

Spring 1988

Benefits of Retirees: Negotiations and the Duty of Fair Representation, 21 J. Marshall L. Rev. 513 (1988)

Robert S. Bates Jr.

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Insurance Law Commons](#), [Labor and Employment Law Commons](#), [Organizations Law Commons](#), and the [Retirement Security Law Commons](#)

Recommended Citation

Robert S. Bates, Jr., Benefits of Retirees: Negotiations and the Duty of Fair Representation, 21 J. Marshall L. Rev. 513 (1988)

<https://repository.law.uic.edu/lawreview/vol21/iss3/3>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

BENEFITS OF RETIREES: NEGOTIATIONS AND THE DUTY OF FAIR REPRESENTATION

ROBERT S. BATES, JR.*

During the early 1980's, employer demands for economic concessions from labor unions became common and wide-spread. In a climate of high business failure rates, unemployment, rising energy costs, inflation, and tight money, the severe national recession fueled a trend of aggressive management demands for concessions from unions in the nation's basic industries. Accordingly, labor organizations frequently found themselves bargaining from positions of weakness, trying to hold on to benefits which they had obtained through the years. Unions often fell short of that goal and were forced to attempt to equitably distribute to diverse memberships, with internally conflicting priorities, the remaining pieces of an ever shrinking pie.¹ In this context, unions have reluctantly engaged in the necessary evil of the hour: concession bargaining. Unions have done so in the attempt to save jobs threatened with elimination. In the process, however, the wages, vacation, severance pay, health insurance, and other benefits of employees—active and retired—have frequently been reduced. The purpose of this paper is not to question the wisdom or propriety of such bargaining strategies; rather, the issue addressed is the risks unions run when such bargaining disturbs the benefits of those who have retired from the workforce.

As a general rule, a "breach of the statutory duty of fair representation [(DFR)] occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."² The courts will allow a "wide range of reasonable-

* Attorney, Jacobs, Burns, Sugarman & Orlove, Chicago, Illinois. B.A., 1972, Marquette University; J.D., 1976, Cornell University Law School. The author's previous positions include: Executive Director of the Illinois Office of Collective Bargaining; Assistant General Counsel for the United Steelworkers of America; and attorney for the National Labor Relations Board.

1. The Executive Speaker, March, 1983, vol. 4, number 3, at 10; N.Y. Times, Oct. 9, 1983, § 3, at 1.

2. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). The issue of whether there has been a breach of the duty of fair representation normally arises in the administrative context in responding to National Labor Relations Act (NLRA) § 8(b)(1)(A), unfair labor practice charges before the National Labor Relations Board (NLRB), or one of the public sector analogues thereof. See 29 U.S.C. § 158 (b)(1)(A) (1982).

ness . . . [to] a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."³ Courts refuse to acknowledge "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 [the union] represents or in supporting the position of one group of employees against that of another."⁴ The above rules are not new or novel principles of DFR law; rather, the courts and administrative agencies have widely recognized and accepted them.

Likewise, union labor lawyers have argued, with success, that a number of non-pension benefits, such as severance pay, may be "vested" or "accrued" by mere virtue of the service of an employee, that such benefits are due and owing to employees, and that such obligations are enforceable in the courts and at arbitration.⁵ In recent years, labor attorneys have used the characterization of benefits as "vested" or "accrued" as both sword and shield in the often successful attempt to forestall employers' attempts to abandon their duty to pay health insurance and other non-pension benefits to retired workers.⁶ But what if the world goes awry? What if labor unions, in the process of negotiating benefits for active workers, disturb the benefits of retirees? It is believed that so long as bargaining is conducted and concluded in "complete good faith" and with "honesty of purpose" no DFR breach has occurred. This belief may be wrong. Labor unions may thus be cast adrift in a DFR "twilight zone" at the risk of nearly incalculable damages.⁷

3. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

4. *Humphrey v. Moore*, 375 U.S. 335, 349 (1964).

5. *See, e.g., John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 545, 551 n.5, 555 n.8 (1964); *United Steelworkers of America v. Midvale Heppenstahl Co.*, 94 Lab.Cas. ¶ 13,528 (W.D. Pa. 1981), *aff'd*, 676 F.2d 689 (3d Cir. 1982).

6. *See, e.g., Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669 (6th Cir. 1985) (life and health insurance benefits); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir.) (health insurance benefits), *cert. denied*, 475 U.S. 1017 (1985); *Local Union No. 150-A, United Food and Commercial Workers Int'l Union v. Dubuque Packing Co.*, 756 F.2d 66 (8th Cir. 1985) (health and welfare benefits); *UAW v. Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1984) (life insurance and hospital insurance); *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983) (life and health insurance), *cert. denied*, 465 U.S. 1007 (1984); *Schneider v. Electric Auto-Lite Co.*, 456 F.2d 366 (6th Cir. 1972) (vacation pay); *Upholsterers' Int'l Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967) (life insurance); *Eardman v. Bethlehem Steel Corp. Employee Welfare Benefits Plan*, 607 F. Supp. 196 (W.D.N.Y. 1984) (health care programs of an employee welfare benefit plan); *see also Hurd v. Hutnik*, 419 F. Supp. 630 (D.N.J. 1976) (pension benefits).

7. In *Bowen v. United States Postal Serv.*, 459 U.S. 212, 223-24 (1983), the United States Supreme Court held that liability is to be apportioned between the employer and the union according to the damages caused by the fault of each, the union being responsible for any increase in damages it causes. *Query*: Did the union do anything to *cause* a reduction in retiree benefits? If so, then there is cause for concern.

The very arguments that labor attorneys have relied upon in recent years to forestall employer attempts to modify or terminate retiree benefits may be used against unions in such DFR litigation. In addition, the issues this possibility raises challenge much of what union attorneys believe they know of DFR law. Rather than employing an arbitrary, discriminatory, or bad faith standard, courts may find a *per se* breach of the duty of fair representation. Rather than allowing a wide range of reasonableness, courts may carve out prohibited areas of union conduct. Rather than viewing the union's acts in the context of the interests of all whom it represents, courts may define the rights of a few as superior to the interests of many. Indeed, courts may fashion a "voluntary" duty owed by unions to those whom it does not in fact represent. This is no fantasy. The seeds of this mutation of DFR law have already been sewn in a number of cases.

When a union negotiates changes with respect to retirees allegedly "vested" or "accrued" non-pension⁸ benefits, do the changes constitute a breach of duty to retirees? That is the issue raised and the answer is far from clear. Suffice it to say that the courts have not squarely faced the core issue of retiree vested benefits in a Labor Management Relations Act (LMRA) section 301/DFR context. When the courts confront this issue, its resolution may not be consistent with otherwise established section 301/DFR principles.⁹ Such a case, if tried, could make new law. That being stated, this article examines the many issues potentially involved in such litigation. First, this article explores whether a union owes a duty of fair representation to retirees. Next, it analyzes the current substantive law relating to a union's duty of fair representation. The article then addresses the issue of whether such benefits are vested or accrued. Finally, the article outlines possible union responses to arguments asserting the existence of a duty of fair representation. The article concludes that a union owes no duty of fair representation to retirees who are not part of its collective bargaining unit.

I. DOES A UNION OWE A DUTY OF FAIR REPRESENTATION TOWARD RETIREES?

To begin with, as union attorneys have stated many times, the duty of fair representation is a judicially developed doctrine under which "the exclusive agent's statutory authority to represent *all members of a designated unit* includes a statutory obligation to serve the interests of all members without hostility or discrimination

8. Pension benefits and ERISA are beyond the scope of this paper. See 29 U.S.C. § 1001-1453 (1982).

9. See *id.* § 185.

toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."¹⁰ The duty emanates from a union's statutory role as exclusive collective bargaining representative of an appropriate collective bargaining unit of employees. The courts have historically inferred that the status of exclusive collective bargaining representative is accompanied by a duty to fairly represent those employees who, by selecting a union as their bargaining representative, have sacrificed their right to individually bargain with their employer with respect to wages, hours, and other terms and conditions of employment.¹¹ Accordingly, an initial response to a retiree's lawsuit alleging a DFR breach in the negotiation of changes in health insurance benefits may be that the union owes no duty to retirees. There is precedent supporting such an argument.

In *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*,¹² the United States Supreme Court held in part that retirees were not "employees" within the meaning of NLRA section 2(3) because "retirees are not members of the bargaining unit, [and] the bargaining agent is under no statutory duty to represent them in negotiations with the employer."¹³ *Pittsburgh Plate Glass*, a case retirees will undoubtedly rely upon in bringing DFR actions against unions that have negotiated changes in their health insurance or other benefits, indicates that the statutory scheme Congress enacted, from which the courts have fashioned the DFR obligation, does not contemplate the protection of *retirees*, as opposed to employees. In *Pittsburgh Plate Glass*, the Supreme Court stated:

The Act . . . is concerned with the disruption to commerce that arises from interference with the organization and collective-bargaining rights of "workers"—not those who have retired from the work force. The inequality of bargaining power that Congress sought to remedy was that of the "working" man, and the labor disputes that it ordered to be subjected to collective bargaining were those of employers and their active employees. Nowhere in the history of the National Labor Relations Act is there any evidence that retired workers are to be considered as within the ambit of the collective-bargaining obligations of the statute.

To the contrary, the legislative history of [section] 2(3) itself indicates that the term "employee" is not to be stretched beyond its plain meaning embracing only those who work for another for hire.¹⁴

Even more recently, in *Schneider Moving & Storage Co. v. Robbins*,¹⁵ the Supreme Court reaffirmed the principle that a union does

10. *Vaca*, 386 U.S. at 177 (emphasis added).

11. See National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1982) [hereinafter NLRA].

12. 404 U.S. 157 (1971).

13. *Id.* at 181 n.20.

14. *Id.* at 166.

15. 466 U.S. 364 (1984).

not owe a duty of fair representation to retirees stating:

A union's statutory duty of fair representation traditionally runs only to the members of its collective-bargaining unit, and is coextensive with its statutory authority to act as the exclusive representative for all the employees within the unit Even if there were a duty of fair representation here, it would accord the Union wide discretion and would provide only limited protection to trust beneficiaries. A primary union objective is 'to maximize overall compensation of its members' Thus, it may sacrifice particular elements of the compensation package "if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole."¹⁶

Because the National Labor Relations Act is not concerned with the disruption to commerce that arises from interference with the rights of those who have retired from the work force, and because the duty of fair representation flows solely from a union's role as exclusive statutory bargaining representative, it is difficult to imagine how any retiree may claim that a union owes him or her a duty of fair representation. Even so, such an argument cannot be lightly dismissed.

In *Brotherhood of Railroad Trainmen v. Howard*,¹⁷ black train porters filed suit in federal court to declare a contract void between their railroad employer and the all-white Brotherhood of Railroad Trainmen, which sought to eliminate the black porters' jobs in preference to white union members. The suit also sought to enjoin the railroad from discontinuing the black train porters' jobs.¹⁸ The United States District Court for the Eastern District of Missouri held that the action was preempted because, under the Railway Labor Act, exclusive jurisdiction rested with the National Mediation Board and the National Railroad Adjustment Board.¹⁹ The Court of Appeals for the Eighth Circuit reversed.²⁰ On review, the Supreme Court noted that the plaintiffs were *not* part of the collective bargaining unit represented by the Brotherhood, and addressed the argument that "the Brotherhood owed no duty at all to refrain from using its statutory bargaining power so as to abolish the jobs of the colored porters and drive them from the railroads."²¹ The Court characterized this argument as "unsound" and concluded that the prior opinion of *Steele v. Louisville & Nashville Railroad Co.*,²²

16. *Id.* at 376 n.22 (a trustee's failure to exhaust alleged arbitration remedies under a labor contract did not preclude a suit to compel employer contributions to a trust fund) (citations omitted).

17. 343 U.S. 768 (1952).

18. *Id.* at 770.

19. 72 F. Supp. 695 (E.D. Mo. 1947).

20. 191 F.2d 442 (8th Cir. 1951).

21. *Brotherhood of R.R. Trainmen*, 343 U.S. at 772-73.

22. 323 U.S. 192 (1944).

"point[ed] to a breach of statutory duty by th[e] Brotherhood . . . [because] discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations."²³ The Supreme Court held that the district court had jurisdiction to hear the case and the power to grant the relief plaintiffs sought.²⁴ The Court also commented that: "[b]argaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers . . ."²⁵ and remanded the case to the district court to fashion an appropriate decree. *Howard* is still good law, and it is reasonable to anticipate that any retiree suing a union will likely rely upon it to support his or her claim that a duty of fair representation is owed even if [s]he is no longer a member of the union's collective bargaining unit.²⁶

II. *Pittsburgh Plate Glass* AND ITS PROGENY: THE SUBSTANTIVE LAW IN EVOLUTION

Assuming, *arguendo*, that a duty of fair representation is owed retirees, what precedent is there for the proposition that a union breaches that duty by negotiating reductions with respect to retiree's vested or accrued non-pension benefits? While this writer has found no reported decisions that properly find such a breach,²⁷ it is a safe assumption that any retiree considering a hybrid section 301/DFR action will likely base his or her claim on the footnote in *Pittsburgh Plate Glass*, in which the Supreme Court stated that "[u]nder established contract principles, vested retirement rights may not be altered without the pensioner's consent."²⁸ This passage of *Pittsburgh Plate Glass* is often cited for the proposition that a union has no authority to bargain away vested rights of retirees without their consent.²⁹

23. *Brotherhood of R.R. Trainmen*, 343 U.S. at 773.

24. *Id.* at 774-75.

25. *Id.* at 774.

26. See also *Shishido v. SIU Pac. Dist.-PMA Pension Plan*, 587 F. Supp. 112, 120 (N.D. Cal. 1983) (bargaining representative owes duty of loyalty to both union and non-union members of the bargaining unit).

27. See *infra* note 58 for a discussion of *Hauser v. Farwell, Ozmun, Kirk & Co.* (court improperly found union to have breached its duty to employees by bargaining away vested benefits).

28. *Pittsburgh Plate Glass*, 404 U.S. at 181 n.20.

29. See, e.g., *Shatto v. Evans Prods. Co.*, 728 F.2d 1224, 1227 (9th Cir. 1984); see also *Hauser v. Farwell, Ozmun, Kirk & Co.*, 299 F. Supp. 387, 393, 396 (D. Minn. 1969). In *Hauser*, former employees brought a DFR action against their union for its having released a defunct employer from its obligation to contribute to a pension fund. The district court held that the union may not bargain away the accrued or vested rights of its members and is liable for amounts necessary to provide deferred annuities for the plaintiffs. In support of this holding, the court cited the case of E.J.

The issue addressed in *Pittsburgh Plate Glass* was whether an employer's mid-term unilateral modification of a collective bargaining agreement's retiree insurance provisions violated the NLRA.³⁰ The Supreme Court held that the bargaining obligation does not embrace changes in retiree's benefits, and that an employer's unilateral modification of such benefits does not constitute an unfair labor practice. *Pittsburgh Plate Glass* involved neither a DFR breach nor a section 301 suit. In addition, a close reading of *Pittsburgh Plate Glass* reveals that when the Supreme Court opined that vested retirement benefits cannot be altered without the pensioner's consent, the Court was only expressing *obiter dictum*, because the quoted passage did not embody the resolution or determination of the Court; that is, it was "not necessarily involved in the case or essential to its determination."³¹ As such, the passage lacks the force of an adjudication. Nonetheless, the footnote's suggested prohibition is that when the retirees benefits are "vested" or "accrued" they may not be disturbed. Accordingly, once the courts determine whether retirees are owed a duty of fair representation, the issue arises whether the benefits at issue are "vested" or "accrued."

III. ARE THE BENEFITS IN QUESTION "VESTED" OR "ACCRUED": WHY ARGUE THIS SIDE OF THE QUESTION?

"Vested" or "accrued" benefits, in contrast to wages, are deferred compensation for work already done. They may take the form of wages due for past work, vacation time, seniority rights, or other conditions of employment linked to past service. The test in deciding if benefits have accrued is whether they are due and payable on the date on which the employer denied them.³² If the benefits in question are "vested" or "accrued," then the prohibition spoken of in *Pittsburgh Plate Glass* may come into play. If not, then the retiree plaintiff may not be able to rely on the cited case and its some-

& E. Ry. v. Burley, 325 U.S. 711, 739-40 (1946) (Supreme Court drew a distinction under the Railway Labor Act between a union's authority to collectively bargain with respect to future concerns, e.g., prospective working conditions, and with respect to making settlements retroactive, e.g., involving accrued rights or claims); Dwyer v. Climatrol Indus., Inc., 544 F.2d 307, 310-11 (7th Cir. 1976) (pension rights not vested, therefore union could change pension plan without members' consent), cert. denied, 430 U.S. 932 (1977); Bianchin v. McGraw-Edison Co., 438 F. Supp. 585, 587-88 (W.D. Pa. 1976) (new collective bargaining agreement did not affect vested rights), aff'd, 564 F.2d 89 (3d Cir. 1977), cert. denied, 434 U.S. 1047 (1978); Rothlien v. Armour & Co., 377 F. Supp. 506, 509 (W.D. Pa. 1974) (pension rights not vested, therefore Hauser case not controlling).

30. *Pittsburgh Plate Glass*, 404 U.S. at 159-60.

31. BLACK'S LAW DICTIONARY 541 (4th ed. 1968).

32. E.L. Wiegand Div. v. NLRB, 650 F.2d 463, 468-69 (3d Cir. 1981) (citing Allied Indus. Workers Local 289 v. NLRB, 476 F.2d 868, 876 (D.C. Cir. 1973)), cert. denied, 455 U.S. 939 (1982); see also Upholsterer's Int'l Union v. American Pad & Textile Co., 372 F.2d 427, 428 (6th Cir. 1967).

what frightening progeny.

Obviously, a union does not want to concede that it has violated an explicit prohibition against altering the "vested" benefits of retirees. While the almost instinctive response to such an allegation is to deny that the benefits in question are "vested," that approach is not without problems of its own. There are two *major* problems with a union arguing that the health insurance benefits of retirees are not "vested" or "accrued." First, as a matter of policy and long range goal planning, do unions really want to make it *more difficult* to establish in court that retirees'—or anyone's—benefits have "vested" or "accrued"? In the long run, will increasing the difficulty of that hurdle hinder rather than aid union goals? For example, the same union being sued on such a theory today may desire to litigate on *behalf* of retirees tomorrow in another forum or jurisdiction. Having to defend such suits impales the union on the horns of a very difficult dilemma.

Second, if the union elects to defend a retiree lawsuit—which alleges in part that the disturbed benefits are "vested"—by arguing that the benefits in issue are not "vested," union counsel may think it advantageous to rely upon the collective bargaining agreement to refute such allegations. Plaintiffs will have to rely on the labor contract in order to establish their section 301 claim; however, the labor contract may contain little or no indication that the parties to the labor contract intended that the retirees' non-pension medical insurance or other benefits be construed as "vested," as contrasted with *pension* benefits that are often *explicitly* construed as "vested." Accordingly, union counsel may argue that the parties to the labor contract clearly displayed their ability to express their intent, and had they intended medical insurance benefits to "vest," they would have expressed such an intent in their contract, as they did with respect to pensions. After all, it is the parties' expression of intent that controls.³³ The contract's unambiguous health insurance language may resolve any dispute. More likely, ambiguities will require the court to examine other provisions of the contract, or even to consider extrinsic evidence such as employer representations to retirees that their benefits have "vested" or "accrued" (for example, as a recruiting device at the time of their hire, or during exit interviews at which time their right to receipt of benefits in the future may have

33. *UAW v. Roblin Indus.*, 561 F. Supp. 288, 299-300 (W.D. Mich. 1983); see also *In Re White Farm Equip. Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986) ("the parties may themselves set out by agreement . . . whether retiree welfare benefits vest"); *UAW v. New Castle Foundry, Inc.*, 114 L.R.R.M. 3589, 3590-91 (S.D. Ind. 1983) ("We must . . . determine whether the parties . . . intended for retire[es] . . . to have vested rights.").

been explained to them).³⁴ Perhaps courts may even consider court decisions or arbitration awards won by the union that establish that the benefits in issue are “vested” or “accrued.”

When relying on the labor contract, union counsel must note the extensive and growing body of precedent—resulting primarily from union efforts—which easily finds that retiree benefits *have* “vested” or “accrued.” Many courts will liberally construe labor contract language to reach such an end.³⁵ While there is no legal presumption that retirees’ non-pension fringe benefits are “vested,” certain cases and the suggested trend may present a substantial hurdle for a union contending that such benefits are not “vested.” Clearly, the good that unions do today may have a cost to be deemed tomorrow.

IV. THE UNION’S RESPONSE TO RETIREE RELIANCE UPON *Pittsburgh Plate Glass* AND ITS PROGENY

There are cases with language unfavorable to unions which support a holding that a union breaches its duty owed retirees when the union negotiates reductions in retirees’ benefits. Typically, these cases, which rely upon *Pittsburgh Plate Glass*, hold that a union has “voluntarily” assumed a duty toward retirees. Consequently, these cases purport to prohibit the union, under peril of breach, from negotiating changes in their “vested” or “accrued” benefits. Thus, in *Nedd v. UMW*,³⁶ certain pensioned coal miners sued Health and Welfare Fund trustees and the United Mine Workers (UMW) for their alleged failure to enforce the coal mine operators’ contractual obligations to pay a tonnage royalty to the trust fund. As a result of possessing a majority of seats on the board of trustees, the UMW had unlawfully dominated the trust fund.³⁷ Because of the UMW’s unlawful domination and the trustees’ failure to enforce the employ-

34. See, e.g., *Musto v. American Gen. Corp.*, 615 F. Supp. 1483, 1486-87 (M.D. Tenn. 1985) (some evidence that employer represented retirement benefits were irrevocable).

35. *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 672-76 (6th Cir. 1985); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 612-16 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986); *Local Union No. 150-A, United Food and Commercial Workers Intern. Union v. Dubuque Packing Co.*, 756 F.2d 66, 69-70 (8th Cir. 1985); *UAW v. Cadillac Malleable Iron Co., Inc.*, 728 F.2d 807, 808-09 (6th Cir. 1984); *Schneider v. Elec. Auto-Lite Co.*, 456 F.2d 366, 370-72 (6th Cir. 1972); *Upholsterers’ Int’l Union of N. Am. v. American Pad & Textile Co.*, 372 F.2d 427, 428 (6th Cir. 1967); *Eardman v. Bethlehem Steel Corp. Employee Welfare Benefit Plans*, 607 F. Supp. 196, 209-14 (W.D.N.Y. 1984); *Hurd v. Hutnik*, 419 F. Supp. 630, 653-55 (D.N.J. 1976). *But see* *District 29, UMW v. Royal Coal Co.*, 768 F.2d 588, 590-92 (4th Cir. 1985) (strict interpretation of wage agreement), *cert. denied*, 108 S. Ct. 1111 (1988); *District 17, UMW v. Allied Corp.*, 735 F.2d 121, 126-27 (4th Cir. 1984) (literal construction of labor contract language), *cert. denied*, 473 U.S. 905 (1985).

36. 556 F.2d 190 (3d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

37. *Id.* at 207.

ers' obligations to make payments of royalties to the trust fund, the court imputed to the UMW the trustees' breach of their fiduciary duty in the management of the trust.³⁸

The *Nedd* pensioners claimed in part that the UMW had breached a duty of fair representation the union allegedly owed to them. The district court held that it lacked subject matter jurisdiction over this claim, and that even if it had subject matter jurisdiction, the UMW was not liable under the pensioners' DFR theory.³⁹ The pensioners appealed. In the portion of its opinion addressing the *procedural issue* of whether the pensioners' DFR claim supported federal question jurisdiction, the Court of Appeals for the Third Circuit discussed its view of *Pittsburgh Plate Glass*:

While *Chemical Workers v. Pittsburgh [Plate] Glass* held that future retiree benefits were not the subject of mandatory collective bargaining, it also recognized that such benefits were a permissive subject of bargaining. When the Union elects to undertake such bargaining, the union's duty of fair representation must apply Moreover, *Chemical Workers* . . . does not deal with the Union's duty when it unilaterally undertakes, as the Mineworkers' Union undertook, to act as collector and enforcer of the Fund's contractual royalty entitlement. The Union need not have done so, and if it had not, the pensioners would have had a remedy against the employers for any delinquencies. But having undertaken, on behalf of the Fund, to enforce the employers' obligation to pay royalties, the Union was not then entitled to act in a manner which discriminated against the pensioners.⁴⁰

Significantly, the court in *Nedd* did *not* decide whether the UMW had, as a matter of law, breached a duty of fair representation owed the pensioners; instead, the court deferred its discussion of the merits to a later portion of its opinion.⁴¹ In the portion of the *Nedd* opinion devoted to the *substantive issue* of whether the UMW had acted unlawfully, the court's analysis concerned itself *solely* with the effects of the UMW's "equal representation violation" under section 302(c)(5)(B) of the Labor Management Relations Act (LMRA).⁴² The court stated that "[s]ince the Union undertook the task and controlled the fiduciaries, *it became a fiduciary*, and its duty toward the fund beneficiaries should have been measured by *the same standard of care as the court applied to the trustees*."⁴³ It is therefore apparent that, in vacating and remanding the judgment of the district court, the Third Circuit was holding the UMW accountable for its knowing participation in a

38. *Id.* at 207-14.

39. *Id.* at 195-96.

40. *Id.* at 200; *cf.* *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1971).

41. *Nedd*, 556 F.2d at 200.

42. 29 U.S.C. § 186(c)(5)(B) (1982).

43. *Nedd*, 556 F.2d at 212 (emphasis added).

breach of trust (that is, its actual and voluntary participation in the non-enforcement of the obligation to pay royalties). The court reasoned that *by dominating the trustees* who had breached their fiduciary duty to the beneficiaries of the trust, the UMW had placed itself in a position of statutorily prohibited "conflicting loyalties." The court did *not* refer to this as a DFR breach; rather, the court clearly relied upon LMRA section 302(c)(5)(B). LMRA section 302(c)(5)(B) requires that the trust fund be established for the "sole and exclusive benefit" of the pensioners, and that labor and management be "equally represented in the administration" of the fund.⁴⁴

In view of the foregoing, *Nedd* concerned pensioners' rights to a retirement pension under a health and welfare trust instrument, not retirees' right to medical insurance or other non-pension benefits under a collective bargaining agreement.⁴⁵ Likewise, *Nedd* concerned the application of a statute specifically designed to protect pensioners' benefits and that specifically forbade conflicting loyalties. This article, however, concerns principles of DFR law which have long recognized that conflicting loyalties are inherent in the negotiation and representation process. In addition, *Nedd* concerned the UMW's voluntary undertaking to enforce the trust fund's, *i.e.*, someone else's, rights and obligations. In contrast, litigation involving a union's duty of fair representation will most often involve a union's efforts at administering, improving, or limiting the erosion of its own labor contract. Finally, although the court in *Nedd* admonished the UMW not to "discriminat[e] against the pensioners," very clearly, under well established principles of DFR law, a union would not "discriminat[e]" against retirees by negotiating reductions in their benefits in the best interests of all of those who are represented by the union. It cannot be emphasized too strenuously, however, that the negotiation of changes in retirees' benefits does *not* present a typical DFR fact pattern. Accordingly, reliance on the foregoing attempt to distinguish *Nedd* cannot be comfortably maintained.

Likewise, *Toensing v. Brown*⁴⁶ contains language that purports to establish a union duty to fairly represent retirees. In *Toensing*, pension trust fund beneficiaries sued the fund's trustees, alleging a violation of LMRA section 302(c)(5). The alleged violation occurred when the trustees decided "to award a larger increase in pension

44. 29 U.S.C. § 186(c)(5)(B) (1982).

45. In contrast to the pensioner's rights in *Nedd*, retirees' medical insurance benefits are "created by collective bargaining" and may "be extinguished by subsequent collective bargaining." *Hendricks v. Airline Pilots Ass'n Int'l*, 696 F.2d 673, 676 (9th Cir. 1983).

46. 528 F.2d 69 (9th Cir. 1975).

benefits to active carpenters than to those retired”⁴⁷ There was no union defendant in *Toensing*, and the court’s opinion does not disclose any allegation of a DFR breach.⁴⁸ Although “the increase in benefits adopted by the trustees was recommended by the collective bargaining parties,”⁴⁹ the Court of Appeals for the Ninth Circuit commented that a union is not required to negotiate additional pension benefits for retirees.⁵⁰ The court noted that if the union undertakes to negotiate additional pension benefits for retirees, the retirees’ vested retirement rights may not then be disturbed.⁵¹ The benefits for retirees, however, are not required to be absolutely equal with those for active employees.⁵² The court concluded that “the collective bargaining parties acted *properly* in recommending varying benefit increases for active and retired carpenters.”⁵³ The court then affirmed the grant of summary judgment dismissing the suit below.⁵⁴ Therefore, it is clear that while the *Toensing* court did refer to a “duty” to fairly represent retirees, the plaintiffs had sued a *trust fund*, not their *collective bargaining representative*.⁵⁵ The court’s holding did *not* involve any union DFR issues or address in any respect the propriety of bargaining table conduct of either a union or an employer. In sum, the court’s DFR references were *dicta*.

What unions have to fear most from the *Nedd-Toensing* line of cases is the creation of a “*per se*” DFR rule prohibiting a union from negotiating with respect to certain benefits and establishing a breach—without further inquiry—whenever a union does so. One possible union response to arguments urging such a rule is that even if *Nedd* and *Toensing* created a duty of fair representation when a union “voluntarily” acts on behalf of retirees, neither the *Toensing* nor the *Nedd* court even hinted that it intended to impose restrictions on unions in the negotiation of collective bargaining agreements. Rather, the *only* restrictions on union acts the courts envisaged concerned the LMRA’s protection of *retirees’ vested pension benefits under trust instruments*. Neither court even remotely suggested that when a union “voluntarily” acts on behalf of retirees in the negotiation of collective bargaining agreements, the “wide range of reasonableness” normally accorded to it in performing such func-

47. *Id.* at 71.

48. *Id.* at 71-72.

49. *Id.* at 71.

50. *Id.* at 72.

51. *Id.*

52. *Id.*

53. *Id.* (emphasis added).

54. *Id.*

55. See 29 U.S.C. §§ 152(5) (defining a “Labor Organization”), and 159(a) (defining who shall represent workers in collective bargaining).

tions would somehow be diminished.⁵⁶ While retirees may rely on *Nedd* and *Toensing* to establish their claim that a union has a duty of fair representation toward them and cannot agree to reduce their medical insurance benefits without their consent under peril of breaching that duty, neither *Nedd* nor *Toensing* nor any other case has explicitly created such a *per se* rule. Furthermore, neither case held that the conduct of a union that acts on behalf of retirees should be judged by any standard other than that traditionally applied to a union acting on behalf of *bargaining unit personnel* with respect to the negotiation of a collective bargaining agreement, *i.e.*, the arbitrary, discriminatory, and bad faith standards of *Vaca v. Sipes*. *Vaca* has never been read to prohibit, *per se*, a union from negotiating reductions in employees' benefits without their consent. Therefore, even if *Nedd* and *Toensing* established such a union duty of fair representation toward retirees, those cases could not, consistent with *Vaca*, prohibit the conduct that the offended retirees may attack.⁵⁷ In sum, under the standards of *Vaca*, it is simply not a DFR breach for a union to negotiate reductions in benefits without employees' consent and there is no *per se* DFR rule which requires that allegedly "vested" contractual benefits be treated any differently than other contractual benefits in this respect.⁵⁸

Since *Nedd* and *Toensing*, other courts have used language that may eventually support the kind of retiree DFR litigation this article contemplates. For example, in *Brown v. UAW*,⁵⁹ the United

56. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) ("complete satisfaction of all who are represented is hardly to be expected").

57. *Humphrey v. Moore*, 375 U.S. 325, 349 (1964); *Ford Motor Co.*, 345 U.S. at 338.

58. But see *Wolford v. Steelworkers Local 1054*, 117 L.R.R.M. 2021, 2022, 105 Lab.Cas. ¶¶ 12,191, 27,035 (S.D. Ind. 1984) (union could not amend a previous agreement so as to eliminate a provision for extended vacations); *Hauser v. Farwell, Ozmun, Kirk & Co.*, 299 F. Supp. 387 (D. Minn. 1969). In *Hauser*, the United States District Court for the District of Minnesota held that a union breached its duty to employees by bargaining away vested benefits. *Id.* at 393. The district court in *Hauser*, however, misread and misapplied the case of *E.J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), *aff'd* 327 U.S. 661 (1945), upon which it relied in reaching its holding. The *Hauser* court read *Elgin* as holding that a union has no authority to bargain away vested or accrued rights of its membership. *Hauser*, 299 F. Supp. at 393. But *Elgin* involved a union's authority under the Railway Labor Act to compromise and settle monetary claims for a *contractual penalty*, where the railroad employer had violated the starting time provisions of the labor contract. *Elgin*, 325 U.S. at 712, 717. Accordingly, the issue in *Elgin* did not involve truly vested or accrued rights, as the employees had not been denied and were not seeking compensation for services performed. The Supreme Court's references to "rights accrued" were to all rights arising out of an existing contract. *Id.* at 723. In sum, the Supreme Court in *Elgin* merely indicated that "minor disputes" (a Railway Labor Act term of art having no NLRA or public sector analog) arising incidentally in the course of employment were subject to the dispute resolution procedures of the Railway Labor Act and could not be settled short of such resolution without employee consent. *Id.* at 741.

59. 512 F. Supp. 1337 (W.D. Mich. 1981), *aff'd*, 689 F.2d 69 (6th Cir. 1982).

States District Court for the Western District of Michigan used such language in holding that:

[D]efendant contends no duty of fair representation was owed to plaintiff class, so no claim for breach exists, because the definition of "employee" in the National Labor Relations Act . . . as set out in Section 2(3) of the Act . . . does not include retirees and other terminated employees

. . . It is an unfair labor practice for employers to refuse to bargain about *active* employees' retirement benefits . . . and once retirement benefits are secured, a union is obliged to protect those rights Defendant's reliance on *Pittsburgh Plate Glass* would lead to the anomalous [sic] result that while labor organizations are forbidden from bargaining away vested pension rights, no member of a union has standing to complain. For these reasons, I am satisfied that plaintiffs have standing to maintain this action against defendant International Union.⁶⁰

In *Brown*, the UAW had breached its duty to fairly represent former employees by failing to monitor the employer's contributions to a pension fund while they were active employees.⁶¹ On appeal, the Court of Appeals for the Sixth Circuit expressed no view as to the correctness of that holding and decided the case on other grounds.⁶² In *Policy v. Powell Pressed Steel Co.*,⁶³ however, the Sixth Circuit finally stated retiree benefits are interminable and vest upon an employee's retirement.⁶⁴

While retirees may argue that *Pittsburgh Plate Glass* creates a cause of action against a union to remedy a defendant employer's alleged breach of contract, it must be noted again that *Pittsburgh Plate Glass* involved neither an alleged violation of NLRA section 8(b) (which prescribes *union* unfair labor practices) nor a DFR breach. Accordingly, if *Pittsburgh Plate Glass* may be read to re-

60. *Id.* at 1348-49 (citations omitted).

61. *Id.* at 1361.

62. *Brown v. UAW*, 689 F.2d 69 (6th Cir. 1982).

63. 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986).

64. *Id.* at 613, 616. The court stated:

. . . [T]his Court recognized that normally retiree benefits are vested This is true because retirees, with respect to their benefits, are unprotected in the collective bargaining process. Upon expiration of a collective bargaining agreement, a union owes no duty to bargain for continued non-vested benefits for retirees A union may choose to forego nonvested retiree benefits in future negotiations in favor of more compensation for active employees. The union may not, however, "bargain away retiree benefits which have already vested in particular individuals. Such rights, once vested upon a employee's retirement, are interminable and the employer's failure to provide them [is] actionable under section 301 by the retiree"

Id. at 613 (citing *UAW v. Yard-Man Inc.*, 716 F.2d 1476, 1482 n.8 (6th Cir. 1983)) (citations omitted), *cert. denied*, 465 U.S. 1007 (1984); *see also* *UAW v. Cadillac Mal-leable Iron Co., Inc.*, 728 F.2d 807, 809 (6th Cir. 1984); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984); *Upholsterer's Int'l. Union v. American Pad & Textile Co.*, 372 F.2d 427, 428 (6th Cir. 1967).

strict the acts of either party to a labor contract, then it may also be read to restrict only the acts of management and not labor. Thus, one court has recently stated that "there is nothing in *Pittsburgh Plate Glass* that would prohibit a union from negotiating either to increase or to decrease the benefits of retired workers."⁶⁵ The Supreme Court itself, commenting on *Pittsburgh Plate Glass*, has stated that "former members and their families may suffer from discrimination in collective bargaining agreements because the union need not 'affirmatively . . . represent [them] or . . . take into account their interests in making bona fide economic decisions in behalf of those whom it does represent.'"⁶⁶ This analysis suggests that the remedy the Supreme Court envisioned for retirees whose truly vested rights are altered without their consent is *solely* a section 301 action against their employer, and that the Supreme Court did not envision a remedy against the union.⁶⁷ These cases suggest that an argument may be made that there is no union duty toward retirees and the retirees' sole remedy is to sue the company under LMRA section 301 for breach of contract.⁶⁸

The strength of this argument, however, is questionable. Retirees may argue that equity and *Bowen v. United States Postal Service* are formidable hurdles for the union, in that if damages must be apportioned according to the fault of each party to the labor contract, then it seems inconsistent and unfair to let the union off the hook for its participation in the reduction of retiree benefits. Moreover, retirees may insist that, especially if a union owes no duty of fair representation toward retirees, it is unconscionable to permit a union to disturb their "vested" or "accrued" benefits without providing them a remedy against the union. Of course, the response to these arguments is that retirees are *not* without a remedy. Retirees are fully capable of moving *on their own* to enforce their alleged

65. *In re Century Brass Prod. Inc.*, 55 B.R. 712, 714, 121 L.R.R.M. 2220, 2222 (D. Conn. 1985) (rejecting a union argument that under the bankruptcy code the employer could not propose modifications in the labor contract that would reduce the benefits of retirees), *rev'd on other grounds*, 795 F.2d 265 (2d Cir.), *cert. denied*, 107 S. Ct. 433 (1986).

66. *UMW v. Robinson*, 455 U.S. 562, 574-75 (1982) (citing *Pittsburgh Plate Glass Co.*, 404 U.S. at 181 n.20) (holding that LMRA section 302(c)(5) did not authorize a federal court to review the provisions of a labor contract for reasonableness regarding the allocation of health benefits among the beneficiaries of a trust fund).

67. *Pittsburgh Plate Glass*, 404 U.S. at 181 n.20; *see, e.g., Anderson v. Alpha Portland Indus.*, 727 F.2d 177, 181-82 (8th Cir. 1984), *cert. denied*, 471 U.S. 1102 (1985) (because "a union owes no duty of fair representation to retirees," retirees need not exhaust contractual remedies before suing their employer for breach of contract, and observing that the Supreme Court in *Pittsburgh Plate Glass* did not point out any union duty created when the union negotiates retiree benefits).

68. *See, e.g., Dist. 17, UMW v. Allied Corp.*, 765 F.2d 412 (4th Cir.), *cert. denied*, 475 U.S. 905 (1985) (upholding a district court injunction requiring a company to provide benefits to retirees until successors assumed its obligations).

rights.⁶⁹ Moreover, not every injured party has a remedy against every possible tortfeasor. So long as a remedy is available to them, retirees are not harmed by the absence of a remedy against the union.

As the foregoing discussion suggests, one plausible reading of *Pittsburgh Plate Glass* is that a union is simply without power to affect retirees' "vested" or "accrued" benefits. Thus, if a union owes no duty of fair representation toward retirees, and the only recourse for retirees as envisioned by the Supreme Court is an action against their employer, one could conclude that union acts with respect to them are simply ineffective or void *ab initio*. This writer has found no case explicitly adopting such a theory. However, at least one fairly recent case has raised the issue. In *Local U. No. 150-A, UFCW v. Dubuque Packing Co.*,⁷⁰ the union obtained enforcement of an arbitrator's award which held that current employees had a vested interest in all health and welfare benefits, except insurance, and the union obtained an injunction requiring the company to continue payments to recently terminated current employees as well as previously retired employees. The company appealed. On appeal, the Court of Appeals for the Eighth Circuit affirmed, stating:

The burden is on the plaintiffs to show that the parties intended retirees' benefits would be vested and not tied to the agreement which created them. While the agreements are not unambiguous, we believe plaintiffs have carried their burden of proof. As noted previously, there are many indications in the agreements and course of dealing that the parties intended the right to benefits would vest upon retirement. *The right to receive health and welfare benefits arises from the retiree's status as a past employee.* It is not dependent on a continued or current relationship with the company. *The status of a retiree cannot be affected by future negotiations or agreements between the Company and the Union; neither can act on behalf of retirees.* There is simply no evidence that the company and the union did not intend to vest the right to benefits in the retirees. There is, on the other hand, evidence that the parties implicitly intended to provide lifetime benefits to retirees. Because the right to benefits has become vested and the retirees are not part of the collective bargaining process, the company's claim that it may implement its final offer to the retirees of lower benefits, because it has bargained to impasse, is without merit.⁷¹

The actual holding of *Dubuque Packing* is nothing more than that the company there was obliged to continue benefits coverage

69. *Smith v. Evening News Ass'n*, 371 U.S. 195, 197-98 (1962); *Anderson*, 727 F.2d at 181-82; *Yard-Man*, 716 F.2d at 1484-87. *But see In Re E-Systems, Inc.*, 86 Lab. Arb. 441, 446 (1986) (arbitrator held that a grievance filed on behalf of retirees protesting changes in insurance coverage was not arbitrable because retirees are not "employees").

70. 756 F.2d 66, 70 (8th Cir. 1985).

71. *Id.* (emphasis added).

for retirees even after the labor contract had expired. The court's broad language, however, suggests more: that collective bargaining negotiations between the parties could *not* alter vested rights of retirees. This seems to suggest that retirees as plaintiffs may be better off simply pleading that any changes negotiated were *ineffective*. Nonetheless, the court's "neither can act on behalf of retirees" language is, in this writer's view, pure *dictum*. It expresses a principle that goes beyond the legal issues before the court. As such, reliance on it is risky. Moreover, its meaning is unclear. Does the "neither can act" passage suggest that if the union did so act, then it would *breach* any duty of fair representation owed the retirees, or does it simply intend to state that the union has no duty and may act as it chooses, but *ineffectively* with respect to vested rights of retirees? Would the Eighth Circuit find negotiated changes of retirees' vested benefits to be *void ab initio*? Nothing in *Dubuque Packing* suggests an answer to these questions.

From the foregoing, it may be fairly concluded that retirees are clearly *not* part of a union's collective bargaining unit in view of *Pittsburgh Plate Glass*. Although it may be argued that retiree-plaintiffs, as non-unit members, are not owed a duty of fair representation, it appears that where a union *chooses* to act on behalf of retirees, at least insofar as their alleged *vested* rights are concerned, the union's acts may be subject to judicial scrutiny. Thus, even though a union generally has no duty toward retirees, when it voluntarily acts on their behalf it arguably must do so in accordance with its duty of fair representation toward all "employees." *Pittsburgh Plate Glass*, *Nedd*, *Brown*, *Toensing*, *Policy*, *Dubuque Packing*, and *Hauser* make it abundantly clear that while a union duty of fair representation toward retirees may be "voluntary," a good number of courts will recognize that it exists, if only in *dicta* for the moment.

V. NOTICE AND OPPORTUNITY TO BE HEARD—DUE PROCESS FOR NON-UNIT RETIREES

Because retirees are not part of the bargaining unit that the union represents, any changes made with respect to their benefits may occur without advance notice to them. This raises an issue of whether a union, by failing to give notice to individuals affected by negotiations and failing to let them be heard with respect to proposed changes in their benefits, breaches a duty owed.

While employees enjoy no inherent right to ratify or vote on a contract in modification in the absence of an express requirement in the labor contract,⁷² since as long ago as *Steele v. Louisville &*

72. *Coleman v. Tennessee Valley Trades & Labor Counsel*, 396 F. Supp. 671,

Nashville Railroad Co.,⁷³ the Supreme Court has required that unions give notice to employees whose employment may be affected by the union's acts at the bargaining table. But this requirement does not impose a rigid code of formalized requirements or procedures. For example, in *Maurer v. UAW*,⁷⁴ the plaintiffs contended that the union breached its duty of fair representation by bargaining away the plaintiffs' rights to reemployment without notice and an opportunity to state their views, or to offer alternative proposals.⁷⁵ The court declined to examine the notice issue in isolation, but instead focused on "the totality of the circumstances to see if it disclose[d] discrimination, arbitrariness, hostility, or bad faith on the part of the union."⁷⁶ While assuming that "it would have been the better approach" for the union to give notice to the affected employees, in view of the fact that the employer had adamantly insisted that the union waive an arbitrator's award granting reemployment rights to the plaintiffs, the court concluded that the union had not breached its duty of fair representation. In the court's view, not only was *the plaintiffs' position obvious to the union*, but also other employees would not likely have supported the plaintiffs' position.⁷⁷

Similarly, in *Goodin v. Clinchfield Railroad Co.*,⁷⁸ certain railroad employees sued their employer and union to enjoin them from putting into effect a labor contract provision that would require all employees aged seventy or older to forfeit their seniority and retire. On appeal, the district court's judgment, which dismissed the action, was affirmed. In the district court, the plaintiffs had raised the issue of whether the union had given proper notice and opportunity to be heard.⁷⁹ The United States District Court for the Eastern District of Tennessee summarily concluded that "failure to invite plaintiffs to a meeting of the union to express their views does not invalidate the bargaining agreement" where the plaintiffs had written the union

677 (E.D. Tenn. 1975) (citing *Aikens v. Abel*, 373 F. Supp. 425, 435 (W.D. Pa. 1973)).

73. 323 U.S. 192, 204 (1944). In *Steele*, the Supreme Court stated:

While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, *the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action.*

Id. (emphasis added).

74. 105 L.R.R.M. 2883 (M.D. Pa. 1980).

75. *Id.* at 2886.

76. *Id.*

77. *Id.* at 2887.

78. 229 F.2d 578, 580 (6th Cir. 1956).

79. 125 F. Supp. 441, 452 (E.D. Tenn. 1954).

and made known their objections to a mandatory retirement age and "the union acted fairly and in good faith in entering into the bargaining agreement."

More recently, in *Waiters Union, Loc. 781 of Washington, D.C. v. Hotel Association of Washington, D.C.*,⁸⁰ a local union sued an employer's association and international union claiming in part that a DFR breach occurred when the international union reversed a previous position and endorsed a negotiation proposal giving bartenders a right to a portion of customer tips previously available only to waiters. The United States Court of Appeals for the District of Columbia Circuit affirmed a verdict for the defendants.⁸¹ *Steele, Maurer, Goodin, and Waiters Union* instruct that a DFR breach for failure to give notice will not be lightly found, nor will courts consider such allegations in a vacuum. On the other hand, in *Branch 6000, National Association of Letter Carriers v. NLRB*,⁸² the District of Columbia Circuit enforced an NLRB order, holding that a union violated the NLRA and breached its duty of fair representation by denying non-union members in its bargaining unit participation in a referendum conducted to determine a specific term and condition of employment affecting all bargaining unit employees.⁸³

80. 498 F.2d 998, 999-1000 (D.C. Cir. 1974).

81. *Id.* In responding to the plaintiff's claim that it was not given "due hearing" on the issue under negotiation, the court stated:

The duty of fair representation implies some consideration of the position of the members involved. As much can be said for any parent who must resolve a quarrel between brothers. But there is no requirement of formal procedures. The fiduciary principle precludes arbitrary conduct, but it must not be stretched so as to "judicialize" the conduct of the affairs of the Union, and to cut athwart a common sense and practical approach toward resolution of problems and disputes that is fair in its essence without being rigid in its procedures.

In the present case there can be no doubt that in fact the officers of the International Union were apprised of the position of the Waiters and gave it due consideration.

.....

While it would have been better practice, in view of the fact that the International Union was reversing a previous position, to have scheduled a conference with the Waiters Local before Mr. Miller framed the issues to be submitted for negotiation, the Waiters Local did not present substantial evidence that there was no meaningful or adequate opportunity for consideration of their position.

Id. at 1000.

82. 595 F.2d 808, 813 (D.C. Cir. 1979).

83. *Id.* With respect to the union's consideration of the views of non-members, the court stated:

The Board's conclusion in this case is fortified by the consideration that there was neither a procedure, nor the intent, to consider the views and interests of non-union employees. In most cases a general familiarity with the working environment may allow a representative of some experience to appreciate adequately the perspective of all employees. There must be communication access for employees with a divergent view, although there is no requirement of formal procedures. Where, as here, it appears to the Board that as a practical

Whatever the perimeters of the *Steele* notice requirement may be, it is at least clear that a union may not "[circulate] inadequate or misleading information."⁸⁴ Unless there is evidence that the union has misled retirees into sitting on their rights,⁸⁵ where it is clear that the union was both aware of their position and acted with rational good faith in consideration of it, no breach of the duty predicated on a *Steele* lack of notice theory may be successfully established. As the *Walters Union* case makes clear, lack of advance consultation does *not* mean "that there was no meaningful or adequate opportunity for consideration of their position." It is safe to assume that retirees would oppose a reduction in, for example, their health insurance benefits. Therefore, it is extremely unlikely that a breach of duty will be made out in the typical case. Normally, it will suffice for the union in defending such a DFR suit to show that, by being aware of the retirees' position, and acting in rational good faith consideration of it, the union did all that the law requires. *Steele* creates no union duty to provide actual consultation, or "due hearing," or any other "formal procedures." Retirees are not entitled to vote on the issues at hand, or participate in their negotiation, or map the strategies of the parties. The atypical case does arise, however, and counsel should be aware of the foregoing cases in the unwelcome event that defending such a suit becomes a necessity.

VI. DEFENDING THE ANTICIPATED RETIREE DFR SUIT WITH TRADITIONAL ARGUMENTS

One may fairly anticipate that a retiree whose benefits have been reduced during bargaining will allege that [s]he is a sacrificial lamb to the union's interests in protecting the benefits of active employees. Incontrovertible principles of DFR law establish that a wide

matter one segment of the bargaining unit has been excluded from consideration, it may find a breach of the duty of fair representation.

Id.

84. *Bunz v. Moving Picture Machine Operators, Etc.*, 567 F.2d 1117, 1121 n.22 (D.C. Cir. 1977). As one court stated:

The union argues that it was not required to adhere to any particular position or force any issue in the give and take of negotiations and that it must be free to exercise its judgment as to what benefits could be obtained and whether the benefit is worth the cost. That argument misses the point. In using its best judgment, the union has the responsibility to fully disclose to those whom it represents what that judgment is and why. At the least, it must not intentionally deceive its members, regardless of its motives for so doing.

Deboles v. Trans World Airlines, 90 L.R.R.M. 3064, 3072 (E.D. Pa. 1975).

85. As stated earlier, because retirees are *not* part of a union's collective bargaining unit, they are not limited to dealing with their employer through their former union, and as such they are free to deal *directly* with their former employer. *See, e.g.*, *UAW v. Yard-Man*, 716 F.2d 1476 (6th Cir. 1984). A union must therefore take special care not to induce retiree inaction by misleading remarks regarding the status of their benefits.

range of reasonableness must be allowed to a statutory bargaining representative in servicing the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.⁸⁶ Thus, contrary to the retirees' anticipated assertion, it is clearly *not* a DFR breach for a union to take a good faith position that benefits one group of employees to the detriment of another.⁸⁷

There is ample precedent with which to defend the union's position.⁸⁸ For example, in *Strick Corp.*,⁸⁹ which preceded and involved the very same facts as *Maurer*,⁹⁰ the NLRB held that the UAW did not violate NLRA section 8(b)(1)(A) (the statutory "equivalent" of the DFR obligation) by agreeing to a labor contract provision. The agreement abrogated an arbitrator's award authorizing preferential hiring and retroactive seniority for discharged strikers. The court so held because: (1) the employer was adamant in its intention to "take a strike" if the union failed to agree to the provision; (2) resistance to the clause would delay implementation of a new contract and its improved benefits to the detriment of working employees; (3) working employees and their shop committee wanted the provision to be included in the contract; and (4) a strike in opposition to the provision probably would have been ineffective.⁹¹ Clearly, the discharged strikers there were placed at a disadvantage to active employees who desired the security of a finalized agreement. But that should not be the focal point for any court's analysis, because such tension within the group owed a duty inevitably will be present.⁹² The focus should be on the *union's motive for its conduct*. If it is, assuming the court analyzes the case properly and applies the same rules as are applied in other DFR cases, then the fact that such reductions may occur to retirees' benefits is defensible.

Similarly, in *Hendricks v. Airline Pilots Association Interna-*

86. *Ford Motor Co.*, 345 U.S. at 338.

87. *Maurer v. UAW*, 105 L.R.R.M. 2883, 2886 (M.D. Pa. 1980); *see also* Knoll v. Phoenix Steel Corp., 325 F. Supp. 666, 671 (E.D. Pa. 1971), *aff'd*, 465 F.2d 1128 (3d Cir. 1972).

88. *See Strick Corp.* 241 N.L.R.B. 210, 217, 100 L.R.R.M. 1491, 1492 (1979).

89. *Id.*

90. *Maurer*, 105 L.R.R.M. at 2883.

91. *Strick Corp.*, 241 N.L.R.B. at 210, 100 L.R.R.M. at 1492.

92. *See, e.g.*, *United Indep. Flight Officers v. United Airlines*, 756 F.2d 1262, 1267-68 (7th Cir. 1985); *Shishido*, 587 F. Supp at 121. Indeed, it has been held that a union does not breach its duty of fair representation unless it *intentionally* causes harm to employees. *United Indep. Flight Officers v. United Airlines*, 756 F.2d 1274, 1282 (7th Cir. 1985) (citing *Hoffman v. Lonza, Inc.*, 658 F.2d 519, 522 (7th Cir. 1981)). However, other courts have held that the breach need *not* be intentional. *See Carpenter v. West Virginia Flat Glass*, 763 F.2d 622, 624 (4th Cir. 1985) (citing *Wyatt v. Interstate Ocean Transp. Co.*, 623 F.2d 888, 891 (4th Cir. 1980)); *Miller v. Gateway Transp. Co., Inc.*, 616 F.2d 272, 277 n.11 (7th Cir. 1980) ("the duty may be breached without scienter on the part of the union").

tional,⁹³ the union and United Airlines (UA) agreed that UA could "buy back" from individual pilots their remaining, unused, vacation so that extra man-hours could be worked to fill an expanded flight schedule.⁹⁴ After certain pilots accepted UA's buy-back offer and UA began paying off pilots pursuant to individual agreements, economic conditions worsened and UA informed the union of anticipated layoffs.⁹⁵ Thereafter, the parties engaged in concession bargaining and agreed to avoid layoffs provided that pilots would take one-half of the vacation they had agreed to forfeit, and UA could forego one installment of the buy-back payments it had initiated.⁹⁶ Pilots dissatisfied with this resolution claimed that a loss of compensation would result and sued the parties contending that the union breached its duty of fair representation in negotiating an agreement that released UA from performance of the buy-back agreements.⁹⁷ The Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment for the union and UA.⁹⁸

Starting with the principle that "rights created by collective bargaining ordinarily can be extinguished by subsequent collective bargaining," the court rejected the plaintiffs' contention that the union breached its duty by "confiscat[ing] the plaintiffs' right to compensation in favor of and directly to the economic benefit of the groups of pilots subject to a potential layoff."⁹⁹ Pellucidly, DFR law "clearly permits a union to negotiate for and agree to contract provisions involving disparate treatment of distinct classes of workers . . . as long as such conduct is not arbitrary or taken in bad faith."¹⁰⁰ *Hendricks* is particularly significant because the benefit in issue there was vacation pay, which has been held to be a "vested" or "accrued" benefit.¹⁰¹ In sum, a union arguably may not be shown to have breached its "duty" toward retirees *merely* because retirees' health insurance benefits have been reduced.

Mauer and Hendricks are not alone in supporting a union's acts

93. 696 F.2d 673 (9th Cir. 1983).

94. *Id.* at 674.

95. *Id.*

96. *Id.* at 674-75.

97. *Id.* at 675.

98. 696 F.2d at 674-75, 678.

99. *Id.* at 677.

100. *Id.* Significantly, the court also noted that the plaintiff-appellants had not challenged the earlier buy-back agreement:

[Y]et it afforded appellants an opportunity to obtain compensation not paid other pilots. Both the creation of the preference and its termination were justified by the same basic consideration—the best interest of the bargaining unit as a group. Both agreements were rational accommodations to changing economic circumstances. Neither was vulnerable merely because its immediate impact was less favorable to some part of the group than another.

Id. at 678.

101. See *Schneider v. Electric Auto-Lite Co.*, 456 F.2d 366 (6th Cir. 1972).

on behalf of all whom it represents when an adversely affected group protests. They illustrate the traditional approach unions take in defending such DFR suits. If a court, however, takes the approach that under *Pittsburgh Plate Glass*, because the benefits at issue are "vested" or "accrued," the union should not have bargained at all with respect to such retiree benefits, such a court would be adopting a "*per se*" approach, finding the conduct of the union to be arbitrary, discriminatory, or in bad faith by definition. While *Hendricks* affords some arguments against such a judgment, as stated earlier, *Pittsburgh Plate Glass* and its progeny may suggest that this is an area in which the union should not act at all without the consent of the retirees. At the very least, a union should walk this path with great caution, and seek the assistance of union counsel.

VII. CONCLUSION

A union owes no duty of fair representation to retirees who are not part of its collective bargaining unit. The reason for this is that they are *retirees*, not bargaining unit "employees" within the meaning of NLRA sections 2(3) and 9(a).¹⁰² Even so, *Howard* may create a DFR obligation where a union "voluntarily" acts with regard to non-unit retirees. Where a union thus voluntarily assumes a duty toward retirees by acting with respect to them where it need not have acted, then union counsel may argue that it is no breach for the union to extinguish contractual benefits by the very process which created the benefits and that a union by taking a good faith position which benefits active employees to the detriment of retirees does *not* breach its duty to retirees.¹⁰³ However, *Pittsburgh Plate Glass* and its progeny arguably may be construed to require that the vested benefits of retirees not be disturbed without their consent. Some courts appear poised to find a breach of the duty where a union acts in disregard of this prohibition. In defense, a union may argue either that retirees' benefits are not vested (at the risk of creating precedent contrary to the union's long term goals), or that there is no "*per se*" DFR rule exempting vested benefits from the traditional *Vaca*, *Huffman*, and *Humphrey* standards of analysis, because plaintiff retirees have no contractual rights *superior* to those of active employees. In other words, even if their benefits are "vested," negotiating them away *in the interests of the bargaining unit as a whole*, including consideration of the interests of non-unit retirees, would *not* constitute a DFR breach.¹⁰⁴ While the union may

102. 29 U.S.C. §§ 152(3), 159 (a) (1982).

103. *Nedd v. UMW*, 400 F.2d 103, 105 n.5 (3d Cir. 1968) (1978).

104. *Contra Hauser v. Farwell, Ozmun, Kirk & Co.*, 299 F. Supp 387 (D. Minn. 1969).

argue that it lacks the ability to effectively alter retirees' benefits, this may or may not avoid a finding of a breach, and it certainly has the potential to undo the changes negotiated in the contract. Finally, retirees may contend that they are owed notice and consultation with respect to changes in their benefits. As long as the union is aware of their position with respect to reductions in their benefits, and acts rationally and in good faith in consideration of such position, no breach is likely established, because the retirees have thus been accorded all of the notice and consultation that the law requires. Optimally, their interests have been considered along with those of bargaining unit employees, and the union has acted in the best interest of *all* concerned.

If all of the foregoing generates some uncertainty, then that is not without reason. The legal issues this article raises are a subject of uncertainty. The core issue of retiree vested benefits in a section 301/DFR context has not been *squarely* faced. Its resolution may not be consistent with otherwise established section 301/DFR principles. Such a case, if tried, could make new law. Hopefully, such an event will not undo much DFR law.