In the

Supreme Court of the United States

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO.1

Petitioner,

v

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, et al.

and

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, et al.

No. 70-32

No. 70-39

Pages 1 thru 57

Washington, D.C.
October 20, 1971

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ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1, Petitioner,	:	
v.	:	No. 70-32
PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, et al.	:	
- - - - and - - - - - - - - - - -	:	
NATIONAL LABOR RELATIONS BOARD, Petitioner,	:	
v.	:	No. 70-39
PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, et al.	:	

Washington, D. C.,

Wednesday, October 20, 1971.

The above-entitled matters came on for argument at 10:59 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

NORTON J. COME, ESQ., Assistant General Counsel, NLRB, for the Petitioner National Labor Relations Board.

MORTIMER RIEMER, ESQ., 2217 The Illuminating Building, Cleveland, Ohio 44113, for the Petitioner Allied Chemical & Alkali Workers of America, Local No. 1.

GUY FARMER, ESQ., 1120 Connecticut Avenue, N.W., Washington, D. C. 20036, for the Respondents.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 32 and 39, Allied Chemical Workers against Pittsburgh Plate Glass, and the Labor Board against Pittsburgh Plate Glass.

Mr. Come, you may proceed whenever you're ready.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE PETITIONER NLRB

MR. COME: Mr. Chief Justice, and may it please the Court:

This case is here on certiorari to the United States Court of Appeals for the Sixth Circuit, which denied enforcement of the Board's bargaining order.

The question presented is whether an employer violates his bargaining obligation under the National Labor Relations Act by refusing to bargain with the Union representative of his employees about changes in health benefits which the employer proposes to negotiate with employees who have already retired.

Now, the basic facts are these:

Since 1949, Local 1 of the Allied Chemical Workers of America has been the bargaining representative for all hourly employees at the Barberton, Ohio, plant for the Pittsburgh Plate Glass Company. In 1950, the Union and the Company negotiated a contract which, for the first time, included

provisions for a pension and a hospitalization and surgical insurance plan. At the same time the parties orally agreed that employees who retired could participate in the medical plan by contributing the entire cost of the insurance premiums, which would be deducted from their pensions.

In 1959, retiree benefits under the plan were improved, and as a result of contract negotiations in 1962 the medical insurance plan became contributory for the first time; the Company agreeing to contribute two dollars toward the cost of insurance premiums for employees who retired in the future. And this was available to both the retiree and his spouse; and at the same time a change was made in the pension plan to make 65 the mandatory retirement age.

A new contract was negotiated in 1964, and that forms the basis for this case. At that time the Company agreed to increase its monthly contribution to medical insurance from two dollars to four dollars. The increase was made available not only to employees who retired after the effective date of the contract, but also to each participating employee in the health plan who had retired on or after the effective date of the 1962 contract. In other words, it went back and definitely reached employees who had already retired.

In anticipation of the enactment of Medicare, however, the agreement further provided that the Company could rescind the two-dollar increase in its contribution if a government

health program were enacted.

Now, Congress enacted Medicare on July 30, 1965. This contract, as I said, was negotiated in 1964 and, by its terms, it had until October of 1967 before it would terminate.

In November of 1965, the Union asked the Company to engage in bargaining for the purpose of negotiating insurance benefits not covered by Medicare. The Company responded several months later by stating that because of the enactment of Medicare, it intended to rescind the two-dollar extra contribution that it was making to the health insurance plan, and it intended, as a matter of fact, to cancel the medical insurance plan for retirees entirely, because the enactment of Medicare would render the Company insurance plan useless.

Instead, the Company said that it would pay the three dollars per month subscription cost of supplemental Medicare for each retired employee who elected that and decided to leave the company plan.

The Company conceded --the Union conceded that under the contract the Company, by virtue of its reservation, had the right to reduce its contribution to the health and welfare plan from four dollars to two dollars. However, the Union vigorously protested the Company's further action in cancelling the Company plan altogether.

And the Union further inquired what provision did the Company intend to make for those pensioners and their wives

who were under 65 and not eligible for Medicare at all.

The Company challenged the Union's right to bargain about retirees and acknowledged that there was a problem about the pensioners who were under 65 and not eligible for Medicare, and said that they would have to think about that.

Several days later the Company informed the Union that it would not cancel the medical plan for retired employees; instead, it would write each retiree, notifying them of the pendency of Medicare and indicating that it would give it the option of either remaining under the Company plan with reduced contribution of two dollars on the part of the Company or getting out of the Company plan, in which case the Company would pay the three-dollar supplemental Medicare subscription.

The Union objected on the ground that such change should be the matter of negotiation and could not be done unilaterally by the Company. The Company took the position, reiterated the position that this was not a bargainable matter and went ahead and did contact the retirees individually with the offer. As a result of it, 15 out of the 190 retirees availed itself of the Company's option; the remainder remained under the old plan with the reduced employer contribution.

The Union thereupon filed charges with the Board alleging that the Company's refusal to bargain about the changes in the health plan for the retirees violated the Company's bargaining obligation under the National Labor

Relations Act.

The Board sustained the complaint which had been issued by the Board's general counsel, agreeing with the Union's contention that the Company had violated its bargaining obligation.

There were two bases for the Board's decision: first of all, that retirees remain employees under the Act for purpose of their retirement benefits; and secondly, that even if they were not employees there was a duty to bargain about this matter because changes in retirement benefits had a direct and vital impact on the terms and conditions of employment of the active employees as to whom there was clearly a bargaining obligation.

The Board entered an appropriate order. The Sixth Circuit denied enforcement of the Board's order; and we are here.

Now, we submit that the Sixth Circuit erred for two basic reasons, which I will try to develop.

Section 8(a)(5) and 8(d) of the National Labor Relations Act impose on the employer and the representative of his employees the obligation to bargain with each other in good faith with respect to wages, hours, and other terms and conditions of employment.

Now, by now it's well established that employers are obligated to bargain with the Union representative about

pensions and insurance benefits to be enjoyed by active employees upon their retirement. And, indeed, a large percentage of Union-represented employees are currently working under negotiated pension and retirement plans.

However, experience and the facts of this case show that retirement benefits, once negotiated, do not remain static, but they are subject to unanticipated events. Even after the employee has retired. Monetary inflation is one obvious unanticipated event; the other one is a change in public law. And this case illustrates that, because at the time the parties originally hammered out the health insurance plan nobody contemplated what effect Medicare would have on it.

So the question presented here is whether, when the changes are to be made in the benefits of employees that have retired, the employer must bargain with the Union on behalf of the employees, of the retired employees, about those changes, just as it did with the Union when they were originally negotiated, or whether it's going to be free to act unilaterally.

Now, this Court, in the Fibreboard case, indicated that industrial practice in this country is a very important consideration in determining whether a matter is a mandatory subject of collective bargaining; and, further, the amenability of the subject to the collective bargaining processes of the Act.

This experience, we submit, supports the Board's conclusion that changes in retiree benefits are a mandatory subject of collective bargaining, because, as shown in the amicus brief of briefs that have been filed by the AFL-CIO and by the Senior Citizens Committee, employers and Unions have for many years regularly and consistently bargained, not only about the pension and retirement benefits for active employees to be enjoyed upon their retirement but also upon improvements in the benefits for employees who have already retired.

Q May I ask a question, Mr. Come, if employer contributions are deferred wages?

MR. COME: Yes, Your Honor, I think that that is basic to the Board's argument here. That was certainly the basis on which pension and retirement benefits were held for active employees to enjoy upon retirement, was found to be within wages, hours, terms, and conditions; and to carry that to retirees is just, we submit, a natural progression. It is a deferred wage.

Now, both the Company and the Union, however, arrive conclusion, principally in this fashion: They say Section 8(a)(5) of the Act requires the employer to bargain with a representative of his employees, subject to the provisions of Section 9(a) which in turn makes the representative selected by a majority of the employees in an appropriate unit the exclusive representative of all the employees in such unit.

Now, since retirees are no longer on the payroll of the employer, and the Board does not permit them to vote in a representation election, the argument runs: they cannot be regarded as his employees or employees in such unit within the meaning of Section 8(a)(5) and Section 9(a).

We submit that there is no warrant for such a restrictive interpretation of the terms "employee" and "unit". However, if we prevail on our first argument, namely, that there is a duty to bargain about the benefits paid to retirees because of the direct impact that it has on the benefits of the active employees, we don't even have to reach the, what is the principal thrust of the opinion of the Court of Appeals and of the Company here. That comes in only on the second leg of the Board's argument, namely, that in any event retirees still remain employees for purposes of their retirement benefits.

Q Mr. Come, were the benefits that the employer had been paying before the change or before the offer, were they required by a collective bargaining contract? Were they part of the terms of a collective bargaining contract?

MR. COME: They were required by an agreement. What the Company did was they negotiated a collective bargaining agreement and then they, at the same time, executed a side agreement covering --

Q With the Union?

MR. COME: With the Union.

Q So that, anyway, it's a contractual matter.

MR. COME: That is correct, Your Honor.

Q What if the employer had just, instead of changing the payments had just stopped them? I suppose the individual retired employees would have had a cause of action against him.

MR. COME: That is correct. The --

Q Would the Union, too?

MR. COME: For breach of the collective bargaining agreement, perhaps under -- probably under 301.

Q Was there some doubt about it?

MR. COME: No, I do not think that there is any doubt about it.

Q You don't mean a breach of the collective bargaining, do you? A breach of the side issue.

MR. COME: Breach of the side --

Q 301 is a breach of any agreement?

MR. COME: That is correct.

Q All right. Now, does your position also include the proposition that the Union could negotiate a modification of the side agreement on the retirement benefit, reducing them and bind the retired employees?

Here's an agreement that's been made, the promise is to pay X; and there are employees who retire, the Union and the

employer get together and they all agree that they are going to a standard or something, that it's desirable to lower retirement benefits generally, and they lower them. Can the Union -- is the Union a representative of those retired employees for that purpose?

MR. COME: I think that the logic of my argument would cover that as well. However, if the --

Q And how does that work out when the employee -- when that retired employee has absolutely no --

MR. COME: Well, I think again, I think you would then get into problems of breach of a duty of fair representation. The question as to whether or not, if the thing is vested, any such agreement is going to be enforcible.

However, with the employer free to act unilaterally, you've got the same problem. The only question is whether you reach it as a result of the employer's unilateral action or as a result of collective bargaining.

I think that if the --

Q Well, there are always contractual remedies against them. I mean if lowers the -- if he doesn't live up to his agreement, the retired employees can have an action against him.

MR. COME: Well, I think that --

Q And your objection is that he's raising the benefits.

MR. COME: Well, they could also have an action against the Union for breach of the duty of fair representation. However, we don't have anything like that in this case, Your Honor.

Q Going back to the hypothetical that Mr. Justice White suggested to you about the Union exercising this power to negotiate a reduction in benefits previously agreed upon, it seems to me I recall some Court of Appeals cases that referred to this in terms of a possible breach of the fiduciary duty of the Union toward its members.

MR. COME: Yes, Your Honor, I think that a Union would bring itself afoul of that line of decision.

Q Does the Board have jurisdiction of that, or would that be a suit under 301, or where would it be?

MR. COME: I think it would be a suit in the courts as an independent suit under the National Labor Relations Act, along the line of tungsten and steel cases, it might be under Landrum-Griffin, it -- the Board would also, could also have jurisdiction under that, under its Miranda line of decisions, which had held that a breach of the duty of fair representation on the part of a union as a violation of Section 8(b)(1)(A) of the National Labor Relations Act.

I think there is a whole host of remedies for the situation of a union that would be so unwise as to negotiate a reduction of retiree benefits. The experience that is shown as

to the way the bargaining has taken place in this area to which I refer the Court to the amicus brief for, shows that invariably the negotiations have resulted in an increase in retirement benefits. There has been no instance that I have been able to find where there has been such a relief.

Q Well, now, does the union claim or does the Board claim in this case that the employer was in the process or did breach the collective -- the side agreement by what he had done in this case?

MR. COME: Well, we don't -- that is, the Board doesn't get into the question as to whether or not there has been a breach of the collective bargaining agreement --

Q If there had been, there would be a remedy for it?

MR. COME: There would have been a remedy, but there could be a concurrent remedy, because some breaches of the collective bargaining agreement may also be a breach of the duty to bargain collectively under 8(a)(5) of the National Labor Relations Act, and that's what we submit we have here.

Now, I would like to develop for a moment our first line of argument here that without regard to the question of whether the retiree remains an employee or not, the active employees are clearly the company's employees and they are included in the unit which the union represents. The company, there is no question, is required to bargain with the union

respecting their wages, hours, and other terms and conditions of employment.

Now, this obligation includes the employment conditions of persons outside the unit, where they have a direct impact on the conditions of the employees within the unit, and therefore the company, I submit, is not wholly accurate in saying that the bargaining unit defines the boundaries of the bargaining obligation and controls the scope of the bargain.

This Court's decision in the Oliver case, we submit, establishes a proposition -- a contrary proposition. Because in Oliver, as the Court will recall, it held that a bargaining unit including an overwhelming majority of concededly employed drivers of carrier-owned equipment was entitled, under Section 8(d) of the National Labor Relations Act, to bargain to impasse concerning minimum rentals to be received by owner-drivers, when they became lessees of the carrier.

And as the Court explained in the Drum case, its holding in Oliver, it said, and I quote: "It was not necessary to determine whether the owner-drivers were 'employees' protected by the Act, since the establishment of the minimum rental to them was integral to the establishment of a stable wage structure for clearly covered employee-drivers."

Now, we submit here that so here the benefits paid to retirees are integral to the establishment of the terms and conditions of employment for clearly-covered active employees.

And if we're right on this point, we think that that is enough to sustain the Board's position without more.

Q You never get, then, to the question of whether the retirees are employees --

MR. COME: That is correct, Your Honor.

Now, our brief --

Q That's getting an awful lot of mileage out of the Oliver case, isn't it?

MR. COME: Well, we submit -- no, Your Honor. For this reason, there is a very close relationship here between the benefits paid to the actives and adjustments in retiree benefits.

It's true it does not involve loss of --

Q A loss of jobs.

MR. COME: A loss of jobs.

Q Or an immediate threat to wages, or working conditions of the existing employees.

MR. COME: Well, when we say immediate threat to wages, I think that that's where we would differ with the company here, because the adjustments that are made, and the benefits for retired employees directly affect the bargain that's going to be made for the active employees. If the adjustments made for retirees are too liberal, there is obviously going to be less in the pot for the active employees, because the employers generally allocate a certain amount for

their total labor cost figure.

Beyond that, the active employee, being aware of these unanticipated changes, is going to look for what the retiree is getting. If there is a history in this plant of negotiation to improve retirement benefits, the active employee might well be willing to settle for a fixed retirement plan at a mandatory retirement age, leaving to negotiations the ironing out of the unanticipated events that develop in the future.

If there is not this history of bargaining or this possibility of bargaining, the chances are that the active employees are going to insist upon some kind of a flexible retirement plan with a cost-of-living escalator clause. This is going to make it much harder to get a bargain for the active employee. So that there is a very close relationship here between the bargaining for the active employee and the adjustment in retiree benefits.

I should like to save the balance of my time for the rebuttal, and leave to the brief the second leg of our argument.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Come.

Mr. Riemer.

ORAL ARGUMENT OF MORTIMER RIEMER, ESQ.,
ON BEHALF OF PETITIONER ALLIED CHEMICAL
& ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1.

MR. RIEMER: Mr. Chief Justice, and may it please the Court:

In 1950 the Union began to put together a comprehensive program of retirement benefits for the employees of the company in its Barberton, Ohio, plant. The first insurance program, one of hospitalization and surgical benefits, was an oral agreement. But by 1960 this became a written document, supplementing the collective bargaining agreement.

The 1960 written agreement provided for a hospitalization and surgical program that was non-contributory. And in 1962 the first contributory program was executed by the parties, under which the Company agreed to contribute two dollars per month for employees -- for retirees. The cost was otherwise borne by deductions from the pension check of the retiree.

Q May I ask, Mr. Riemer --

MR. RIEMER: Yes, sir.

Q -- do retirees remain union members?

MR. RIEMER: They remain, Your Honor, Mr. Justice Brennan, they remain honorary members. They have no other obligation to the Union.

Q No dues-paying obligation?

MR. RIEMER: They pay no dues. They are considered

honorary members without the payment of dues; they have the right to visit meetings, attend meetings, but not to participate --

Q But not to vote?

MR. RIEMER: Not to vote, yes.

Q If the Union has something in the nature of club facilities, as some of them do, are they permitted to use all those facilities, generally?

MR. RIEMER: Well, Your Honor, some years ago the Union was going to start such a program, but it was abandoned because of cost. Now what they do, the retirees do use the union meeting hall as a congregating place. It's very ample for that purpose. But there is no recreational program, as such.

Q Was the plan funded by insurance?

MR. RIEMER: Yes -- the insurance program? Yes, sir. Equitable Life Assurance Society was the carrier.

Q I see. Thank you.

Q Of course some unions do have rather extensive recreational facilities and programs for retirees, do they not?

MR. RIEMER: Yes, indeed, they do, Your Honor.

And I could mention many that do, and it's a definite program of many unions. But this small independent union has never been able to bear the financial cost of such a program.

What I want to say, Mr. Chief Justice, and to the

members of the Court, is that from 1950 down to 1964 this insurance program was a negotiated program. And it was usually reached at or about the time collective bargaining negotiations were entered into and adjustments were made to the pension agreement. So it was not a loose, informal arrangement, but it was a firmly bargained arrangement; particularly the 1962 and the 1964 agreements.

Now, in 1962, and I think this is most significant, when the collective bargaining agreement was negotiated, when changes were made in the pension agreement, the Company exacted from the Union a promise, as part of the collective bargaining agreement, that retirement would become mandatory at age 65, effective in 1964.

Then, at that point, it seems to me, the union member must look to the Union, the retiree must look to the Union, for some quid pro: if I am going to be forced to retire when I reach the age of 65, then at least I must look to the Union to be sure the bargained-for program on surgical benefits, on hospitalization benefits is going to be carried out. And if there are going to be any changes in what the Union bargained for me, since I must retire at age 65, then I must rely upon the Union to accomplish those changes.

But what happened between '50 and '64, as I've related, was consistent with what was happening throughout the entire industrial movement. And this brings me to one point

that I should like to make, and that is to decry what I think is a misleading effort on the part of the Company to challenge the statistics and the studies which have been included in the briefs of the Board, in the brief of the Union, and in the amici briefs.

We think we had a right, we think we had a right to call to this Court's attention the voluminous studies of the Department of Labor and other authentic information showing the growth of the industrial practice of bargaining about hospitalization and surgical benefits for retirees.

And under this Court's decision in Vaca v. Sipes and in Fibreboard, I think there's ample authority to sustain what was done.

The 1964 agreement, Your Honor was a firmly bargained agreement, it had three years to go, expiring in 1967. And supplementing that collective bargaining agreement was the insurance agreement in the Appendix. It was co-terminus; this, too, had three years to run, subject only to a defeasance, if you want to call it that, that effective with Medicare the Company would reclaim the two dollar additional contribution which it had agreed to in 1964.

And so it's understandable, with the approaching effective date of Medicare, and its impact upon the active employees now retired, the Union was in a position to inquire and ask: what did the Company propose to do come July 1966,

when Medicare became effective?

The Union had bargained for these benefits for these people when they were active. The benefits were being enjoyed now that they were retired, and they had assumed a continuing responsibility to these retired employees which could not be evaded.

And so in November 1965 this is an entirely plausible and understandable and, I think, correct -- from the trade union point of view -- inquiry to make of the Company: What do you propose to do in 1966 when Medicare becomes effective?

The Company replied: We're going to cancel, because Medicare has made this program useless; we're going to take back the two dollars; and we're going to contribute three dollars to Medicare.

This was challenged sharply by the Union, and had it not been at that point, had it not been for the challenge of the Union, the entire Company program in Barberton would have been canceled.

Not only retirees eligible for social security would have lost the advantage of their insurance, but retirees who were not eligible for social security or Medicare, because they were below the age of 65, and their spouses, too, would have lost their insurance. But for the intervening and necessary act of the Union, this was prevented; and two days later the Company came in with a new program of no cancellation, but

refusing to consider or discuss with the Union any modification of the insurance program effective when Medicare became -- or went into effect in July of 1966.

Q But you had a contractual right to keep the employer from canceling -- from terminating unilaterally its own contract?

MR. RIEMER: Yes. I think a suit for breach of contract might have been brought, Your Honor. I think the individuals might have brought a 301 action. But, if I may suggest, Mr. Justice White --

Q Was there any kind of a grievance or arbitration provision in the side agreement? If there were --

MR. RIEMER: Yes -- in the side agreement?

Q -- disagreements, that they would arbitrate or something?

MR. RIEMER: There was never any attempt to arbitrate. The Union filed no grievance. The collective bargaining agreement does contain a very comprehensive grievance and arbitration procedure.

Q Is it normally an 8(b)(5) or an 8(a)(5) violation if an employer refused to follow the grievance procedure in a collective bargaining contract? It normally is, is it not?

MR. RIEMER: I should think it would be. But I don't think it's normal, Your Honor.

I think a failure on the part of an employer to -- what -- to refuse to arbitrate, to refuse to follow the grievance procedure, I think is an 8(a)(5); normally this does not occur, at least in my experience.

Q Tell me, Mr. Riemer, what interests of the active employees were affected by the proposed company revisions?

MR. RIEMER: Well, the interests of the active employees, Your Honor, Mr. Justice Brennan, affected by this is, it seems to me, somewhat manifold, really. The Union wrote into the collective bargaining agreement a mandatory retirement provision. The active employees had the right to look to the future for a program of benefits that would be rewarding, and perhaps above the mere poverty level.

The dollar value of this hospitalization and surgical program, together with a reduced life insurance program, is of some monetary value. The active employees know that its cost is something that they've given up in order that they may in the future recoup, in a sort of deferred way, what they had given up while active employees.

I think this is all inextricably intertwined; one generates another.

Q Is this to suggest that when they arrived at age 65, the active employees, and were mandatorily retired, that these revisions would be applicable to them as retirees, and that they may be less advantageous than were they able now

to negotiate, they were able to negotiate for their own condition after age 65?

MR. RIEMER: I believe that's true, Your Honor. The more advantageous provisions that can be made for the retiree, the more the active employee anticipates that upon reaching the age of 65 he will enjoy no less than the retiree is now getting. And hopefully more.

Q Do you think this meets the suggestion that the active membership of the union might sell the retirees down the river sometime?

MR. RIEMER: Mr. Chief Justice, absolutely not.

Q I say, do you think it meets the suggestion? It answers it? That there is no likelihood that the actives are going to sell the retirees down the river.

MR. RIEMER: Oh. Mr. Chief Justice, I have complete confidence that the Union would not permit active employees to sell retired employees down the river. And I don't think any union worth its salt would dare take that position.

Q And if they did --

MR. RIEMER: And if they did --

Q -- assume the possibility, if they did there'd be at least, if not a 301 action, there would be an accountability as a fiduciary, would there not?

MR. RIEMER: There would be an accountability legally and politically.

MR. CHIEF JUSTICE BURGER: Mr. Farmer.

ORAL ARGUMENT OF GUY FARMER, ESQ., ON BEHALF OF THE RESPONDENT PITTSBURGH PLATE GLASS CO.

MR. FARMER: Mr. Chief Justice, and may it please the Court:

We see the case, of course, quite differently from my brother Mr. Come and Union counsel, Mr. Riemer. We see the case as being an issue not of the subject matter of bargaining, but a fundamental issue as to the representation rights of the Union and the parallel bargaining obligation of the employer.

Now we see these two things as parallel, that the Union's exclusive representation rights under the statute are the same, or cover the same group or unit as the Act speaks of, as the group which the employer must bargain for. Now, we're not dealing here with the question of whether it would be permissible, on a voluntary basis, for this Union and this Company to make some arrangements to improve benefits for people already retired.

There is no issue of that; it's agreed. The court below held that on a voluntary basis this could be done under the Act.

We're dealing here with the question of whether it is mandatory, obligatory on the part of the Union and on the part of the employer to bargain for these people who have

already retired.

Q I suppose, also, it's common ground, isn't it, Mr. Farmer, that retirement benefits for present employees are a mandatory subject of collective bargaining?

MR. FARMER: No question. No question, that it's been decided for many, many years, under Inland Steel and subsequent cases, that the benefits with which employees retire are a mandatory subject of bargaining. But this Court held in the Borg-Warner case several years ago that there are different gradations of bargaining: there is permissive, and there is mandatory, and there is unlawful.

There are things you cannot bargain about at all. There are things you must bargain about; and there are things that you may bargain about.

We say that the --

Q Mr. Farmer, as a practical matter, when you're dealing with a large number of retired employees, --

MR. FARMER: Yes.

Q -- and this was quite a large number, 190?

MR. FARMER: 190.

Q 190. If they have no access to bargaining through their union of which they are honorary members, does that mean they must bring a class action or must -- if they want to negotiate, they must band together in some sort of an organization?

MR. FARMER: Well, Your Honor, --

Q And if they did, could they require the employer to negotiate with them?

MR. FARMER: Not in my opinion, Your Honor. In my opinion once the employer-employee relationship is terminated and people are not longer working or performing services, that they no longer have a right to band together to, let's say, force concessions through collective action out of their former employer.

It is my position, and it was the position of the court below, that the proper time for employees to negotiate their retirement benefits is when they are working and performing the services for which they are being compensated and which they're negotiating about.

Q Well, Mr. Farmer, suppose the Union is directing a negotiation --

MR. FARMER: Yes.

Q -- to make a demand upon the Company --

MR. FARMER: Yes.

Q -- for a provision in the collective bargaining agreement, that no changes should be made after retirement in the retirement benefits, except in collective bargaining with the Union. Would that demand be a mandatory subject for bargaining?

MR. FARMER: I do not believe so.

Q Why not?

MR. FARMER: Because they're --

Q They're bargaining now for the active employees.

MR. FARMER: They could bargain for the active employees that there would be no change made in their benefits after retirement.

Q Without collective bargaining with the Union.

MR. FARMER: Now, that "without collective bargaining with the Union", I think then is an attempt to project the bargaining obligation into the retirement situation. I think they could even bargain that if the cost of living went up, the benefits would automatically escalate.

Q Some of them have done that, have they not?

MR. FARMER: Yes. And I think that's perfectly valid bargaining.

But the point is that once a bargain is made, while the employee is working, as to what his benefits will be, this is a part of his total compensation, this is based on a combined agreement and judgment by the Union and the employer as to the value of the services which he is rendering; and this comes out in wages and benefits, some of which are to be deferred until he retires. And when he retires, he has -- he has a right to bargain to vest those benefits so they can't be taken away and reduced by the Company or anyone else; and all of this is valid. But once this employee retires, it seems

to me it's contrary to the purpose of the Act and it's unfair to the employer to say that he must continue to renegotiate after retirement the value of this person's services.

Now, he cannot, as the court below pointed out, go back and adjust his prices to compensate for what he is going to bill on the benefits of these people who have already retired, and so he is going to be subjected under the Board view here to a continual repetition, repetitive revaluation of services that have long since been rendered, for people who are no longer rendering any services at all.

Now, we say that this is contrary to the whole principle of collective bargaining as set out in the statute. It arises from the statute, and it should be controlled by the statute. We say the issue here is: Who does the Union represent? And who does the employer have to bargain for?

And we say, as the court below did, that this is determined by the statutory provisions that set up the bargaining process. One of these is Section 8(a)(5), which says that the employer must bargain with the representative of his employees -- of his employees -- subject to the provisions of Section 9. That is what 8(a)(5) says.

Q If in the original contract it says the retirement benefits shall not be changed under any circumstances.

MR. FARMER: Yes.

Q And it is changed. Then does the Union have a

right to negotiate about that change? Because that change affects the present employees, too.

MR. FARMER: I don't think, if the contract --

Q Don't you agree that it affects the present employees?

MR. FARMER: The change in the benefits of people already retired?

Q Yes.

MR. FARMER: I don't quite see, Your Honor, how it does.

Q Well, if the change is from two to three dollars --

MR. FARMER: Yes.

Q -- and I'm about to retire next week, I've got an interest in that, haven't I?

MR. FARMER: It depends on whether that change is to be applied to you or to someone who's already retired. That would depend on the agreement that was made. Now, there are many people retired from companies who have different levels of retirement benefits, depending on the time at which they're retired.

Q That's what I mean.

MR. FARMER: And if I, as the Company, and the Union agree to go back to the 1960 retirees and give them an extra three dollars a month, that would not automatically apply to

you as an active employee unless the agreement so provided.

Q But the Union has negotiated a binding contract, and the Company has broken it. Right?

MR. FARMER: I'm sorry; I didn't quite get the latter part.

Q Isn't it true that where the Union negotiates a binding contract concerning retirement benefits --

MR. FARMER: Yes.

Q -- and the employer breaks it, the Union has nothing that it can do?

MR. FARMER: No, that is not true, Mr. Justice Marshall.

Q What can the Union do?

MR. FARMER: It can sue for breach of the agreement, under Section 301.

Q Of the contract, you mean.

MR. FARMER: Yes.

Q And I assume you say that the retiree can also --

MR. FARMER: Yes.

Q -- go on the contract?

MR. FARMER: Yes, Your Honor.

Q But nothing else.

MR. FARMER: Nothing else except possible arbitration, if it's provided for, which could be provided and is provided in some cases.

Now, if it please the Court, we think that this is a new issue before the Court, but that it's governed by some very clearly established principles.

Now, up to this time, I would challenge the Board to produce a case in which the Board has ever held that a Union can force bargaining for any person who is not a member of the bargaining unit under Section 9.

Q Well, you wouldn't contend that the employer has the right either to increase or decrease the --

MR. FARMER: No, I do not.

Q -- the benefits to retired employees?

MR. FARMER: I think he has a right to increase them if they accept, if they want to accept the benefits.

Q Well, what if they -- yes, but your promisee is the Union in the side agreement.

MR. FARMER: Are you talking about this particular --

Q Yes. I mean, the parties to the contract are the Union and the Company.

MR. FARMER: The Company agreed to pay four dollars a month as a contribution toward this medical insurance.

Q I see.

MR. FARMER: With the right to reduce it to two dollars.

Q I see.

MR. FARMER: The Company did not -- the Company started

to, or acted as if, or talked as if they were going to change that agreement; but they did not, in the end.

Q Well, let's assume that the Company comes along and just unilaterally increases its contribution for retired employees to five dollars.

MR. FARMER: Well, I think he definitely can do that. The retirees themselves --

Q Well, the Union says that's hurting them, though; that's what --

MR. FARMER: How does it hurt the Union?

Q Well, it's taking -- there's less money available for active employees.

MR. FARMER: Well, this concept of interest bargaining opens up a Pandora's box that I can't see the end to, because --

Q Well, I'm not talking about the bargaining part of it, I'm just asking you whether there isn't an existing remedy --

MR. FARMER: Oh, you're talking --

Q -- that the Union already has with respect to either increases or decreases?

MR. FARMER: Well, if the increase is a violation of that agreement, certainly they have a remedy. But I question in my own mind whether that would be a violation. If I agree to pay you two dollars and I voluntarily pay you four, I don't

quite see why that --

Q But if the Union is right, that it has a substantial interest in preventing increases to retired employees which would take money away from the actives, then it is a breach of contract.

MR. FARMER: Agreed. But I do not agree that the Company has -- that the Union has that much of an interest in controlling what happens to people that it doesn't represent. The Company might want to set up and would set up a retirement plan for supervisors, who are not represented by the Union, and the Union might say: Well, that money -- you shouldn't do that, because that money is money you could spend in retirement benefits for us.

But certainly they have no right to require the Company to negotiate with them about what they're going to do for the supervisors.

Now, perhaps I haven't gotten your point. But I do not agree with the interest theory, that the Union can represent and speak for exclusively people who are not -- whom it does not represent, are not in the bargaining unit, because the Company might in some way do something for those people that would take some money away from the Union, that might otherwise go to the Union.

That kind of an argument, I think, opens up a completely chaotic situation, under which the Union could

demand bargaining about anything and anybody at any time.

Q Well, do you read the Union's claim here and the Board's position as permitting the Union to have a strike issue if the Union made a demand for an increase in pension of retired employees --

MR. FARMER: No question.

Q -- and that was refused?

MR. FARMER: No question.

Q That they could go on strike?

MR. FARMER: If the Board decision is right, they could strike to force more benefits for retirees.

And even if they had no benefits, the people who retired without benefits of any kind, presumably under this decision of the Board the Union could demand that a program of benefits be instituted for people that had been retired since 1950, or whatever date. And the Company would have to negotiate if the Union didn't like what the Company did, was willing to do, they could strike the whole plant --

Q Mr. Farmer, does --

MR. FARMER: -- over that issue.

Q -- this decision really go that far? I thought it was limited to the question, whether,there being an existing agreement, the Union has any right to insist on bargaining changes in an existing agreement.

MR. FARMER: I do not believe that that's the Board's

position, and I would say that if that were the position that it would be pretty close to being correct. In other words, if the Company here did violate that agreement, then it was under Board decision a unilateral modification of an agreement under Section 8(d) of the Act and therefore would be an unfair labor practice.

But that is not as I understand the Board's position. The Board's position is that regardless of that agreement, that as a general universal rule persons on retirement are covered by the mandatory bargaining obligation and the Union that happens to be representing the active employees, which, incidentally, may never have represented these pepple, because you could have a change in representatives, it may never have -- if that union has a right to demand mandatory bargaining for people who have left the employ of the company in some loose arrangement called retirement.

Q I didn't read it as that broad a claim, but I will ask counsel in rebuttal to clarify that. My impression was that the claim was rather narrow, that the Company, the employer cannot unilaterally make any changes without negotiating. But we will see whether it was claimed that they, on the Union side, could initiate a claim for increased benefits and go on strike if they were denied.

MR. FARMER: Yes, Your Honor.

Q That would be a very important distinction,

wouldn't it?

MR. FARMER: Yes, and I would like to hear the answer, too; because, as I understand it, the claim is a broad one, that the Union represents these people just as it does the active employees, and it can initiate negotiations for retirees the same as it can the active employees; that it doesn't have to wait until the Company does something or initiates something; that this becomes a part of the Union's representation rights and a part of the employer's mandatory bargaining obligation.

This is the way they presented it below, and this is the basis on which the court below decided.

And, incidentally, we could add, I think, very little to the analysis of the court below, we are simply here repeating, I think, arguments that have already been made by the court below, and we think they have covered the case in a most excellent fashion; and there's very little that I can add.

Now, let me just say about the Oliver case: Well, certainly they do try to get a lot of mileage out of Oliver. They are saying that in Oliver, of course, that was a case where the union had a legitimate interest, as this Court found, in seeing that their jobs as drivers were not eroded by phony arrangements made with driver-owners; and therefore the union and the company made an agreement that the amounts paid

to these owner-drivers would not be below a certain minimum. That was to protect the erosion of the jobs in that bargaining unit.

Those owner-drivers presented a direct threat to the jobs of these employee drivers, and this Court so held in that case.

Now, to say that these retirees, who have no bargaining strength whatsoever, who are not competing for jobs, and are not competing for wages, that they present such a threat to these active employees who have the power to shut down this operation any time to get their demands, to say that these retirees threaten them so much that the actives have to have control over their benefits, I think, becomes almost an absurd argument. And I don't think that Oliver was intended to go that far at all.

In no case prior to this one has the Board ever come to this Court, or any other court, and made the argument that a union has the exclusive right to represent people who are not in the bargaining unit.

And the Board admits here that retirees are not in the bargaining unit. In fact, the Board has uniformly excluded them from all bargaining units, saying they do not have a community of interest with the active employees and probably are not employees at all. They have excluded them. They excluded them here. They set up a unit of only active

employees; they did not include these people.

It seems to me that there is one aspect of the Act, that is the industrial democracy aspect, which I would like to discuss next.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Farmer, you may continue. You have 26 minutes left.

MR. FARMER: Mr. Chief Justice -- thank you -- may it please the Court:

I don't think I will need all that time.

MR. CHIEF JUSTICE BURGER: That's always a welcome thing. Whatever you say.

MR. FARMER: Ten minutes will suffice.

I think that the court, as I said, the court decision below, in my opinion, is sound and sets forth the rationale which supports the decision of the court below.

I would just like to make one or two points that I haven't touched on.

The Board has argued here today, and I believe for the first time, that the bargaining unit does not control the scope of the bargaining -- does not necessarily control the scope of the bargaining.

This, I think, is basic to this case, and this is a change of position on the part of the Board, the position it took in the court below.

In the court below the Board conceded that the obligation to bargain is limited to the bargaining unit. And that position is supported by a long line, unbroken line of

decisions by the Board itself and by the courts; and it is supported by the statute.

I did not cite Section 8(b)(3) in the Appendix to the brief, I did cite 8(a)(5) which says that the employer's bargaining obligation is to bargain with the representative of his employees, subject to Section 9(a). Section 8(b)(3) says the same thing with respect to unions.

It says that a union bargains subject to Section 9. As the court said, the Second Circuit said in one of the two ILA cases, where the ILA tried to force a company, or the shipping companies in New York to bargain for longshoremen in Florida and other places, which were not in the same bargaining unit, the Board went into court in that case and got an injunction against that strike and later held that it was a violation of the Act to try to force bargaining outside the bargaing unit.

In that case, I believe it was Judge Friendly said: Section 9 fixes the framework within which labor and management are required to bargain.

And the Court of Appeals here, in a second ILA case, under similar circumstances, held the same thing. It said that the extent of the bargaining obligation is determined by the certification of the bargaining unit. And that is precisely what the Act itself says in Section 9.

Now, the Board would have to concede here that

people who have retired permanently and no longer are employed or performing services are not in the bargaining unit. The Board does not claim, as I understand it, that these people are in the bargaining unit.

But they project here an entirely new argument that a union can, under certain circumstances not clearly defined, demand bargaining for people who are not in the bargaining unit.

Q Mr. Farmer, in your view, would a union honor a picket line consisting exclusively of retired employees who were picketing for an increase in pensions outside of a contract?

MR. FARMER: I think they very well might. I know one union, at least, that would and has, consistently, honored such a -- well, a picket line by retired persons has been honored traditionally in the coal industry. And I can't answer it elsewhere, but I know that to be a fact, as far as the coal industry is concerned.

Now, it seems to me, when Congress designed the Act, they designed it around the theory of industrial democracy; that the employees, in groupings that the Board would determine which are called bargaining units, that they would select, by a majority vote, their representative; and that representative would then represent all of them, exclusively, in that unit.

But, by like token, that representative was not

intended to have any authority to represent anyone who was not in that unit for which it had been selected.

Now, in this particular case, the Board has certified a unit, back in 1949, in which it excluded -- in which it limited the unit to active working employees; did not include those pensioners, and did not allow them to vote. Now, that's in accordance with the Board's uniform policy which they followed in every case in which this issue has ever come up, and they are saying today in their brief that they still would not allow retired people to vote or be a part of a bargaining unit.

They say they don't have a community of interests with these active people sufficient to allow them to be in the same bargaining unit. And yet, inconsistently it seems to me, they are still arguing that the bargaining unit representative is their exclusive representative.

So this is representation without any voice in the selection of the union. There are provisions in the Act whereby a union can be changed; they have no voice in that. They have no voice in this particular union in ratifying agreements that are made.

Now, it may well be that unions would not, as a matter of practice, want to try to injure retirees. I'm not saying that they would. But I am saying certainly the possibility exists. We cannot expect that it couldn't happen. That

the active people saying: We want all this money in wages now, and we do not want you giving any money to these people who have retired. And they would have the right to strike to force that demand; and an employer, a weak employer, might very well give in to it.

So I think, regardless of arguments about the right to fair representation, and arguments that the unions are altruistic, and all those things which they are; nonetheless, the opportunity would still exist and we could not say, and I do not believe anyone could say that it would not happen, that a union might, under certain circumstances, act to the detriment of these people who have no economic strength of their own. Because they are scattered all over, those 190 people, in several different States, and some of them even in Yugoslavia, today. Where they obviously would not have any economic strength in this picture as the court below pointed out.

Q Isn't that also a consideration for their having a bargaining representative of some kind?

MR. FARMER: Well, I think if they are going to have one, it ought to be one they select themselves. And of course the Board hasn't answered that question. If they are a part of some bargaining setup, must they only be represented by this union that represents the actives? Should they not be permitted to have their own union to represent their own interests? As

the Board says, they are not in common with the interests of the active employees.

These are questions that we have raised concerning the scope of this ruling, and we've had no answer to those questions. And I cannot say. But it would seem to me, logically, that they should be entitled, if they're going to be represented, they should be entitled to select their representative.

I would like to move now to the point made by brother Coma, that there is a -- and by Union counsel, that everybody is doing this. Now, that is not true, because we have, in this case, amicus briefs filed by employer groups who say they are not doing it and they know others are not doing it, too. I mean bargaining for benefits for people after they have retired.

But they are saying, the argument is that because it's asserted that a lot of people are permissively or voluntarily making arrangements for retirees, that the Court should then say: Well, this now becomes a mandatory obligation for everyone.

And the logic of that argument, I must say, escapes me; and certainly would inhibit employers and unions from experimenting with new subjects of bargaining and new areas if it then turned out to be a practice that was termed the practice and then becomes the law.

Now, I would also like to point out that in this case, which the Board sat on for two years before deciding what to do with it, there is not one iota of evidence as to what industry practice is, in the record of this case.

That all of this is derived from self-serving statements made by amicus briefs on both sides.

Q Suppose, Mr. Farmer, that these 190 employees have managed in some way to get together --

MR. FARMER: Yes.

Q -- and engage a lawyer and designate him as their bargaining representative, as they could if they were an active union. In effect, a de facto union. Isn't the real question whether there is an obligation of the employer to engage in bargaining on the issues?

MR. FARMER: Yes. Yes, I say there is not because they are not employees, they are not in any -- and in order to be, for there to be a bargaining obligation, it runs between the employer and his employees; and once they have retired permanently, with no expectation of re-employment, performing no services, receiving no salaries, but simply enjoying the fruits of what they negotiated while they were working, that the bargaining obligation no longer exists.

Of course, that is our position, and that is what the court below held: that there is no place in this structure for organizations of retirees who can force mandatory bargaining

on the employer, who can come and picket his plant and shut it down, even though the employees working there might have perfectly satisfactory arrangements as far as they're concerned, but the retiree wants more, he wants more for himself, so he bands together and forms a union to come in and negotiate; but he does not have this standing under the Act, because, under the Act as it is structured, as the court below held, the bargaining relationship exists as between employer and his current employees.

Q Well, if the employer arbitrarily cut the pension in half -- let's take an extreme case --

MR. FARMER: Yes.

Q -- what, in your view, would be the remedy of the employees? Would it be limited to a suit as third-party beneficiaries of the contract previously made?

MR. FARMER: I would say it would be limited to a suit for violation of the agreement, which would be a class action or what-have-you under Section 301. Now, they can -- when they are in active status, they can negotiate these benefits, they can provide for their vesting, as here the pensions are, they are vested in this company after 15 years; nobody can take those away from them once they have vested, after they have served the 15 years and then retired. And if they were taken away or reduced, they would have their remedy in court to protect their beneficial interests.

And there are many cases which so hold.

But to say that they can come to the employer, they have, let's say, retired with a $250-a-month pension based on the pension plan in effect; they come to him five years later and say, We think this ought to be 500, and we've banded together now, we're going to picket you until you agree to pay it.

I think this is outside the contemplation of the statute, which is supposed to resolve on-going issues between -- in our industrial society, between the employers and the current work force of employees. And I think every word in the Act, and every decision up to now, has been consistent with that interpretation of it; and inconsistent with the view that a union, representing active employees, can, not only negotiate their benefits to take effect when they retire but can reach out and renegotiate without limitation, not just once but any number of times, the benefits that the employee retired with.

And as I said earlier, I don't think -- I think that this creates an unfair burden on employers to expose him to this risk indefinitely, when he cannot go back and say, All right, I'll have to adjust my price levels in order to pay those things retroactively.

Now, the industrial practice is very spotty, as I read the various amicus briefs. Some companies do negotiate

these things with their unions; some do not; some discuss them with them and work out on an amicable basis. But to say that the Act will be, in effect, amended by some kind of industrial practice, I think, is contrary to normal rules of statutory interpretation.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Farmer.

Mr. Come.

I hope at some point you will address yourself to the questions I put before lunch, but you do it in your own time.

REBUTTAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE PETITIONER NLRB.

MR. COME: Yes, Your Honor. I think I might as well start with that.

The precise holding of the Board in this case is at page 46 and 47 of the Appendix. And the Board -- reading down toward the middle there -- says:

Accordingly we find that by unilaterally modifying its medical insurance plan for retired employees, respondent violated Section 8(a)(5) and (1) of the Act.

Then over on --

Q Excuse me, Mr. Come, I don't find it. At 46, does it begin?

MR. COME: Page 46, the last sentence of the first paragraph, "Accordingly".

Q Yes, I have it now.

MR. COME: And then at the bottom of the next paragraph, the Board says:

We hold only on the record of this case that respondent violated the statute by making unilateral changes.

And then Finding 3 on page 47: By instituting unilateral adjustments in the health insurance plan for its retired employees.

Now, I think that is the factual setting of this case, and the precise holding of the Board.

I think, however, that candor requires me to point out that, although that is not this case, that the logic of holding that this is a mandatory subject of bargaining would mean that in a case where you did not have employer making a unilateral adjustment, but the union proposes a change in retiree benefits, that that would be --

Q In other words, what you mean is that everything is going along fine, but suddenly the union comes in to the employer and says: We'd like to have a bargaining, reopen the matter of pensions; the cost of living has gone up, there's been inflation, and this, that, and the other thing.

MR. COME: Assuming --

Q The Board's position is that even in that case it would be mandatory upon the company to sit down and bargain with the union?

MR. COME: I think that is the logic of the Board's holding here. I don't think that that is what it held on the facts of this case.

Now, all that I say, however, presupposes that the contract would not preclude a reopening. I mean, obviously, if there's a contract in effect that --

Q Well, Mr. Come, what's this mean, just ahead of what you refer to, at page 46, is a sentence: The General Counsel does not contend, nor do we find, that respondent was obligated to enage in midterm bargaining with the union over its proposal to negotiate amendments in the health insurance plan.

What's that mean?

MR. COME: I think what that means is, Your Honor, as I pointed out in my facts, that the contract here had two years, I believe, to go --

Q You mean the collective bargaining agreement?

MR. COME: The collective bargaining agreement. Now, under 8(d) neither party is obliged to discuss a reopening of terms that are fixed; however, since the company agreed to reconsider the effect of Medicare, the matter -- it, in effect, waived its right to say no, we're not going to talk about this while the contract is still in effect. And at that point then it became a bargainable matter.

Q But the emphasis, I suppose, in that sentence

should be on the phrase "midterm".

MR. COME: That is correct.

Q And as you rightly say, I think, in answer to the basic question, when the Board said that this is a violation of 8(a)(5) it necessarily said that this is a subject of mandatory collective bargaining; didn't it?

MR. COME: That is correct. Of course, the way the --

Q Whether or not there had been any unilateral change?

MR. COME: That is correct. But of course the way the problem is most likely to arise, as judged by the experience in the area, is going to be in the context of your having negotiated a health and welfare or pension plan that's going to cover active employees and retirees.

I mean --

Q Yes, but there's nothing at all in --

MR. COME: -- and then has a result of unforeseen changes, either the employer or the union is going to bring up the question, whether it be at the time you negotiate a new contract or whether, in the course of an old one that can be reopened, the question of adjusting to these unexpected, unforeseen changes.

And the question -- and these adjustments are made today. So that the question is: should the employer, although up to now, as our data shows, he has been willing to bargain

about it, should he be permitted to say that from here on out I'm going to do it unilaterally.

That's what this case boils down to.

Now, we are not seeking to --

Q But the legal principle here doesn't boil down to that. He can't make any change unilaterally in an agreement that he's made without being sued for breach of contract or breach of that agreement. It doesn't involve his right to make unilateral changes in an existing system of benefits for retirees. He obviously doesn't have that right, without violating the contract.

MR. COME: But there is nothing to prevent him, however, from improving those adjustments and those provisions, and the question is: is it healthier for collective bargaining relationship, including the impact on the active employee, for these improvements to be negotiated as a result of the same kind of bilateral negotiation that went into formulating them to begin with; or to permit the employer to make these changes unilaterally.

Q Well, Mr. Come, I don't like to --

MR. COME: I understand, Your Honor.

Q -- take your position on the question, but I don't think it's a matter of a policy decision as to whether this is healthy or not; and I don't think you really think so either, as a matter of fact, that the law provides.

MR. COME: No -- that is correct, Your Honor.

Q Mr. Come, --

MR. COME: But, I just wanted to say, without being overly argumentative, that part of the reason that governs whether you conclude that a subject is a mandatory subject of collective bargaining or not, is whether or not it is likely to be a bone of contention between labor and management, and that it makes for industrial peace rather than strife to subject it to the collective bargaining processes of the Act, and that's all that I meant by healthy, Your Honor.

Q Let me see if I can explore how far this logical substantion, I think is what you called it, logic of the Board's present position. Assume a case where you have 100 employees who have a vested interest in a pension of $200 a month by a contract negotiated when they were active employees. No provisions in the contract for cost of living or escalation or reopening increase. The union, at the urging of the retirees, demands a 25 percent increase in the pension, for whatever arguments they want.

Can the union, if either bargaining is refused or if no agreement is reached, call a valid strike on that issue?

MR. COME: In the Board's view, Your Honor, as I understand it, it could. Whether it would or not, of course, --

Q We're only concerned with whether --

MR. COME: Yes.

Q -- whether they can. That certainly opens up a whole new area of industrial strife, doesn't it?

MR. COME: Well, I think that the same argument could have been made, and was made, by the employers in '47 when they were protesting the extension of the Act's bargaining requirements to bargaining over pensions and health and welfare benefits. The whole history of what is a mandatory subject for bargaining has been an evolving one. And things that today are routinely accepted as bargainable, in '35 or even in '47 were looked at as being an unheard-of extension.

But the concept does grow, and we submit that this is a reasonable extension of the holding in Inland Steel in '47, that the whole matter of pensions and health and welfare matters are bargainable matters.

Q Mr. Come, if the employer, during the term of the collective bargaining contract, unilaterally lowers wages, contrary to the contract, without bargaining; that certainly is a breach of contract. Is it an unfair labor practice?

MR. COME: Yes. The Board would find that that is a violation of 8(d) of the --

Q 8(d)?

MR. COME: 8(d) says that you can't make modifications in the --

Q All right, now, that's -- but it is not an 8(a)(5)?

MR. COME: Well, an 8(a)(5) via 8(d).

Q But no other reason?

MR. COME: No other reason.

Q And what's the remedy? To restore it, isn't it?

MR. COME: Yes, and to --

Q That's the only remedy? Plus a cease and desist order; don't do it again.

MR. COME: I believe that is right; I'm not in on that aspect of the case, Your Honor.

Q Okay.

MR. COME: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Come.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:24 p.m., the case was submitted.]