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The Establishment and Administration of Pension Plans in the Labor Relations Process

*Robert John Hickey**

Since World War II, pension plans have become an important part of the benefits bargained for in the negotiation of collective bargaining agreements. The author here analyzes the role of pension plans in the labor relations process, federal legislative regulation of pension plans, and relevant court decisions. He concludes that collectively bargained pension plans will produce problems in the future which are now only beginning to appear.

I. Introduction

The purpose of this article is to analyze the role of pension plans[1] in the labor relations process. The earliest pension plans had their origin in the early nineteenth century and were pioneered by fraternal associations established and operated by and for the employees.[2] The advent of unions on the labor scene resulted in the union, instead of the fraternal association, administering the program. As for employer pension plans, the union leaders feared that such programs were only a devious employer's device to prevent unionization.[3] Thus, prior to World War II, employer pension plans were usually unilaterally instituted. However, beginning in 1942 collective bargaining for pension plans began to achieve major momentum. Among the circumstances which combined to produce this result were the tax deduction allowed the employer for contribution to these programs;[4]

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1. The Welfare and Pension Plans Disclosure Act § 3(a), 72 Stat. 997 (1958), as amended, 29 U.S.C. § 302 (Supp. V, 1959-63), defines the term "employee pension benefit plan" as "any plan, fund, or program which is communicated or its benefits described in writing to the employees, and which was heretofore or is hereafter established by the employer or by an employee organization, or by both, for the purpose of providing for its participants or their beneficiaries, by the purchase of insurance or annuity contracts or otherwise, retirement benefits, and includes any profit-sharing plan which provides benefits at or after retirement."
2. Latimer, Industrial Pension Systems in the United States and Canada (1932).
3. O'Neil, Modern Pension Plans (1947); Rowe & Paine, Pension Plans Under Collective Bargaining, 76 Mo. Lab. Rev. 237, 484, 714 (1953); Comment, 59 Yale L.J. 678 (1950).
4. Revenue Act of 1942, ch. 619, § 137, 56 Stat. 836.

the National War Labor Board policy of freezing cash pay raises while increasing compensation in the form of fringe benefits;[5] and decisions of the National Labor Relations Board, sustained by the courts, that pensions were properly within the statutory scope of the employer's duty to bargain.[6]

II. Pensions as an Anti-Union Weapon

The National Labor Relations Board (NLRB) has held that statements by an employer warning the employees that the employer would not negotiate concerning a pension plan or that it would discontinue the operation of a plan initiated by the employer if the union won an election to represent its employees violates section 8(a)(1) of the National Labor Relations Act since such warnings constitute a clear threat of economic reprisal.[7] There is no less a violation if the employer couches his language in the form of an opinion (*e.g.*, statements that the employees will probably lose their pension plan if the union gets into the plant).[8] However, an employer could note that the union seeking to represent the employees has failed to secure pension plans in other plants where it is the collective bargaining representative.[9]

Not only threats, but also promises of benefits may constitute interference. During a union campaign to organize a plant, an employer cannot present and publish a pension plan or promise improvements in an existing plan if the initiation or improvement is conditioned on rejection or abandonment of union membership or activities.[10] Obviously, conduct including strategically timing the announcement of the retroactive effect of a profit-sharing plan would be an unfair labor practice since it would amount to an attempt to buy the employee's vote.[11] But an employer does not violate 8(a)(1) by stating in pre-election remarks that he contemplates giving the employees such benefits, and where the employer does not condition benefits on the defeat of the union in the election.[12]

There is one further area where the employer cannot use a pension plan as device to influence the employees' choice of their own bar-

5. Stabilization Act of October 2, 1942, ch. 578, § 10, 56 Stat. 768; Exec. Order No. 9250, 7 Fed. Reg. 787 (1942); Amended Exec. Order No. 9381, 8 Fed. Reg. 13003 (1943).
6. Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).
7. Como Plastics, Inc., 143 N.L.R.B. 151 (1963).
8. Elias Brothers' Big Boy, Inc., 139 N.L.R.B. 1158 (1962).
9. Trial Examiner's Decision in Imco Container Company, 5-CA-2425, NLRB (1964).
10. Central Freight Lines, Inc., 133 N.L.R.B. 393 (1961).
11. Homedale Tractor and Equipment Co., 101 N.L.R.B. 1033 (1952).
12. Western Reserve Telephone Co., 138 N.L.R.B. 755 (1962).

gaining representatives. An employer cannot assist a minority union or an outside union by conduct aimed at weakening the majority union. The Board has held that an employer unlawfully assisted a minority union in violation of section 8(a)(2) by cutting off payments to the majority union's pension fund.[13] Nor can an employer encourage membership in an employer-favored union by signing a contract with it which includes payments to a pension fund at a time when an outside union is trying to organize the employees.[14] Payment to one union by an employer during a rival union's campaign is always suspected by the Board. In fact, the Board has held that a payment to a union in connection with services involving pension activities during such a campaign constitutes illegal support.[15]

III. The Nature and Establishment of a Pension

A. *The Nature of Pension Plans*

There are four ways in which a trust can be viewed: a gratuity, a unilateral contract, a deferred wage, or a charitable contribution. The traditional view is that a noncontributory employer-instituted plan does not give rise to an enforceable contract, but is in fact a mere gratuity.[16] Under such a theory, an employee has no vested rights in a plan until he begins to receive benefits.[17] In an effort to guarantee that the courts would find such plans to be gratuities, employers have disclaimed liability by inserting clauses that declare the pensions to be gratuities which create no enforceable right; clauses which give broad powers to the employer, to amend, modify or terminate the plan;[18] and clauses giving the employer or the employer-appointed trustees broad discretionary powers to determine eligibility and the amount of benefits to be conferred.[19]

The courts which have found that these pensions are gratuities have generally done so because of the presence of the following factors: the granting of pensions was wholly voluntary on the part of a company; the employee made no contributions to the fund; and there was no provision that the pension was guaranteed.[20] Of course,

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13. Perry Coal Co., 125 N.L.R.B. No. 1256 (1959).
14. Koehler's Wholesale Restaurant Supplies, 139 N.L.R.B. 945 (1962).
15. Kresge Department Stores, 77 N.L.R.B. 1375 (1948).
16. McNevin v. Solvay Process Co., 32 App. Div. 610, 53 N.Y. Supp. 98 (1898), *aff'd*, 167 N.Y. 530, 60 N.E. 1115 (1901).
17. Dolan v. Heller Bros. Co., 30 N.J. Super. 440, 104 A.2d 860 (Ch. 1954).
18. Bromberg v. United Cigar Stores, 27 L.R.R.M. 2480 (N.Y. Sup. Ct. 1951). The court held that such a clause is similar in effect to a gratuity clause.
19. Bowling v. Texas & N.O.R.R., 80 S.W.2d 456 (Tex. Civ. App. 1935).
20. Umshler v. Umshler, 332 Ill. App. 494, 76 N.E.2d 231, 233 (1947).

where there is an express disclaimer, the courts will include this among the factors.

Because of the harshness of this result, courts have been reluctant to construe these provisions in a way that would deprive employees of their benefits. Courts have imposed an obligation on the employer to administer his plan in good faith.[21] Where the employer is granted unilateral power to amend, modify, or terminate a plan, a court can construe these provisions as giving the employer the power to exercise them only in a case of necessity and in good faith. And where the clause provides that the employer or his trustees have discretion to determine eligibility and benefits, the courts can inquire into the exercise of that discretion to determine if there is fraud or bad faith.[22]

In addition, courts have scrutinized these programs to see if the employee has been unfairly induced by the employer to rely on the promise of a pension.[23] The court is applying the principle of promissory estoppel and granting recovery on the ground that the employee relied on the expectation of a pension to his detriment. In a normal case, the employer does expect the employee to rely upon the promise of pension; otherwise his announcement would have no meaning. Factors which the court could examine to determine if this doctrine is applicable are the past practice of the employer in granting such a benefit, the employee's lack of knowledge of the limitation on the employer's liability, and the fact that the plan did not result from collective bargaining. The court should not impose on the employee the burden of showing that he would have accepted a better paying position elsewhere were it not for the pension because of the obvious inherent difficulty in proving this.

As an alternative to the gratuity theory, some courts have held that a pension is a unilateral contract.[24] Under this theory, a binding obligation is created when the employer makes what amounts to an offer by announcing the initiation of a plan and the employee accepts the offer by fulfilling the requirement that he continue in the employment of the employer for the requisite number of years. Consideration may be found either in the longevity of service,[25] which is not assured the employer in the normal employment relation, and the daily work of the employee.[26] Since the major objective of the employer in adopting this plan is said to be his desire to encourage

21. McNevin v. Solvary Process Co., *supra* note 16.
22. *Supra* note 19.
23. Schofield v. Zion's Co-op. Mercantile Institution, 85 Utah 281, 39 P.2d 342 (1934).
24. Hurd v. Illinois Bell Tel. Co., 234 F.2d 942 (7th Cir. 1956).
25. *Ibid.*
26. Inland Steel Co. v. NLRB, *supra* note 6.

continuity of service, if the employee voluntarily leaves without completing the required service, the employer has gained no benefit and would not be liable to the employee. This also would be true if the employee was discharged for cause, but would not be if he was discharged in bad faith, especially if he is discharged to avoid being paid the pension. Under such circumstances, the employee ought to be able to recover.[27]

The third theory under which an employee covered by an employer's unilaterally instituted plan has been able to recover is that of the deferred wage theory. This theory is similar to the unilateral contract theory, but the emphasis here is on the daily work of the employee. Under this theory, the employer withholds part of the earnings of the employee and pays it after the employee has retired. Consideration for the employer payment is the employee's remaining a specified period of time with the employer. This theory is tied to theories developed by the National Labor Relations Board concerning pensions as a mandatory subject of bargaining, discussed below. One judge has reached this same result by inference from the Internal Revenue Code. Judge Brown, concurring in *Ball v. Victor Adding Machine*,[28] declared:

> And the idea that a Pension Trust expressly approved as was this one, by the Internal Revenue Service as a plan qualified under . . . the 1954 Code, § 401 . . . is a mere gratuity or charitable enterprise. . . . is completely out of keeping with the philosophy and purpose of such plans as the means of paying *additional* compensation to the covered employees in a way to afford substantial and immediate tax advantages to the Employer and substantial tax and monetary advantages to the employees. . . .

Section 8(d) of the National Labor Relations Act requires the employer and the employees' representative to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment." While, within that area, neither party is legally obligated to yield, the Supreme Court in *NLRB v. Wooster Division of Borg-Warner*[29] held that there is a class of lawful bargaining subjects which fall outside of "wages, hours, and other conditions of employment" over which the parties may bargain, if they choose, but a disagreement as to these cannot be made valid grounds for refusing to sign a contract covering subjects within the area of mandatory bargaining. The Board, in a later case, *Houston Chapter, Associated General Contractors of America, Inc.*,[30] interpreted *Borg-Warner* as setting forth two tests to aid in determining

27. Bos v. United States Rubber Co., 100 Cal. App. 2d 565, 224 P.2d 386 (1950).
28. 236 F.2d 170, 173 (5th Cir. 1956).
29. 356 U.S. 342 (1958).
30. 143 N.L.R.B. 409 (1963).

whether a subject of bargaining is mandatory; first, the subject matter must settle a term or condition of employment, and second, the subject sought to be bargained about must regulate the relations between the employer and the employees.

In the *Inland Steel Company* case,[31] the Board held that the employer engaged in an unfair labor practice in violation of Section 8(a) (5) by failing and refusing to bargain with the union upon the application or modification of the terms of a pension program which was originally established prior to the employees' designation of a statutory representative. The Board, in finding pensions a mandatory subject of bargaining stated:

> We find that matters affecting tenure of employment, like the respondent's retirement rule, lie within the statutory scope of collective bargaining. Any other view would remove bargaining with respect to such matters as seniority and union security provisions from the conference to the picket line. Indeed, the Supreme Court has specifically held that the statutory scope of collective bargaining extends to matters involving discharge actions. . . .
>
> The respondent claims that the term "wages" as used in the Act means the "wages earned" by the employees for actual performances of work on production activity, and that pension benefits are based on the economic philosophy that holds that such benefits are not earned by expenditure of productivity effort on the part of the employees, but are determined by the length of time over which employees perform their work. We are of the opinion, however, that regardless of the validity of this economic philosophy of pension benefits, there is no basis for concluding that such a narrow and technical definition of "wages" was intended by Congress in delineating the statutory area of collective bargaining.
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> One of the broad purposes of the Act, as set forth in Section 1 thereof, is to encourage collective bargaining to "wages, rates, and the purchasing power of wage earners" as a means of eliminating industrial strife. To implement this objective, the Congress, in generally defining the ambit of obligatory collective bargaining used not only the specific terms "rates of pay" and "hours of employment" but also the broad generic and widespread phrase "wages and other conditions of employment. . . ." With due regard for the aims and purposes of the Act and the evils which it sought to correct, we are convinced and find that the term "wages" as used in Section 9(a) must be construed to include emoluments of value, like pensions and insurance benefits, which may accrue to employees out of their employment relationship. . . .
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> Moreover, as indicated above, in all fields of law dealing with Congressional legislation for the protection of public rights, the term "wages" has consistently been construed to include increments, such as retirement benefits or other types of dismissal pay rights, which flow to employees because of their longevity. Thus, in examining our statutory power under Section 10(c) of the Act to "reinstate with back pay," we have, in effect,

31. *Supra* note 6.

> uniformly held that pensions and other "beneficial" insurance rights constitute a part of the employee's real wages and have accordingly required restoration of those benefits as part of our make whole order.[32]

Behind this holding lies the simple fact that the employees pay for their own pensions. All labor costs which go to the employees are wages.[33] The fact that they are deferred to a later date and are subject to the condition that the employee loses his rights if he does not meet other requirements of the plan does not make them any less wages. In fact, today, both employers and unions bargain about these plans as if they were wages. Both parties understand that pensions are part of a wage package and are taken in lieu of direct cash wages or other items of compensation.[34]

This does not mean that the employer receives no benefit from his pension program. As Judge Magruder observed in *New England Telephone & Telegraph v. United States:*[35]

> The primary purpose of establishing a pension plan is to deal in an orderly way with the problem of superannuation. The costs of superannuation have to be met by the business in some way. In the absence of provision for retirement of employees on a fair pension, experience has shown the inevitable result to be that employees are kept on the payroll after their usefulness has been impaired, the promotion of younger and more vigorous employees is delayed, and there is a general lowering of efficiency in the conduct of the business . . . . Systematic retirement on pensions results in removing superannuated employees from the payrolls and in improving the morale and efficiency of the younger employees who thus have an added incentive for remaining in the service of the company. The adoption of a pension plan substitutes a new type of expense, namely, pension costs, for the expense, not so easily measurable in dollars and cents, which must somehow be borne by the business in the absence of an orderly handling of the superannuation problem. It is widely believed that this substituted expense results, on the whole, in a net gain for the company.

Thus, among the benefits the employer derives from the plan is the increased efficiency in the orderly and painless retirement of superannuated personnel whose efficiency has been impaired.[36] A well devised and well established plan will infinitely improve morale and may also help to develop and retain a superior work force by decreasing labor turnover.[37] It will serve as a means of reducing strikes

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32. Inland Steel Co. v. NLRB, 77 N.L.R.B. 1, (1948).
33. NLRB v. Niles-Bement-Pond Co., 199 F.2d 713 (2d Cir. 1952); Inland Steel Co. v. NLRB, *supra* note 6.
34. Inland Steel Co. v. NLRB, *supra* note 6.
35. 53 F. Supp. 400, 409 (D. Mass. 1943).
36. O'Neil, Modern Pension Plans 4-6 (1947).
37. *Report and Recommendations of the Steel Industry Fact Finding Board,* 13 L.A. 46, 86, 91 (1949).

and promoting loyalty to the company.[38] In addition, it will help attract better employees. Of course, from the employee's view, the purpose of the plan is to provide income when age forces him to retire.[39]

The *Inland Steel* ruling that pensions are mandatory subjects of bargaining was logically extended to profit-sharing plans[40] which are simply a different manner of financing the employees during their post-retirement period. This obligation to bargain extends, not only to the amount to be paid upon retirement, but also to the method of financing. One court has even held that a bargaining agent had authority to enter into an agreement setting up a benefit program and providing for deduction from the employees' paychecks to finance it.[41]

This obligation to bargain imposes on the employer the duty to submit its proposed plan to the union for consideration and then to meet with the union, making it possible for the union to express any opposition to the plan before the employer puts it into effect.[42] Practical differences in negotiation about the plan do not affect the employer's duty to bargain.[43] The employer cannot insist that any plan submitted by the union meet all the requirements of section 302 of the Labor Management Relations Act at the time of its initial submission.[44] While the employer must bargain, he need not make concession to the union. An employer will not be held to have refused to bargain where his position, although unyielding, is based on considerations frankly and openly discussed.[45]

One problem that frequently arises under a union-negotiated plan is that of trying to force the employer to pay over to the pension fund the amount that he has agreed to contribute. In a recent decision, *Excello Dry Wall*,[46] the Board held that a clause requiring the employer to establish a fund to insure contribution to a pension fund was not a mandatory subject of bargaining. In this case, the union's demand was an outgrowth of past delinquencies in which this employer had failed to make fund contributions for as long as fourteen months, accumulating arrears in amounts equal to 5 months' payments. It was this history that the union sought to deal with when it proposed as one of the terms of the new contract the establishment of a wage

38. O'NEIL, *op. cit. supra* note 36, at 4-6.
39. EPSTEIN, THE CHALLENGE OF THE AGED 89-91 (1928).
40. Como Plastics, *supra* note 7.
41. Olsen v. Potlatch Forests, 200 F.2d 700 (9th Cir. 1953).
42. Square D, 105 N.L.R.B. 253 (1953).
43. Tide Water Associated Oil Co., 85 N.L.R.B. 1096 (1949).
44. Cheney California Lumber Co. v. NLRB, 319 F.2d 375 (9th Cir. 1963).
45. Old Line Life Insurance Co. of America, 96 N.L.R.B. 499 (1951).
46. 145 N.L.R.B. No. 64, 55 L.R.R.M. 1015 (1963).

deposit to assure prompt and full payment of fringe benefit contributions and of the wages due the employees. The majority held that whenever the demand may be construed as in the nature of a performance bond, that demand is outside the area of a mandatory subject of bargaining. The dissent, in rejecting this per se approach, observed:

> Consideration of the demand in the instant case in light of the foregoing requires the conclusion that the "wage deposit" proposal of the union was a "mandatory subject of bargaining" concerning which it could lawfully insist to a state of impasse. Thus, it related to a benefit or security for the employees. It dealt with wages of the employees and involved when and how wages were to be paid to them. It was not payable to and for the security of one of the contracting parties. Instead, it was a deposit to assure timely payment to employees of wages and fringe benefits if the employer failed to make such payment in the normal fashion. In other words, it was not an indemnification of one of the parties for breach of the contract, but was merely an alternative mode of wage payments to the beneficiaries of the contract, the employees.[47]

The dissent also took note of the fact that since 1935 the Miller Act[48] has required that all contractors on government construction contracts exceeding 2,000 dollars furnish a payment bond as guarantee for wage claims of affected employees.[49]

Some courts have held pension funds to be charitable trusts.[50] A ruling that these funds are charitable would place them under the protection of the Attorney General for the state. Any legal action taken in relation to them would be equitable in nature.[51] The logic of this approach is questionable, for as an earned right paid in the form of deferred compensation, they cannot be considered charitable in nature.[52] Also, since the employer establishes the trust, it is often difficult to regard him as a true trustee.[53] However, a number of courts have held them to be charities because of the alleged indefiniteness about the beneficiaries who may qualify under a plan which prescribes qualification for future participation and which has not yet been terminated. But, at any given time, the beneficiaries, potential

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47. *Id.* at 1018.
48. 49 Stat. 793, 40 U.S.C. § 270 (a)-(d) (1958).
49. Sherman v. Carter, 353 U.S. 210 (1957).
50. Van Horn v. Lewis, 79 F. Supp. 541 (D.D.C. 1948).
51. Szuch v. Lewis, 193 F. Supp. 831 (D.D.C. 1960).
52. Hobbs v. Lewis, 159 F. Supp. 282 (D.D.C. 1958).
53. Hurd v. Illinois Bell Telephone, 136 F. Supp. 125 (N.D. Ill. 1955), *aff'd*, 234 F.2d 942 (7th Cir. 1956). In order for an employer to be held a trustee for his employees, it must be established that the employer manifested an intention to make himself trustee for his employees. The providing of a pension does not per se make the employer a trustee for his employees. Even if it be determined the employer intended to create a trust, the normal trustee would be the financial institution managing the funds and not the employer.

or actual, are always known. Although some of the potential beneficiaries may never become actual beneficiaries by reason of their termination of employment before retirement, such a potential beneficiary has a legally protected interest in the pension fund. Another difference lies in the purpose for which the trust is created. Here, as noted above, the employer's purpose is not a charitable one, but one to benefit himself.[54]

Some of the courts that have tried to tag the charitable label on pension funds have done so because of a fear that they would be invalid otherwise under the Rule Against Perpetuities. It is a rare pension plan that fixes a termination date. Under the Rule Against Perpetuities, a class gift will fail if the beneficial interest of any member might not vest until after the period of a life in being plus twenty-one years.[55] At first glance, it would appear that a pension plan without a fixed date of termination would come under the rule. However, the rule should not apply because a pension fund does not come within the policy behind the rule, *i.e.*, alienability of property. In order to avoid a possibility that a court might misapply the rule, a party should put a clause in the contract explaining this. Today, most states have specifically exempted these plans from the operation of the statute.[56]

B. *Eligibility*

Coverage by the plan does not necessarily follow from the employment relationship alone. An employee must fulfill certain criteria in order to be covered by the plan and to participate in its benefits.[57] The minimum criteria which govern eligibility to participate in the pension system include type of work, accummulated earnings, and the attainment of a specified age and length of service[58] as an employee.[59] They may be limited to a particular class or unit of employees. A maximum age may also be imposed. These criteria might vary depending on whether it is a single plant plan, an area plan, or a multi-employer plan. The employee must be eligible at the time the benefits are to be conferred.[60] The purpose of these requirements

54. Pavlovscak v. Lewis, 168 F. Supp. 839 (W.D. Pa. 1958).

55. 6 American Law of Property § 24:26 (Casner ed. 1952).

56. All states, except the following, exempt pensions from the application of the Rule Against Perpetuities: Arizona, Arkansas, Idaho, Iowa, Nevada, New Hampshire, North Dakota, Utah, Vermont, and Wyoming.

57. Garrity v. UMW Welfare & Retirement Fund, 52 L.R.R.M. 2939 (Pa. Ct. C. P. 1963).

58. Szuch v. Lewis, *supra* note 51 (one year in the industry immediately preceding retirement); Pavlovscak v. Lewis, *supra* note 54 (regular employment in the industry).

59. He must be a bona fide employee, Kennet v. UMW, 183 F. Supp. 315 (D.D.C. 1960), and must not be an independent contractor, Hescox v. Lewis, 55 L.R.R.M. 2217 (Ct. C.P. Pa. 1963).

60. Gambrell v. Lewis, 47 L.R.R.M. 2620 (Munic. Ct. App. Colo. 1961).

is the exclusion of employees who may not be expected to remain with the plan for any length of time.

The eligibility requirements for the fund can be specifically included in the trust agreement or the trust agreement can confer the power of adopting rules and regulations governing eligibility directly on the trustees.[61] Decisions made in good faith pursuant to such a provision are not reviewable.[62] However, in order for the exercise of this power to be final and conclusive, it must be spelled out in the contract.[63] In any case, the court will impose an obligation on the trustees to be reasonable in establishing these rules and regulations.[64]

There are certain limitations placed on the eligibility requirements. An employer will violate section 8(a)(3) of the National Labor Relations Act by maintaining a provision in a pension plan that denies eligibility to union members.[65] In *Melville Confection, Inc.*,[66] the Board held that an employer violated the act by maintaining and continuing a profit-sharing plan for its employees which required as a condition of participation that the employee not be represented by a labor organization for purposes of collective bargaining. Following this line of reasoning, the Board has held[67] that where a credit system is used, the employer cannot compute credits in such a manner as to deny eligibility to union members.

Nor can the employer and the union bargain with respect to a pension plan for union members only where the union is the exclusive bargaining agent for the employees in the appropriate unit comprised of both union and nonunion members.[68] This would also mean that the union cannot require membership in good standing as a condition for participation in the plan.[69] Where the employer contributes to a member-only fund, the Board can direct that the employer cease making such contributions without providing nonunion members equivalent coverage and benefits and to make whole the employees for any financial loss suffered by reason of his failure to

61. Bono v. Kramer, 191 N.E.2d 760 (Mass. 1963).
62. Menke v. Thompson, 140 F.2d 786 (8th Cir. 1944).
63. Hobbs v. Lewis, *supra* note 52.
64. Powell v. Lewis, 48 L.R.R.M. 2151 (W.D. Pa. 1961).
65. Jim O'Donnell, Inc., 123 N.L.R.B. 1639 (1959).
66. 142 N.L.R.B. 1334 (1962), *enforced*, 327 F.2d 689 (7th Cir. 1964).
67. Toffenetti Restaurants Co., 136 N.L.R.B. 1156 (1962), *aff'd*, 311 F.2d 219 (2d Cir. 1962), *cert. denied*, 372 U.S. 977 (1963).
68. Progressive Kitchen Equipment Co., 123 N.L.R.B. 992 (1959).
69. Carty Heating Corp., 117 N.L.R.B. 1417 (1957); County Electric Co., 116 N.L.R.B. 1080 (1956); Jandel Furs, 100 N.L.R.B. 1390 (1952); Local 140, United Furniture Workers of America, 109 N.L.R.B. 326 (1954). The fact that a plan might discriminate against nonunion members can be raised only in an NLRB proceeding and cannot be raised nnder section 302 of the Labor Management Relations Act. Van Horn v. Lewis, *supra* note 50; Upholsterers International Union v. Leathercraft, 82 F. Supp. 570 (E.D. Pa. 1949).

provide coverage and benefits comparable to those given the union members.[70] By maintaining and enforcing a contract which grants more advantageous working conditions, in the form of benefits, to union-member employees, the employer violates 8(a)(2) and (3) and the union violates 8(b)(1)(A) and (2) since such conduct amounts to unlawful discrimination against the nonunion members. It is no defense that the provision was never enforced since the mere existence of the clause has a natural tendency to encourage or discourage union membership[71] and amounts to an inducement to nonmembers to seek union membership.

In all these cases, the union was the exclusive bargaining representative of the employees. By establishing a plan for its members only, the union failed in its duty to represent all employees fairly. But what about a minority union; can it bargain for its group alone? In *Reliable Newspapers*,[72] a case involving non-pension benefits, the Board held that the employer could not bargain with a minority union, even though there was no exclusive representative in the plant. The court of appeals disagreed on the ground that the majority non-union members had it within their power to correct the situation. A solution to this problem would be to have two funds, one for union members and one for nonunion members.

Section 302 of the Labor Management Relations Act also places some limitations on the eligibility requirements. In *Kroger v. Blassie*,[73] the court held that inclusion of trust employees as beneficiaries of a joint employer-union welfare trust violates section 302(a)(5) since the act does not include employees of trust proper as beneficiaries, but requires that beneficiaries be employees of a contracting employer and that this requirement may not be satisfied by bookkeeping transactions within the trust itself designed to represent contributions to the trust by the trust as an employer. On this same ground that beneficiaries must be employees of a contributing employer, the court also held that officers and employees of the union could not be included.

In addition, the pension planner also must be guided by section 401 of the Internal Revenue Code[74] if he wants a qualified plan. Since, under the Code, a plan must be for the exclusive benefit of employees or their beneficiaries, partners and individual proprietors are excluded. In order to prevent disqualification, the plan must meet either a mathematical employee coverage test or the Internal Revenue Service

70. Northeast Coastal, Inc., 124 N.L.R.B. 441 (1959).
71. Bitoni Foods Corp., 126 N.L.R.B. 767 (1960); Seaboard Terminal & Refrigeration Co., 114 N.L.R.B. 1391 (1955).
72. 88 N.L.R.B. 659 (1950), *enforcement denied*, 187 F.2d 547 (3d Cir. 1951).
73. 225 F. Supp. 300 (E.D. Mo. 1964).
74. See also Treas. Reg. § 1.401 (1958).

must find that the plan does not discriminate in favor of officers, stockholders, supervisory or highly-paid employees. If the mathematical test is used, then the plan must cover either seventy per cent of the employees, of whom the employer may exclude employees who have been employed for less than a minimum period, and employees who customarily work for less than twenty-four hours a week or for less than five months a year; or eighty per cent of the eligible employees, provided seventy per cent or more of the remaining employees are eligible to participate in the plan.

If the plan fails to meet this test, it may still qualify if its coverage classification does not discriminate in favor of key employees. A plan cannot use a formula which results in giving highly-paid employees larger amounts in proportion to compensation than the lower-paid employees.[75] Again, to prevent discrimination, vesting is required when the employee meets the plan's requirements, when the plan is terminated, and where failure to vest will effect a prohibited discrimination. These and other provisions are designed to prevent a prohibited group being the only ones eligible for benefits or to receive a disproportionate share of the benefits.

C. *Method of Contribution*

Besides determining eligibility, the plan must determine the manner of contribution. Normally, the employer pays a contribution to the fund directly. However, for particular reasons, the employer and the unions have sometimes insisted on a different manner of payment. The problem has arisen under the Davis-Bacon Act,[76] which requires the payment of prevailing wage rates as determined by the Secretary of Labor on federally-financed construction in excess of 2,000 dollars. The prevailing wage is just that—wages alone. It does not include other fringe benefits. So unless the employer included the pension payment as direct wages, he could not compete with another employer with higher wages, but a less overall wage package.[77] Under a situation like this, the union agrees to have the employer pay a wage directly to the employee from whom a payment to a pension plan would be deducted. However, because these are wages, the employees must pay a tax on them.[78] Two courts have upheld the power to negotiate such plans.[79] Section 302(c)(7) of the Labor Manage-

75. Treas. Reg. § 1-404 (a) (ii) (1958).
76. 46 Stat. 1494 (1931), as amended, 40 U.S.C. § 276(a) (1958).
77. There are presently pending bills that would include fringe benefits, such as pensions, in a Davis-Bacon determination of prevailing wages. S. 450, H.R. 404, 927, 2402, 2642, 4265, 4469, 6401, 6673, 8825, 88th Cong., 1st Sess. (1963).
78. Query as to whether this plan could qualify under the Internal Revenue Code.
79. Potlatch Forests, Inc. v. Int'l Woodworkers, 108 F. Supp. 906 (D.C. Idaho

ment Relations Act indicates that this is permissible.

There is a problem under such a plan as to whether there must be individual assignments. Where the contract specifically states that the union should obtain individually signed authorizations for such deductions, one court has held that the employees must individually execute written authorizations.[80] Another court has indicated that the union lacks the power by contract to bind the employees without their consent or express ratification.[81]

D. *Special Clauses Found in Pension Plans*

Another clause commonly found in pension plans is one that restricts alienation by making pension rights nonassignable. The purpose of such a clause is to prevent a pensioner's creditors from attaching it. Where the employee makes contributions to the plan or where the employer makes contributions to the fund as deferred wages, the employee is a settlor of the trust and it cannot be considered a spendthrift trust. However, some states have given this effect to pension trusts. But even where this occurred, the pensioner's family has been able to reach his interests in the fund for support purposes. In *Thiel v. Thiel*,[82] the Supreme Court of New Jersey held that the clause should not bar recourse to the pension payments when this provides the only reasonable asset for a wife's support in the state of her residence. The court noted that the purpose of the exemption clause is to relieve the pensioner from claims hostile to his needs and those of his dependents and the pensioner has a duty to share his pension with his wife.

Once a plan has been written, questions arise concerning approval by either the shareholder or the union members. Since a pension plan will create a binding obligation over a long period of time, a corporation might want to condition its acceptance of the pension plan on shareholder approval. Since a requirement of shareholder approval might unduly burden the bargaining process, such a requirement might conflict with the policies of the NLRA.[83] As for union member approval, a Federal district court held in *Davis v. Washington*

1951), *aff'd. sub nom.*, Olsen v. Potlatch Forests, Inc., 200 F.2d 700 (9th Cir. 1953); Coos Bay Lumber Co. v. Local 7-116, Int'l Woodworkers, 203 Ore. 342, 279 P.2d 508 (1955).

80. Int'l Woodworkers v. McCloud Lumber Co., 32 L.R.R.M. 373 (N.D. Cal. 1953).

81. Coos Bay Lumber Co. v. Local 7-116, Int'l Woodworkers, *supra* note 79.

82. 41 N.J. 446, 197 A.2d 354 (1964).

83. Compare Greene v. Holz, 148 N.Y.S.2d 291 (Sup. Ct. 1955). Section 8(a)(5) requires an employer to bargain with his employees' representative in good faith. This means that the employer cannot use dilatory tactics to delay bargaining and to dissipate the union's strength. If shareholder approval would unduly delay the bargaining process, it should not be enforced as contrary to § 8(a)(5).

State Carpenters,[84] that union members do not have a right under the Labor Management Reporting and Disclosure Act to vote on a pension plan since the relief sought in effect attempts to set aside actions of the joint-bargaining committee which is not a labor organization for purposes of the LMRDA.

E. *Qualifications*

A plan must meet the requirements of section 302 of the Labor Management Relations Act;[85] section 4(a) of the Welfare and Pension Plan Disclosure Act;[86] and, if it intends to qualify for certain tax benefits, the provisions of the Internal Revenue Code.[87] Section 302 restricts payments to employees' representatives, and applies to all funds in which the union is the sole, or one of the trustees, and which was created after 1946. Section 302(a) makes it unlawful for an employer or association of employers or any person who acts as a labor relations expert, adviser or consultant, to an employer or who acts in the interest of an employer to pay, lend, or deliver any money or other thing of value to any representative of any of his employees, any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership any of the employees. Section 302(b) makes it unlawful for any person to request, demand, receive or accept, or agree to receive or accept any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a). Thus, any payment to a trust will be characterized as a payment to a representative of the employees. The question here is whether payment to a trustee wonld be considered a payment to an employees' representative. In *United Marine Division v. Essex Transportation Company*,[88] the court held:

> These trustees were not, in our judgment, representatives of the employees. They were trustees of a welfare fund. It is true that they were chosen half and half by the employers' association and this union. But we think that when set up as a board . . . these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees.

However, in a criminal case under this section, *United States v. Ryan*,[89] the Court cast doubt upon this case by holding that "in using the term 'representative' Congress intended that it include any persons authorized by the employees to act for them in dealing with their

84. 47 L.R.R.M. 2245 (W.D. Wash. 1960).
85. 61 Stat. 157, as amended, 29 U.S.C. § 186(a) (Supp. V, 1959-63).
86. 72 Stat. 997 (1958), as amended, 29 U.S.C. §§ 301-309 (Supp. V, 1959-63).
87. INT. REV. CODE OF 1954, § 401.
88. 216 F.2d 410, 412 (3d Cir. 1954).
89. 350 U.S. 299, 302 (1956).

employer." The Court's decision could be read to include all trustees of welfare funds since any trustee acting as a fiduciary must deal with employers. But simply because trustees deal in labor relations, they should not be considered to be labor organizations any more than arbitrators. They are not established to function as a representative of the employees or to be directed by them exclusively, even though by the nature of their job they are subject to employee pressure. It is still doubtful whether payments to a fund trustee who is also a union trustee are legal.[90]

Section 302(c)(5) specifically exempts trust funds where the payments which are intended to be used for the purpose of providing pensions for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pension or annuities; where the trust fund is established for the sole and exclusive benefit of the employees, their families and dependents; where there is a detailed basis on which such payments are to be made which is specified in a written agreement; where the employees and the employers are equally represented in the administration of the fund; where the agreement contains a provision for resolution of a deadlock by an impartial third person; and where the agreement provides for inspection of an annual audit by interested persons. If any of the above conditions are missing, the pension fund does not qualify for exemption. It should be noted that a wilful violation of 302(a) and (b) constitutes a misdemeanor and subjects the violator to a fine of not more than 10,000 dollars, or to imprisonment for not more than one year, or both.

If a plan wishes to qualify under the Internal Revenue Code, section 401(a), it must meet the following requirements: The pension plan must provide, as a method of deferred compensation, systematic payments of definitely determinable benefits to employees over a period of years after retirement. It must be for the exclusive benefit of the employees or their beneficiaries. Such a plan cannot benefit partners who are not employees. Neither are partners to be credited for services as partners prior to becoming employees. Benefits under the plan must be definitely determinable, which means that they cannot be suspended after retirement without cause. Life insurance, disability, and death benefits may be provided only as an incidental feature of a pension plan.[91] Contributions made either to a trust or

90. In one decision that came down after United States v. Ryan, *supra* note 89, the court held that a fund did constitute a representative. Local 2, Plasterers v. Paramount Plastering, Inc., 310 F.2d 179 (9th Cir. 1962), *affirming* 195 F. Supp. 287 (S.D. Cal. 1961).

91. A benefit is incidental where the insurance protection is not greater than 100 times the monthly annuity.

paid as premiums under insurance contracts must meet the qualification that the plan must be funded.

Advance funding is permitted where it is minor in relation to the actuarial liability under the plan, where there is no possibility of the reversion of a substantial amount to the employer on termination of the plan, and if advance funding is exclusively for the benefit of the employees or their beneficiaries. The plan, which must be in writing and communicated to the employees, must be established as a permanent and continuing program. Finally, since the plan must benefit the employees in general, the plan must cover either seventy per cent of all employees[92] or eighty per cent of all eligible employees if seventy per cent or more of all the employees are eligible to benefit under the plan.

Not only must the plan be qualified, but the trust also must qualify. A qualified employees' trust must be organized or created in the United States and maintained at all times as a domestic trust.[93] Investments made by the trust must be for the exclusive benefit of the employees or their beneficiaries, must not be a prohibited transaction under section 503, must not result in unrelated business taxable income under section 511, and must not be operated as a feeder organization.

If all the above requirements are met, then contributions made by the employer are deductible under section 404(a) so long as they are an ordinary and necessary business expense and reasonable in amount. Under a noncontributory plan, the employer, under section 402, includes in his taxable income all amounts received or made available to him. Section 501(a) and (b) provides that the trust shall be exempt from federal income tax.

The requirement that the plan be in writing and communicated to the employees is found, not only in the Internal Revenue Code, but also in the Labor Management Relations Act and Welfare and Pension Plan Disclosure Act. Requirements of section 302 of the LMRA are that the detailed basis on which payments are to be made must be specified in a written agreement. The agreement need not be signed,[94] and the requirement will be satisfied if the trust agreement is in existence before payment is made[95] and will subsequently be reduced to writing.[96] While it is better from a drafting viewpoint to write

92. The percentages are applied after excluding certain short service, seasonal and part-time employees.

93. If a foreign trust meets all the other requirements of § 401(a), employers making contributions thereunder are allowed deductions within the applicable limits of § 404(a)(4).

94. William Dunbar Co. v. Painters & Glaziers District Council, 129 F. Supp. 417 (D.D.C. 1955).

95. Bey v. Muldoon, 53 L.R.R.M. 2188 (E.D. Pa. 1962).

96. Van Horn v. Lewis, *supra* note 50.

out the details of the plan so the parties will be cognizant of the details when they sign, some courts will allow the trustee to decide the details of the plan[97] and in some instances have gone so far as to allow arbitrators to write the plan.[98] However, other courts have rejected this approach and have held that the plan must contain a detailed statement and that the rules of eligibility should not be left to the trustees for decision.[99]

Under section 4(a) of the Welfare and Pension Plan Disclosure Act, the pension plan must be established by an employer, or by an employee organization, or by both, for purposes of providing for its participants or their beneficiaries. The act does not define the word "establishes." The Secretary of Labor has advised that it is reasonable to conclude that a fund has been established when the employer or employee organization determines to follow some particular system or method of providing for the specified benefits.[100]

If a plan is to qualify for tax benefits, it must be a definite written program setting forth all the provisions essential for qualification.[101] In the case of a trustee plan, there must be a valid existing trust, complete in all respects and recognized as such under applicable local law. In the case of a nontrustee annuity plan which is evident only by contracts with an insurance company, the plan is not in effect until such contracts are executed and issued. In all other nontrustee plans, the plan may be in effect before the close of the first taxable year where the appropriate steps are taken to establish the plan, the insurance contracts have been applied for, the application has been accepted by the insurance company, the contracts or abstracts have been prepared in sufficient detail defining all terms, at least a part payment of premiums has been irrevocably made and the plan has been communicated to the employees.

Under this provision of the Interual Revenue Code, communication means that the employees are to be apprised of the establishment of a qualified plan and its salient provisions. While the Service recognizes that the most effective way of doing this is by furnishing each employee with a copy of the plan, it will allow various substitutes to be used where this is not feasible. It will be sufficient that a booklet summarizing the plan in all essential features be furnished the employees, or that a notice be posted conspicuously on the employer's bulletin board, stating that a plan has been established, setting forth

97. *Ibid.*
98. Builders Ass'n v. Greater Kansas City Laborers Dist. Council of the Int'l Hod Carriers, 326 F.2d, 867 (8th Cir. 1964), *cert. denied,* 377 U.S. 917 (1964).
99. Bey v. Muldoon, 54 L.R.R.M. 2642 (E.D. Pa. 1963).
100. Dept. of Labor Interim Memorandum, February 16, 1959.
101. Treas. Reg. 1.401-1(a)(2) (1958). See Rev. Rul. 61-157.

the type thereof, specifying the eligibility requirements, containing a synopsis of all benefits provided thereunder, indicating whether employees are to contribute and, if so, the amount or rate of contributions, and defining the vesting provisions. But in all cases of substitution, the medium used must apprise the employees that a copy of the complete plan may be inspected at a designated place on the company's premises during stated times.

A pension plan must also be communicated to the employees under section 3(2) of the Welfare and Pension Plan Disclosure Act. A question might arise whether the employees must be apprised of the plan in writing by a description of its benefits. It would appear sufficient for the plan to be communicated orally to the employees so long as they have an opportunity to see the actual plan in writing.

The participants of the plan need to understand its provisions so that they may plan intelligently for their retirement. It would be unfair to the participants for the employer or the union to hold out exaggerated promises of benefits the plan does not actually provide. Where the actual plan is not given to the employees, it is necessary that any substitute contain all important limitations contained in the plan. Courts have imposed a duty on the trustees to communicate an adequate picture to the employees of what the pension will do for them and will hold the trustees to any oversimplified and exaggerated impression which they have given.[102] But a mere discrepancy between the plan and the substitute medium should not afford a sufficient ground for a successful action on the part of any employee. Also, if the employee is told of the actual plan and is given an adequate opportunity to see it, then he cannot rely on the substitute.[103]

IV. Administration of a Pension Plan

A. *Administration*

The pension fund is a separate entity operated by a board of trustees. The functions and determinations of this board are of considerable importance to the fulfillment of the pension program's purpose. Section 302(c)(5) of LMRA requires that the pension fund be administered by a joint board of trustees apportioned equally between union and management. A significant cause of many of the irregularities found in pension plans is the result of management's abdication of its responsibility. An employer often takes the position

102. Gediman v. Anheuser-Busch Inc., 51 L.R.R.M. 2008 (2d Cir. 1962).

103. Gallo v. Howard Stores Corp., 145 F. Supp. 909, *aff'd*, 250 F.2d 37 (3rd Cir. 1957).

that since payments to the fund are in lieu of wages, the money is the property of the employee to do with as he wishes. This allows an unscrupulous or incompetent union greater opportunity to divert or mismanage these funds. By 302(c)(5), Congress intended to eliminate misuse and mismanagement.[104] However, the act does not apply to plans unilaterally established by the employer, plans covering employees not engaged in interstate commerce, or plans established prior to 1946.

The collective bargaining agreement between the employer and the union usually establishes the composition of the board of trustees.[105] Section 302 itself contains no provision designating who can be selected as trustee of a fund. There is no prohibition against union officers acting as trustees of a pension fund.[106] There might be a possible conflict of interest where members of the union negotiating committee designate themselves. One question is whether the right to appoint the union trustees belongs to the union president or the membership. It would seem that this right belongs initially to the membership[107] unless it authorizes the union president through a clause in the constitution or a by-law, or in the trust agreement, to exercise such power.[108]

Some or all of the functions may be delegated to an insurance company, bank, or service organization. Even where control is not delegated to one of these groups, in most plans this function is delegated to a paid administrator. There are no cases deciding whether a union official could be the administrator of the fund. It seems certain that Congress wanted the trust fund to be jointly administered by a joint board with equal apportionment. A plan leaving this to a union official would defeat this purpose.

The members of the board usually serve at the pleasure of their appointing group. Although a plan may state that a trustee will serve until his death, resignation or removal, there is usually no limitation on the removal power. If a plan contains a neutral trustee, his removal might be limited to violations of his fiduciary relationship or malfeasance in office. If a vacancy occurs among the appointing group, his successor usually is appointed from that group. If the vacancy occurs in the neutral position, both groups will appoint his successor. To encourage the prompt appointment of a successor and

104. *Compare* Sanders v. Birthright, 172 F. Supp. 895 (S.D. Ind. 1959), *with* Copra v. Suro, 236 F.2d 107 (1st Cir. 1956).

105. Holton v. McFarland, 52 L.R.R.M. 2842 (D. Alaska 1963).

106. Philadelphia Nat'l Bank v. Employing Bricklayers, 169 F. Supp. 591 (E.D. Pa. 1959).

107. *Ibid.*

108. Holton v. McFarland, *supra* note 105.

to prevent the possible interruption and curtailment of board action, some plans provide alternative methods to be used in delays in filling this vacancy.

In order effectively to carry out the administration of the fund, the trust instrument usually contains regulating procedures to be used by the board of trustees. This will include the time and notice of meetings, place of meetings, minutes of meetings, quorums and voting. Since it is imperative that decisions be reached in every case, virtually all plans have either neutral members or provide a procedure for the selection of an impartial arbitrator. If no agreement is reached as to the selection of an impartial umpire, then under 302(c)(5)(B) of LMRA the parties shall petition the district court to appoint an arbitrator. The appointed arbitrator can resolve only issues which the trustees themselves could decide.[109]

The administration of the fund usually involves the receiving of applications, the processing of claims, the adoption and interpretation of rules and regulations, the determination of eligibility, the paying of benefits, the collecting of contributions, and the reviewing and approving of investments. The board is also given the power to establish bank accounts; pay out reasonable expenses; accumulate reserves; employ executive, consultant, administrative, clerical, secretarial and legal personnel; compromise, settle or release claims; invest; buy insurance contracts; invest through commercial trustees; and terminate, alter, amend, reduce, suspend, or discontinue the plan or any of its provisions. The major exception to the trustees' power is that the revision of the basis and amount of the contribution is always reserved for the contracting parties to determine by collective bargaining.

The employer is usually required to make payments within a stated period. In order to determine the employer's obligation, the trustees have the power to enter upon the premises of the individual employer during business hours, at a reasonable time, and to examine and copy the applicable books, records, papers or reports of the employer.[110] Where the employer refuses to contribute, various devices and schemes have been devised to extract the money owed. The most effective is simply to call the men out on strike. Other means include clauses giving the trustees the power to sue. When this power is given, a companion clause will oblige the employer to pay auditing costs, attorney fees, and court costs. Some plans have included liquidated damages clauses, but these have been found by the NLRB not to be mandatory subjects of bargaining.[111]

109. Barrett v. Miller, 276 F.2d 429 (2d Cir. 1960), *reversing* 166 F. Supp. 929 (S.D.N.Y. 1958).

110. Bassen v. Model Iron & Aluminum Co., 55 L.R.R.M. 2785 (Sup. Ct. N.Y. 1964).

111. Excello Dry Wall, 145 N.L.R.B. No. 64, 55 L.R.R.M. 1015 (1963).

As noted earlier, the trustees of most negotiated plans have the power to make regulations governing the award of pensions and eligibility. Such regulations confer a right upon the trustees to determine who is qualified for a pension.[112] In order for this discretion to be final and binding, it must be explicitly stated in the contract.[113] Most courts will not inquire into a decision made in good faith pursuant to such clauses.[114] Notwithstanding a provision giving the trustees absolute discretion in determining eligibility, the courts have held the trustees' actions subject to judicial review limited to determining whether they have breached their fiduciary duty by arbitrary or capricious action.[115] One court[116] has gone further and held that the trustees' decisions on both questions of law and fact are subject to review. Courts have been quite liberal and will grant relief where the employee has substantially complied as far as he is able[117] with the requirements.

The trustees cannot modify a plan so as to affect vested rights.[118] Where the employee has met the original eligibility requirements, he is entitled to receive benefits under regulations in effect at the time he retired.[119] Where the trustees modify a plan, they must give notice of the impending change and a period of grace so as to afford a reasonable opportunity for employees who qualify under the old plan to retire.[120] Non-vested rights may be changed retroactively.

B. *Investment*

A serious threat to the beneficiaries is that the trustees may invest the pension funds unwisely. The trustees are under a duty to use reasonable care and skill in investing trust property, that is, such care and skill as a man of ordinary prudence would exercise in dealing with his own property.[121] The objective of investing is to achieve the greatest possible benefit at the lowest possible cost. The trustee must, therefore, be concerned with the safety of principal, yield, and liquidity.

Unions feel that not only should the funds be invested safely, but

112. Lewis v. Jackson & Squire, 86 F. Supp. 354 (W.D. Ark. 1949), *aff'd*, 181 F.2d 1011 (8th Cir. 1950).
113. Hobbs v. Lewis, 159 F. Supp. 282 (D.D.C. 1958).
114. Menke v. Thompson, 140 F.2d 786 (8th Cir. 1944); Hurd v. Illinois Bell Tel. Co., 136 F. Supp. 125 (N.D. Ill. 1955), *aff'd*, 234 F.2d 942 (7th Cir. 1956).
115. Kosty v. Lewis, 53 L.R.R.M. 2341 (D.C. Cir. 1963); Ruth v. Lewis, 166 F. Supp. 346 (D.D.C. 1958).
116. Kennet v. UMW, 183 F. Supp. 315 (D.D.C. 1960).
117. Bednar v. UMW, 34 L.R.R.M. 2163 (D.D.C. 1953).
118. Scoville v. Surface Transit, Inc., 53 L.R.R.M. 2777 (Sup. Ct. N.Y. 1963).
119. Danti v. Lewis, 312 F.2d 345 (D.C. Cir. 1962).
120. Kosty v. Lewis, *supra* note 115.
121. 2 SCOTT, TRUSTS § 227 (2d ed. 1956).

that they also should provide a direct benefit to the employees, such as investments in government-insured, low-income housing. In *In re Bricklayers*,[122] the court held that the trustees are limited to only those investments which are legal in the state where the fund is located. Despite this, the courts have permitted considerable latitude in the investment policies of the trustees. The trustees may invest pension funds in a building to house the administrative offices of the fund.[123] If the building was purchased as an investment, the trustees must show that it is a legal investment under state law. The trustees may lend money to employees where there is both an adequate reason and adequate collateral.[124] In fact, where there is adequate security, funds can be loaned to the employer.[125]

While it might not be improper to invest in the employer's own company, such investments violate the principle of diversification and subject the plan to a double jeopardy—if the employer's earnings falter, the fund may be deprived not only of promised contributions, but also of expected return of capital. Furthermore, there is a temptation on the part of the employer to gain an advantage by evaluating his securities with less objectivity than in arm's length dealings. If the plan is qualified, Treasury Regulation 1.401-1(b)(5)(i) requires that funds invested in stocks or securities of, or loaned to, the employer, be fully disclosed and the reasons and conditions under which the investments are made given to the Service. The Service will check to see that the cost does not exceed fair market value, that a fair return is provided, and that there is sufficient liquidity to permit distributions in accord with the terms of the plan. Also, under section 503, a trust will lose its tax exempt status if it should lend money to an employer without adequate security and a reasonable rate of interest or if there should be a sale of securities or other properties between the trust and the employer to the financial detriment of the trust.

C. *Information*

Effective administration of the fund necessitates availability to the trustees of facts with respect to the financial condition of the employer. While some pension trusts contain clauses giving the trustees this power, generally it is lodged in the union. As early as 1942, the NLRB held that the employer had a duty to provide the union with sufficient information to bargain concerning pensions.[126] Since the

122. 159 F. Supp. 37 (E.D. Pa. 1958).
123. *Ibid.*
124. United Garment Workers v. Jacob Reed's Sous, 93 F. Supp. 49 (E.D. Pa. 1949).
125. Vaccaro v. Gentile, 138 N.Y.S.2d 872 (Sup. Ct. 1955).
126. Aluminum Ore Co. v. NLRB, 131 F.2d 485 (7th Cir. 1942).

cost of a plan is a variable factor, a union needs current actuarial information and data on pension fund earnings and costs. Lacking these figures, the union cannot effectively bargain with the employer. The minimum that the employer must furnish the union is copies of any plan.[127] In *Electric Furnace Co.*,[128] the NLRB held that an employer violated the act by refusing to furnish the union with information as to deferred vested pension rights that became available to certain laid-off employees since the requested data was held to be necessary to the union's formulation of proposals concerning benefits for all employees in the course of liquidation of the employer's business. Not only must the employer supply such information, but it must do so promptly,[129] and the information must be accurate.[130] Of course, a union can waive its right to such information,[131] but the courts will not find a waiver unless it is clear and explicit.[132] If the trust agreement gives the trustees the right to any information, data, reports or documents relevant to the administration of the plan, then it probably would be an unfair labor practice for the employer to refuse the trustee such information.

Disclosure of information is not only a duty of the employer, it is also the duty of the trustees. The trustee is under a duty to the participant to give the latter information about the trust and its investments. The trustee is also under a duty to keep full and accurate accounts and, on reasonable demand by the participant, to render an accounting. One of the purposes of this requirement is to enable the participants to obtain facts with respect to the operation of the plan which will permit them to self-police their own funds.

The need for policing was made evident during a Senate investigation.[133] These investigations revealed not only wilful abuse, but also mismanagement and ineptitude in the handling of these funds. Questionable business practices were found to include imprudent and inefficient management, excessive fees and salaries, inadequate record-keeping, depletion of reserves, needless expenditures, and a general laxity in the conduct of the trustees. In addition to mismanagement,

127. Toffenetti Restaurants Co., 136 N.L.R.B. 1156 (1962), *aff'd*, 311 F.2d 219 (2d Cir. 1962), *cert. denied*, 372 U.S. 977 (1963).

128. 137 N.L.R.B. 1077 (1962).

129. NLRB v. John S. Swift Co., 277 F.2d 641 (7th Cir. 1960).

130. Compare Gallo v. Howard Stores, *supra* note 103.

131. Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951).

132. Timken Roller Bearing Co. v. NLRB, 325 F.2d 746 (6th Cir. 1963), *cert. denied*, 376 U.S. 971 (1964). But see Square D. Company v. NLRB, 332 F.2d 360 (9th Cir. 1964).

133. *Senate Comm. on Labor & Public Welfare, Final Report on Welfare and Pension Plans Investigation*, S. Rep. No. 1734, 84th Cong., 2d Sess. (1956); *Hearings on S. 1994 Before the Subcommittee on Labor of the Senate Committee on Labor & Public Welfare*, 87th Cong., 1st Sess. (1961).

these investigations revealed many instances of abuse. The opportunity for malfeasance stems from the common characteristics of funded plans that contributions are channeled through the trustees and administrators before being placed in a fund. This has proved to be too great a temptation in the loosely regulated funds. One of the worst abuses was found in the procurement of insurance by the plan's administrator. Improper service fees or administrative allowances paid by the insurance company resulted in illicit gains for the administrator. Any practice which augments commissions must also diminish coverage, dividends, credits, or benefits.

In order to regulate these abuses and mismanagement, Congress enacted the Welfare and Pension Plan Disclosure Act in 1958[134] which was amended in 1962.[135] The act relies heavily on disclosure through reporting to correct these problems. The theory is that the beneficiaries will be able to obtain full and accurate information upon which they can adequately enforce their private rights with a minimal amount of federal intervention.

The act does not apply to all pension plans. A plan to be covered must be established by an employer or an employee organization in an industry affecting interstate commerce;[136] must contain at least twenty-five participants,[137] and must be administered by a governmental body. Where the plan is established solely to comply with workmen's or unemployment compensation legislation[138] or where the administration is by a tax exempt fraternal organization,[139] it is exempt.

Section 5(a) requires that the plan administrator publish within ninety days after a plan is established a description of its operations and an annual report. The term "administrator" is defined as:

> 5(b)(1) the person or persons designated by the terms of the plan or the collective bargaining agreement with responsibility for the ultimate control, disposition or management of the money received or contributed; or
>
> (2) in the absence of such designation, the person or persons actually responsible for the control, disposition, or management of the money received

134. 72 Stat. 997, 29 U.S.C. §§ 301-09 (1958).

135. 72 Stat. 997 (1958), as amended, 29 U.S.C. §§ 301-09 (Supp. V 1959-63).

136. The operation of the act depends on a "de minimus" volume of business.

137. The term "participant" is defined as any employee or former employee of any employer or any member of an employee organization who is or may become eligible to receive a benefit of any type from an employee welfare or pension plan, or whose beneficiaries may be eligible to receive any such benefit.

138. This provision is only important in those states where compliance with applicable law may be achieved through an employer administered program. Whether a program has been developed for the sole purpose of complying with state law is a question of intent to be derived from the circumstances of the case.

139. Section 4(b)(3) provides that plans administered by fraternal associations which represent their members for purposes of collective bargaining are not exempt.

> or contributed, irrespective of whether such control, disposition or management is exercised directly or through an agent or trustee designated by such person or persons.

Problems arise under this definition where the parties have not drafted a plan naming a designated person. If there is no designated person, responsibility for meeting the act's publication requirements falls on those with actual or designated control over and responsibility for the operations of the plan. Where responsibility for control is distributed by agreement or practice, it is difficult to determine who has control. The responsibility should not be placed on those who perform pure administrative functions or who carry out the everyday operation of the plan. While what constitutes "control" under the act is not defined, the Secretary of Labor can give authoritative advice in doubtful situations.

The act requires that ninety days after the establishment of a pension plan a description must be published under section 8. The word "publish" refers to both the duty to file information with the Secretary of Labor and the duty to mail copies of the information to beneficiaries of the pension plan.[140] The description must contain: the name and address of the administrator; his official position; his relation, if any, to the employer or to the employee organization; other offices, positions or employment held by him; the name, address, and description of the plan and the type of administration; the schedule of benefits; the name, title, and address of any trustee, if such person is different from the plan administrator; if the plan is mentioned in a collective bargaining agreement, copies of the plan or the bargaining agreement, or other instrument under which the plan was established; the source of financing and the identity of any organization through which benefits are to be provided; the details of the bases on which the records of the plan are kept; and the procedure for presenting and appealing claims. Section 6(b) provides that the above must be signed and sworn to by the plan administrator. Any change in this information must be reported to the Secretary of Labor within sixty days after it has been effected.

The purpose of this section is to provide the plan's participants with adequate information so that they will be in a better position to determine their rights under the plan. Also, by revealing information about the plan's administrator, the participants will know of any possible conflict of interest which might work to their detriment.

Under section 7 of the act, the administrator must file an annual report. Plans covering less than one hundred participants are exempt unless the Secretary of Labor, after an investigation, deems that they

140. Kelly v. Struse, Civil No. 27220 (E.D. Pa. March 7, 1960) (unreported).

should also file a report. Where the plan is unfunded, it is only necessary to include the total benefits paid; the average number, by year, of eligible employees during the preceding five years; and, where applicable, a statement that the plan is underwritten solely by the general assets of the employer, and the report must specify the total benefits paid to retired employees.

If funded, the administrator must report: the amount contributed by each employer and by the employees; the amount of benefits paid or furnished; the number of employees covered; a statement of assets specifying the total amount of cash, government bonds, nongovernment bonds and debentures, common stock, preferred stock, common trust funds, real estate loans and mortgages, operated real estate, other real estate, and other assets; a statement of liabilities, receipts, and disbursements; and a detailed statement of salaries, fees, and commissions.

If insured, the following additional information must be given: the premium rate or subscription charge, the total premium or subscription paid to each carrier or organization, and the approximate number of persons covered by each class of such benefits. The carrier must report: the total amount of premiums received; the approximate number of persons covered by each class of benefits; the total claims paid by such carrier or other organization; dividends or retroactive rate adjustments, commissions, and administrative services or other fees or other specific acquisition costs paid by such carrier or other organization; any amounts held to provide benefits after retirement; the remainder of such premiums; and the names and addresses of the brokers, agents, or other persons to whom commissions or fees were paid, the amount paid each, and for what purpose. Where the carrier does not maintain separate experience records on the specific groups it serves, the report may include only the basis of its premium rate, the total amount of premiums received from the plan, a copy of the carrier's financial report, and a detailed statement of specific costs in connection with the acquisition or retention of any particular plan or plans, if such costs are incurred. The annual report of the funded pension plan must also include: the type and basis of funding; actuarial assumptions used in determining the payments under the contract; and the number of employees, both retired and nonretired, covered by the contract and, except for benefits completely guaranteed by the carrier, the amount of current and past service liabilities based on those assumptions and the amount of reserves accumulated under the plan.

Where the pension plan is funded through a trust, this additional information must be given: a statement showing the assets of the fund which may be elevated either on the basis used in reporting the fund to the Secretary of the Treasury for tax exemption or the aggregate cost or present value, whichever is lower; a detailed list, including cost, present value and percentage of total of all investments of the employer, employee organization or other parties in interest,[141] a detailed list of all loans made to the employer, employee organization, or other parties in interest, including the terms and conditions of the loan and the name and address of the borrower. A pension plan funded through a trust medium must report the type and basis of funding, actuarial assumptions used, and the amount of current and past service liabilities.

The purpose of this section is to give the participant a knowledge of the operation of his plan and the use of its moneys. Despite the volume of information requested, there are certain gaps and difficulties. While the 1962 amendment removed the word "summary" from the requirement of a statement of accounts, its effect is limited to avoiding the opportunity to file sketchy information and the lumping of fund assets but does not go so far as to require full disclosure of assets and liabilities. The fact that a finder's fee paid to an individual to obtain a loan from the plan need not be reported provides a disguised method for kickback. There are also several ambiguous or undefined terms in this section. However, since the Secretary of Labor is authorized to regulate the form and detail of the information required in the plan description and annual report, these words and terms can be defined in regulation. Also, since he now has the power to regulate the manner in which the plan is to be executed, published and filed, he will be able to define when a plan year occurs.

Disclosure is effected in two ways. Publication of the plan description and annual report must be made to both participants and beneficiaries. This can be done by making the plan available at the principal office of the plan and, upon written request, by sending an adequate summary of the report to a participant. Two copies of this information must be sent to the Secretary of Labor, who must make them available in the public document room of the Department of Labor and who may publish any such information where this would protect the interests of the participants or beneficiaries of the plan.[142]

141. "A party in interest is any administrator, officer, trustee, custodian, counsel, or employee of any welfare benefit plan, or an employer any of whose employees are covered by such a plan or officer or employee or agent of such employer . . . or a labor organization having members covered by such a plan." The Welfare and Pension Plans Disclosure Act § 3A, 72 Stat. 997 (1958), as amended 29 U.S.C. § 302 (Supp. V, 1959-63).

142. Such publication is limited to the contents and descriptions on file with the

Under section 8 the Secretary is empowered to prepare forms for the description and annual reports, and use of the forms prescribed for these purposes has been made mandatory by regulation.

Willful violation of the act is a misdemeanor, punishable under section 9 by imprisonment for not more than six months or a fine of not more than 1,000 dollars. Because of a strict definition of willfulness,[143] this section has been rendered meaningless. Section 9(b) provides that, upon request, if an administrator shall fail or refuse to publish the description or annual report within thirty days, he may become liable to that person for 50 dollars per day. An individual who brings such a suit may be allowed reasonable attorney fees and costs. Under section 9(f), the Secretary can obtain, under appropriate circumstances, both permanent and temporary injunctions. Section 9(g) grants federal courts jurisdiction to hear these suits.

The Secretary has the power of section 9(d) to initiate, upon complaint or his own motion, civil investigations where he has reasonable cause to believe that such investigation may reveal a violation of the act. Under this power, the Secretary may require the filing of supporting schedules of assets and liabilities; statements in writing and under oath of any person of any matter under investigation; plan descriptions and annual reports, as well as certified information for the completion of annual reports. The Secretary is prohibited from regulating or interferring with the plan or using his power for a "fishing expedition." Also, before the Secretary begins his investigation, he must have a certificate from a public accountant based on a comprehensive audit stating that information contained in the annual report is true. If the administrator refuses to secure this, the Secretary can proceed.

Although the statute has secured its purpose—full disclosure—it will be some time before we will be able to study and report on its effectiveness. One problem with the act is that it discloses the information to the participant after the plan has started but before he has a chance to evaluate it. Once the plan has been initiated, the employees can effect changes through concerted actions leveled at both the union and the employer. Pressure can be brought against the employer through the normal weapons of employees' strikes, picketing and boycotts. It can be brought against the union officials through the internal workings of the union—removal of elected officials or through a suit under 501(b) of the LMRDA to correct an abuse in the

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Secretary and does not extend to facts which he may learn during an inquiry. 108 CONG. REC. 1728, 2010 (Feb. 6, 7, 1962).

143. There must be deliberate defiance or persistent refusal in good faith to comply. H.R. REP. No. 2283, 85th Cong., 2d Sess. 11 (1958).

handling of funds of union members.[144] It should be noted that the act itself does not provide an enforceable civil right to correct the abuse discovered. This will weaken the effect of the statute since it is unlikely that a participant will sue where he has nothing to gain for himself. While it is possible for the states to fill this gap,[145] most states[146] do not at present regulate pension funds.

Of course, this gap could be filled by construing section 302(e) as creating a federal common law regulating pensions.[147] Courts have used this section to regulate trust expenditures. In *Conditioned Air & Refrigeration Co. v. Plumbing & Pipe Fitting Labor-Management Trust*,[148] the court held that trust funds could not be used to enforce the collective bargaining agreement, protect wage standards, hire personnel[149] or provide office space.[150] Beyond regulating expenditures, courts have differed as to the scope of 302(e) jurisdiction. Some courts have interpreted it very narrowly as merely giving the federal courts power to prevent unlawful payments to union representatives,[151] while others have held that it confers a broad equity power regulating the administration of trust funds.[152] Neither the language nor the legislative history supports either position conclusively. If the Supreme Court ultimately decides that the section confers a broad jurisdiction, then the courts will have the duty to develop a complete common law. Such a development, of course, would

144. But see Forline v. Local 42, Int'l Ass'n of Marble Polishers, 211 F. Supp. 315 (E.D. Pa. 1962).

145. The states are not preempted from acting in this area. People v. Automobile Transporters' Welfare Fund, 53 L.R.R.M. 2878 (N.Y. Ct. of App. 1963), *cert. denied*, 376 U.S. 908 (1964).

146. California, Connecticut, Massachusetts, New York, Washington and Wisconsin are the only states regulating pension funds.

147. This approach was adopted by the Supreme Court to create a federal common law of contracts out of a companion section of that act, the Labor Management Relations Act of 1947 § 301, 61 Stat. 156, 29 U.S.C. § 185 (1958); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

148. 159 F. Supp. 887 (S.D. Calif. 1956), *aff'd*, 253 F.2d 427 (9th Cir. 1958).

149. But see Ware v. Adams, 53 L.R.R.M. 2290 (S.D. Cal. 1963). The court held that section 302 does not prohibit trustees from entering into a business arrangement with the union under which the union was to provide administrative service for the fund.

150. See also Kroger v. Blassie, 225 F. Supp. 300 (E.D. Mo. 1964) (office may not be located in union-owned building). In American Bakeries Co. v. Barrick, 162 F. Supp. 882 (N.D. Ohio 1958), the court held that the fund must have completely separate quarters and independent operations and, therefore, ordered a physical separation of the union and trustees' offices. But in Ware v. Adams, *supra* note 149, the court held that the fund's administrative office could be located in union office building.

151. Kroger v. Blassie, *supra* note 150; Employing Plasterers v. Journeymen Plasterers, 186 F. Supp. 91 (N.D. Ill. 1960); Sanders v. Birthright, *supra* note 104; American Bakeries v. Barrick, *supra* note 150; Moses v. Ammond, 162 F. Supp. 866 (S.D.N.Y. 1958).

152. *In re* Bricklayers, *supra* note 122; Copra v. Suro, *supra* note 104.

raise the issue of preemption. State courts are already split on the question.[153] However, following the analogy of section 301, state courts will not be divested of their jurisdiction.[154]

D. *Regulation of Trustees*

Another method of regulating the trust is to regulate the trustees. Under general trust law, the trustee has a duty to administer the trust solely for the interest of the employee and is subject to judicial correction upon showing that he acted arbitrarily or capriciously towards a beneficiary. He is liable for negligence and corruption and has a duty to disclose all material facts concerning a transaction of which he has knowledge and must avoid all conflicts of interest. This duty can be enforced, not only at common law, but also under section 501 of the LMRDA in the case of a union trustee. An exculpatory provision is ineffective to relieve the trustee of intentional breach of trust.[155]

In addition to the common law, the Welfare and Pension Plan Disclosure Act imposed some restrictions on the trustees. Section 1027 makes it a misdemeanor, punishable by a fine of not more than 10,000 dollars, or imprisonment of not more than one year, or both, for any person to make a false statement or conceal any document required to be published under that act. In addition, Congress, in section 644, made it a misdemeanor, punishable by a fine of not more than 10,000 dollars, or imprisonment of not more than five years, or both, for any person to embezzle, steal, or unlawfully and willfully abstract or convert any of the plan's moneys, funds, securities, premiums, credits or other assets. Finally, section 1954 provides a fine of not more than 10,000 dollars, or imprisoument for not more than three years, or both, for the offer, acceptance or solicitation of money, or other thing of value, for the purpose of influencing the operation of the plan.

Section 13 requires that administrators, officers, and employees of the plan who handle the property of the plan must be bonded unless underwritten solely by the general assets of the union or the employer. The bond must not be less than ten per cent of the total funds handled, except that it must be at least 1,000 dollars and can be less than

153. Courts holding that they were preempted: *In re* Bricklayers, 14 Pa. D. & C.2d 468 (1957); State v. Montgomery Ward & Co., 120 Utah 294, 233 P.2d 685 (1951), *cert. denied,* 342 U.S. 869 (1951). Courts holding that they were not preempted: Cox v. Superior Court, 52 Cal. 2d 855, 346 P.2d 15 (1959); *In re* Thacher, 10 N.Y.2d 439, 224 N.Y.S.2d 657 (1962).

154. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962). The law to be applied would be federal law.

155. RESTATEMENT (SECOND), TRUSTS § 222 (1959).

500,000 dollars if the Secretary of Labor has not prescribed otherwise. It can be individual or schedule in form and protects only against fraud or dishonesty. Duplicate bonding is eliminated by making this the sole bonding statute under federal law where a fund would come under this act[156] and by preempting state laws under section 16. The bond must be secured from a company acceptable to the Secretary of Labor which does have an interest in or control over the fund. The Secretary may accept other arrangements as an indication of financial responsibility. Finally, the Secretary is given power to issue regulations concerning the bonding provision.

V. CONCLUSION

Generally, labor laws are lengthy, overly complex statutes with many ramifications. The law with regard to pensions is no exception. Although these statutes touch many phases of law, of necessity, my discussion has been limited to certain aspects in the establishment and administration of these funds, as examples of the types of problems that can arise. This does not mean that there are not other major areas in pension planning which involve labor relations law or that these areas are not interrelated with the areas discussed. The scope, magnitude, and scheme of collectively bargained pension plans should make it evident that we are not dealing with a settled and fixed phenomenon but with an intricately structured system whose problems are just appearing on the surface. Only time will render the answers. However, it can be safely assumed that whatever direction this new dimension takes, it will affect not only the employers, unions, and employees involved, but the whole social process in America. Significantly, it should be noted that the federal government has not established a minimum mandatory set of standards for pensions outside of the exceptions noted in the article. Although this study reveals certain gaps in federal regulation, particularly in regard to the investment policies, vesting of benefits and the right of an employee to bring a suit, further extensive governmental regulation does not appear to be warranted or desirable at this time.

156. Thus §§ 13 and 502 of the Labor Management Relations Act would apply to union funds which came within the act's jurisdiction.