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DEVELOPING FEDERAL LABOR LAW OF WELFARE AND PENSION PLANS*

Raymond Goetz†

For some twenty years, welfare and pension plans have been encompassed within the phrase “wages, hours, and other terms and conditions of employment”¹ that describes the scope of mandatory bargaining under sections 8(a)(5), 8(b)(3), and 8(d) of the Labor-Management Relations Act (LMRA).² The regular inclusion of these plans as subjects of collective bargaining has been a major factor in their tremendous growth. Recently, efforts have been made to extend other principles of federal labor law to the negotiation and administration of these plans. This article will explore four areas in which federal labor law of welfare and pension plans seems to be developing: (1) the union duty of fair representation with respect to these plans; (2) the relationship of trustees of jointly-administered plans under section 302(c)(5) of the Act³ to collective bargaining; (3) the federal court jurisdiction over trust administration under section 302(e) of the Act;⁴ and (4) the interplay of state and federal law in enforcement of various types of welfare and pension agreements.

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¹ Labor-Management Relations Act (Taft-Hartley Act) § 8(d), 29 U.S.C. § 158(d) (1964). See *W.W. Cross & Co.*, 77 N.L.R.B. 1162, *enforced*, 174 F.2d 875 (1st Cir. 1949); *Inland Steel Co.*, 77 N.L.R.B. 1, *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949). The term “welfare plan” is used broadly herein to include all negotiated plans providing group life insurance, hospital, medical, surgical, accident and sickness, and similar benefits, insured or uninsured, under a single or multi-employer program. The term “pension plan” is also used broadly to include all negotiated plans providing retirement benefits, whether by insurance or by trust, of the single or multi-employer type.

² 29 U.S.C. §§ 158(a)(5), (b)(3), (d) (1964). See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). For a detailed discussion of the scope and nature of the bargaining obligation with respect to pension plans, see *Goetz, Pension Plans and Labor Law*, 1967 U. ILL. L.F. 738.

³ 29 U.S.C. § 186(c)(5) (1964).

⁴ *Id.* § 186(e).

I

THE UNION DUTY OF FAIR REPRESENTATION

A union certified or recognized as the exclusive bargaining agent under federal law has a statutory obligation to serve the interests of all members of the unit without hostility or discrimination, and to exercise its discretion as bargaining agent in good faith.⁵ Breach of this duty may provide the basis of a suit for damages in state or federal courts or an unfair labor practice charge with the NLRB.⁶

An important new facet of the duty of fair representation concerns the negotiation of changes in welfare and pension benefits that affect persons who have retired from the bargaining unit. This extension of the duty is a probable result of the NLRB decision in *Pittsburgh Plate Glass Co.*⁷ that an employer's duty to bargain includes an obligation to bargain about changes in welfare and retirement benefits for retirees. Although the Board was not faced with the fair representation issue, it is implicit in the Board's determination that retirees from the bargaining unit are still "employees" within the meaning of the Act.⁸ The Board did not actually state that the union was "representing" the retired "employees," but unless the Board intended to establish the union as their representative under sections 8(a)(5) and 9(a) of the Act,⁹ there was no apparent reason to have decided that retirees are "employees."

If the union actually is the representative of retirees—at least for purposes of bargaining about changes in their benefits—it would follow that the duty of fair representation must apply. The original reasons for implying this duty as a correlative of the union's statutory right to act as exclusive bargaining representative¹⁰ have equal force here. Like a minority within the active unit, retirees are deprived by law

⁵ *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953); *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 199-200 (1944).

⁶ *Vaca v. Sipes*, 386 U.S. 171 (1967); *United Rubber Workers Local 12 v. NLRB*, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967); *Miranda Fuel Oil Co.*, 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963). Although the duty originated under the Railway Labor Act, 15 U.S.C. §§ 151-88 (1964), this article deals only with the duty as it applies under the Labor-Management Relations Act.

⁷ 177 N.L.R.B. No. 114, 71 L.R.R.M. 1433 (July 9, 1969).

⁸ *Id.* at 5, 71 L.R.R.M. at 1435. See *id.* at 23, 71 L.R.R.M. at 1442 (Zagoria, dissenting).

⁹ 29 U.S.C. §§ 158(a)(5), 159(a) (1964).

¹⁰ *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

of the opportunity to select a separate representative to protect their interests. Thus, when retirees are represented by the union that is currently the bargaining agent for the unit from which they retired, they must be represented fairly. If, after this extension of the statutory bargaining duty, unions and employers are to determine adjustments in retiree benefits, the affected retirees should be protected against possible selfishness or caprice of the union majority.¹¹

Would this protection be available, however, if retirees were not considered employees under the LMRA? This question would become important should the court of appeals enforce the Board's *Pittsburgh Plate Glass* bargaining order concerning retiree benefits without affirming the Board's questionable determination of employee status for retirees.¹² Such a result could be reached on the basis of the Board's alternate theory that retiree benefits are a mandatory bargaining subject under section 8(d) because those benefits vitally affect active employees and are therefore part of their "conditions of employment."¹³ If this alternate theory were adopted, there would be no basis for considering the union to be the exclusive "representative" of retirees, and, accordingly, no basis for implying a correlative duty of fair representation.

It seems doubtful, however, that this logical gap would give unions uncontrolled discretion over retiree benefits. The Supreme Court in *Brotherhood of Railroad Trainmen v. Howard*¹⁴—a case involving racial discrimination—has already extended the union's duty of fairness to persons outside the bargaining unit. The Court there stated that bargaining agents who enjoy the advantages of federal labor laws "must execute their trust without lawless invasions of the rights of other workers."¹⁵ This reasoning does not confine a union's duty of fair representation to minorities deprived of separate representation by a statutory monopoly grant. In fact, the complainants in *Howard* had their own bargaining agent in a separate unit, but they would have been ousted from their jobs by the agreement negotiated by the discriminating union. Unless *Howard* is limited to instances of racial discrimination—which seems unlikely—its guiding principle would

¹¹ This rationale for judicial supervision of bargaining was adopted in Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 167 (1957).

¹² The case is now pending before the Sixth Circuit on petition for review. *Appeal docketed*, No. 19875, 6th Cir., Sept. 23, 1969.

¹³ 29 U.S.C. § 158(d) (1964). See *Pittsburgh Plate Glass Co.*, 177 N.L.R.B. No. 114, at 13, 71 L.R.R.M. 1433, 1438 (July 9, 1969).

¹⁴ 343 U.S. 768 (1952).

¹⁵ *Id.* at 774.

seem to be that a union occupies a position of trust with respect to all persons whose rights or economic benefits may be directly affected by agreements reached in the course of its functioning as bargaining agent.¹⁶

This principle could apply to benefits of retirees. Whether or not the bargaining agent for the active unit is viewed as their statutory representative, a federal statute has now been interpreted as granting that agent the right to bargain with the employer about retiree benefits. Since the economic security and welfare of retirees is within the union's control, the union is placed in a position of trust with respect to their benefits. Although it is difficult to imagine union discrimination against retirees as blatant as that in *Howard*, retiree dependence on the negotiation of benefits entrusted to unions by *Pittsburgh Plate Glass* might well call for protection against any possibility of discrimination.

Assuming that a duty of fair representation is owed to retirees, what does it entail? The duty has never required identical treatment of all. As the Supreme Court noted in *Ford Motor Co. v. Huffman*:¹⁷

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. . . . A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents.¹⁸

Thus, unions have considerable latitude in apportioning benefits between active and retired employees in collective bargaining. As long as a union does not arbitrarily ignore or subvert the needs of retirees, there should be no breach of the duty to represent them fairly.

This generalization does not provide union representatives a useful standard for resolving the competing demands of the bargaining process. How can a union be certain that its pragmatic resolution of these conflicts under pressure will not later be viewed as arbitrary or discriminatory by a court? This problem is not unique to welfare and pension bargaining, but it may be particularly acute there because benefits for retirees usually are obtainable only at the expense of

¹⁶ See Summers, *Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law*, 72 YALE L.J. 421, 432 (1963). But cf. Cox, *supra* note 11, at 158 (suggesting that *Howard* be limited to its peculiar facts).
¹⁷ 345 U.S. 330 (1953).

¹⁸ *Id.* at 338. In *Humphrey v. Moore*, 375 U.S. 335 (1964), the Court stated: [W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another.

Id. at 349.

active employees, and vice versa. Bargaining representatives are faced with some difficult practical questions: Must the union negotiate increased benefits for retirees every time it negotiates benefits for active employees, or at least each time it negotiates improved welfare and pension benefits for active employees? How may a union justify differences in treatment of the two groups? Must the union seek out the wishes of retirees before bargaining on pensions? Unfortunately, the vague concept of good faith provides no pat answers.

A union probably would not be justified in devoting an entire settlement effort to securing economic benefits for active employees simply to satisfy the dictates of political pressure within the union. Based on fair representation cases in other contexts, it seems likely that if a choice of demands were based on political expediency alone a breach of the duty of fair representation could be found.¹⁹ On the other hand, the union probably would not have to solicit views of retirees as long as they were given a reasonable opportunity to be heard.²⁰

The standard of good faith would also govern the disposition of claims of retirees under existing welfare or pension agreements. Frequently such agreements call for union participation in special procedures for resolving disputed benefit claims.²¹ The duty of fair representation owed to retirees doubtless would include the administration of existing agreements and would require that the union stay within the bounds set forth in *Vaca v. Sipes*²² for handling grievances of active employees. Even though a benefit claim might ultimately turn out to be meritorious, settlement by the union short of arbitration would not be a breach of the union's duty as long as its decision was made in good faith and in a reasonable manner.

Questions concerning the duty of fair representation also arise in the negotiation of welfare and pension benefits for active employees. Compulsory retirement, for example, may work to the disadvantage of

¹⁹ *Truck Drivers Local 568 v. NLRB*, 379 F.2d 137, 142-43 (D.C. Cir. 1967) (discrimination in the assignment of overtime); *Ferro v. Railway Express Agency, Inc.*, 296 F.2d 847, 850 (2d Cir. 1961) (discrimination in transfer of place of employment); Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1482 (1963).

²⁰ See *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 204 (1944); *McMullans v. Kansas, O. & G. Ry.*, 229 F.2d 50, 56 (10th Cir.), cert. denied, 351 U.S. 918 (1956); *Goodin v. Clinchfield R.R.*, 125 F. Supp. 441, 452 (E.D. Tenn. 1954), aff'd, 229 F.2d 578 (6th Cir.), cert. denied, 351 U.S. 953 (1956).

²¹ See, e.g., *Pension Agreement Between United States Steel Corporation and United Steelworkers of America*, CCH PENSION PLAN GUIDE ¶ 43,733 (1967); *Pension Agreement Between General Motors Corporation and the UAW*, CCH PENSION PLAN GUIDE ¶¶ 43,517-39 (1968).

²² 386 U.S. 171, 191-94 (1967).

older employees as capable of working as younger employees whose superior numbers might determine the union's bargaining position on this issue. Several courts have held, however, that agreement to such a provision does not breach a union's duty of fair representation because it does not show hostile discrimination.²³ Since all employees who remain long enough will be similarly affected by the provision, it is not considered discriminatory.

Agreements providing special early retirement privileges or lesser insurance benefits for women are incapable of uniform application and might be considered unfair discrimination based on sex. Whatever their status under other federal laws, however, such agreements probably do not violate the duty of fair representation if the difference in treatment is designed to take into account economic needs of married women.²⁴

Where a union agrees to eliminate jobs through "automation" arrangements, negotiation of special welfare and retraining benefits for those thrown out of work probably does not breach the duty of fair representation.²⁵ Although employees remaining on the job may reap the benefit of higher wages at the expense of those eliminated, such agreements seem genuinely designed to meet competitive conditions in the particular industry and to achieve the greatest good for the greatest number. Any claim of hostile discrimination against the displaced minority should be overcome by the special benefits negotiated by the union to ease the transition.

In negotiated arrangements for termination of pension plans in connection with plant shutdowns, a superannuated minority is sometimes given favorable treatment at the expense of the majority. Questions about the duty of fair representation arise when funds accumulated under an insurance contract or trust are inadequate to provide all accrued benefits. In one such case, the union and the company agreed to amend the pension plan so that the portion of the fund attributable to a division being closed would be used entirely to provide benefits for employees over age sixty with at least fifteen years of ser-

²³ *Roberts v. Lehigh & N.E. Ry.*, 323 F.2d 219 (3d Cir. 1963); *McMullans v. Kansas, O. & G. Ry.*, 229 F.2d 50 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956). See *Goodin v. Clinchfield R.R.*, 125 F. Supp. 441 (E.D. Tenn. 1954), *aff'd*, 229 F.2d 578 (6th Cir.), *cert. denied*, 351 U.S. 953 (1956).

²⁴ *Cf. Cortez v. Ford Motor Co.*, 349 Mich. 108, 128, 84 N.W.2d 523, 533 (1957).

²⁵ Examples of such arrangements are the West Coast Longshoremen's "containerization" settlement referred to in an address by William E. Simkin, entitled "Preventive Mediation Revisited," in *BNA LAB. REL. YEARBOOK 195-97* (1966), and the packinghouse automation program discussed in *Report of the Armour Automation Committee*, 55 L.R.R.M. 30 (1964).

vice.²⁶ Other employees below age sixty were to receive nothing, even though some had served longer than those over sixty. In a suit by the latter group against the union and the employer, the court granted defendants' motion for summary judgment.²⁷ Although arbitrary discrimination had been alleged, the court apparently did not consider the preference of age over service the type of discrimination that would violate the duty of fair representation. This seems in accord with *Ford Motor Co.*,²⁸ which mentioned age as a permissible variable. While the settlement in question deprived many employees of deferred compensation paid into the pension fund, it appeared to be a good faith effort by the union and the employer to distribute a limited fund among those employees approaching normal retirement age who would consequently have the most difficulty finding work.

Good faith alone may not be sufficient to insulate a union from liability to employees for a termination settlement that wipes out vested rights to benefits.²⁹ An agreement to modify such rights might be the kind of arbitrary union action that breaches the duty of fair representation.

However, it is often difficult to determine whether or not particular employee benefits actually are vested.³⁰ Most collectively-bargained welfare and pension agreements have a specified term after which they may be renegotiated or terminated. This raises the question whether any rights to welfare or pension benefits can properly be considered immutable in the absence of very clear language in the agreement.

The problem is illustrated by the recent case of *Hauser v. Farwell, Ozmun, Kirk & Co.*³¹ There, a deposit administration insurance contract implementing the pension plan expressly provided that, in the event of termination of employer contributions, the "deposit fund" would be used to provide annuities for employees in a stated order of precedence, and that such annuities would be "fully vested" in each participant. In contemplation of an announced plant shutdown that would have resulted in termination of the pension plan, the union and

²⁶ *Smith v. DCA Food Indus., Inc.*, 269 F. Supp. 863, 867 (D. Md. 1967).

²⁷ *Smith v. DCA Food Indus., Inc.*, Civil No. 18237 (D. Md. April 3, 1968).

²⁸ *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

²⁹ By definition, a vested right is one that is legally immutable. 3A A. CORBIN, CONTRACTS § 742, at 453 (1960).

³⁰ Professor Corbin has pointed out that "[p]erhaps nobody knows exactly what is meant by the term 'vested interest'—a term that is so often rolled ponderously off the tongue as a substitute for a major premise, in order to reach a desired conclusion." *Id.*

³¹ 299 F. Supp. 387 (D. Minn. 1969).

the employer agreed to amend the stated order of precedence so that the entire fund could be used to provide meaningful annuities for three employees between ages sixty-two and sixty-five. Without this amendment, the fund would have been used to provide deferred annuities averaging \$2.70 per month (less than \$5.00 per month in every case) for all thirty-seven employees below age sixty-five. As part of the settlement, the company agreed to contribute an additional \$1,771 toward annuities for the three employees.

Since the contract failed to stipulate when a termination of employer contributions would trigger the vesting provision, and since the amendment was made two weeks before the plant shutdown, the union could reasonably assume it still had the power to alter the order of precedence. Although the district court conceded that both the union and the company had acted in good faith, it found that the rights of all employees to annuities under the original termination provision had become vested. The court, therefore, held the union and company jointly liable for the deferred annuities to which employees under age sixty-two should have been entitled. Liability was not based on the union's duty of fair representation, however. The court relied on *Elgin, Joliet & Eastern Railway v. Burley*³² for the proposition that a union cannot bargain away vested rights of its members, and concluded that the union and the company were liable as "converters" of the fund.

It must be conceded that the concept of "vested rights" necessarily implies that a union has no authority to bargain away such rights. It should be emphasized, however, that vesting of benefits cannot be presumed under an agreement that by its terms is subject to renegotiation and termination. The real question is whether the agreement does make it clear that certain benefits are beyond the power of the union and the employer to modify.³³

Even when employee rights to benefits under a pension plan are clearly vested, it does not necessarily follow that because a negotiated modification may be ineffective the union must incur joint liability with the employer for conversion of the fund. A more logical result would be reinstatement of the employer's original obligation. If the union exercised its statutory bargaining rights in good faith, it should not be penalized.

³² 325 U.S. 711 (1945), *aff'd on rehearing*, 327 U.S. 661 (1946).

³³ For a statement that unions do have the power to adversely affect pension benefits of employees who have met the eligibility requirements, but have not retired, see Note, *Contractual Aspects of Pension Plan Modification*, 56 COLUM. L. REV. 251, 268 (1956).

The principles applied in *Vaca v. Sipes*³⁴ seem broad enough to relieve the union from liability in cases of this kind. There, the union had undermined a disabled employee's claim to reinstatement through failure to pursue his grievance to arbitration. The claim was later found to be meritorious by a state court. The Supreme Court, however, held that the union was not liable to the employee for damages because there was no showing that it had acted arbitrarily or in bad faith. Moreover, even if a breach of the duty of fair representation had been shown, the union would not have been liable to the employee for damages resulting from the employer's breach of contract; that liability rests solely with the employer. In *Vaca*, of course, the union sought to resolve a close question of contractual rights under a grievance procedure designed for this purpose, whereas in *Hauser* the union sought to change known rights it considered negotiable. Since the effect on the employee in either case is to deprive him of legal rights he possessed under the contract, it is difficult to see why the union's liability should be any greater in the latter case than in the former.

Reliance on the ancient tort of conversion in the *Hauser* case seems inappropriate, but was perhaps due to a misunderstanding of the characteristics of the "fund" involved. A deposit fund under such a contract is an undivided account comprising part of the general assets of the insurance company. No individual has any right to a specified sum from the fund; rather, annuities are purchased for employees when they retire. The amount received by employees under the annuity contracts is determined by longevity.³⁵ There are no indicia of ownership in the fund that can be drawn on, sold, or transferred by employees. Thus, in *Hauser* there was no element of the interference with tangible personal property or documents normally associated with the tort of conversion.³⁶

Unions may be powerless to impair or extinguish "vested rights" of employees in negotiating the disposition of a pension fund, but there is no necessity to hold them liable to employees when such an agreement is made in good faith.³⁷ In such cases, there is no breach of the duty of fair representation, nor any real conversion, and the employees still can recover from their employer.

³⁴ 386 U.S. 171 (1967). In this case the employees were trying to recover from the employer, not the union.

³⁵ J. HAMILTON & D. BRONSON, PENSIONS 149-52 (1958).

³⁶ W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 15, at 81-84 (3d ed. 1964).

³⁷ See *International Longshoremen v. Kuntz*, 334 F.2d 165, 171 (9th Cir. 1964); cf. *Jennings v. Jennings*, 56 Ohio L. Abs. 258, 91 N.E.2d 899 (Ct. App. 1949).

The actions of union-appointed trustees under jointly-administered welfare and pension plans established under section 302(c) of the LMRA may open another frontier of the duty of fair representation.³⁸ These negotiated plans—commonly found in industries such as construction and trucking where irregular employment and multi-employer bargaining are the rule—permit pooling of contributions by numerous employers to provide benefits on a uniform basis for the overall employee group. Whenever union representatives participate in their administration, these funds must be structured in accordance with section 302(c) of the LMRA.³⁹ One of the statutory requirements is that employees and employers be equally represented in the administration of the fund, which must be in the form of a trust. The employee representatives are normally union officials appointed as trustees by the union.

A recent case, *Nedd v. UMW*,⁴⁰ indicates that under certain circumstances a union might be liable for actions of union trustees that would have constituted a breach of the duty of fair representation if taken by the union directly in fulfilling its normal bargaining responsibility. There, the complaint alleged that the union and the trustees had failed to collect some \$10,000,000 in royalty payments for a welfare fund from certain employers because of a secret decision to promote the interests of active miners over retirees. Although the court assumed that the union had no contractual obligation to enforce employer payments to the fund and that the payment obligation was enforceable by the trustees, it held that this allegation, if proven, might establish breach of the union's duty of fair representation.

This holding suggests that a union might also be liable for breach of the duty of fair representation if its appointees to the board of trustees caused the fund to be administered in a manner that discriminated unfairly against minorities. Thus, the duty might also extend to cases where union trustees cause or permit the fund to be used

³⁸ 29 U.S.C. § 186(c) (1964).

³⁹ For a detailed discussion of these statutory requirements, see Goetz, *Employee Benefit Trusts Under Section 302 of Labor Management Relations Act*, 59 Nw. U.L. REV. 719 (1965).

⁴⁰ 400 F.2d 103 (3d Cir. 1968). *But see* *Miniard v. Lewis*, 387 F.2d 864, 865 n.5 (D.C. Cir. 1967), stating that the union's duty of fair representation is not applicable to trustees because as trustees they do not act as representatives of either the employers or the union. This statement was based on *United Marine Div. v. Essex Transp. Co.*, 216 F.2d 410 (3d Cir. 1954), in which the court made a questionable interpretation of the term "representative" that would have rendered § 302(c) a nullity. *Cf.* *Sheet Metal Contractors Ass'n v. Sheet Metal Workers Ass'n*, 248 F.2d 307, 315 (9th Cir. 1957), *cert. denied*, 355 U.S. 924 (1958).

for aggrandizement of the union or its officials to the detriment of covered employees.⁴¹ Although discrimination would be lacking, the union would be executing its trust as statutory representative in a manner adverse to the individuals it was supposed to represent fairly. Such conduct might also be a breach by the trustees of their own trust, but affected employees could have a more effective remedy against the union for breach of the duty of fair representation because individual trustees might be "judgment proof" or insulated from liability by exculpatory clauses in the trust agreement.

Development of the law in this area will depend on whether actions of union-appointed trustees are viewed as an integral part of the union's function as exclusive bargaining representative.

II

THE RELATIONSHIP OF TRUSTEE CONDUCT OF JOINTLY-ADMINISTERED FUNDS TO COLLECTIVE BARGAINING

Union and employer trustees of jointly-administered welfare and pension plans under section 302(c)(5) of the LMRA⁴² undoubtedly have the same fiduciary responsibility imposed on individual trustees under the common law of trusts.⁴³ Their primary responsibility is to administer the trust in accordance with its terms, solely in the interest of the beneficiaries.⁴⁴ A new dimension may be added to this responsibility by the statutory provision that employer trustees are "representing" employers and union trustees are "representing" employees.⁴⁵

It may be significant that section 302(c)(5) does not speak of trustees "appointed by" employers and employees. The requirement of proviso (B) that "employees and employers [be] equally *represented*

⁴¹ For a flagrant example of this type of abuse, see *Kroger Co. v. Blassie*, 225 F. Supp. 300 (E.D. Mo. 1964), *modified & remanded*, 345 F.2d 58 (8th Cir. 1965).

⁴² 29 U.S.C. § 186(c)(5) (1964) states in relevant part:

(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other such thing of value paid to a trust fund established by such representative *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing

See note 39 *supra*.

⁴³ *Cohen v. Kralstein*, 73 L.R.R.M. 2845 (N.Y. Sup. Ct. March 3, 1970); *cf.* *Booth v. Security Mut. Life Ins. Co.*, 155 F. Supp. 755 (D.N.J. 1957).

⁴⁴ RESTATEMENT (SECOND) OF TRUSTS §§ 2, 164 (1959).

⁴⁵ 29 U.S.C. § 186(c)(5)(B) (1964).

in the administration of such fund" is followed immediately by provision for appointment of a neutral person to break deadlocks by "the *representatives* of the employers and the *representatives* of [the] employees."⁴⁶

The importance of completely separate representation for employers and employees was emphasized in the recent case of *Quad-City Builders Ass'n v. Tri-City Bricklayers Union No. 7*.⁴⁷ The welfare fund there was held to violate section 302 because one of the three employer trustees was a union member, as was a majority of the employer group empowered to appoint and remove employer trustees. The court concluded that union domination of the fund was "a very real possibility" and that inherent in such domination was the possibility of abuse that section 302 was designed to prevent.

Thus, the usual parties to collective bargaining—employers and employees—must be separately represented when trustees of welfare and pension funds confer. Furthermore, the subjects about which the trustees confer are within the scope of mandatory collective bargaining under the Act.⁴⁸ The typical collective bargaining agreement pursuant to which a fund is established provides simply that employer contributions shall be made at a specified rate to a trust already existing, or to be established, for the purpose of providing either health and welfare benefits or pension benefits.⁴⁹ The governing trust agreement separately entered into by the parties to the collective bargaining agreement may specify general categories of benefits, but it normally delegates to the trustees broad discretion to determine specific benefit levels and eligibility requirements, to modify the benefit plan, and to administer the plan.⁵⁰

Exercise of this discretionary power may involve important questions of policy or judgment on which union and employer trustees may well differ. This potential divergence of interests was the underlying reason for the statutory requirement of equal representation.

⁴⁶ *Id.* (emphasis added).

⁴⁷ 302 F. Supp. 1031 (S.D. Iowa 1969); *cf.* *Tucker v. Shaw*, 73 L.R.R.M. 2567 (E.D.N.Y. Jan. 9, 1970).

⁴⁸ See notes 1-2 *supra*.

⁴⁹ See, e.g., *Central States Area Over-The-Road Motor Freight Supplemental Agreement of Teamsters Union*, CCH LAB. L. REP. ¶¶ 59,944.38, .63, .64 (1967).

⁵⁰ See, e.g., *Agreement and Declaration of Trust, establishing the IAM Labor-Management Pension Fund art. VI, § 1* (May 1, 1960) (copies of which are available to all contributing employers), which provides in part:

The Trustees shall have full authority to determine all questions of nature, amount and duration of benefits to be provided, based on what it is estimated the Fund can provide without undue depletion or excessive accumulation

Employer representatives were intended to act as a check on the untrammelled discretion of the union. The possibility of adverse interests leading to dispute is recognized by the statutory provision for breaking deadlocks through appointment of an impartial umpire.

Despite the unusual setting, the deliberations of trustees of these funds may be looked upon as an extension of the collective bargaining process within contractual and statutory limits. It must be recognized, of course, that trustees generally consider themselves aloof from collective bargaining.⁵¹ Undoubtedly, the atmosphere in trustees' meetings is quite different from that of the bargaining table. Both sides do have a common interest in the welfare of the employees. The small number of reported decisions on petitions for appointment of an impartial umpire would indicate that serious disputes are rare.⁵² However, the absence of deadlocks could be deceptive. Since action on most matters can be taken by a simple majority, factionalism among employer trustees may permit a unified group of union trustees to "pick off" one employer trustee needed for action.⁵³ To the extent that this is done, it further evidences a "quasi-bargaining" situation.

One result of viewing employer and union trustees of such funds as collective bargaining representatives would be the possibility, discussed earlier, of including their actions within the union's duty of fair representation. Logically, the trustees might also be subject to the duty to bargain in good faith imposed on their principals, both employers and unions, by sections 8(a)(5) and 8(b)(2) of the Act.⁵⁴ Thus, in the event employer trustees flatly refused to consider a proposal made by union trustees within the scope of mandatory bargaining and their powers under the trust agreement—such as benefits for retirees—they might be guilty of a violation of section 8(a)(5). However, the statutory procedure for breaking trustee deadlocks through arbitration

⁵¹ The Third Circuit has even taken the anomalous position that when they put on their trustees' "hats," union and employer appointees no longer act as representatives of the parties. *United Marine Div. v. Essex Transp. Co.*, 216 F.2d 410 (3d Cir. 1954). This contradicts both the wording of the statute and the realities of the situation.

⁵² *Poston v. Caraker*, 378 F.2d 439 (5th Cir. 1967); *Mahoney v. Fisher*, 277 F.2d 5 (2d Cir. 1960); *Barrett v. Miller*, 276 F.2d 429 (2d Cir. 1960); *Bath v. Pixler*, 283 F. Supp. 632 (D. Colo. 1968); *Weinstein v. Bracco*, 69 L.R.R.M. 2436 (S.D.N.Y. 1968); *Ware v. Swan*, 44 L.R.R.M. 2785 (S.D. Cal. 1959); *In re Feldman*, 165 F. Supp. 190 (S.D.N.Y. 1958).

⁵³ See James, *Manipulation of a Joint Pension Board for Power Purposes: The Teamster Experience*, N.Y.U. 20th ANNUAL CONF. ON LAB. 381 (1968).

⁵⁴ 29 U.S.C. §§ 158(a)(5), (b)(2) (1964). This analysis is supported by the parallel phraseology of § 8(a)(5), which makes it an unfair labor practice for an "employer" to refuse to bargain collectively with "the representatives of his employees," (*id.* § 158(a)(5)) and § 302(c)(5), which refers to union trustees as "the representatives of employees." *Id.* § 186(c)(5).

probably makes it unnecessary to extend the duty to bargain this far.

A more likely consequence of looking upon trustees' meetings as an extension of collective bargaining would be a different approach by federal courts to petitions under section 302 for appointment of an impartial umpire to resolve deadlocks. The courts have not hesitated to examine the applicable trust agreement to determine whether the question on which the trustees are deadlocked is resolved by the governing documents. For example, one court denied appointment of an impartial umpire to resolve a deadlock on self-insurance of welfare benefits because an interpretation of the trust agreement permitting this mode of benefit payment was "not fairly arguable."⁵⁵ Another court denied appointment of an impartial umpire to break an impasse on the question of trustee compensation on the ground that the trust agreement could not be interpreted to allow such compensation.⁵⁶

If the *Steelworker Trilogy*⁵⁷ rules concerning judicial determination of arbitrability were applicable in this area, a different result would be reached in such cases. These rules state that courts have no business weighing the merits of the case or determining whether language in the agreement will support the claim at issue; doubts should be resolved in favor of arbitrability. Thus, the court would be confined to ascertaining whether the dispute on its face is governed by the trust agreement.

In *Weinstein v. Bracco*,⁵⁸ however, the court found these rules governing arbitration under collective bargaining agreements inapplicable to arbitration of a deadlock between trustees of a fund. Appointment of an impartial umpire to break a deadlock concerning a method of appointing co-counsel to the trustees was denied on the ground that the trustees had no power under the trust agreement to adopt the proposed method. The court found the *Trilogy* rules inapplicable because "[t]here are no 'labor disputes' here nor possibility of 'industrial strife.'"⁵⁹

This view seems unrealistic. In cases of this kind, there clearly is a dispute between employer and union representatives over a matter intimately related to wages and working conditions. But for the delegation to the trustees, the dispute would normally be resolved through

⁵⁵ Barrett v. Miller, 276 F.2d 429, 432-33 (2d Cir. 1960).

⁵⁶ Poston v. Caraker, 378 F.2d 439 (5th Cir. 1967).

⁵⁷ *Steelworkers Trilogy*: United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

⁵⁸ 69 L.R.R.M. 2436 (S.D.N.Y. 1968).

⁵⁹ *Id.* at 2438.

more traditional bargaining channels. The possibility of strife is not as remote as the court assumes. For example, if it could be demonstrated that self-insurance of benefits would result in benefit increases, employees might well resort to economic pressure against contributing employers in support of their position. In fact, almost any issue important enough to result in deadlock of the trustees could be important enough to the union and employees to carry the seeds of immediate or future industrial strife.

Courts should appoint an impartial umpire in every case where employer and union trustees have reached a deadlock on the administration of the fund, regardless of the issue.⁶⁰ That is what the wording of the statute plainly contemplates. Whenever a court takes it upon itself to determine that an issue is not within the trustees' powers, it is in effect deciding the merits in favor of the group opposing the proposal. That is the job of the umpire, not of the court. The urge to avoid arbitration on the ground that there is nothing to arbitrate seems to be a vestige of judicial distrust of arbitration. It becomes clearly inconsistent with national labor policy when trustees' actions are viewed as part of the bargaining process.

III

THE EXTENT OF FEDERAL COURT JURISDICTION OVER TRUST ADMINISTRATION UNDER SECTION 302(E)

At first glance, it may seem unlikely that subsection (e) of section 302—which gives federal district courts jurisdiction “to restrain violations” of that section⁶¹—could give rise to any conflict with, or overlap of, state court jurisdiction. To understand the problem, it is necessary to bear in mind the peculiar structure of section 302. Although generally looked upon as a measure to regulate employee benefit funds, it does not affirmatively set forth requirements that these funds must meet. Instead, it provides a broad prohibition of

⁶⁰ The processing of these arbitrations would have “therapeutic values.” *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960).

⁶¹ 29 U.S.C. § 186(e) (1964). It should be noted that § 302 applies only where the employees involved are employed in an industry affecting commerce. *Sheet Metal Contractors Ass'n v. Sheet Metal Workers Ass'n*, 248 F.2d 307 (9th Cir. 1957), *cert. denied*, 355 U.S. 924 (1958); *Pappas v. American Guild of Variety Artists*, 125 F. Supp. 343 (N.D. Ill. 1954). Section 302 has no application to funds controlled by the employer. *Independent Ass'n of Mutual Employees v. New York Racing Ass'n*, 398 F.2d 587 (2d Cir. 1968); *Mechanical Contractors Ass'n v. Local 420, Plumbing & Pipe Fitting*, 265 F.2d 607, 609 (3d Cir. 1959); *Shapiro v. Rosenbaum*, 171 F. Supp. 875 (S.D.N.Y. 1959).

all payments by an employer to a "representative of his employees." But subsection (c) makes the basic prohibition inapplicable to certain kinds of payments that presumably would otherwise be proscribed. One exception is for payments to welfare and pension funds with prescribed structure, benefits, and administration. Thus, under subsection (e) a federal district court could enjoin employer payments to a welfare or pension fund if it was not operated as a trust, if it provided benefits not of the type specified, or if it otherwise failed to come within the exception.⁶² No question of state jurisdiction would then arise.

Subsection (e) has been interpreted as authorizing affirmative relief to eliminate those offensive features in a welfare or pension fund's structure or operations that cause it to fail to qualify for the exception in subsection (c)(5).⁶³ Were this not true, employees would be deprived of their bargained-for employer contributions merely because of some shortcoming of the fund or of its administrators.

In cases where affirmative relief is needed to conform the trust to section 302(c)(5), federal and state jurisdiction may overlap. This is most apparent when an alleged statutory violation concerns the subsection (c)(5) requirement that the trust be "for the sole and exclusive benefit of the employees."⁶⁴ This phrase happens to parallel the standard of fiduciary responsibility imposed by the common law of trusts.⁶⁵ Traditionally, supervision of trust administration to enforce such responsibility has been a function of state courts of equity.⁶⁶ Thus, irresponsible action by a trustee might be viewed both as a violation of section 302, enjoined by a federal district court under subsection (e), and a common law breach of trust, enjoined in a state

⁶² *Local 2, Operative Plasterers v. Paramount Plastering, Inc.*, 310 F.2d 179 (9th Cir. 1962); *Mechanical Contractors Ass'n v. Local 420, Plumbing & Pipe Fitting*, 265 F.2d 607 (3d Cir. 1959); *Bey v. Muldoon*, 217 F. Supp. 401 (E.D. Pa. 1962).

⁶³ *Blassie v. Kroger Co.*, 345 F.2d 58 (8th Cir. 1965); *Giordani v. Hoffmann*, 295 F. Supp. 463, 472 n.3 (E.D. Pa. 1969); *American Bakeries Co. v. Barrick*, 162 F. Supp. 882 (N.D. Ohio 1958). See *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552, 558 (6th Cir. 1962), where the court stated: "The jurisdiction conferred by § 302(e) will permit employment by the district courts of whatever equitable remedies may be needed to command obedience, by the trustees, to their contractual and statutory obligations." *Id.* The court also noted that employees should not be deprived of the benefit of their collectively-bargained contributions because of the alleged misconduct of the trustees.

⁶⁴ 29 U.S.C. § 186(c)(5) (1964).

⁶⁵ RESTATEMENT (SECOND) OF TRUSTS §§ 2, 170 (1959).

⁶⁶ *Kroger Co. v. Blassie*, 225 F. Supp. 300, 313 (E.D. Mo. 1964), *modified & remanded*, 345 F.2d 58 (8th Cir. 1965). See generally G. BOGERT, TRUSTS AND TRUSTEES §§ 861-71 (2d ed. 1962). Where diversity of citizenship can be shown, federal courts have jurisdiction over a typical beneficiary action for breach of trust without regard to § 302(e). *Booth v. Security Mut. Life Ins. Co.*, 155 F. Supp. 755 (D.N.J. 1957).

court of equity. The question, therefore, is how far federal courts may encroach on traditional state court jurisdiction over trust administration under the guise of restraining violations of section 302.

The First Circuit, in *Copra v. Suro*,⁶⁷ was the source of speculation that Congress may have intended to give federal district courts broad equity jurisdiction to regulate the internal administration of trusts covered by section 302. The same court recanted in *Bowers v. Ulpiano Casal, Inc.*,⁶⁸ where it ruled that section 302(e) must be read narrowly to mean that the only violations that may be enjoined "are violations of basic structure, as determined by the Congress, not violations of fiduciary obligations or standards of prudence in the administration of the trust fund."⁶⁹ Consequently, the court found no federal jurisdiction over the suit for an accounting and repayment of money diverted from a welfare fund.

The *Bowers* court labelled the statutory provision that the trust be for the exclusive benefit of employees as merely a structural requirement. This could make the provision a nullity. If section 302 can only be violated by a fund's "basic structure" and not by its administration, a fund originally set up as a trust for the benefit of employees could subsequently be administered for purposes other than their exclusive benefit without violating section 302. Such a result seems absurd. The exclusive benefit of employees can be assured only by proper administration. Structure is just one means to this end, not the end in itself.

Confusion about this new "structural violation" test is apparent in the recent case of *Giordani v. Hoffmann*.⁷⁰ The district court ac-

⁶⁷ 236 F.2d 107 (1st Cir. 1956). The court stated:

The legislative history suggests to some extent that the cases first cited above are correct and that Congress intended in § 302(e) to create a broad equity jurisdiction that would not only authorize the district courts to forbid the making of payments in violation of § 302(a) and (b), but that would also authorize them to exercise a more general equity power over the welfare funds whose life in effect depends on the permissive exception of § 302(c)(5). The way in which § 302 was presented, however, necessarily causes the legislative history to be lacking in conclusiveness.

Id. at 115. Similar statements can be found in *Upholsterers' Union v. Leathercraft Furniture Co.*, 82 F. Supp. 570, 575 (E.D. Pa. 1949), and *Van Horn v. Lewis*, 79 F. Supp. 541, 544 (D.D.C. 1948).

⁶⁸ 393 F.2d 421 (1st Cir. 1968).

⁶⁹ *Id.* at 424. See also *Bath v. Pixler*, 283 F. Supp. 632 (D. Colo. 1969); *Moyer v. Kirkpatrick*, 265 F. Supp. 348 (E.D. Pa. 1967), *aff'd*, 387 F.2d 955 (3d Cir. 1968); *Retail Store Employees Local 692 v. Gordon*, 56 L.R.R.M. 2470 (D. Md. 1964); *Holton v. McFarland*, 215 F. Supp. 372 (D. Alas. 1963); *Kane v. Shulton*, 189 F. Supp. 882 (D.N.J. 1960); *Sanders v. Birthright*, 172 F. Supp. 895 (S.D. Ind. 1959); *Moses v. Ammond*, 162 F. Supp. 866 (S.D.N.Y. 1958).

⁷⁰ 295 F. Supp. 463 (E.D. Pa. 1969).

cepted jurisdiction under section 302(e) where an allegation of failure to comply with the statute was based on a pattern of dealing between the union and the trust. Since the allegation concerned internal administration of the trust, defendants argued that the issue should be adjudicated in the state courts. The district court, having accepted jurisdiction on the basis of what it considered to be structural violations, however, assumed discretionary authority to resolve claims of breach of fiduciary responsibility. The obvious basis of the court's action was belief in the existence of concurrent federal-state jurisdiction over trust administration and enforcement of fiduciary responsibility.

The case of *Kroger Co. v. Blassie*⁷¹ took a position between the *Bowers* and *Giordani* extremes. The court there did exercise jurisdiction under section 302(e) to reverse trustee action on certain administrative matters normally within the scope of state court supervision. The trustee actions affected included location of the trust office in union headquarters, use of trust funds for non-employee beneficiaries, and diversion of funds for improper benefit programs. Still, the court felt compelled to assert that "activities in the day-to-day administration of the trust" were solely within the jurisdiction of the state courts.⁷² Thus, it refused to consider such matters as payment of brokerage commissions to a union trustee, participation of a union trustee in the purchase for the trust of property owned by himself, and the making of a motion picture about the trust primarily for the union's benefit. Similarly, in *American Bakeries Co. v. Barrick*,⁷³ the court disapproved location of the fund office in union headquarters, but stated that the statute did not mean that the court should "take over the supervision or management of the trust fund."⁷⁴

The views of federal jurisdiction expressed in *Bowers*, *Blassie*, and *American Bakeries* seem unduly restrictive. Whenever a violation of section 302 is alleged, a federal district court plainly has jurisdiction to adjudicate the claim and to grant appropriate relief under sub-

⁷¹ 225 F. Supp. 300 (E.D. Mo. 1964), *aff'd in part*, 345 F.2d 58 (8th Cir. 1965).

⁷² 225 F. Supp. at 313. The district court relied on the dictum in *Employing Plasterers' Ass'n v. Journeymen Local 5*, 279 F.2d 92, 97 (7th Cir. 1960), which stated that the "Act does not create jurisdiction in the federal courts to entertain employees' claims based solely on the alleged diversion or conversion of their welfare funds."

⁷³ 162 F. Supp. 882 (N.D. Ohio 1958).

⁷⁴ *Id.* at 883.

It has been pointed out, however, that because of the broad discretion given under the instrument to trustees of this type of trust they are not as formally supervised by any court as a testamentary trust docketed in a probate court. *Dersch v. UMW Welfare & Retirement Fund*, 73 L.R.R.M. 2409, 2410 (S.D. Ind. Nov. 20, 1969).

section (e). Any improper diversion of trust funds seems properly includible among such violations—whether in the form of self-dealing by trustees with trust assets, loans made with inadequate security or interest to favored borrowers, inflated administrative expenses, or any other trustee conduct that might similarly constitute a breach of trust. In such cases, jurisdiction could be based on failure of the trustees to administer the funds “for the sole and exclusive benefit of the employees.” In addition to restraining the questioned action, effective remedies might well include an accounting and recovery of funds diverted. That these remedies are also within the equity powers of a state court has no bearing on the proper interpretation of section 302.

Thus, whether or not a particular trustee action involves “internal administration,” federal district courts should have jurisdiction to grant appropriate equitable relief whenever an alleged violation of section 302 is predicated on the failure of a trustee to act for the exclusive benefit of employees. State court jurisdiction need not be preempted, but concurrent federal jurisdiction should be recognized.

Such a jurisdictional standard would do no violence to the statutory language of section 302⁷⁵ and seems in keeping with its basic purpose—safeguarding negotiated welfare and pension funds for the benefit of employees.⁷⁶ While congressional concern may have been

⁷⁵ The Supreme Court in *Arroyo v. United States*, 359 U.S. 419 (1959), stated: Continuing compliance with these [statutory] standards in the administration of welfare funds was made explicitly enforceable in federal district courts by civil proceedings under § 302(e). The legislative history is devoid of any suggestion that defalcating trustees were to be held accountable under federal law, except by way of the injunctive remedy provided in that subsection.

Id. at 426-27 (footnote omitted).

⁷⁶ Senator Ball, who introduced § 302 as an amendment on the Senate floor, stated:

Mr. President, the sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them, and that they shall not degenerate into bribes. . . . I have heard of many cases in which unions have even relinquished wage demands in order to secure a welfare fund, with a percentage of the payroll paid into the welfare fund established [T]here is very grave danger that the funds will be used for the personal gain of union leaders, or for political purposes, or other purposes not contemplated when they are established

2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1305 (1948). In support of the amendment, Senator Taft stated:

[T]he purpose of the provision is that the welfare fund shall be a perfectly definite fund, that its purposes shall be stated so that each employee can know what he is entitled to, can go to court and enforce his rights in the fund, and that it shall not be, therefore, in the sole discretion of the union or the union leaders and usable for any purpose which they may think is to the advantage of the union or the employee. . . .

. . . . The tendency is to demand a welfare fund as much in the power of the

directed primarily at possible diversion to the benefit of unions or their leaders, diversion to other improper uses would equally deprive employees of the fruits of their labors, a result which Congress sought to prevent.

Concurrent federal-state jurisdiction over areas of trust administration governed by section 302 would be in keeping with the resolution of a similar jurisdictional problem in suits for violation of labor agreements under section 301.⁷⁷ If the analogy to contract cases under section 301 is valid, it follows that federal law would govern any case arising either in a state or federal court involving a matter of concurrent jurisdiction.⁷⁸

The reasons for application of federal law in cases involving collective bargaining agreements under section 301 apply with equal force to cases involving trusts under section 302. Their outcome should not depend on the forum chosen since a question of national labor policy may be involved. The need for national uniformity is evidenced by the existence of a federal labor statute regulating these trusts and their operation as an outgrowth and extension of collective bargaining. Indeed, they may even be considered a part of the collective bargaining agreement. Different state and federal rulings concerning phases of trust operation covered by section 302 could therefore have a disruptive effect on negotiation and administration of collective agreements.

The unique functions of the specialized employee benefit trusts developed under section 302 also indicate a need for a specialized body of federal common law of trust administration. For example, questions about location of the fund office cannot be satisfactorily resolved by reference to traditional state common law principles designed for *inter vivos* and testamentary trusts. While location of jointly-administered welfare and pension trusts in union headquarters obviously redounds to the benefit of the union, it may be so advantageous to the trust as to be desirable in most cases. At the same time, abuses that would cause such location to defeat the statutory purpose of joint administration should be enjoined. The federal law emerging on this point

union as possible. Certainly unless we impose some restrictions we shall find that the welfare fund will become merely a war chest for the particular union

Id. at 1311-12.

⁷⁷ 29 U.S.C. § 185 (1964). See *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

⁷⁸ *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

represents a determination of federal labor policy that should uniformly govern any related question in state courts.⁷⁹

Clearly, some substantive federal law drawn from the federal statute must be recognized in any state court action involving section 302 trusts. The supremacy clause of the Federal Constitution would preclude state court rulings in conflict with express federal statutory provisions.⁸⁰ But it remains to be seen whether state courts will concede that federal law must be applied to some aspects of section 302 trust administration.⁸¹

IV

THE INTERPLAY OF STATE AND FEDERAL LAW IN ENFORCEMENT OF WELFARE AND PENSION AGREEMENTS

Problems of federal-state relations are also involved in actions for enforcement of agreements between unions and employers concerning welfare and pension plans. A threshold question is whether they are suits within the scope of section 301.⁸² The answer determines whether jurisdiction lies with the federal or state courts, or both, and whether federal or state law applies.⁸³

Where the welfare or pension plan is a jointly-administered Taft-Hartley trust of the type covered by section 302(c)(5), the collective bargaining agreement usually provides only for specified employer contributions to a fund. This obligation under the collective

⁷⁹ *Kroger Co. v. Blassie*, 225 F. Supp. 300 (E.D. Mo. 1964), *modified & remanded*, 345 F.2d 58 (8th Cir. 1965); *Ware v. Adams*, 53 L.R.R.M. 2290 (S.D. Cal. 1963); *American Bakeries Co. v. Barrick*, 162 F. Supp. 882 (N.D. Ohio 1958).

⁸⁰ U.S. CONST. art. VI. An example of such a conflict might be an attempt under state insurance law to prevent "self-insurance" or direct payment of benefits, both of which § 302 expressly permits. See Goetz, *Regulation of Uninsured Employee Welfare Plans Under State Insurance Laws*, 1967 Wis. L. REV. 319, 329-34.

⁸¹ The California Supreme Court in *Cox v. Superior Court*, 52 Cal. 2d 855, 346 P.2d 15 (1959), recognized the existence of this problem, but found it unnecessary to determine what law should be applied. The Minnesota Supreme Court apparently believes that state law governs. *St. Paul Elec. Workers Welfare Fund v. Cartier*, 283 Minn. 212, 215-16, 167 N.W.2d 131, 133-34 (1969).

⁸² 29 U.S.C. § 185 (1964).

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter [*id.* § 152(6)], or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties
Id. § 185(a).

⁸³ The problem is complicated by the layers of documentation of welfare and pen-

bargaining agreement is enforceable by the union as promisee,⁸⁴ but it is usually enforced by trustees of the fund as third party beneficiaries.⁸⁵ When an industry affecting commerce is involved, action to enforce such obligations is within the ambit of section 301⁸⁶ and therefore may be brought either in federal or state courts.⁸⁷

As in other actions under section 301, whether in federal or state courts, federal common law of collective bargaining agreements is applicable.⁸⁸ This is desirable since the obligation to contribute to a jointly-administered welfare or pension fund has unusual characteristics calling for development of federal law that may differ from state common law of contracts.

A leading case in this development is *Lewis v. Benedict Coal Corp.*,⁸⁹ a suit by welfare fund trustees against an employer for contributions due under a collective bargaining agreement. A general rule of contract law is that a promisor may raise against a third party beneficiary the same defenses he could raise against the promisee.⁹⁰ Nevertheless, the defendant employer in this case was not allowed to set-off its damages resulting from the union's breach of the agreement against the claim of the trustees. The Supreme Court noted that a collective bargaining agreement is not a typical third party beneficiary contract, particularly where contributions to a jointly-administered

sion plans. Customarily, detailed eligibility requirements and benefit formulas are not set forth in the basic collective bargaining agreement covering wages, hours, and other terms and conditions of employment. These details may be found in some other document collateral to the basic agreement.

⁸⁴ *Local 445, Teamsters v. Crozier Bros.*, 68 L.R.R.M. 2510 (S.D.N.Y. 1968); *Local 90, Stove Mounters' v. Welbilt Corp.*, 178 F. Supp. 408 (E.D. Mich. 1959); *United Constr. Workers v. Electro Chem. Engraving Co.*, 175 F. Supp. 54 (S.D.N.Y. 1959); *Local 401, Teamsters v. Alto Trucking Co.*, 68 L.R.R.M. 2446 (Pa. Ct. C.P. 1967).

⁸⁵ *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *Trustees v. Wachsberger Roofing & Sheet Metal Works*, 66 L.R.R.M. 2047 (E.D.N.Y. 1967); *Hann v. Korum*, 64 L.R.R.M. 2862 (D. Ore. 1967); *Sabella v. Litchfield*, — Cal. App. 2d —, 78 Cal. Rptr. 845 (1969); *see Lewis v. Lowry*, 295 F.2d 197, 199 (4th Cir. 1961), *cert. denied*, 368 U.S. 977 (1962); *Lewis v. Quality Coal Corp.*, 243 F.2d 769 (7th Cir. 1957).

⁸⁶ *Schlecht v. Hiatt*, 271 F. Supp. 644, 648 (D. Ore. 1967), *rev'd*, 400 F.2d 875 (9th Cir. 1968) (employers not engaged in interstate commerce); *Hann v. Harlow*, 271 F. Supp. 674 (D. Ore. 1967); *Hann v. Korum*, 64 L.R.R.M. 2862 (D. Ore. 1967); *Thomas v. Reading Anthracite Co.*, 264 F. Supp. 339 (M.D. Pa. 1966).

⁸⁷ *See, e.g., Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). For examples of suits for enforcement of employer contributions brought in federal and state courts, *see cases cited in notes 84-85 supra*.

⁸⁸ *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *see Nedd v. UMW*, 400 F.2d 103 (3d Cir. 1968).

⁸⁹ 361 U.S. 459 (1960).

⁹⁰ 4 A. CORBIN, CONTRACTS §§ 818-19 (1951); RESTATEMENT OF CONTRACTS § 140 (1933).

employee benefit fund are involved. The agreements are usually industry-wide; thus, if one employer were permitted to set-off damages for union breaches against its liability for contributions, the burden would fall in the first instance on employees and their families, and ultimately on other employers. Furthermore, such payments are tantamount to wages, which cannot be decreased because of claims the employer may have against the union. Thus, deviation from state contract law has clearly been authorized in suits under section 301 for collection of employer contributions to jointly-administered funds.

The recognized importance of contributions to these funds might justify punitive damage awards in trustee collection suits. Although not generally allowed in contract actions,⁹¹ punitive damages have been held to be an appropriate remedy in at least one suit under section 301. In *Sidney Wanzer & Sons, Inc. v. Milk Drivers Local 753*,⁹² the court stressed the need for an effective deterrent to the type of conduct involved there—breach of a no-strike clause. An effective deterrent is equally needed in contribution collection cases where it can be shown that the breach is deliberate and, particularly, where it is repeated. Such a deterrent would carry out federal labor policy by protecting the interest of employee-beneficiaries in sound funds and by minimizing the possibility of strikes to enforce employer obligations to contribute. Punitive damage awards would also support the public policy of states that make willful nonpayment of contributions to welfare and pension funds a criminal offense.⁹³

The award of reasonable attorneys' fees as part of the damages collected by trustees of jointly-administered funds in an action against employers would be an appropriate deterrent to willful contribution delinquencies. Otherwise, employers owing small amounts to the trust might be tempted to ignore the obligation knowing that suit to collect would be a losing proposition for the trustees. Even when the breach is not willful, such an award could be justified if there were an express provision for recovery of collection costs in the collective bargaining agreement or trust agreement.⁹⁴

Although not usually a part of the damages for breach of con-

⁹¹ 5 A. CORBIN, *CONTRACTS* § 1077 (1964); *RESTATEMENT OF CONTRACTS* § 342 (1933); Simpson, *Punitive Damages for Breach of Contract*, 20 OHIO ST. L.J. 284 (1959); Annot., 84 A.L.R. 1345 (1933).

⁹² 249 F. Supp. 664 (N.D. Ill. 1966). *Contra*, *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3d Cir. 1962); *Navajo Freight Lines, Inc. v. International Bhd. of Teamsters*, 291 F. Supp. 908 (D. Colo. 1968).

⁹³ *See, e.g.*, CAL. LABOR CODE § 227 (West 1955), *as amended*, (West Supp. 1968).

⁹⁴ S. WILLISTON, *CONTRACTS* § 786 (3d ed. 1961).

tract,⁹⁵ recovery of counsel fees has been permitted by the Supreme Court in *Sherman v. Carter*.⁹⁶ That case involved a suit for welfare fund contributions against the surety under a Miller Act payment bond, but the award was based on the right to recover counsel fees as damages under the agreement between the contractor and the union. Consequently, it seems appropriate to consider the recovery of reasonable attorneys' fees as part of the federal common law applicable in contribution collection cases involving trusts under section 302.

Another developing aspect of federal common law concerns oral modification of written agreements to contribute to Taft-Hartley trusts. In several suits for employer contributions by trustees of the Mine Workers Welfare and Retirement Fund, employers have defended on the basis of oral agreements with union representatives that contributions specified in the written collective bargaining agreement need not be made. Under general rules of contract law, such oral agreements would be given effect, notwithstanding the parol evidence rule.⁹⁷ Accordingly, the Third, Fourth, and Sixth Circuits have refused to exclude evidence of oral modification to written contribution agreements.⁹⁸ In each case, however, dissenting or concurring judges favored establishment of a federal common law rule that employer contribution agreements cannot be modified or nullified by secret side agreements when a Taft-Hartley trust is involved.

This approach to the problem of oral modification of employer contribution agreements was taken by the Third Circuit in *Lewis v. Seanor Coal Co.*⁹⁹ The court there held that an oral agreement by union representatives to suspend contributions required by an existing written collective bargaining agreement was not a defense to a trustee suit for employer contributions. The court reasoned that such oral modification would violate section 302(c)(5).¹⁰⁰ The section re-

⁹⁵ 5 A. CORBIN, CONTRACTS § 1037 (1964).

⁹⁶ 353 U.S. 210 (1957).

⁹⁷ Generally, evidence of antecedent oral understandings is not admissible for the purpose of varying or contradicting the terms of a completely integrated written agreement. 3 A. CORBIN, CONTRACTS § 573 (1960); RESTATEMENT OF CONTRACTS § 237 (1933). An exception, however, permits extrinsic evidence to show that an existing document was not executed as a contract or as an integrated agreement. A. CORBIN, *supra* §§ 577, 582. Evidence of subsequent oral agreement is also admissible to modify a prior written integration. *Id.* § 574.

⁹⁸ *Lewis v. Owens*, 338 F.2d 740 (6th Cir. 1964); *Lewis v. Mears*, 297 F.2d 101 (3d Cir. 1961), *cert. denied*, 369 U.S. 873 (1962); *Lewis v. Lowry*, 295 F.2d 197 (4th Cir. 1961); *cf. Lewis v. Coleman*, 257 F. Supp. 38 (S.D.W. Va. 1966).

⁹⁹ 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968).

¹⁰⁰ It is difficult to understand why other courts have paid so little heed to the mandate of the Supreme Court in *Lincoln Mills* to fashion a body of federal common law

quires that "the detailed basis on which such payments are to be made [be] specified in a written agreement with the employer."¹⁰¹ This phrase has been interpreted to cover employer payments to the trust fund.¹⁰² Consequently, an oral agreement varying the terms of a written agreement concerning contributions to such a fund should be ignored as a matter of federal labor policy on the ground that it does not comply with the federal statute.

This principle, applied by the Third Circuit with respect to oral agreement *subsequent* to the written agreement, seems equally applicable to oral agreements *prior* to or contemporaneous with the written agreement. Any other result would defeat the purpose of section 302(c)(5), which was to give employees the right to know exactly what they were receiving for their services.¹⁰³

Applicability of federal common law based on national labor policy also comes into question when employees or unions sue to enforce rights to benefits under negotiated welfare and pension plans. Where the asserted right arises out of a jointly-administered employee benefit trust, the action might be viewed as a suit in equity to enforce the terms of a trust, rather than a suit under section 301 for violation of a contract between an employer and a labor organization. At least one federal district court has taken this view and based its jurisdiction on diversity of citizenship.¹⁰⁴ A number of other federal courts have accepted jurisdiction over suits by employees to enforce rights under such jointly-administered trusts without discussing section 301 or any other basis for their jurisdiction.¹⁰⁵ Presumably, it was based on diversity of citizenship or on some factor unrelated to the Labor-Management Relations Act.

On the other hand, one federal district court, in *Abruscato v. Industrial Workers*,¹⁰⁶ recently held that a suit by an employee to enforce

for enforcement of collective bargaining agreements. See cases cited in note 98 *supra*. In *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), this mandate was clearly made applicable to trustee suits for collection of contributions to welfare and pension funds.

¹⁰¹ 29 U.S.C. § 186(c)(5)(B) (1964).

¹⁰² *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 394 U.S. 919 (1969); *Lewis v. Seanor Coal Co.*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968); *Employing Plasterers' Ass'n v. Journeymen Local 5*, 46 L.R.R.M. 2692 (N.D. Ill. 1960); *cf. Ramsey v. UMW Welfare & Retirement Fund*, 231 F. Supp. 909 (E.D. Tenn. 1964); *Wm. Dunbar Co. v. Painters Dist. Council 51*, 129 F. Supp. 417 (D.D.C. 1955). *But cf. Bey v. Muldoon*, 223 F. Supp. 489 (E.D. Pa. 1963).

¹⁰³ See note 76 *supra*.

¹⁰⁴ *Dersch v. UMW Welfare & Retirement Fund*, 73 L.R.R.M. 2409 (S.D. Ind. Nov. 20, 1969).

¹⁰⁵ See cases cited in notes 107-108 *infra*.

¹⁰⁶ 69 L.R.R.M. 2537 (S.D.N.Y. 1968).

rights under a jointly-administered trust could properly be brought under section 301. The court reasoned that the collective bargaining agreement, providing for employer contributions to the trust, in effect incorporated the trust agreement and made a violation of the trust agreement a violation of the collective bargaining agreement. It may have been significant that the union and certain employers, as well as the trustees, were defendants.

In a series of cases involving the Mine Workers Fund, federal courts have developed a standard for review of the broad discretion given trustees of welfare and pension funds over questions of coverage and eligibility of employees. The standard is that "the trustees' decisions are subject to judicial correction only in cases where it can be shown that they have acted arbitrarily and capriciously towards those to whom their trust obligations run."¹⁰⁷ When a prima facie showing of unreasonable action is made, the trustees have the burden of showing "some rational nexus" between the fund's purpose and the action taken.¹⁰⁸

In view of the tailoring of this standard for Taft-Hartley trusts, under which trustees have special discretion, it probably can be considered part of federal common law applicable to the trusts. If suits against trustees to enforce employee rights are indeed suits under section 301, as the *Abruscato* case would indicate, then this standard ought to be applied in similar actions in state courts. Nevertheless, a recent Washington state court decision, overturning a pension benefit determination by the trustees of a jointly-administered fund, treated the case as a contract action without any mention of possible application of section 301 or federal law.¹⁰⁹

A different problem is presented by cases concerning rights to benefits under negotiated welfare and pension plans not jointly-administered by union and employer trustees and not covered by section 302. Instead of reviewing the reasonableness of trustee exercise

¹⁰⁷ *Gomez v. Lewis*, 414 F.2d 1312, 1314 (3d Cir. 1969). See also *Kosty v. Lewis*, 319 F.2d 744, 747 (D.C. Cir. 1963), cert. denied, 375 U.S. 964 (1964); *Danti v. Lewis*, 312 F.2d 345 (D.C. Cir. 1962); *Pavlovcsak v. Lewis*, 190 F. Supp. 205 (W.D. Pa. 1960), aff'd per curiam, 295 F.2d 39 (3d Cir. 1961). The same principle applied to exercise of discretion by a joint board of administration under a plan not covered by § 302. *Borg v. Wojcik*, 70 L.R.R.M. 3093 (E.D. Mich. 1969).

¹⁰⁸ *Roark v. Lewis*, 401 F.2d 425, 429 (D.C. Cir. 1968).

¹⁰⁹ *Dorward v. LLWU-PMA Pension Plan*, 75 Wash. 2d 492, 452 P.2d 258 (1969). In *Beaty v. Maritime Ass'ns*, 442 S.W.2d 823 (Tex. Ct. Civ. App. 1969), a claim for pension benefits under a jointly-administered fund was treated as a contract action by the state court without any mention of federal law. In *Branch v. White*, 99 N.J. Super. 295, 239 A.2d 665 (1968), the court held that § 302 did not give federal courts exclusive jurisdiction over suits to enforce rights under jointly-administered trusts and proceeded to decide the merits without consideration of federal law.

of broad discretion, the court in such cases must make its own interpretation or application of a provision in the governing plan.

If the contract contains a disputes procedure, the complaining employee or union, of course, must show either that it has been exhausted or that it would be impractical or futile to do so.¹¹⁰ When such a showing has been made, the question facing a court is whether section 301 applies to the particular legal document on which the claim is based. In cases where that document is the collective bargaining agreement itself, or a related insurance or pension agreement between the employer and the union, section 301 clearly applies,¹¹¹ as does the federal substantive law of collective bargaining.¹¹²

A claim to benefits, however, sometimes must be based on a separate group insurance policy, pension plan, or trust agreement to which the union is not a party. When the underlying collective bargaining agreement makes some reference to the separate plan, a claim based on that plan may still be considered a suit for violation of a contract between an employer and a labor organization covered by section 301.¹¹³ It is not necessary that the plan actually be incorporated by reference or physically attached to the collective bargaining agreement; provision that the plan will not be changed during the term of the agreement is sufficient.¹¹⁴

The Fifth Circuit, in *Connecticut General Life Insurance Co. v. Craton*,¹¹⁵ has stated that "[i]t may be that the scope of § 301 is sufficiently broad to include within its coverage the declaration of rights under insurance policies which arise out of the collective bargaining process."¹¹⁶ On the other hand, the Eighth Circuit, in *Hudson v. John Hancock Mutual Life Insurance Co.*,¹¹⁷ held that disposition of certain forfeited surrender values must be determined under the terms of the applicable annuity contract without regard to national labor

¹¹⁰ *Vaca v. Sipes*, 386 U.S. 171 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *Hauser v. Farwell, Ozmun, Kirk & Co.*, 299 F. Supp. 387 (D. Minn. 1969); *cf. Rakness v. Swift & Co.*, 275 Minn. 451, 147 N.W.2d 567 (1966).

The right to arbitrate a claim to vested benefits may survive expiration of the agreement. *United Rubber Workers v. Lee Rubber & Tire Corp.*, 394 F.2d 362 (3d Cir.), *cert. denied*, 393 U.S. 835 (1968); *United Steelworkers v. H.K. Porter Co.*, 64 L.R.R.M. 2201 (W.D. Pa. 1966).

¹¹¹ *Upholsterers' Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967).

¹¹² *Borg v. Wojcik*, 70 L.R.R.M. 3093 (E.D. Mich. 1969).

¹¹³ *UAW v. Textron, Inc.*, 312 F.2d 688 (6th Cir. 1963); *American Fed'n of Labor v. Western Union Tel. Co.*, 179 F.2d 535, 538 (6th Cir. 1950).

¹¹⁴ *American Fed'n of Labor v. Western Union Tel. Co.*, 179 F.2d 535, 538 (6th Cir. 1950).

¹¹⁵ 405 F.2d 41 (5th Cir. 1968).

¹¹⁶ *Id.* at 48.

¹¹⁷ 314 F.2d 16 (8th Cir. 1963).

policy. In reaching this conclusion, the court noted that the union was not a party to the annuity contract, that the collective bargaining agreement made no reference to the contract, and that the annuity plan had been discussed only very indirectly in negotiations.¹¹⁸

Thus, it seems reasonable to conclude that suits based on rights under an insurance policy, pension plan, or trust agreement referred to in a labor agreement, or designed to implement an agreement reached through bargaining, should come within the ambit of section 301. In the rare case where a union could have demanded bargaining about a plan but did not, application of section 301 and federal labor law may not be warranted. Even in cases where plan benefits have never been negotiated, however, the plan might still be considered an implied term of a contract between an employer and a labor organization so that a suit for benefits could be considered under section 301.

Federal labor law has generally been ignored in state court actions to enforce employee claims to negotiated plan benefits.¹¹⁹ Just how considerations of national labor policy might require deviation from established state insurance, contract, or trust law in determining employee rights to benefits is difficult to foretell. Some deviation appears inevitable as a steadily increasing volume of litigation dramatizes the labor relations aspects of these plans that distinguish them from garden-variety, master-servant problems under the common law. A problem area likely to receive special treatment concerns employee rights and employer duties under negotiated welfare and pension plans after plant shutdown and plan termination.

SUMMARY AND CONCLUSION

The duty of fair representation probably has been extended to retired former employees by the NLRB holding that unions have a statutory right to bargain about benefit adjustments for retirees. This may present some difficult practical problems for unions attempting to resolve competing interests of active employees and retirees in the limited amounts available for economic settlements negotiated with employers. Unions are also exposed to potential liability in negotiating the final distribution of pension funds in connection with plan terminations, particularly where "vested rights" of employees may be involved. If employee rights are truly vested, an agreement to modify

¹¹⁸ *Id.* at 23-24.

¹¹⁹ *Sbrogna v. Worcester Stamped Metal Co.*, 354 Mass. 17, 234 N.E.2d 749 (1968); *Harrison v. Lakey Foundry Corp.*, 72 L.R.R.M. 2186 (Mich. Cir. Ct. 1969); *Rakness v. Swift & Co.*, 275 Minn. 451, 147 N.W.2d 567 (1966); *Reilly v. Walker Bros.*, 425 Pa. 1, 229 A.2d 457 (1967).

such rights may be ineffective, but this should not result in liability to a union that has acted in good faith without hostile discrimination.

The conduct of employer and union trustees under jointly-administered plans, though primarily fiduciary in nature, has overtones of collective bargaining. This should make the *Steelworker Trilogy* rules on arbitrability applicable to petitions for appointment of impartial unpires to break trustee deadlocks. There is also a possibility that unions may be held responsible under their duty of fair representation for any hostile discrimination against employees by union-appointed trustees.

Federal courts continue to show reluctance to accept jurisdiction under section 302(e) over internal administration of jointly-administered trusts. Nevertheless, there seems to be an adequate basis for such jurisdiction whenever it is alleged that the trust is not being administered for the exclusive benefit of employees. Such cases may call for application of a developing federal common law of trust administration.

Suits to enforce employer obligations to contribute to jointly-administered funds are covered by section 301 and require application of federal common law. This has led to the conclusion that employer defenses available against the promisee-union are not available against the trustees, and to the award of attorneys fees as part of damages. Special rules seem to be developing to prevent oral modification of written agreements to contribute, and may also be appropriate for the award of punitive damages.

In suits to enforce employee rights to benefits based on documents separate from the collective bargaining agreement—insurance policies, pension plans, and trust agreements—applicability of section 301 and other federal labor law is still in doubt. It probably should be applied whenever the document is referred to in a collective bargaining agreement, or is used to implement benefits called for by a collective bargaining agreement.

Federal labor law and federal courts are beginning to play an expanded role in enforcement and administration of negotiated welfare and pension plans. This expansion seems likely to continue as courts become more aware of the close relationship of these plans to collective bargaining and national labor policy.*

* Subsequent to the completion of this article, the Sixth Circuit has refused to enforce the NLRB's *Pittsburgh Plate Glass* decision. 74 L.R.R.M. 2425 (6th Cir. June 10, 1970); see discussion pp. 912-14 *supra*. The court found retired employees to be neither "employees" nor within the "bargaining unit" for purposes of § 8(a)(5). Supreme Court review is likely.