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LABOR IN THE ERA OF MULTINATIONALISM: THE CRISIS IN BARGAINED-FOR FRINGE BENEFITS

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I.	INTRODUCTION	907
II.	MEDICAL BENEFITS	912
	A. <i>Medical Benefits I: LTV</i>	912
	B. <i>Medical Benefits II: Tee Nee Trailer</i>	921
	C. <i>Medical Benefits III: Republic Hose</i>	922
	D. <i>Medical Benefits IV: GF</i>	926
III.	PENSION BENEFITS	933
	A. <i>Pension Benefits I: LTV</i>	933
	B. <i>Pension Benefits II: Wean United</i>	938
IV.	CONCLUSION	940

I. INTRODUCTION

Under assault from overseas, plants in the United States are closing and unions in the United States have lost the ability to protect their members' jobs. The prospect of still stiffer competition from a more integrated European economy promises more of the same.¹

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1. In referring to an "assault from overseas" and "the prospect of still stiffer competition from Europe," the authors are not placing blame on European workers. Overall, labor costs in Europe including the cost of legally required insurance programs and various benefit plans are higher than labor costs in the United States. In 1989, compensation of European production workers averaged 102 percent of United States costs. Hourly compensation costs were between 20 and 30 percent higher in Germany, Norway, and Sweden, and 5 to 15 percent higher in Belgium, Denmark, Finland, the Netherlands, and Switzerland. Bureau of Labor Statistics report 787, summarized in Bureau of National Affairs, 134 Lab. Rel. Rep. (BNA) 188-89 (1990). If European firms are more efficient than their counterparts in the United States, this would appear to be due to acceptance of lower profit margins, greater insistence on quality, the diversion of fewer resources to military efforts, and such factors, *not* to lower labor costs in Europe.

This crisis has been with us since the 1970s. Its dimensions are familiar.² Real wages have fallen. The percentage of non-farm workers in trade unions is about half what it was in the 1950s. Unions win a declining proportion of NLRB elections. Board and court decisions have narrowed the space within which workers can carry on self-organized concerted activity on the shop floor. Concession bargaining has become a way of life.

Commonplace as these perceptions have become, it may still not be recognized how fundamentally the promise of CIO unionism has miscarried. Unions like the United Steelworkers of America and the United Auto Workers are centralized one-party governments. Workers have tolerated these institutions because such unions, so it appeared, could establish uniform employment conditions throughout the national economy. Above all, workers felt the unions could deliver a trouble-free retirement by means of collectively-bargained pension and medical insurance programs.

After World War II, management and organized labor in the United States undertook to provide, through private collective bargaining, "fringe benefits" which in other industrialized nations are financed by taxes and provided by the state.³ Entire communities like Youngstown, Ohio came to be composed of families whose members worked their entire lives in one plant so as to become entitled to the fringe benefits that such long service made possible. The pattern of culture was that wages went to buy homes which pensions would make it possible to live in happily, free of anxiety because of medical insurance. Workers took less in wages because of the promise of benefits when they retired. They viewed pensions and medical insurance as deferred compensation, for which consideration in the form of their labor had been fully rendered at the time of retirement.

2. See, e.g., Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV., 1769-1827 (1983); Chaison & Dhavale, *A Note on the Severity of the Decline in Union Organizing Activity*, 43 INDUS. & LAB. REL. REV., 366-73 (1990).

3. Voluntary employment-based private plans are the primary source of health insurance coverage for most of the U.S. population, while publicly financed compulsory schemes are primary in every other major industrialized nation, according to a study conducted by the Employee Benefit Research Institute and reported in Commerce Clearing House, *Employee Benefits Management Directions*, (CCH) No. 12, at 3 (October 16, 1990).

This is the bargain that has collapsed in the era of multinationalism. National labor unions have shown themselves impotent to protect their members against imports or the flight of capital. Under pressure from overseas competition, the practice of collectively bargaining fringe benefits has broken down. There is a fringe benefits crisis within, and as a result of, a crisis of plant closings and loss of jobs.

The outline of the crisis is that corporations made promises to unions with respect to both pensions and medical benefits which they cannot fulfill. A shrinking workforce in industries such as steel cannot generate the cash flow needed to pay for the benefits of a much larger number of retirees.⁴

The steel industry — both basic steel and steel fabricating — is especially instructive as an example of the effects of foreign competition. The American steel industry has faced a growing global market for thirty years and lost a quarter of its domestic market to foreign imports. Accordingly, the effects of foreign competition are prevalent in the steel industry. We can expect the effects currently seen in the steel industry to be repeated in other American industries as they face increasing levels of foreign competition.⁵

4. There is a vast literature on the crisis in employer-financed medical insurance programs. See, e.g., UNITED STATES GENERAL ACCOUNTING OFFICE, *EMPLOYEE BENEFITS: EXTENT OF COMPANIES' RETIREE HEALTH COVERAGE*, HRD-90-92 (March 1990); U.S. BIPARTISAN COMMISSION ON COMPREHENSIVE HEALTH CARE (the Pepper Commission), 101st CONG., 1st SESS., *A CALL FOR ACTION* at 25-30 (Sept. 1990); Karp, *Retirees Fight Health Benefit Cutbacks by Employers*, A.B.A. COMM'N ON LEGAL PROBLEMS OF THE ELDERLY, 11 BIFOCAL No. 2 (Summer 1990). As a result many private corporations now support some form of government health insurance. Uchitelle, *Seeking U.S. Aid for Health Care*, *The New York Times*, May 21, 1990, at D2. The crisis in employer-financed pension plans is especially evident in the steel industry, because of the high ratio of retirees to active workers as a result of mill closings. See section III, *infra*.

5. The long-term dilemmas of the steel industry are discussed in FEDERAL TRADE COMMISSION, *THE UNITED STATES STEEL INDUSTRY AND ITS INTERNATIONAL COMPETITORS: TRENDS AND FACTORS DETERMINING INTERNATIONAL COMPETITIVENESS* (1977); OFFICE OF TECHNOLOGY ASSESSMENT, *TECHNOLOGY AND STEEL INDUSTRY COMPETITIVENESS* (1980); and R. CRANDALL, *THE U.S. STEEL INDUSTRY IN RECURRENT CRISIS* (1981). The decline of a particular steel mill is narrated in M. REUTER, *SPARROWS POINT: MAKING STEEL—THE RISE AND RUIN OF AMERICAN INDUSTRIAL MIGHT* (1988), and of particular steelmaking communities in D. BENSMAN & R. LYNCH, *RUSTED DREAMS: HARD TIMES IN A STEEL COMMUNITY* (1987), and S. LYND, *THE FIGHT AGAINST SHUTDOWNS: YOUNGSTOWN'S STEEL MILL CLOSINGS, 1977-1980* (1982).

Other industries exhibit similar symptoms in varying degrees. The UAW estimated that to add a cost of living feature to pensions would cost "about \$6.00 hourly per worker, or more than all of

In a recent response to the crisis in employer-financed pension programs, the Supreme Court of the United States has summoned workers to "object strenuously" and to "resist" when corporations seek to curtail fringe benefit commitments. The problem was presented to the court in *Pension Benefit Guaranty Corporation v. LTV Corporation*, decided on June 18, 1990.⁶ There the Court upheld a decision of the Pension Benefit Guaranty Corporation (PBGC) to restore to LTV Steel Company, Inc. (LTV) three previously-terminated pension plans. PBGC said that the plans should be restored because LTV had abused the pension guaranty program by negotiating what it called "follow-on plans," that is, "pension arrangements intended to make up benefits that plan participants lost as a result of the [pension plans'] termination."⁷

The Supreme Court found that PBGC's policy against follow-on plans was a permissible construction of the Employee Retirement Income Security Act (ERISA). PBGC convinced the Court that its policy encourages workers to fight harder for their fringe benefits. In oral argument before the Court, Attorney Carol Flowe of the PBGC described the agency rationale as follows:

If an employee stands to lose when his plan terminates, then he's going to resist termination, and he's also going to pressure his employer to fund the plan better in the first instance.⁸

The Supreme Court agreed. In the words of its decision:

the UAW's other demands combined." 134 Lab. Rel. Rep. (BNA) 4, at 114 (1990). The cost of medical insurance is also staggering, especially at Chrysler, where hourly labor costs are more than \$2.00 per hour higher than those at GM and Ford because Chrysler has "as many retirees as active workers." Chrysler's health bills amount to more than \$700 million a year and are increasing 12-20 percent annually. 134 Lab. Rel. Rep. (BNA) 11, at 339-40 (1990). According to Chrysler vice chairman Robert Miller, Chrysler pays \$700 in health-care costs for each vehicle manufactured, as compared to \$375 per vehicle in France, \$337 in Germany, \$246 in Japan, and \$223 in Canada. 135 Lab. Rel. Rep. (BNA) 124 (1990).

6. 87 Bankr. 779 (Bankr. S.D. N.Y. 1988), *aff'd*, 875 F.2d 1008 (2d Cir. 1988), *rev'd*, 110 S. Ct. 2668 (1990).

7. 110 S. Ct. 2668, 2673.

8. Transcript at 12, *Pension Benefit Guaranty Corporation v. LTV Corporation*, 110 S. Ct. 2668 (1990) (No. 89-390). In the view of the PBGC, Attorney Flowe explained to the Court, a policy prohibiting follow-up plans provides "disincentives to [pension plan] termination from the standpoint of employees and their unions . . ." Transcript at 13, *id.* Thus, "if the union doesn't think it can have follow-on plans, once the company tries to negotiate to get permission to terminate . . . the union will say no." Transcript at 96, *id.*

The PBGC's anti-follow-on policy is premised on the belief, which we find eminently reasonable, that employees will *object more strenuously* to a company's original decision to terminate a plan (or to take financial steps that make termination likely) if the company cannot use a follow-on plan to put the employees in the same (or a similar) position after termination as they were in before. The availability of a follow-on plan thus would remove a significant check — *employee resistance* — against termination of a pension plan.⁹

For the past four years, the authors have represented Youngstown-area retirees who have “object[ed] . . . strenuously” and vigorously “resist[ed]” changes in promised medical and pension benefits. They have carried on this struggle through a retiree organization named Solidarity USA. We think it will be instructive to tell the story of the benefits crisis in this part of the country from the standpoint of the workers who have resisted it. We hope to show: (1) that there is indeed a fringe benefit crisis; (2) that patchwork national legislation has dramatically failed; (3) that retirees, who (at least in the case of steel) no longer belong to the union, do not pay dues, do not vote to elect union officers, do not vote on changes in retiree benefits negotiated by the union, and, as a result, have no control over what the union does, cannot rely on the union to protect their benefits;¹⁰ (4) that what is emerging is, on the one hand,

9. 110 S. Ct. 2668, 2670 (emphasis added).

10. A union that seeks to bargain for both current workers and retirees may be compared to the union of white railroad workers in *Steel v. Louisville & Nashville*, 323 U.S. 192 (1944). There, a union wholly made up of white workers also bargained for black workers who were not allowed in the union and could not vote on contracts. Inevitably, the union tended to favor its dues-paying members.

Retirees believe that unions that bargain for both current workers and retirees favor the interests of current workers, for the same reason. Thus, the contract negotiated between the United Steelworkers of America (hereafter USWA) and LTV in 1990 provided \$7.00 in contract improvements for the average current worker as compared to \$1.00 in contract improvements for the average retiree. A Solidarity USA pamphlet detailed the following contrasts in benefits received by current workers and retirees:

<u>Benefit</u>	<u>Current Workers Will Get</u>	<u>Retirees Will Get</u>
Life Insurance	\$17,500	\$3,500 - \$5,000
Hospice benefits	Unlimited coverage	Nothing
Diagnostic X-ray ultra sound devices	Annual maximum increases from \$400 to \$1,500	Annual maximum remains at \$75
Major medical annual maximum	Annual maximum increases from \$30,000 to \$50,000	Annual maximum remains at \$30,000
Major medical	Increases from \$50,000	Remains \$50,000 but

a greater government role (as in national health insurance),¹¹ and on the other hand, a rebuilding of the labor movement from below by grassroots direct action.

II. MEDICAL BENEFITS

A. Medical Benefits I: LTV

On July 17, 1986, LTV filed for Chapter 11 protection in the Bankruptcy Court of the United States District Court for the Southern District of New York.¹²

LTV is an amalgam of what used to be Jones & Laughlin Steel, the Youngstown Sheet and Tube Corporation, and Republic Steel. It is the second-largest steel company in the nation, after USX (formerly U.S. Steel).

At the same time that it filed its bankruptcy petition, LTV, a self-insured employer, directed the insurance companies that ad-

lifetime maximum	to \$250,000	new entitlement to that amount begins in 1991
Dental benefits	Lifetime maximum increases from \$650 to \$1,300	Not provided
Vision care benefits	Program in effect before May 1, 1986 is reinstated	Not provided
Employer payment of major medical premiums	Employer pays 100 percent	Employer will pay 50 percent beginning in 1991
Ratification bonus	\$1,000	Nothing
Right to ratify	Yes	No

Leaflet from Solidarity USA Inc., *You Be the Judge* (Mar. 1990) (available upon request from authors).

11. The national health insurance proposal most familiar to Mahoning Valley retirees is the Canadian health insurance system as modified by the Cambridge-based Physicians for a National Health Program. Himmelstein, *A National Health Program for the United States*, 320 *NEW ENG. J. OF MED.* 102 (1989); National Council of Senior Citizens, *Paying More, Getting Less: How U.S. Health Care Measures Up* (1990). The latter publication compares health care in Canada, Sweden, Great Britain, Japan, West Germany, and the United States, concluding: "Of the six nations compared, only one does not have a national health care system. Only one does not guarantee universal access. Only one spends more than 10 percent of the G.N.P. on health care. Only one requires patients to pay 29 percent of total health care costs out-of-pocket. This is the United States." *Id.* at 1.

12. In re Chateaugay Corporation, Reomar, Inc., the LTV Corporation, 112 Bankr. 526 (Bankr.

S.D. N.Y. 1990).

ministered its benefits programs to stop paying medical and life insurance claims to approximately 80,000 hourly and salaried retirees, 11,000 of them in the Youngstown area, as well as to 20-25,000 current workers. The legal rationale for the action was that these claims arose pursuant to collective bargaining agreements in effect at the time of the bankruptcy filing, hence were pre-petition debts.

The results were catastrophic.¹³ Roy St. Clair, a retiree who lived in a steelworkers' suburb south of Youngstown named Struthers, came home from the hospital the day the company filed for bankruptcy. St. Clair had a heart condition. After a day spent frantically seeking for alternative medical insurance, he experienced a recurrence of his heart symptoms, but did not seek hospitalization because he did not know how he could pay the bill. He died a few hours later. Early in 1987 another Struthers resident, Louis Lipka, blew his brains out in his bedroom because (according to his wife) he was worried about the family's benefits.

Community response was strong.¹⁴ Clergymen and Congressmen spoke of "industrial terrorism," of conduct no different from "a mugging," of "one of the most unconscionable corporate acts in this century." The pro-business *Youngstown Vindicator* editorialized: "We think the whole situation stinks."¹⁵

Resistance sprang up on several fronts. Workers at LTV's steel mill in East Chicago, Indiana, walked off the job after the wives of retirees set up a picket line outside the mill. Senator Metzenbaum conducted committee hearings in Cleveland at which retirees testified. In Youngstown, Delores Hrycyk, a lector at a Catholic Church and wife of a retiree with thirty-six years at Republic Steel, tele-

13. The authors took part in the events described in the remainder of this article. For example, the events leading up to the death of Roy St. Clair were narrated to them by Rev. Rob Dietrich, Mr. St. Clair's minister, and they interviewed Mrs. Louis Lipka after her husband's suicide. Statements in the text for which no source is cited are based on the personal experience of the authors and on material in their possession.

14. Letter from William J. Witt to the editor, *Youngstown Vindicator*, Aug. 10, 1986.

15. *Youngstown Vindicator*, editorial, July 23, 1986; see also, Congressional Delegation Investigates LTV Action, *Stripscript*, Local 2265, USWA, Aug. 1986, at 1. The other Mahoning Valley newspaper quoted Sen. Howard Metzenbaum's characterization of the company action as "a travesty of fairness" and "an act of extraordinary insensitivity," adding: "We agree." *Warren Tribune Chronicle*, July 28, 1986, at A4.

phoned radio talk shows and called a rally in downtown Youngstown for Saturday, July 26. A thousand people attended. Less than a month after it stopped paying benefits, LTV asked the Bankruptcy Court for permission to resume payments.

Meantime, Youngstown-area retirees, under Hyrcyk's leadership, formed an organization with the name Solidarity USA. The idea was an organization in this country similar to the Polish union, Solidarity. Donations poured in from unions, city councils, physicians, and others. Between August 1986 and March 1987 the group took busloads of retirees to the Bankruptcy Court in New York City, to Washington, D.C., to sympathetic city councils in Pittsburgh and Cleveland, and to Aliquippa, Pennsylvania, where on several occasions retirees sat down in the street leading to the mill gate.

On January 31, 1987, more than two thousand retirees from LTV plants in northeastern Ohio and western Pennsylvania, met in Youngstown's largest auditorium to plan further mass action. The gathering was addressed by Bishop James Malone, bishop of the Youngstown diocese and recently-retired president of the National Council of Catholic Bishops, Senator Metzenbaum, Congressman James Traficant and others. On April 12, 1987, retirees gathered at St. Titus Catholic Church in Aliquippa to celebrate Palm Sunday. It was the fiftieth anniversary of the United States Supreme Court's decision in *National Labor Relations Board v. Jones & Laughlin Steel*,¹⁶ holding the Wagner Act constitutional. As the *Wall Street Journal* described the scene:

On Palm Sunday, hundreds of LTV Corp. pensioners reunited outside the steelmaker's nearly deserted mill here to play out a symbolic crucifixion — their own. Anchoring a makeshift pine cross outside the plant gates, the gray-haired throng chanted, "Who owns the pensions? The workers!"¹⁷

We were among those who walked from the church to the mill gate, carrying palms. The gate had been the scene of daily demonstrations by retirees seeking guarantees for their pension and med-

16. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

17. *Wall Street Journal*, May 27, 1987, at 1.

ical benefits. At the gate, a former tractor operator explained in broken English that he had been discharged by the company in the mid-1930s, and was one of those who filed the NLRB charge that became the *Jones & Laughlin* case. We also heard from Monsignor Charles Owen Rice, Pittsburgh's celebrated labor priest, from De-lores Hrycyk, and from an acoustic band and chorus who sang "Christ the Worker." As the mass ended, bread was distributed, Easter embraces exchanged, and the hat passed to collect funds for the next demonstration.

A second generation of Solidarity USA leaders was elected in 1988. They included Jerry Morrison, a Teamsters organizer, and Ed Mann, formerly president of Local 1462, USWA. A newsletter was begun. The group meets once a month at the Odd Fellows hall in Hubbard, Ohio, northeast of Youngstown.¹⁸

The retirees who make up Solidarity USA have up to forty-odd years' seniority in Mahoning Valley steel mills. They pride themselves on keeping their contractual promises. Even in the 116-day strike of 1959, they found ways, with the help of extended family members, to make their mortgage payments and maintain their credit ratings. Now, they say, it is the companies' turn to carry out contracts. Their slogan, chanted in innumerable Solidarity USA demonstrations, is: "We worked for it, we earned it, we want every penny of it."

The retirees have a complex relationship with the United Steelworkers of America. These men and women, now in their fifties, sixties, and seventies, built the CIO in the Mahoning Valley. Many were local union officers and grievance committeemen. "Don't get me wrong," they will say. "I'm not anti-union. We *are* the union!"

But these retirees are bitterly disappointed in the union's representation, or lack thereof. In the United Steelworkers of America, retirees are no longer members of the union, hence they do not pay

18. The International Order of Odd Fellows (IOOF) is understood by Mahoning Valley residents to have been founded by poor people who were not welcome in more prestigious fraternal groups. The president, vice president, and treasurer of Solidarity USA elected in 1988 were also members of the Odd Fellows.

dues, cannot vote for union officers, and have no voice in the negotiation or ratification of contracts that affect their benefits. Yet the union insists on representing them, for example in the LTV bankruptcy proceedings.¹⁹

Thus in August 1987, thirteen months after LTV sought Chapter 11 protection, the Steelworkers negotiated a contract that required retirees to pay \$26.82 a month for basic hospitalization insurance that had hitherto been fully paid by the company.²⁰ These retirees had given up wages when they were working so that they would not have to pay for these benefits after they retired, and now they were being asked to pay for them again. Youngstown retirees still speak of how they learned about this imposition at a meeting called by the Steelworkers in a Youngstown auditorium, at which active workers (who could vote on the contract) were seated in front, and retirees (who could not vote) were seated behind a rope at the rear. Not surprisingly, as the 1990 negotiations approached, the retirees' leading demands were to have a role in negotiations and a vote on the resulting contract.

Problems with medical insurance affect all LTV retirees. These problems have been of several kinds:

1. After LTV stopped payment of medical benefits in July 1986, Congress passed a resolution that forbade LTV or any other company in Chapter 11 proceedings from unilaterally ceasing to pay medical insurance claims to retirees. This resolution was extended a number of times, until, in 1988, Congress passed the Retiree Ben-

19. The 1988 amendments to the Bankruptcy Code permit a union to choose whether or not it will represent retirees in bankruptcy proceedings. 11 U.S.C. § 1114(c)(1) (1989). The UAW has typically chosen *not* to represent hourly retirees in bankruptcy cases. So did the United Rubber Workers in the *Republic Hose* case discussed in the text. In all the other cases discussed herein, the USWA chose to represent retirees.

20. Prior to August 1987, basic hospitalization insurance (which also includes some physicians' services) was financed by LTV, while retirees paid the entire cost of "optional major medical" insurance through deductions from their pension checks. The 1987 collective bargaining agreement continued unchanged the arrangements for major medical insurance, apart from the increases in premiums discussed in the text, *infra*. The new \$26.82 a month payment for basic hospitalization insurance was deducted from retirees' pension checks. A comparable sum was deducted from current employees' profit-sharing accounts but it was not deducted from their pay. After any year during which LTV Steel made \$200 million or more in profits the \$26.82 a month payments for the previous year were to be returned, without interest.

efits Bankruptcy Protection Act which added Section 1114 to the Bankruptcy Code. Section 1114(e)(1) directed a Chapter 11 debtor-in-possession to “timely pay and . . . not modify”²¹ retiree medical and life insurance benefits, unless and until a modification was negotiated with the union (in the case of hourly retirees) or ordered by the Court. The Steelworkers union, the Auto Workers union, and Solidarity USA, all lobbied for Section 1114 and contributed to its drafting and legislative history.

2. The \$26.82 a month premium for hospitalization coverage that the union agreed to in 1987 was a constant irritation. In the fall of 1988, LTV announced that it had not earned \$200 million that year, and so would not return the monthly premiums. Solidarity USA and a sister organization, Retirees Against Greed and Exploitation (RAGE) of Canton, Ohio, chartered buses to Cleveland and picketed LTV headquarters. Soon thereafter, the company announced it would return the premiums after all. In the 1990 negotiations the \$26.82 was finally abolished.

3. In response to increasing health care costs, insurance administrators delayed payments and chiseled away claims. The company and union (without consulting retirees) agreed to substitute Blue Cross Blue Shield of Ohio (“Blue Cross”) for the Metropolitan Life Insurance Company (“Metropolitan”) as administrator of LTV’s major medical program, effective January 1989. Blue Cross thereby became administrator of both hospitalization and major medical insurance for hourly retirees. Solidarity USA members soon found that Blue Cross was shifting procedures performed at a hospital (such as a treadmill test for a heart condition) from hospitalization coverage that paid participants 100 percent of cost, to major medical coverage that paid only 80 percent.²²

Enraged retirees demanded interviews with decisionmakers at the headquarters of Blue Cross and LTV in Cleveland and with the union in Pittsburgh. A pattern repeated itself three times. Solidarity

21. 11 U.S.C. § 1114(e)(1).

22. The shift of payment from basic to major medical policies also reduced costs charged to LTV and tended to raise premium costs for retirees, as well as causing many retirees to fear that their claims would come to exceed the \$50,000 lifetime maximum for major medical.

USA would write that it was coming to Cleveland or Pittsburgh for a meeting on a certain day. Each organization replied that it would not meet with Solidarity USA representatives. Solidarity USA replied that it was coming anyway, with chartered buses, picket signs, and bullhorns, and lo!, in each case the meeting was had. The upshot was weekly visits of Solidarity USA members with unpaid medical claims to the Youngstown office of LTV, where a working relationship was hammered out, and a decision by the union to go back to Metropolitan as major medical insurance administrator.

4. Early in 1990, Solidarity USA presented evidence to the Bankruptcy Court in Manhattan that many early retirees from LTV had lost as much as 15-20 percent of their pension income since the company filed for bankruptcy, above all because of runaway increases in major medical premiums.²³ The figures, uncontested by counsel for LTV or by Judge Lifland, were as follows:

Loss of part of pension supplement, taxation of pension supplement. Approximately 8,000 retirees who were forced to retire early when their plants shut down were promised \$400.00 per month pension supplement until age 62 (early Social Security retirement age). They have lost:

Pension supplement reduced from \$400/mo. to \$360/mo.	\$40.00/mo.
--	-------------

FICA tax on supplement because supplement no longer paid from a qualified pension plan	<u>27.04/mo.</u>
--	------------------

Loss due to pension plan termination	\$67.04/mo.
--------------------------------------	-------------

Increased medical premiums. The basic hospital insurance in effect when LTV filed for bankruptcy was free of charge, apart from de-

23. Bobby G. Burns and eleven other individual LTV retirees or spouses and Retirees Against Greed and Exploitation (RAGE), Senior Citizens Committee of Local 1375 USWA, Solidarity USA, Solidarity USA — Aliquippa, and Tunnel Rats for Workers Solidarity, Objections to "Notice of Motion for Order Approving and Authorizing Debtors to Implement a Key Employee Extension Plan," Jan. 5, 1990, at 5-6. For certain LTV retirees in Aliquippa, Pennsylvania, who had chosen coverage with a Health Maintenance Organization as an alternative to major medical coverage through an insurance company, the proposed premium increases were even greater: from \$34.78 a month in 1989 to \$133.34 in 1990 for a retiree and spouse, both Medicare-eligible. Letter from George Glomb on behalf of LTV Retirees Solidarity USA, Aliquippa Chapter, to D. J. Evans, Director Employee Benefits, LTV Steel Company, Jan. 18, 1990.

ductibles, expenses not covered, etc. It was increased to \$26.82 per month after August 1987, although these premiums were returned (without interest) in years when LTV made a \$200 million profit. Major medical premiums have increased as follows:

	<u>Aug. 1987</u>	<u>Current</u>	<u>Announced</u>
Single retiree or spouse not eligible for Medicare			
Basic hospital	—	\$26.82/mo.	\$26.82/mo.
Major medical	<u>\$26.89/mo.</u>	<u>\$43.30/mo.</u>	<u>\$70.66/mo.</u>
Total per month	\$26.89/mo.	\$70.12/mo.	\$97.48/mo.
Married retiree and spouse not eligible for Medicare			
Basic hospital	—	\$ 26.82/mo.	\$ 26.82/mo.
Major medical	<u>\$52.66/mo.</u>	<u>\$ 86.66/mo.</u>	<u>\$141.32/mo.</u>
Total per month	\$52.66/mo.	\$113.48/mo.	\$168.14/mo.

Once again Solidarity USA's pressure bore fruit. Although the court refused to require the union to submit its 1990 contract with LTV to retirees for a vote, when that contract was made public it provided, first, for cancellation of a previously-announced increase of up to 63 percent in major medical premiums for 1990, and second, for the payment of one-half the major medical premium by LTV beginning in January 1991.²⁴

Each of the victories described required an intense, abrasive struggle not only with LTV but with the Steelworkers union. In its publication for retirees, the USWA International Executive Board described Solidarity USA (without naming it) as a "rump" made up of "dissidents," and called on retirees to be uncritically supportive of the Union "before, during and after contract negotia-

24. The cost of major medical insurance remains a problem for other groups of retirees. In the fall of 1990, retirees of Copperweld Steel in Warren, Ohio were informed that the major medical premium for an individual not yet 65 and therefore not covered by Medicare would increase from \$80 to \$125 a month (56 percent), while for individuals 65 and over the increase would be from \$49.25 to \$72 a month (46 percent). Premiums for Copperweld retirees have increased ten-fold since the program was begun in the early 1980s.

tions."²⁵ The charge was especially incongruous because in *PBGC v. LTV Corp.*, Solidarity USA supported PBGC's effort to restore the pension plans at issue to LTV, while the USWA, after initially equivocating, opposed PBGC and supported LTV in the courts.²⁶

Members of Solidarity USA and kindred retiree groups are reluctant to spend their golden years in unremitting conflict with both company and union to preserve or restore promised benefits. In the spring of 1989, Solidarity USA endorsed national health insurance based on the Canadian model. The process was as follows. A retiree group in Aliquippa proposed the creation of a Health Benefits Guaranty Corporation, similar to the PBGC. Solidarity USA was sympathetic but troubled. The Aliquippa project, if successful, would provide medical insurance only to those who had already won it through collective bargaining. Thirty to forty million Americans who had never had medical insurance would not be helped.²⁷

25. In January 1990, the Executive Board adopted a resolution stating on behalf of the Union and its official retiree organization, SOAR:

Whereas, SOAR's ability to serve our retired members in an appropriate way during negotiations is today threatened by the disruptive tactics of certain rump groups that claim to represent retirees. The goal of SOAR is to re-identify USWA retirees *with* the International Union. The actions of such dissident groups result in alienating retirees *from* the International Union, and

Whereas, our union's traditional and historic function in any contract negotiations would be seriously jeopardized if, *to any degree, officially or semi-officially*, we permit the bargaining agenda for retirees to be formulated or influenced by such dissidents, and,

Whereas, negotiations with the LTV Corporation this year are going to be extremely difficult because this company is still operating under Chapter Eleven Bankruptcy, therefore the interests of active members and retirees will best be served only if all retirees are solidly supportive *before, during and after* contract negotiations, as pledged by SOAR, and,

Whereas, the concern of SOAR in this matter extends not only to the handful of current dissidents bent on exploiting the sensitive 1990 LTV contract talks, but also extends to the fact that such disruptive tactics can and most assuredly will be used by companies and anti-union groups that would profit from failed negotiations. Using the same tactics, a company financed group, purportedly defending the interests of active USWA members and/or retirees, could sow discord and seriously weaken our union.

3 *Soar Insider*, No. 1 at 2 (Mar. 1990) (emphasis in original).

26. Solidarity USA filed an *amicus* brief supporting PBGC in the District Court. USWA General Counsel Bernard Kleiman told LTV workers and retirees at Stambaugh Auditorium in Youngstown on July 15, 1987 that if PBGC decided to return the pension plans to LTV it would be okay with the Union. Notes of Alice Lynd, July 15, 1987. When PBGC announced that very decision a month later, the USWA opposed it in the District Court and on appeal.

27. A General Accounting Office study gives the number of uninsured Americans in 1986 as

In the end, Solidarity USA rousingly endorsed what the authors were careful to describe as “national health insurance,” but what Solidarity USA members routinely, and matter-of-factly, referred to as socialized medicine.

B. Medical Benefits II: Tee Nee Trailer

Workers, for small as well as large companies, have found that the medical benefits they counted on were not there when it came time to collect.

In October 1989, August Vespasian, local union president at the Tee Nee Trailer Company, received explanations of benefits from Blue Cross that said, “Since these services were rendered after the cancellation of this group’s coverage, we are unable to provide benefits for these charges.” A few days later the president of the company sent a notice to all employees saying that their Blue Cross coverage had been cancelled because the company did not have the money to pay premiums. The notice advised workers to get their own insurance.

Still later, Tee Nee Trailer workers learned that the insurance had been cancelled retroactive to June 1, 1989, and that it was too late to convert to individual coverage. The Vespasians owed thousands of dollars in medical bills. During the summer of 1989, the company president had advised Mr. Vespasian to get surgery that he needed. Mrs. Vespasian had cancer which required ongoing treatment, as well as other serious conditions.

An amendment to ERISA known as COBRA²⁸ was intended to provide continuing coverage at the participant’s expense, but at group rates, and without exclusion of pre-existing conditions or a waiting period. But there was no possibility of COBRA coverage at Tee Nee Trailer because the employer was no longer offering group health insurance to any of its employees, and there was no on-going plan

36.8 million. *Health Insurance: An Overview of the Working Uninsured*, GAO/HRD-89-45 at 11 (Feb. 1989).

28. ERISA §§ 601-08, 29 U.S.C. §§ 1161-68 (1988).

to which Tee Nee Trailer workers could be added. The Vespasians were in their late fifties with years to go before they would be eligible for Medicare at age 65. No alternative coverage, even if they could afford it, would be comparable to the coverage they lost, which had totally covered generic prescription drugs and cost them only \$2.00 for brand-name prescriptions.

In February 1990, Tee Nee Trailer filed for bankruptcy under Chapter 11.²⁹ Because Mr. Vespasian was an employee, not a retiree, he was not covered by 11 U.S.C. § 1114. 11 U.S.C. § 507 gives priority to up to \$2,000 of benefit claims incurred within ninety days prior to the bankruptcy filing, but Mr. Vespasian's claims far exceeded \$2,000 and in many cases had been incurred more than ninety days before the company sought bankruptcy protection. The Union will argue that these expenses should receive priority treatment under 11 U.S.C. § 1113.³⁰

For August Vespasian, it was a third experience of having the rug pulled out from under his life expectations. The department he worked in at Republic Steel had shut down. He then worked for Youngstown Steel Tank, which went bankrupt. Now Tee Nee Trailer was shut down.³¹

C. Medical Benefits III: Republic Hose

Liquidation under Chapter 7 of the Bankruptcy Code can be more traumatic than reorganization pursuant to Chapter 11.

29. *In re Tee Nee Trailer Company*, No. 90-217 (Bankr. N.D. Ohio).

30. 11 U.S.C. § 507(a)(3) states:

(a) The following expenses and claims have priority in the following order:

...

(3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance, and sick leave pay —

(A) earned by an individual within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only
(B) to the extent of \$2,000 for each such individual.

Id.

In our experience this language has been understood to include bills for medical services provided within 90 days of the bankruptcy, if the employee was employed within 90 days of the bankruptcy.

The position that employee medical benefits must continue to be paid by a debtor in possession unless and until the collective bargaining agreement that mandates the payments is rejected, pursuant to 11 U.S.C. § 1113, is supported by *In re Unimet Corporation*, 842 F.2d 879 (6th Cir. 1988), and *In re Canton Castings, Inc.*, 103 Bankr. 874 (Bankr. N.D. Ohio 1989).

31. Tee Nee Trailer Company closed in August 1990 and any assets will be liquidated.

Republic Hose Manufacturing Corporation was Youngstown's first employee-owned company. In the 1970s the Albert Street plant (then known as Republic Rubber) was operated by Aeroquip, in turn a subsidiary of the Libby-Owens-Ford conglomerate. The plant made rubber hoses. In August 1978, the parent conglomerate shut it down.

A joint committee of former managers and hourly employees asked Aeroquip whether it would sell the plant to them. Aeroquip said yes, gave the committee an option to buy, and set a price of \$2 million. Six former supervisors invested \$100,000 each in the new company. A local bank loaned \$1,350,000, guaranteed by the United States Department of Commerce. HUD and the Small Business Administration provided another \$1,250,000 outright. Thus the enterprise had \$600,000 available for working capital in addition to the purchase price of the plant.³²

Despite this hopeful beginning, the new company lasted only a few years. There had been two other corporate buy-outs and Republic Hose had become a wholly owned subsidiary of a multinational corporation with numerous other subsidiaries in the United States.

On March 2, 1990, Republic Hose filed for bankruptcy under Chapter 7.³³ A few days earlier, the company put \$30,000 into the fund from which self-insured medical benefits were paid, and told the administrator of the fund to pay medical benefits for as long as the money lasted. This, however, was not to be. The trustee in bankruptcy ordered the administrator not to pay any unpaid medical benefits, and he secured an order from the court to remove the money from the medical benefits account so that it could be available for any debts of the estate according to the Bankruptcy Code priorities.

One retiree had approximately \$8,900 in medical bills on which payment had been delayed because of errors in the billing. Now all of these unpaid bills became his responsibility.

32. See S. LYND, *THE FIGHT AGAINST SHUTDOWNS: YOUNGSTOWN'S STEEL MILL CLOSINGS 1977-1980*, at 214-15 (1982).

33. *In re East Central Corporation AKA: FKA, Republic Hose Corporation*, Case No. 490-00300 (Bankr. N.D. Ohio 1990).

Many retirees or their wives had pre-existing conditions such as cancer, heart problems, diabetes, and high blood pressure. Many had also been found to have asbestos in their lungs because of their exposure while working for the company. These conditions either made them uninsurable or caused new insurance to cost them much more than their total pensions from Aeroquip, which ranged (among our clients) from \$133 to \$303 a month. (They had received only a lump sum distribution from a defined contribution plan when they retired from Republic Hose). Some were on Social Security and had Medicare, but in many cases, their wives were younger and were not yet eligible for Medicare.

Since this was a Chapter 7 bankruptcy, Republic Hose retirees were not protected by U.S.C. § 1114. COBRA has special provisions for retirees who lose group health coverage within one year of the commencement of a bankruptcy proceeding.³⁴ COBRA coverage for retirees is not cut off by Medicare entitlement³⁵ but continues until the death of the retiree and for three years after the death of the retiree for the widow,³⁶ but only so long as the "employer" offers a group health plan to at least one employee.³⁷ The "employer," however, is any member of the group of corporations under common control.³⁸

The rubber workers union was not prepared to undertake any action on behalf of retirees, but its research department provided a list of other subsidiaries of the Republic Hose parent. We sought the assistance of the trustee in bankruptcy to locate one of the subsidiaries that was offering group coverage so that COBRA coverage could attach to it. After several months, the trustee said nothing could be done through him or through the bankruptcy court and he left it to us to pursue the parent corporation.

34. 29 U.S.C. §§ 1163(6), 1167(3)(C).

35. 29 U.S.C. § 1162(2)(D)(ii).

36. 29 U.S.C. § 1162(2)(A)(iii).

37. 29 U.S.C. § 1162(2)(B).

38. 29 U.S.C. § 1167(4); 26 U.S.C. §§ 414(b), (t). All employees of all corporations which are members of a controlled group of corporations shall be treated as employed by a single employer. 26 U.S.C. § 414(b).

Counsel for Republic Hose eventually reported that none of the administrators of plans maintained by the parent or sister corporations would be willing to add retirees to their group. At this writing, potential penalties for failure to provide COBRA notice,³⁹ and for failure to comply with COBRA,⁴⁰ may give some leverage to retirees in seeking to settle their claims in bankruptcy court⁴¹ or in litigation against parties who are not in bankruptcy.

One of the Republic Hose retirees wrote the following letter to Senator Metzenbaum and Congressman James Traficant of Ohio:

Sir,

I am writing in regards to what took place at Republic Hose manufacturing of Youngstown, Ohio, division of Goodall Rubber. Both owned by Trel[l]eborg of Sweden.

I am one of the employees of Republic Hose that was involved in the closing of that plant. I keep asking questions of different people, in the know, and cannot get any answers that are satisfactory to myself and other employees that were involved.

I don't know if you are familiar with the circumstances so if I can let me try to fill you in. First of all in my case I had 42 years seniority at that location and they were acknowledged in the contract that was negotiated with that Co. They (the Co.) chose to close the plant with bankrupt procedures. (Chapter 7 I understand.) I am told we have no benefits because of the bankrupt procedures. The Contract we are talking about is not expired until April of 1991, and it states that I am entitled to Hospitalization for the rest of my life for services rendered. I gave up increased wages etc. to gain this benefit and am under the impression that the funds for this would be set aside for this purpose. They did not live up to their part of the contract. Consequently I have no hospitalization and cannot even buy any. I should not have to even look for any for me and my wife. This also lets them and the Insurance companies off the hook. They would be compelled to take care of Hospitalization for us now. They [k]new Insurance Co's do not have to accept us even if we were willing to and could pay because of our pre-existing conditions. We were lied to and Stole from. They are nothing but crooks and should be made to make restitution for what they have done. If we had violated the contract before the expiration date, would we not be made

39. Under the civil enforcement provisions of ERISA, § 502(c)(1)(A), 29 U.S.C. § 1132(c)(1)(A) provides that an administrator who fails to meet the requirements of ERISA § 606(4), 29 U.S.C. § 1166(4) may be liable for up to \$200 a day and such other relief as the court deems proper.

40. The Internal Revenue Service can impose a tax of \$200 a day where there has been a failure to satisfy continuation coverage of group health plans and where more than one qualified beneficiary is affected by the same qualifying event. 26 U.S.C. § 4980B(b)(1) and (c)(3)(B) (1990).

41. Proofs of claim included contingent claims for \$2,500 in life insurance, and unliquidated claims for future medical costs, as well as COBRA penalties.

to atone for our actions? I think this is enough to go after them or take whatever action needed to restore these benefits.

Being a representative of the people, for people, is there some way I might help you in making this right or some way for everybody involved in these kinds of situations? Please let me know & acknowledge this letter.

Thank you for putting up with my scribbling.

Sincerely!

Frank A. Maizel

D. Medical Benefits IV: GF

There are not many “golden parachutes” in Youngstown, Ohio. Rank-and-file workers find that their parachutes do not open. Section 1114 of the Bankruptcy Code, for instance, enacted in 1988 so that a company could not seek reorganization under the Bankruptcy Code and at the same time simply stop paying medical benefits, proved its ineffectiveness in Youngstown in 1990 with the bankruptcy of “GF” (formerly General Fireproofing).

GF makes metal office furniture. Founded in Youngstown early in the 20th century, GF was perhaps the leading example of a company locally created, controlled, and managed. At its peak GF employed several thousand workers.

In the spring of 1976, GF management announced the building of a new plant across the valley from its existing facility. Local dignitaries were shown in the YOUNGSTOWN VINDICATOR turning over a symbolic first spadeful of earth.

Soon after, upon the expiration of their collective bargaining agreement, GF production and maintenance workers organized in Local 1617, USWA, went on strike. The strike lasted through the summer. Within a week after its eventual settlement, the company cancelled its plans for new construction in Youngstown and announced that it would transfer one of its major production lines to a plant in Tennessee.

This was the beginning of the end. An unsuccessful law suit sought to compel the company to make good on its promise to build a new plant. An unsuccessful shareholders’ campaign tried to retain local control over the corporation. The 300 remaining workers were

invited to sign a Shutdown Agreement by April 15, 1990, choosing between a layoff option that included medical benefits, and a severance option with a lump sum payout. Three days later, on April 18, 1990, GF filed for bankruptcy protection under Chapter 11.⁴²

When GF declared itself bankrupt, Delores Hrycyk, first chairperson of Solidarity USA, called local radio talk shows to tell GF retirees not to worry. The "Metzenbaum amendment" to the Bankruptcy Code, 11 U.S.C. § 1114, was passed with just this kind of situation in mind, she assured them. She was wrong. This is what occurred:

1. Whereas LTV had millions of dollars of annual income at the time it declared bankruptcy, GF claimed to have run out of money as of April 18, and to be wholly unable to pay any retiree benefits. (Both companies were self-insured). Whereas LTV had merely directed its insurance administrators to stop payment on claims at the time the company declared bankruptcy, GF terminated its insurance programs. It did so, moreover, without seeking Bankruptcy Court approval as required by the express terms of Section 1114.⁴³

2. As a result, more than 1000 hourly and salaried retirees were abruptly deprived of basic hospitalization insurance, major medical insurance, and life insurance, and faced with the prospect of paying an estimated \$1.6 million for medical services rendered before the bankruptcy, and between the bankruptcy filing and June 1.

3. The Bankruptcy Court judge permitted GF in its capacity as debtor-in-possession to borrow \$5 million in direct conflict with the legislative history of Section 1114.⁴⁴ The lender made it a condition

42. *In re GF Corporation*, 115 Bankr. 579 (Bankr. N.D. Ohio 1990).

43. 11 U.S.C. § 1114(e)(1)(A-B) directs a debtor in possession to timely pay and not modify retiree benefits unless and until an modification is approved by the Court or agreed to by an authorized representative of retirees.

44. Judge Bodoh relied on *In re Jones & Lamson Machine Co., Inc.*, 102 Bankr. 12 (Bankr. D. Conn. 1989), holding that use of a secured creditor's collateral to pay retiree benefits would raise constitutional questions and "defeat the public policy of promoting the rehabilitation of financially distressed companies." *Id.* at 16. However, the position of the court both in *Jones & Lamson* and *GF* overlooked the fact that during the drafting of 11 U.S.C. § 1114, Congressman Rodino proposed a substitute for Senator Metzenbaum's bill which directed a Chapter 11 debtor to pay retiree medical benefits "only to the extent such benefits can be paid without impairing any secured claim in such case." H.R. 2969, 100th Cong., 2d Sess. § 12(a)(2) (1987). This language was dropped from the bill as enacted and must be assumed not to have been intended by Congress.

of the loan that the money could be used only to get production "up and running" in Gallatin, Tennessee and Chicago, Illinois, not to pay benefits to Youngstown retirees.

4. Judge Bodoh likewise allowed GF's assets to be sold to an out-of-town purchaser, although the buyer assumed no liability for the fringe benefits of laid-off employees or retirees, and all proceeds from the sale were used to pay secured creditors.

5. During the period between GF's declaration of bankruptcy on April 18 and the sale of its assets on June 11, the company had current salaried employees covered by group medical insurance and, as a result, an obligation to give notice of available COBRA coverage to former hourly employees and retirees whose medical insurance had been terminated. The company ignored this obligation. When GF's assets were sold, GF terminated its few remaining salaried employees. As a result there appears to be no existing group medical insurance plan to which COBRA coverage can attach. Former employees and retirees must try to get individual insurance coverage from companies that do not cover preexisting conditions and charge hundreds of dollars a month for what coverage they are willing to provide. Some are uninsurable at any reasonable price.

6. Retirees induced Senator Metzenbaum to file a vigorous *amicus* statement in which he argued that it would make a "mockery" of Congress to permit GF to cut off retiree benefits unilaterally.⁴⁵ Three days later — and six weeks after GF sought Chapter 11 pro-

45. The Amicus Curiae Statement of United States Senator Howard M. Metzenbaum of Ohio, filed June 4, 1990, said in part:

The 1986 bankruptcy filing of the LTV Company brought home to all members of Congress the dire need to give priority treatment to retirees during the pendency of a reorganization under the Bankruptcy Code . . . Congress explicitly amended the Bankruptcy Code to prevent unilateral termination of benefits from ever occurring again.

. . . Congress recognized that retirees are uniquely vulnerable when compared to other creditors under bankruptcy law. Therefore, Congress determined that during the reorganization process retiree claims should be given priority as administrative claims. Particularly because retiree health benefits are provided at a considerably lower cost on a group basis, it is crucial that the group nature of the benefits be preserved . . .

Until such time as the bankruptcy court judge, after a hearing, determines that a company's retiree benefit obligations need to be modified, retiree benefits must continue to be paid. This requirement is not discretionary . . . To hold otherwise, in my view, would risk making a mockery of Congress' intent to protect retiree benefits.

tection — the Bankruptcy Court finally ordered GF “promptly” to pay retiree benefits from any unencumbered funds that it had or might in the future obtain.⁴⁶

7. GF continued not to pay benefits. When individual retirees filed a motion seeking to enforce the Court’s order, pursuant to 11 U.S.C. § 1109(b), the Court found that they had no standing and threatened their counsel with sanctions under FRCP 11.⁴⁷

8. Counsel for the committee of unsecured creditors filed a motion to convert the case from Chapter 11 to Chapter 7. Authorized counsel for the former hourly employees and hourly retirees and for the salaried retirees thereupon negotiated a so-called compromise with counsel for the debtor and for the unsecured creditors, pursuant to which (a) claims for unpaid medical and life insurance benefits would be cut off as of July 31, 1990, (b) \$100,000 would be set aside for the payment of these claims with the possibility of additional payment in the future,⁴⁸ (c) no provision was made for ongoing group medical insurance or ongoing group life insurance. After a stormy hearing,⁴⁹ the Court vacated its previous order directing

46. *In re GF Corp.*, 115 Bankr. 579 (Bankr. N.D. Ohio 1990).

47. 11 U.S.C. § 1109(b) provides in its entirety:

(b) A party in interest, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a *creditor*, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

Id. (emphasis added). In reliance on this language, fifteen hourly and salaried retirees and a surviving spouse filed an appearance, and thereafter, a motion for implementation of the Court’s order directing the payment of retiree benefits. The Court dismissed the motion, stating *inter alia* that the individual movants “are already represented in these proceedings” by the USWA and by counsel chosen by a committee of salaried retirees appointed by the Court. The decision added that had the Court “reached a hearing on the merits of counsel’s motion, these issues would have been addressed as possible violations of Rule 11 of the Federal Rules of Civil Procedure.” *In re GF Corp.*, 115 Bankr. at 2-3.

48. There are individual retirees who owe almost \$100,000 in unpaid medical bills. One such person owes about \$84,000 for his wife’s terminal illness. She went to the hospital in December 1989, and died in January 1990, while he was still employed by GF. He retired in March and at the time GF filed for bankruptcy protection in April the bills had not been paid.

49. The transcript of the September 26, 1990 hearing states in part:

[MR. LYND]: . . . And if, as I am afraid I suspect to be the case, the proposal is to use the bulk of that one hundred and fifty thousand dollars (\$150,000.00) for attorney’s fees

[COUNSEL FOR GF]: Your Honor, I’m going to object to this rhetoric, because there has been nothing before this court

(BACKGROUND DISCUSSION)

prompt payment of retiree benefits and approved the so-called compromise.⁵⁰

9. Two hundred thirty former employees and retirees are appealing.⁵¹

BY THE COURT: If you don't shut up, I will clear the courtroom. Now I — the purpose of this is not to convince you folks. It is to convince me
Transcript at 33, in re GF Corporation, 115 Bankr. 579.

50. The crux of the Court's rationale is set forth in the following words:

Conversion to Chapter 7 upon the motion of the Unsecured Creditors' Committee is not automatic. However, it is clear that the growing amount of super-priority retiree claims, without the compromise, would constitute grounds to convert. Specifically, these claims create a "continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation" U.S.C. § 1112(b)(1).

Decision, Oct. 11, 1990, at 7.

51. The issues on appeal are the following:

1. Did the Bankruptcy Court err in vacating its directive of June 7, 1990, that the Debtor in Possession "shall promptly pay retiree benefits from any unencumbered funds now in its possession or which it may obtain during the pendency of this Chapter 11 case" pursuant to 11 U.S.C. § 1114(e)?

2. Did the Bankruptcy Court err in approving the allocation to payment of retiree benefits of only \$100,000 of the initial \$250,000 in unencumbered funds received by the Debtor in Possession, and in failing to require the Debtor in Possession promptly to pay retiree benefits from the unencumbered funds to be received from the sale of the DIP's Youngstown property approved by the Court on September 26, 1990?

3. Did the Bankruptcy Court err in denying individual retiree creditors standing to "raise and . . . appear and be heard on any issue in a case under this chapter" pursuant to 11 U.S.C. § 1109(b), where individual retiree creditors repeatedly sought to raise issues through their chosen counsel?

4. Did the Bankruptcy Court err in approving a so-called compromise regarding retiree and employee benefits that does not provide any opportunity for continued group medical coverage pursuant to 11 U.S.C. § 1114 and 29 U.S.C. §§ 1161-1168 (COBRA).

5. Did the Bankruptcy Court err in approving a so-called compromise regarding retiree and employee benefits that does not provide any opportunity for continued life insurance pursuant to 11 U.S.C. § 1114?

6. Did the Bankruptcy Court err in deciding the merits of a motion to convert this Chapter 11 case to Chapter 7 without providing an opportunity for objection, without holding an evidentiary hearing, and without making findings of fact as required by FRCP 52(a)?

7. Did the Bankruptcy Court err in finding that priority payment of retiree benefits creates a "continuing loss to or diminution of the estate" for purposes of 11 U.S.C. § 1112(b)(1), where priority payment of retiree benefits was the express intent of the Congress of the United States in enacting 11 U.S.C. § 1114?

8. Where not one penny had been paid in retiree benefits as of the date of the Court's Order, where the estate could reasonably anticipate more than \$2 million in income during the next nine months sufficient to pay in full the estimated retiree and employee claims through July 31, 1990, and where the sale agreement with C. P. Ten provided for another \$5 million in income to the estate by 1995, did the Bankruptcy Court err in finding that there was a continuing loss to or diminution of the estate and absence of a reasonable

10. Rule 11 proceedings against one of the authors are pending.

The human meaning of these happenings in Bleak House, USA may perhaps be suggested by the following, one of many affidavits filed with the Court in order to attempt to enforce Section 1114.

ARLENE M. GRANLEE, being first duly sworn, states:

I am the surviving spouse of William L. Granlee . . . an employee of GF Furniture Systems, Inc.

For the last two years, since the death of my husband, I have been sending my monthly contribution to GF for my basic hospital and major medical insurance coverage.

I do not have enough oxygen in my arteries and it causes me shortness of breath.

Dr. Alan Cropp has prescribed that I be on oxygen, two (2) liters, twenty (20) hours per day.

The cost of the oxygen I have been using is \$125.00 per month for the tank and over \$91.00 per week for the oxygen.

The Prudential was paying 80% of the cost as a major expense.

. . . I was advised by Sue Ensley, head of employee benefits at GF Corporation headquarters, that no medical benefits will be paid as of the filing of the bankruptcy petition on April 18, 1990.

Sue Ensley advised me to get other medical insurance.

I have repeatedly phoned Blue Cross Blue Shield of Ohio. They will not permit me to convert my coverage to an individual policy⁵²

Or by this one:

HELEN M. DEMARCO, having been duly sworn, states as follows:

. . . My husband, Frederick R. DeMarco, worked at GF for more than thirty-two (32) years as an hourly employee. He retired more than five (5) years ago.

As an hourly retiree my husband had hospitalization coverage with Blue Cross Blue Shield and major medical coverage with Prudential.

In April 1990 I was diagnosed as having cancer of the uterus.

On May 10, 1990, the uterus was surgically removed at St. Elizabeth's Hospital.

. . . I have no idea how the bill for this surgery will be paid.

Before the surgery, I telephoned Blue Cross Blue Shield in Cleveland about

likelihood of rehabilitation" for purposes of 11 U.S.C. § 1112(b)(1)?

Appellants' Designation of (A) Items to be Included in the Record on Appeal, and (B) Issues to be Presented, Oct. 29, 1990.

52. Affidavit of Arlene M. Granlee, Apr. 26, 1990, attachment to Motion for an Order Requiring Debtors to Comply with their Obligations under 11 U.S.C. § 1114, filed May 2, 1990.

medical insurance coverage for the future.

Blue Cross Blue Shield told me:

- a. There would be a waiting period of at least six (6) months;
- b. The cost for myself only would be \$216 a month;
- c. Since I am sixty-three (63) years old I am not yet eligible for Medicare;
- d. The deductible would be \$2500 and the insurance would pay only 80 percent of the cost beyond that;
- e. The insurance would not cover pre-existing conditions, such as any recurrence of the cancer.

After returning from the hospital, I received a telephone call from an agent for another insurance company. He wanted to make an appointment for May 16 to discuss hospitalization insurance. When I told him I was not yet up to it because I just had surgery, he asked what kind of surgery it was. When I told him about the diagnosis he told me, "Forget it. No insurance company will touch you for ten years."

Our total income is \$176 a month in pension, \$318 a month in my Social Security, and \$806 a month in my husband's Social Security, for a total of \$1300 a month [I]f I could still get Blue Cross Blue Shield coverage for \$216 a month that would be 17 percent of our income.⁵³

The lessons of experience at LTV, Tee Nee Trailer, Republic Hose, and GF seem fairly clear.⁵⁴ United States corporations do not create trust funds for payment of promised medical benefits,⁵⁵ as they do in the case of pensions. Instead they undertake to pay medical benefits on a pay-as-you-go basis out of current cash flow. Again, there are no government guarantees for medical benefits as the PBGC provides for basic pensions. The consequence of these institutional arrangements is that when a corporation goes bankrupt, closes a plant, or is merged into a company that has other plans, the payment of medical benefits is likely to be curtailed or terminated and society

53. Affidavit of Helen M. DeMarco, May 17, 1990, attachment to Objection of Salaried Retiree Creditors to Motion to Sell, Transfer, Assume and Assign Property, filed May 17, 1990.

54. Again we wish to emphasize that these particular companies are not unique, even in our area. Valley-Vulcan Mold, a corporation with plants in Hubbard, Ohio and Latrobe, Pennsylvania, filed for bankruptcy protection in fall 1990. In the preceding weeks, some employees received successive notices representing, first, that the company would pay medical benefits through September 30, 1990; second, that the company would pay medical benefits through Labor Day, 1990; and finally, that medical coverage was cancelled as of August 1, 1990.

55. A remedy now being advocated is that companies be required to put into a trust fund, or at least to show as liabilities in their financial statements, the estimated amount necessary to fulfill promises of retiree benefits at the time the employers are earning those future benefits. Freudenheim, *New Rule on Benefits Approved*, *The New York Times*, Oct. 18, 1990, at C1. But international competition is leading not just to the closure of particular plants. Entire industries are going out of business in the United States. It makes no sense to tie medical and pension benefits to the profitability of one corporation or even one industry.

has no fallback plan in place to prevent irreparable harm. These problems are too big for collective bargaining to resolve.

III. PENSION BENEFITS

A. *Pension Benefits I: LTV*

Collectively-bargained pensions are inadequate because the typical private pension plan does not provide for cost-of-living adjustments.⁵⁶ Therefore, it is, in reality, a decreasing income stream, not a "fixed income." Moreover, absent supplemental arrangements in particular industries, the need for pensions is assumed to begin at age 65 (or 62) because it is assumed that any able-bodied, red-blooded resident of the United States under the age of 65 who really wants a job, can find one.

Congress sought to deal with some pension problems when it passed the Employee Retirement Income Security Act (ERISA) in 1974. Title IV of ERISA created the PBGC to protect the basic pensions of plan participants when a pension plan is terminated. Reflecting the implicit assumption of both private and public social policy that jobs are available for those not yet at retirement age, ERISA does not insure the supplemental benefits that have been obtained through collective bargaining. Such supplements are a significant source of income for early retirees, including approximately 8,000 early retirees from LTV. The supplements are paid to workers when the department or plant in which they are working is shut down. Typically, the supplement is \$400 a month from retirement until age 62, at which time the retiree qualifies for reduced Social Security retirement benefits.⁵⁷

56. Only one in four private pension plans provides annual increases to offset inflation. Partly for this reason, only 7 percent of people receiving private pensions receive at least half their income from this source. Uchitelle, *Company-Financed Pensions Are Failing to Fulfill Promise*, The New York Times, May 29, 1990, at A1.

57. When plants are shut down and workers in their fifties are retired, they are also deprived of ten to fifteen years of earnings at higher levels than they can hope to earn on other jobs. Their basic pensions are small without those additional years at the upper end of the wage scale. Their wage base for calculating Social Security benefits is also lower. Many early retirees have to take reduced Social Security benefits when they go off the pension supplement at age 62; thus, their Social Security benefits will be less for life than if they had worked until normal retirement age.

LTV illustrates the inadequacy of existing pension arrangements. As of February 1990 there were 13,800 active LTV workers and 46,000 — almost three times as many — hourly retirees.⁵⁸ The ratio explains why LTV declared bankruptcy and why, notwithstanding ERISA and the guarantee program of the PBGC, there is a pension crisis as well as a crisis in medical benefits. Current workers cannot generate the income necessary to pay the benefits of a much larger number of retirees.⁵⁹ Also, if more companies thus situated terminate their pension plans, the PBGC itself would go bankrupt, or so it fears.

The pension dimension of the LTV bankruptcy that was (for the moment) resolved by the Supreme Court in *PBGC v. LTV Corp.* arose, first, from LTV's failure to fund its pension plans sufficiently to pay even the basic deferred pensions that fall due at normal retirement age, and second, from LTV's initial refusal to continue to pay pension supplements to early retirees after its pension plans were terminated. As Justice Blackmun explained:

[When LTV filed for reorganization in July 1986 it was the sponsor of several defined benefit pension plans.] Chronically underfunded, the Plans, by late 1986, had unfunded liabilities for promised benefits of almost \$2.3 billion. Approximately \$2.1 billion of this amount was covered by PBGC insurance.

It is undisputed that one of LTV Corp's principal goals in filing the Chapter 11 petitions was the restructuring of LTV Steel's pension obligations, a goal which could be accomplished if the plans were terminated and responsibility for the unfunded liabilities was placed on the PBGC. LTV Steel then could negotiate with its employees for new pension arrangements. LTV, however, could not voluntarily terminate the Plans because two of them had been negotiated in collective bargaining. LTV therefore sought to have the PBGC terminate the Plans With LTV's consent, the Plans were terminated effective January 13, 1987.

Because the Plans' participants lost some benefits as a result of the termination, the Steelworkers filed an adversary action against LTV in the Bankruptcy Court, challenging the termination and seeking an order directing LTV to make up the lost benefits. This action was settled, with LTV and the Steelworkers negotiating an interim collective-bargaining agreement that included new pension

58. These were the estimates of counsel for the USWA in proceedings before the Bankruptcy Court in *In re Chateaugay Corporation*, 112 Bankr. 526 (Bankr. S.D. N.Y. 1990).

59. 29 U.S.C. § 1341(c)(2)(B)(iii)(II) provides that termination of a pension plan shall be permitted when "the costs of providing pension coverage have become unreasonably burdensome . . . solely as a result of a decline of such person's workforce"

arrangements intended to make up benefits that plan participants lost as a result of the termination⁶⁰

The "lost benefits" referred to by Justice Blackmun are the \$400 a month supplementary payments to about 8,000 early retirees, described above. The negotiations to which the opinion refers, resulted in payments of approximately 90 percent of the supplement, or \$360 a month, from which FICA and state income taxes were, for the first time, deducted. The FICA tax alone amounted to \$27.04 a month. In reality, the typical early retiree received \$360, less at least \$27.04 or \$332.96, a month. This was 83 percent of what had been received before. The Supreme Court characterized this outcome as placing retirees in "substantially the same positions they would have occupied had the old Plans never been terminated."⁶¹ Retirees living on meager pensions and pension supplements did not view the loss of more than \$800 a year (12 times \$67.04) as insubstantial.

PBGC opposed the negotiated "follow-on" plan, and also concluded that LTV had fared much better financially than PBGC had forecast. For both these reasons PBGC determined to restore the terminated pension plans to LTV, pursuant to a power conveyed by Section 4047 of ERISA,⁶² but never before used. LTV refused to comply, and the resulting dispute brought the issue to the Supreme Court.

The Supreme Court held that PBGC's decision to restore the terminated plans to LTV was not arbitrary and capricious, was not contrary to Congressional intent, and was based on a permissible interpretation of the statute. In particular, as earlier emphasized, the Court accepted PBGC's rationale that a policy prohibiting negotiated follow-on plans would cause employees to "object more strenuously to a company's original decision to terminate a plan" and to offer significant "employee resistance" to a pension plan's termination. The lower courts were instructed to institute "further proceedings consistent with this opinion," to see to it that PBGC's decision to restore the terminated plans to LTV was carried out.

60. 110 S. Ct. 2668, 2672-73.

61. *Id.* at 2673.

62. 29 U.S.C. § 1347.

The Court's decision is an apparent victory for retirees, at least in the short run.⁶³ If and when the Supreme Court's decision is implemented,⁶⁴ LTV retirees will, for the first time since July 1986, be entitled to 100 percent of the medical and pension benefits they were promised when they retired. Since this has been the goal of Solidarity USA since its formation, the organization and its members applauded the outcome of the Supreme Court case.

In the long run, however, the picture is much less clear. The decision in *PBGC v. LTV Corp.* masks rather than resolves the following contradictions:

1. ERISA sanctions pension plan termination when the PBGC determines that a plan "will be unable to pay benefits [to participants] when due" or that "the possible long-run loss [to the PBGC] with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated."⁶⁵

What happens when the objective of paying benefits to participants conflicts with the objective of not increasing PBGC's loss? This dilemma presented itself in regard to LTV when, late in 1986, PBGC anticipated that LTV would shut down several plants the next year. In the words of the Supreme Court:⁶⁶

63. But if LTV applies for distress termination in the future, and the application is approved, early retirees will lose their supplements completely and there will not be any "follow-on" plan to replace benefits lost by plan termination.

64. As of late October 1990, more than four months after the Supreme Court's decision, the Court of Appeals for the Second Circuit had remanded the case to the District Court, and the District Court had not yet ordered restoration of the plans. Early retirees still receive only a percentage of their supplements and FICA tax is still deducted. LTV is arguing that there has been a change of circumstances (lack of funds in one of the pension plans) such that the Supreme Court decision should not be enforced. Furthermore, in a complaint against the Department of Labor, LTV is seeking a declaratory judgment that would require LTV not to make any contributions to the underfunded pension plans except as part of a reorganization plan. *LTV Corporation v. Department of Labor*, Adversary No. 90-Civ-6305A, Civil Action No. 90-Civ-6048.

65. U.S.C. § 1342(a)(2) and (a)(4). This ambiguity in PBGC's rationale for pension plan termination echoes the ambiguity in PBGC's overall purposes as set forth in 29 U.S.C. § 1302(a):

- (1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,
- (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this title applies, and
- (3) to maintain premiums established by the corporation under section 4006 at the lowest level consistent with carrying out its obligations under this title.

These shutdowns, if they occurred before the plans were terminated, would have required the payment of significant "shutdown benefits." The PBGC estimated that such benefits could increase the Plans' liabilities by as much as \$300 million to \$700 million, of which up to \$500 million was covered by PBGC insurance.

Thus, if the plans were not terminated, retirees would predictably receive shutdown benefits that they would *not* receive if PBGC moved promptly to terminate the plans. Faced with the choice between an option that would maximize payouts to plan beneficiaries and an option that would most protect its own funds, the agency "determined that the Plans should be terminated in order to protect the insurance program from the unreasonable risk of large losses, and commenced termination proceedings"⁶⁷

2. The Court tells employees to object strenuously and to resist when corporations threaten to terminate pension plans. But what exactly are employees and retirees supposed to do if, for example, LTV once again does not fund or seeks to terminate its plans?⁶⁸ The first termination, in January 1987, was effectuated by secret proceedings in the District Court without notice to employees, retirees, or the United Steelworkers of America. There is no reason to suppose that PBGC would provide any more ample notice next time since ERISA apparently does not require it for involuntary terminations.

Or if notice is provided, what are the means of struggle with which workers and former workers can intervene? The problem may be compared to the analogous plant closing process. In Youngstown, it was traumatic when workers at Youngstown Sheet & Tube's Campbell Works, received only a week's notice of the mill's shutdown in September 1977. However, workers at Jones & Laughlin's Brier Hill Works were only marginally better off when, in December 1978, they learned that their workplace would be closed in about a year. Of course, with more time to prepare, individual workers were better able to cope with loss of income and benefits, and to rebuild their lives. But for the workers as a whole, and for the

67. *Id.*

68. If the plans are restored to LTV and LTV does not put funds into the plans, it will only be a matter of time before the plans will be unable to pay benefits when due, triggering another involuntary termination by PBGC.

community of the Mahoning Valley, there was little more that one could do to protest with only a year's notice than had been possible at the Campbell Works in a week.⁶⁹ With or without notice, how can employees and retirees of a company in bankruptcy force the company to fund its plans?⁷⁰

So long as the law gives the authority to close plants or terminate pension plans to corporations, as an aspect of their managerial prerogative and as a kind of decision at the "core of entrepreneurial control,"⁷¹ it is a cruel joke solemnly to advise workers to object strenuously and to resist.

B. Pension Benefits II: Wean United

The Wean United struggle shows how hard it is for workers and retirees effectively to wage the strenuous objection and resistance with which, according to *PBGC v. LTV Corp.*, they should respond to the threatened termination of their pension benefits. Wean United was a company based in Youngstown that for many years made machinery for steel mills. The Wean United hourly pension plan became seriously under-funded. Wean United sought and found a buyer for some of its subsidiaries who paid no cash but assumed liability for the under-funded pension plan. United Engineering, Inc. became the new plan sponsor.

The new owner purchased these subsidiaries with the fully-formed intention of terminating the pension plan as soon as possible. This threatened over 200 early retirees with loss of their \$400 a month pension supplements. Instead of receiving a monthly check in the neighborhood of \$800 (\$400 basic pension plus \$400 pension supplement) these retirees faced a fifty percent loss of pension income in the event of plan termination.

In the LTV situation, it seemed that the retirees were always playing catch-up. This time they would act *before* the pension plant

69. See LYND, THE FIGHT AGAINST SHUTDOWNS, *supra*, Part II.

70. LTV retirees have already submitted requests pursuant to 29 U.S.C. § 1132(a)(5) and (b)(1)(B) asking the Secretary of Labor to exercise her authority to enforce minimum funding requirements.

71. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., con-

was terminated. As soon as United Engineering applied to the PBGC for permission to terminate its pension plan, a petition was circulated asking the Union to file suit on the ground that the termination would be in violation of the collective bargaining agreement.⁷² It was suggested that the filing of such a suit would stay termination proceedings. The Union filed suit on behalf of the class of retirees threatened with loss of the supplement.⁷³

The company and the Union informally agreed that pension supplements would continue to be paid. PBGC, however, advised the company that it was contrary to law for it to continue to pay the supplement after the proposed termination date.⁷⁴ The retirees sought to prevent the termination of the plan so as to protect the pension supplement, only to find that, under another provision of ERISA, the company, merely by applying for distress termination, had to stop paying the pension supplement to retirees.

We tried to keep the pension plan from being terminated for as long as possible because retroactive payments of the supplement would be required for any months between the actual cut-off of supplement payments and the actual termination date of the pension plan.

But as the money in the pension plan was running out, it became apparent that the plan would have to be terminated soon, either voluntarily by settlement of the law suit or involuntarily by the PBGC. A settlement was negotiated solely on the issue as to the date of termination of the pension plan, leaving unresolved contractual claims for payment of the supplement from company funds other than the pension fund, and without addressing the company's demand for a scaling back of medical insurance benefits. We argued for the latest possible termination date and were able to obtain retroactive payment of the supplement for nine of the fourteen months

72. U.S.C. § 1341(c) prohibits termination of a pension plan if the termination would violate a collective bargaining agreement.

73. *Humble v. United Engineering, Inc.*, Case No. C 88-4236Y (N.D. Ohio 1988).

74. Federal law provides that after applying for a pension plan termination, the pension plan administrator should pay only benefits guaranteed by the PBGC. 29 U.S.C. § 1341(c)(3)(D)(ii)(IV), (1988).

that had elapsed since payments were cut off. Members of the class who were eligible received \$3,600 with interest.

The loss of future monthly supplement payments for some of the younger retirees amounted to as much as \$50,000. There is little chance that any of them will see any part of this money.⁷⁵

It is hard to imagine what more the Wean United retirees could have done by way of strenuous objection and resistance. They demonstrated at the plant, with support from Solidarity USA. They stopped a loan from the State of Ohio to the company pending resolution of the pension supplement dispute. They tried, unsuccessfully, to have a lien placed on property sold by the company until retiree benefit obligations had been satisfied. They made trip after trip to the offices of Union lawyers in Cleveland, at one point threatening to leave settlement negotiations if the Union refused to let one of the authors attend and participate. Their efforts were dogged by the fact that the Union, which represents the remaining active workers at United Engineering, fears that the payment of retiree benefits might lead to further plant closings. The power of the company, the legal fortifications of that power, and the Union's fear of plant closings, make strenuous objection and resistance very difficult.

IV. CONCLUSION

Current suggestions for reviving the labor movement, such as running a person of integrity for president of the Teamsters Union, or building coalitions between community organizations and existing unions, miss the point. In this era of ever more intense international economic competition, the *nature* of the labor movement must change.

We suggest that working people need to rethink from the ground up what kinds of institutions can best serve their needs. In this article we have sought to document one facet of labor impotence: to show

75. Retirees who were in payment status at least three years before the effective date of plan termination may receive a small percentage of their non-guaranteed benefits through a "recovery ratio" as yet undetermined. 29 U.S.C. § 1322, 1344(a). 34

that in industries most impacted by overseas competition, collective bargaining for fringe benefits has broken down or is breaking down, and that unions in these industries are unable to enforce the pension and medical insurance promises made by employers at the bargaining table.

But this particular malaise exemplifies a more general problem. A focused examination of concessions in medical and pension benefits is particularly apt because these epitomize the larger crisis that permeates all aspects of collective bargaining. These benefits have been among the first casualties of the current concessional bargaining trend, providing a glimpse of what is to come in negotiations over other subjects of bargaining. If we can understand the crisis in medical and pension benefits, we will have an understanding of the process taking place at all levels of labor-management relations.

It may be suggested in response to this thesis that the plight of retirees is not fairly comparable to that of active union members. Collective bargaining may not be working for retirees, according to this rebuttal, but this does not mean that collective bargaining is not working for any one. Indeed, from this point of view, the breakdown in retiree representation may reflect nothing more than one unfortunate Supreme Court decision in the *Pittsburgh Plate Glass* case.⁷⁶

We disagree. It is a point well taken that in *Pittsburgh Plate Glass*, the same Supreme Court that has now called on retirees strenuously to object and to resist when their benefits are threatened, held that these benefits were not a mandatory subject of bargaining and, thereby, weakened the ability of retirees to hold union negotiators accountable.⁷⁷ But emphasis on particular decisions of the courts blurs the fundamental fact that union members have little more power to control their union representatives than do retirees.

76. *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

77. The Court states that when a union bargains for retirees, the retirees could sue for breach of contract under Section 301 of the Labor Management Relations Act if benefits were unilaterally changed. 404 U.S. at 181, n.20. But of course this means that retirees, rather than directly controlling union representatives through voting for union officers and in contract ratification votes, would have to carry the much heavier burden of showing unfair representation by the union as required in Section

Other subjects of collective bargaining should be returned to the grass roots. The single cause most responsible for the ineffectual state of the labor movement in the United States is the lack of participation by rank-and-file workers in decisions that affect their lives. Union members are told by officials who want to control all decisions to leave it to these leaders to take care of things. Union members are conditioned to expect the union to deliver a wage/benefit package in return for dues which are automatically deducted from their paychecks. In union and non-union shops alike, there is little opportunity for shop floor initiative. Concerted activity that might be protected by law in the absence of a contractual waiver is barred by the no-strike clause which was voluntarily accepted by CIO unions since their inception.

Retirees, however, are not bound by contractual no-strike agreements and have employed an imaginative mixture of direct action, lobbying, and litigation, that has not been possible for current employees in this country. Here again, other industrialized nations point the way, as in the recent flurry of nationwide strike actions coordinated from below in Poland, in the Soviet Union, and elsewhere. The world economy requires concerted action that can be started in one place, but is also free to spread nationally and internationally, across union and industry boundaries.⁸⁰

Reforms, 135 Lab. Rel. Rep. (BNA) 211-13, (1990) (BNA). On the other hand, Jerry Tucker of the New Directions movement in the UAW, points out:

The UAW has supported a national health care system for a long time. When I was working in Washington in the 70s, we had a little apparatus set up, a one or two person staff, called the Committee for National Health Insurance. Like organizing of course, we didn't put very many resources into it, not the kind that the issue deserves

The entire labor movement is guilty of paying issues like this more lip service than anything else. You have to take these to the streets sometimes.

New Directions for the UAW: An Interview with Jerry Tucker, 11 *Multinational Monitor* 33 (1990).

80. Space is lacking in this article to set forth fully the basis in history, law, and personal experience for the assessment of the labor movement presented. See A. LYND & S. LYND, *RANK AND FILE: PERSONAL HISTORIES BY WORKING-CLASS ORGANIZERS* (3d ed. 1988); A. LYND & S. LYND, *WE ARE THE UNION: THE STORY OF ED MANN* (1989); LYND, *Youngstown: Rebuilding the Labor Movement from Below*, in MIKE DAVIS, *FIRE IN THE HEARTH: THE RADICAL POLITICS OF PLACE IN AMERICA* 177 (1990); Lynd, *From Protest to Democracy: Labor-Community Ownership and Management of the Economy*, in J. BRECHER & T. COSTELLO, *BUILDING BRIDGES: THE EMERGING GRASSROOTS COALITION OF LABOR AND COMMUNITY* 259 (1990); Lynd, *The Possibility of Radicalism in the Early 1930s: The Case of Steel*, in J. GREEN, *WORKERS' STRUGGLES, PAST AND PRESENT* 190 (1983); Lynd, *Where is Teamster Rebellion Going?*, in *id.* 312; Lynd, *Thesis and Antithesis: Section 7 of the NLRA, the*

Perhaps consideration of such ideas could be indefinitely postponed, were it not for the pressure that has been exerted and will predictably be more forcefully exerted in the future, by competition from outside the United States. The labor movement does not have the luxury of continuing with business as usual, even if it could somehow induce its disillusioned membership to do so. The labor movement must be rebuilt from below, with the goal of a more equal sharing of the fruits of labor in the spirit of "an injury to one is an injury to all." In the process, workers may develop a facility for strenuous objection and resistance that will astonish the Supreme Court that recently called for such activity.

First Amendment, and Workers' Rights, in J. LOBEL, *A LESS THAN PERFECT UNION: ALTERNATIVE PERSPECTIVES ON THE U.S. CONSTITUTION* 151 (1988); Lynd, *The Right to Engage in Concerted Activity after Union Recognition*, 50 *IND. L. J.* 720 (1975); Lynd, *Investment Decisions and the Quid Pro Quo Myth*, 29 *CASE W. RES.* 396 (1979); Lynd, *Ideology and Labor Law*, review of Atleson, *Values and Assumptions in American Labor Law*, 36 *STAN. L. REV.*, (1984); Lynd, *Solidarity Unionism: Rebuilding the Labor Movement from Below* (forthcoming 1991) (available from the author).