-16 *supra* and accompanying text.

benefits"²⁸ The Board reached this conclusion despite the fact that it has consistently ruled that retired workers are not "employees" under the NLRA for the purposes of voting in representation elections.²⁹ The Board said that its earlier decisions applied only to the narrow issue of voting eligibility,³⁰ and noted that decisions had often considered persons who were not presently working for the employer in question to be "employees" within the meaning of the NLRA: "[T]he Board has held that applicants for employment and registrants at hiring halls—who have never been hired in the first place—as well as persons who have quit or whose employers have gone out of business are 'employees' embraced by the policies of the Act."³¹ The Board also emphasized that a pensioner's "retirement status . . . is the culmination and the product of years of employment" and stated that such an individual has "deep legal, economic, and emotional attachments to a bargaining unit which

28. 177 N.L.R.B. No. 114, at 5, 71 L.R.R.M. at 1435.

29. Public Serv. Corp. of N.J., 72 N.L.R.B. 224 (1947). It is interesting to note that in that case, the Board noted that "[w]e have considerable doubt as to whether or not pensioners are employees within the meaning of Section 2(3) of the Act, since they no longer perform any work for the Employers, and have little expectancy of resuming their former employment." 72 N.L.R.B. at 299-30. Furthermore, in Illinois Knitting Co., 11 N.L.R.B. 48 (1939), the Board rejected the argument that the retired person in question should have voting rights because he might possibly return to work at some future date. In rejecting that contention, the Board stated that it did not believe that "the bare prospect of future employment . . . is sufficient to make [the retiree an 'employee' for voting purposes] within the meaning of the Act." 11 N.L.R.B. at 53. In another representation case, *Whiting Corp. v. NLRB*, 200 F.2d 43 (7th Cir. 1952), the court noted:

It seems well established by the Board's own decisions, *The Massillon Aluminum Company*, 27 N.L.R.B. 165; *Western Union Telegraph Co.*, 32 N.L.R.B. 210, at 215; *Van Brunt Mfg. Co.*, 45 N.L.R.B. 634, at 636; *W. D. Byrin & Sons of Md., Inc.*, 55 N.L.R.B. 172, at 174, that whether one is an employee is a question to be determined by his reasonable expectation of employment within a reasonable time in the future.

200 F.2d at 45. See also *NLRB v. Atkinson Dredging Co.*, 329 F.2d 158 (4th Cir.), *cert. denied*, 377 U.S. 965 (1964), in which the court applied the same standard.

30. 177 N.L.R.B. No. 114, at 7, 71 L.R.R.M. at 1436.

31. 177 N.L.R.B. No. 114, at 8, 71 L.R.R.M. at 1436 (citations omitted). It should be noted, however, that, except for *Chemrock Corp.*, 151 N.L.R.B. 1074, 1076-79 (1965), the cases cited by the Board all involved general unfair labor practices and did not have any direct relevance to the narrower issue of who constitutes an "employee" for bargaining purposes under the NLRA. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182-87 (1941); *Local 872, Intl. Longshoremen's Assn.*, 163 N.L.R.B. No. 69 (1967); *Goodman Lumber Co.*, 166 N.L.R.B. No. 48 (1967). Moreover, in his dissenting opinion, Member Zagoria, citing *Piasecki Aircraft Corp.*, 123 N.L.R.B. 348, 349-50 (1959), *enforced*, 280 F.2d 575 (3d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961), pointed out that "[t]hrough an employer may violate Section 8(a)(3) by refusing to hire particular employees, he does not normally violate Section 8(a)(5) by refusing to bargain about them, where they have not yet been made his employees." 177 N.L.R.B. No. 114, at 25, 71 L.R.R.M. at 1441-42. Zagoria based that conclusion on the fact that "[t]he antidiscriminatory provisions refer to 'employee' generally, whereas, unlike those provisions, Section 8(a)(5) contains specific language requiring an employer to bargain for 'his employees'." *Page Aircraft Maintenance, Inc.*, 123 N.L.R.B. 159, 163 n.5 (1959), quoted in 177 N.L.R.B. No. 114, at 25, 71 L.R.R.M. at 1442.

measurably exceed the attachments of others who have been held to be employees."³² Hence, the Board concluded that "the Act's protection is not narrowly limited to those who are recorded on the employer's current payroll."³³ The Board's conclusion is unsatisfactory, however, since the traditional test for whether one is an employee for representation purposes has been whether there is a reasonable expectation of his being employed at a reasonable time in the future.³⁴ Retirees, unlike the examples cited by the Board, simply do not fit this mold.

The Board further noted that an employee's retirement is the time "when he is most vulnerable economically and most needs representation," and it determined that, therefore, protection should be afforded to retirees by treating them as "employees" under the NLRA for bargaining purposes, thereby guaranteeing them continued representation after their retirement from the active work force.³⁵ But retirees are not without protection of their economic rights. Retirement benefits are recognized as vested rights, enforceable in the courts;³⁶ and when they have been granted through an ef-

32. 177 N.L.R.B. No. 114, at 9, 71 L.R.R.M. at 1436. By its reasoning the Board rejected the interpretation of the trial examiner, who had distinguished this line of cases—that is, those holding others not presently working for the employer to be "employees"—on one of two grounds: either that there had been present in those cases circumstances in which there was a reasonable prospect that an employer-employee relationship was capable of being developed, or else that the persons in question in those cases were, unlike the retirees in *Pittsburgh Plate Glass*, members of the working class in general. TXD-196-67, at 6.

33. 177 N.L.R.B. No. 114, at 9, 71 L.R.R.M. at 1436.

34. See note 29 *supra*.

35. 177 N.L.R.B. No. 114, at 10, 71 L.R.R.M. at 1437. The Board supported its position by citing the language of the Supreme Court in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 129 (1944) (emphasis added):

[T]he broad language of the Act's definitions, which in terms reject conventional limitations . . . leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by *underlying economic facts* rather than technically and exclusively by previously established legal classifications. . . . *That term [employee] . . . must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. "Where all the conditions of the relation require protection, protection ought to be given."*

36. In *Weesner v. Electric Power Bd.*, 41 CCH Lab. Cas. 23,739, 23,741 (Tenn. 1961), it was recognized that

[i]n the case of *Bird v. Connecticut Power Co., et al.*, 144 Conn. 456, 133 A.2d 894, the Court holds: "A Board of Directors cannot legally strip an employee of the benefits of a pension plan where the employee has complied with the terms of the offer of a pension since the purposes of the plan could be readily frustrated at the whim of the Directors. *Forrish v. Kennedy*, 377 Pa. 370, 376, 105 A.(2d) 671; *Wilson v. Rudolph Wurlitzer Co.*, 48 Ohio App. 450, 454, 194 N.E. 441.

In *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio St. 405, 410, 171 N.E.2d 518, 522 (1960), the court recognized that "once an employee, who has accepted employment under [a contract providing for a retirement plan], has complied with all the conditions entitling him to participate in such plan, his rights become vested and the employer cannot divest the employee of his rights thereunder." Another court has also noted that a "pension plan is a unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite number of years." *Hurd v. Illinois Bell Tel. Co.*, 234 F.2d 942, 946 (7th

fective collective bargaining contract, they may be enforced in a suit under section 301 of the LMRA as well as in state courts.³⁷ Moreover, it is questionable whether retirees can expect to gain much protection by the representation of a union composed largely of active employees whose interests may be very different from theirs.³⁸

The Board also stated that

[c]ompensation for employment need not be synchronous with the performance of labor. Current services may be rewarded by benefits which arise (or continue) in the future and past services may be retroactively compensated with additional benefits. . . . The critical question is whether the benefit is founded on employment—past or present.³⁹

The Board concluded that it was not inconsistent with the policies of the NLRA to require an employer to bargain about retirement benefits for "employees" who had performed their active employment during earlier time periods.

It is not clear, however, that disposition of this question is so easy. If such benefits were extracted for services which were never provided, the union would be guilty of violating section 8(b)(6) of the NLRA, which makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value . . . for services which are not performed or not to be performed."⁴⁰ There is some conceptual difficulty, at least, with viewing benefits extracted for services rendered in the past as "for services which are . . . performed or . . . to be performed."⁴¹ Although it

Cir. 1956). See *Upholsterers' Union v. American Pad Co.*, 372 F.2d 427 (6th Cir. 1967); *Carrozoni v. Thomas*, 56 CCH Lab. Cas. 19,908 (Pa. C.P. 1966).

37. 29 U.S.C. § 185 (1964); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

38. The Board had previously decided in *Public Serv. Corp. of N.J.*, 72 N.L.R.B. 224 (1947), that "even if pensioners were to be considered as employees . . . they lack a substantial community of interest with the employees who are presently in the active service of the Employers." 72 N.L.R.B. at 230. It might be argued that there is a third possibility for retirees, besides those of no representation or representation by the union which represented them as active employees. That possibility is a separate union for retired employees. But even if retirees could qualify under the NLRA as employees, and even if the Board would certify retirees as an appropriate bargaining unit, it is unlikely that a union composed only of retirees could wield sufficient bargaining power to make it a viable force.

39. 177 N.L.R.B. No. 114, at 9-10, 71 L.R.R.M. at 1436-37.

40. 29 U.S.C. § 158(b)(6) (1964).

41. The Board cited *Bergen Point Iron Works*, 79 N.L.R.B. 1077 (1947) (Leff, Trial Examiner), *affd. by the Board*, 79 N.L.R.B. 1073 (1948), in support of its position that past services may be retroactively compensated with additional benefits. However, *Bergen Point Iron Works* involved a special set of circumstances which do not occur in the normal course of events. While the parties were negotiating for a new contract, they agreed to continue their prior contract in existence until the new one could be reached. It was stipulated by the parties that the new agreement,

should be acknowledged that section 8(b)(6) was aimed at another specific problem—namely, featherbedding⁴²—it is arguable that forcing an employer to bargain about benefits for persons who have ceased to be and who will not again be in his employ, and who have been, or are continuing to be, compensated for their services according to a previous agreement, falls within the spirit as well as the letter of this section.

The Board finally relied on section 302(c)(5) of the LMRA,⁴³ which requires that employer contributions to joint labor-management pension and health insurance plans be held in trusts, each of which must be administered by an equal number of employer and employee representatives. It felt that this provision was an indication of congressional intent that the labor-management relationship is to continue after active workers have retired.⁴⁴ It should be noted, however, that section 302(c)(5) was really intended to provide a safeguard against the corrupt handling of retirement and health insurance trust funds, and that no policy regarding the relationship between employers and their retired workers was meant to be manifested.⁴⁵

when reached, would be retroactively applied to the date of expiration of the old one. It was after this interim agreement that the employer refused to negotiate over the retroactive application of the new contract. Thus, although the trial examiner's decision stated that such a refusal to bargain over retroactivity "was in itself a refusal to bargain upon a proper subject of negotiation" (79 N.L.R.B. at 1101), it is not clear that the same conclusion would be reached in the absence of a prior arrangement between the parties under which the employees continue to work with the full expectation of receiving additional compensation at a later date. The employees of the Pittsburgh Plate Glass Company had no such expectation beyond those "deferred wages" which had been expressly defined by the agreement under which they had been employed. It is possible to argue, then, that once they had finished working for their employer, they had been fully compensated for the work they had performed, except for the specific amount of defined retirement benefits which they would receive in the future. Thus, any demands by them for additional compensation in the form of increased retirement benefits might be looked upon as a demand for payments for services not performed, since they had been, or would be, fully paid for all of their previous services. Under this interpretation, their demands would constitute a violation of § 8(b)(6) of the NLRA, 29 U.S.C. § 158(b)(6) (1964).

42. See 93 CONG. REC. 6446, 6859 (1947); *American Newspaper Publishers Assn. v. NLRB*, 345 U.S. 100, 102 (1953); Note, *Featherbedding and Taft-Hartley*, 52 COLUM. L. REV. 1020, 1025-33 (1952).

43. 29 U.S.C. § 186(c)(5) (1964).

44. The Board cited *United States v. Ryan*, 350 U.S. 299 (1956), in support of its argument, but that case dealt only with the narrow issue of who constitutes an employee "representative" under § 302(b) of the LMRA, 29 U.S.C. § 186(b) (1964).

45. See *United States v. Roth*, 333 F.2d 450 (2d Cir. 1964), *cert. denied*, 380 U.S. 942 (1965); *Weir v. Chicago Plastering Institute, Inc.*, 177 F. Supp. 688 (N.D. Ind. 1959), *revd. and remanded on other grounds*, 279 F.2d 92 (7th Cir. 1960); *Sanders v. Birthright*, 172 F. Supp. 895 (S.D. Ill. 1959); *American Bakeries Co. v. Barrick*, 162 F. Supp. 882 (N.D. Ohio 1958), *affd.*, 285 F.2d 426 (6th Cir. 1960). See also Note, *Taft-Hartley Regulation of Employer Payments to Union Representatives: Bribery, Extortion and Welfare Funds Under Section 302*, 67 YALE L.J. 732 (1958).

In view of the fact that, as a matter of law, the Board's conclusion was hardly inevitable, the benefits and protections likely to be gained by retirees as a result of the position assumed in *Pittsburgh Plate Glass* should be examined and compared with the problems which could arise from that position. At first, one is likely to believe that the Board's *Pittsburgh Plate Glass* holding will be highly beneficial to the vast group of retired workers who, until that decision, were generally unrepresented. It must be recognized, however, that since retirees themselves possess no economic bargaining power, they must depend on their actively employed brethren to bring pressure to bear against their former employers for increases in retirement benefits. It is improbable that active employees will be primarily interested in retirement benefits; rather, they are likely to be more concerned about increased wages, shorter hours, and greater fringe benefits. Moreover, since increased benefits for retirees tend to make less money available for the benefits being sought by the active employees, it is difficult to imagine that the latter would be willing to exert much bargaining pressure on behalf of the retirees.

Apparently, retirees are not to have even the slightest influence on the bargaining representative by being able to vote for or against a particular union. Although it seems incongruous for the Board to consider a retiree to be an "employee" within the meaning of the NLRA for collective bargaining purposes, while at the same time denying him the right to vote in the very election which determines who his bargaining representative will be, that appears to be the conclusion which the Board reached. Thus, while retirees do not have the right to vote, they are to have the right to be represented by the union which has been designated by the active employees as their bargaining representative.⁴⁶

The requirement that unions represent retirees could place a heavy burden on those unions. Even though one court has indicated that a medical insurance plan for active employees may provide better coverage than its counterpart does for retired workers,⁴⁷ such treatment might no longer be permissible. If a union allowed disparate treatment of active employees and retirees to exist, it might be guilty of a breach of its statutory duty of fair representation.⁴⁸

46. In most cases, however, due to the no-raiding agreements which most unions have today, the union representative is the very one which the retirees themselves had the right to choose while they were actively employed.

47. *Jensen v. Garvison*, 274 F. Supp. 866, 869 (D. Ore. 1967).

48. See *Vaca v. Sipes*, 386 U.S. 171 (1967). See also *Humphrey v. Moore*, 375 U.S. 335 (1964); *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967); *Hughes Tool Co.*, 147 N.L.R.B. 1573 (1964); Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO ST. L.J. 39 (1961); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Hanslowe, *The Collective Agreement and the Duty of Fair Representation*, 14 LAB. L.J. 1052 (1963).

That duty requires a union "to serve the interests of all members [of the designated bargaining unit] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."⁴⁹ Although this standard does not require a union to treat all persons identically, it does restrict its freedom of action. A union could easily find itself caught between the demands by active employees for all of the money which the employer has available for negotiated increases and the threat of suits by retirees for a breach of its fair representation duty if it fails to obtain increases in their benefits commensurate with those achieved for the active workers.⁵⁰ The union would be placed in an equally precarious position if the employer decided to lock out its active employees in an effort to obtain a better collective bargaining position with respect to the demands for increased benefits for retirees.⁵¹ If it immediately acceded to the employer's demands, it might be in breach of its duty of fair representation from the standpoint of the retired workers. On the other hand, if it chose to continue pressing its demands for increased retirement benefits, union solidarity might well be endangered, since many active employees would not relish the prospect of a long lockout solely to accommodate the desires of the retirees. Such conflicting internal pressures could impair the union's general effectiveness as a bargaining representative.

These dangers, substantial in themselves, arise from the Board's position in *Pittsburgh Plate Glass* that "retired employees are 'employees' within the meaning of the statute [only] for the purposes of bargaining about changes in their retirement benefits"⁵² New dimensions are added to the problem if retirees are eventually accorded full "employee" status. Although on its face the Board's reasoning did not extend that status under the Act to retirees, an analysis of the provisions of the NLRA suggests that such an extension is implicit in its conclusion. Section 2(3) states that "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, *unless the Act ex-*

49. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

50. While it is not entirely clear how much discretion a union may exercise in these instances, the mere threat of such suits would place the union in an unfortunate position. It might be afraid to seek large wage increases or increases in vacation allowances, in lieu of seeking increased retirement benefits, for fear that retirees might claim that they were not being adequately represented. On the other hand, if the union obtained large retirement benefit increases in lieu of direct wage raises, the young, active employees might well harass it by raising the same type of complaint.

51. That such a tactic is at least possible is demonstrated by *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), and *Darling & Co.*, 171 N.L.R.B. No. 95, 68 L.R.R.M. 1133 (1968).

52. 177 N.L.R.B. No. 114, at 5, 71 L.R.R.M. at 1435.

explicitly states otherwise"⁵³ Section 8(a)(5), dealing with an employer's obligation to bargain collectively, is narrower and expressly restricts the meaning of the term "employee" to the particular employer's own employees.⁵⁴ While it is clear that all persons who would be considered "employees" under section 2(3) would not necessarily be considered "employees" within the narrower scope of section 8(a)(5), it does appear that any person regarded as an "employee" for bargaining purposes under section 8(a)(5) would automatically be covered by the broader section 2(3) definition.⁵⁵ Similarly, those persons covered by section 8(a)(5) appear to be covered by the term "employees" as used in section 9 of the Act,⁵⁶ which regulates the selection of collective bargaining representatives. The reasoning of the Board that retirees can be employees solely for purposes of section 8(a)(5) is difficult to reconcile with the express terms of the Act, for it is clear that section 8(a)(5) merely places a restriction upon those otherwise considered to be "employees" within the scope of section 2(3).⁵⁷ If this construction of the NLRA is sound, the eventual extension of full employee status to retirees is indicated; and, hence, *Pittsburgh Plate Glass* could affect both employers and unions even more significantly than has been anticipated.

The extension of full "employee" status under the NLRA to retired workers would constitute a great departure from existing Board precedent, especially in the area of voting eligibility.⁵⁸ As employees, retirees would be entitled to vote in representation elections and would also have the right to file decertification and deauthorization petitions.⁵⁹ Thus, in those representation elections in which the active employees are fairly divided, it would be possible for a united group of pensioners to provide the controlling "swing" vote. Since retirees usually share little community of bargaining interests with active employees,⁶⁰ such a result might well be destructive

53. 29 U.S.C. § 152(3) (1964) (emphasis added).

54. 29 U.S.C. § 158(a)(5) (1964); see note 4 *supra*.

55. Cf. *Page Aircraft Maintenance, Inc.*, 123 N.L.R.B. 159, 163 n.5 (1959).

56. 29 U.S.C. § 159 (1964). This conclusion naturally follows from the fact that the only individuals with whom an employer is required to bargain by § 8(a)(5) are the "representatives of his employees." Since § 9 defines the procedures to be followed in order to determine who those representatives will be, it is clear that the "employees" who may choose their representatives in accordance with § 9 procedures are the same "employees" with whose selected representatives the employer is required to bargain.

57. See note 4 *supra* and text accompanying notes 53-54 *supra*.

58. See note 29 *supra*.

59. See NLRA §§ 9(c)(1)(A)(ii), (e)(1), 29 U.S.C. §§ 159(c)(1)(A)(ii), (e)(1) (1964).

60. See the argument of the Board in *Indianapolis Glove Co. v. NLRB*, 400 F.2d 363, 368 (6th Cir. 1968).

of the rights of the active workers involved. It is certainly doubtful that the Board contemplated such a result.⁶¹

Pittsburgh Plate Glass could also have important implications in those situations in which a union security agreement⁶² is in effect. If retirees are to be fully and fairly represented by the recognized labor organization,⁶³ that union might equitably expect them to assume the obligation of providing financial support for the organization.⁶⁴ It might be impossible as a practical matter, however, for the union to enforce a security agreement against a retiree. If an active employee refused to pay the required dues and fees, he would be subject to discharge;⁶⁵ but a retiree is not vulnerable to that sanction. A similar result might be reached if the retiree's pension benefits were terminated; but since those benefit rights are generally recognized as being vested rights,⁶⁶ termination of them would probably not withstand challenge in the courts. A possible sanction would be to take away the delinquent retiree's right to vote in representation elections. However, since the collective bargaining representative would already have been chosen, and since union no-raiding agreements tend to minimize interunion

61. This conjecture as to the Board's attitude is well supported by the Board's express statement in *Pittsburgh Plate Glass* that it intended to continue its existing doctrine denying retirees the right to engage in representation proceedings. 177 N.L.R.B. No. 114, at 7-8, 71 L.R.R.M. at 1436.

62. Security agreements force employees, as a condition of employment, to comply with certain requirements which benefit the union. Since the closed shop was outlawed in 1947 by the Taft-Hartley amendments to §§ 7 and 8(a)(3) of the NLRA, 29 U.S.C. §§ 157, 158(a)(3) (1964), the union shop has become the most often employed security device. Union shop agreements, which require an employee to become a member of the union within a prescribed period after his initial employment, were found in about 53% of all collective bargaining contracts in 1964. *Basic Contract Patterns: Union Security Clauses*, 56 L.R.R.M. 16 (1964). But the only "membership" obligation which may be required is, according to the NLRA, the duty to pay initiation fees and dues. *Union Starch & Ref. Co.*, 87 N.L.R.B. 779 (1949), *enforced*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951). Other forms of union security devices are the agency shop, under which an employee need not join the union but must pay the union an amount equal to the customary initiation fee and the periodic dues required of members, and maintenance-of-membership agreements, which require that once an employee is a union member he must remain a member.

63. For discussions of the duty of fair representation, see authorities cited in note 48 *supra*.

64. Congress has recognized the inequities which would result if a union could not require the sharing of its financial burden by all persons whom it is obligated to represent. The proviso to § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1964), which expressly permits the use of union security agreements, was promulgated by Congress in recognition of the fact that, in the absence of such agreements, "many employees sharing the benefits of what unions are able to accomplish, by collective bargaining, will refuse to pay their share of the cost." S. REP. No. 105, 80th Cong., 1st Sess. 6 (1947); 1 LEGISLATIVE HISTORY OF THE L.M.R.A. 412 (1948).

65. See proviso to § 8(a)(3), 29 U.S.C. § 158(a)(3) (1964).

66. See note 36 *supra*.

representation competition, such a "penalty" would have little effect on the retiree. Thus, the burden of representing retirees would be imposed upon a union which could not effectively ensure that retirees would contribute their share to the organization's financial support.⁶⁷

Another problem which could arise in situations in which retirees are allowed to become full union members or are required to do so⁶⁸ is that as members they would be entitled to the wide range of privileges and protections guaranteed under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).⁶⁹

67. This problem would be present even under the Board's position that retirees are "employees" only for bargaining purposes, for even in that case the union would have the right to expect financial support from the retired workers whom it must represent.

68. These situations, however, are not the normal ones. Many unions have limited retirees to honorary, nonvoting membership status. 177 N.L.R.B. No. 144, at 24, 71 L.R.R.M. at 1441. Nevertheless, if a union security agreement is in effect and it requires retirees to maintain their union membership, those retirees, presumably as "members," have the same obligations and rights as other employees. But if allowing retirees to be voting members proved to be burdensome or problematic, the union might wish to expel them. It might be able to do so under the proviso to § 8(b)(1)(A) of the NLRA, 29 U.S.C. § 159(b)(1)(A) (1964), even though it has a security agreement. It should be noted, however, that the expulsion of retirees might be challenged under § 102 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 412 (1964), or under state law as a violation of a contract right or a property right in their union membership. See *Polin v. Kaplin*, 257 N.Y. 277, 177 N.E. 833 (1931); *Heasley v. Operative Plasterers Intl. Assn.*, 324 Pa. 257, 188 A. 206 (1936). In any event, if the union did expel retirees, it would thus have no way to enforce the payment of dues and fees by the retirees. In addition, the proviso to § 8(b)(1)(A) apparently allows a union to exclude retirees, even if they are "employees," in situations in which they are exempted from the security agreement or in which there is no security agreement. A union's right to exclude employees from membership on the basis of race was upheld in *Oliphant v. Brotherhood of Locomotive Firemen*, 156 F. Supp. 89 (1957), *affd.*, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959). Although racial discrimination by most unions was outlawed by § 703(c) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c) (1964), the general principle of unrestricted union control over membership seems to persist. One recent development which might limit this doctrine is the growing recognition of a union's duty of fair representation for all members of the bargaining unit. See, e.g., *Vaca v. Sipes*, 386 U.S. 171 (1967). Arguably, this principle is incompatible with the idea that a union may arbitrarily exclude those for whom it is the exclusive bargaining representative; but this question is as yet unanswered.

69. 29 U.S.C. §§ 401-531 (1964). These retirees would clearly be "members" within the meaning of that term as defined in § 3(o) of the LMRDA, 29 U.S.C. § 402(o) (1964). Among the rights which the LMRDA guarantees to the union members are the right to nominate candidates and to vote in union elections or referenda; freedom of expression on any business properly before a union meeting; the right to sue the union; and procedural safeguards in any disciplinary proceedings instituted against them. LMRDA § 101(a), 29 U.S.C. § 411(a) (1964). For discussions concerning the particular rights guaranteed to individual union members under the LMRDA, see Aaron, *The Union Member's "Bill of Rights": First Two Years*, *INDUST. REL.*, Feb. 1962, at 47; Dunau, *Some Comments on the Bill of Rights of Members of Labor Organizations*, in *N.Y.U. 14TH CONF. ON LAB. 77* (1961); Thatcher, *Rights of Individual Union Members Under Title I and Section 610 of the Landrum-Griffin Act*, 52 *GEO. L.J.* 339 (1964). See generally Aaron, *The Labor-Management Reporting and*

Consequently, when the actively employed membership is closely divided on a particular internal union issue, a united group of retired employees, who may share few interests with the active employees, might be able, as voting union members, to control the final resolution of the issue.

Pittsburgh Plate Glass could also have important ramifications on other groups of individuals who are not currently employed in active capacities, especially if the ultimate effect of that decision is the imposition of full "employee" status on retirees. The question might arise, for example, whether permanently and totally disabled persons who are receiving compensation from their former employers above the amount to which they are entitled under workmen's compensation laws are "employees" within the meaning of the NLRA. They too have continuing ties with their former employment units, even though they have no future expectation of being re-employed. Perhaps the Board's decision indicates that their disability benefits should also be considered mandatory subjects for collective bargaining. Another group of individuals who might qualify as "employees" under the Board's *Pittsburgh Plate Glass* reasoning consists of unemployed persons who have been laid off for long periods of time with no reasonable prospect of returning to work, but who are receiving supplemental unemployment benefits (SUB) from their former employers. The Board's reasoning appears to require a union and an employer to negotiate over possible increases in these persons' SUB rates as well as in the length of time for which the benefits must be paid, although such individuals, like retirees, may have no reasonable prospects for re-employment in the near future. One might argue that this reasoning suggests that these persons should also be afforded coverage under the NLRA, but that conclusion would only magnify the problems which have been discussed with respect to the extension of such coverage to retired workers. Since pensioners, disabled persons, and unemployed workers usually have bargaining objectives and interests very different from those of active employees, bitter dissension among the various union factions is easily anticipated. Moreover, when the members of these various classes are aggregated, it is conceivable that in some situations they could constitute a substantial portion of the union membership with considerable influence in the union. It is clear, at least, that the inclusion of such "marginal employees" in the bargaining unit would not be conducive either to the effective representation which a labor organization is expected to provide

Disclosure Act of 1959, 73 HARV. L. REV. 851 (1960); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819 (1960); Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 VA. L. REV. 195 (1960).

for its membership or to the stable labor relations which the NLRA was intended to foster.⁷⁰

Some of the problems which have been discussed would not arise if the narrow position of the Board were maintained. In that event, retirees would be "employees" under the NLRA only for the purposes of being represented with respect to their retirement benefits. Despite the fact that this result appears to be inconsistent with the Act's provisions,⁷¹ it might be justified if it would afford either substantial benefits to retirees or significant protection of retirees' rights which are not already protected under the vested-rights theory or by the section 301 suit.⁷² However, the benefits and protection which retirees would gain under *Pittsburgh Plate Glass* are, at best, minimal. Retirees have very little economic power on their side, and this impotence would place them at a distinct collective bargaining disadvantage vis-à-vis their former employer. Since many of their objectives are in direct conflict with those of the active employees, one might argue that their situation would be even worse. Indeed, without the right to full "employee" and "membership" status under the NLRA and LMRDA, retirees would be at the mercy of the very persons with whom they compete for the available monies of their employer. On the other hand, if full "employee" and "membership" status were accorded to retired workers, the situation might well be reversed, with a divided group of active employees being "controlled" by a united group of pensioners. At the least, there is the danger that full employee status for retirees might produce considerable internal union dissension, which would reduce the union's effectiveness in representing all persons in the bargaining unit.

Even if retired workers were to be covered by the Act, a union would not really be able to prevent an employer from making unilateral changes in their retirement plans. Once a bargaining impasse is reached on an issue, the employer would be free to implement its proposed modification, so long as it did so in good faith and with valid economic justification.⁷³ Since active employees are un-

70. See Labor Management Relations Act § 1(b), 29 U.S.C. § 141(b) (1964).

71. See text accompanying notes 52-57 *supra*.

72. With respect to the vested-rights theory, see note 36 *supra* and accompanying text. With respect to the § 301 suit, see text accompanying notes 26, 37 *supra*.

73. See *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. U.S. Sonics Corp.*, 312 F.2d 610 (1st Cir. 1963); *Pacific Gamble Robinson Co. v. NLRB*, 186 F.2d 106 (6th Cir. 1950). See also Cox, *The Duty To Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Comment, *Impasse in Collective Bargaining*, 44 TEXAS L. REV. 769 (1966). This reasoning, of course, assumes that the impasse was reached in "good faith"; otherwise, the employer would be guilty of violating § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1964). See *Industrial Union of Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964). See also Bowman, *An Employer's Unilateral Action—An Unfair Labor Practice?*, 9 VAND. L. REV. 487 (1956); Lang, *Unilateral*

likely to exert economic pressure in order to protect retirees, the latter would be forced to resort to the same legal remedies which have always been available to them for the protection of their vested rights.⁷⁴

Thus it appears that the exclusion of retirees from the coverage of the NLRA would not deprive them of meaningful protection, for even under the Act they would enjoy very little.⁷⁵ When the problems of supporting the Board's position in *Pittsburgh Plate Glass*, and the potential problems of giving it effect, are balanced against the minimal benefits, the wisdom of including retirees within the coverage of the NLRA appears to be doubtful. In *Pittsburgh Plate Glass* itself, the Board's finding of an unfair labor practice should be sustained only on the ground of the employer's unilateral modification of an effective collective bargaining agreement.⁷⁶

Changes by Management as a Violation of the Duty To Bargain Collectively, 9 Sw. L.J. 276 (1955).

74. See notes 36-37 *supra* and accompanying text.

75. Of course, employers and unions would still be free to engage in "permissive" collective bargaining on the subject of retirees' benefits. As Member Zagoria noted, "[m]any unions and companies, recognizing their mutual interest in retiree benefits, have voluntarily worked out arrangements to improve past pensioners' rights and benefits. . . . [That is] a tribute to the humanistic quality of an enlightened labor-management relationship" 177 N.L.R.B. No. 114, at 27, 71 L.R.R.M. at 1442.

76. See notes 15-16 *supra* and accompanying text.
