

No. 06-2324

In the
United States Court of Appeals
For the Seventh Circuit

UNITED MINE WORKERS OF AMERICA, THOMAS
H. ADKINS, GLEN W. BARNES, et al.,
Plaintiffs-Appellants,

v.

BRUSHY CREEK COAL COMPANY and WESTERN
FUELS-ILLINOIS, INCORPORATED,
Defendants-Appellees.

**On Appeal from the United States District Court
for the Southern District of Illinois
Case No. 04-CV-4249
The Honorable J. Phil Gilbert Presiding**

BRIEF OF DEFENDANTS-APPELLEES,
BRUSHY CREEK COAL COMPANY, *et al.*

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DISCLOSURE STATEMENT

Appellate Court Number: 06-2324
Short Caption: *United Mine Workers of America, et al. v. Brushy Creek Coal Company, et al.*

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information:

- (1) The full name of every party that the attorney represents in the case:

Brushy Creek Coal Company and Western-Fuels Illinois, Inc.

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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- (3) If the party or amicus is a corporation:

- i) Identify all its parent corporations, if any; and
Brushy Creek Coal Company is a wholly-owned subsidiary of Western Fuels-Illinois, Inc. The equity of Western Fuels-Illinois, Inc. is owned by two municipally-owned electric utilities, the Kansas City, Kansas Board of Public Utilities and the Sikeston, Missouri Board of Municipal Utilities.
- ii) list any publicly held company that owns 10% or more of the party's or amicus' stock: None.

Attorney's Signature: /s/ Thomas M. Lucas Date: May 22, 2007
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- ii) list any publicly held company that owns 10% or more of the party's or amicus' stock: None.

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ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly held that Plaintiffs-Appellants failed to show their entitlement to vested medical benefits through “clear and express” welfare plan or collective bargaining agreement language?
2. Whether the district court correctly held that Brushy Creek Coal Company (“Brushy Creek”) properly terminated medical benefits to former employees who were not enrolled in the Brushy Creek medical benefits plan prior to March 8, 2004?
3. Whether Brushy Creek “clearly and unmistakably” waived its right to implement changes to the plan if discussions with the union yielded no agreement?

STATEMENT OF THE CASE

On December 7, 2004, the United Mine Workers of America (“UMWA”) and several individually named former Brushy Creek employees filed suit in the Southern District of Illinois pursuant to Section 502 of the Employment Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §1132, and Section 301 of the Labor Management Relations Act of 1947 (“LMRA”), 29 U.S.C. §185. Plaintiffs alleged that Brushy Creek unilaterally changed the Brushy Creek retirees’ medical benefits in violation of the parties’ collective bargaining agreement (“CBA”) and ERISA by unilaterally imposing changes to benefits. Defendants argued that Brushy Creek was entitled to modify the benefits due the retirees and that they violated neither their CBA with the UMWA nor any provision of ERISA.

In a Memorandum and Order dated January 18, 2006 (“Jan. 18, 2006 Order”), Judge J. Phil Gilbert entered partial summary judgment in favor of defendants and partially denied plaintiffs’ motion for summary judgment. (PA 1 – 23).¹ In a Memorandum and Order dated

¹ Pages from Plaintiffs-Appellants Appendix, will be cited as “PA ____.”

April 11, 2006 (“April 11, 2006 Order”), Judge Gilbert disposed of the remaining issue in the case by granting the remainder of Brushy Creek’s summary judgment motion and denying the remainder of plaintiffs’ motion. (PA 24 – 29). Judge Gilbert ruled that Brushy Creek was authorized by law to modify or terminate medical benefits for the Brushy Creek retirees.

STATEMENT OF THE FACTS

Brushy Creek operated the Brushy Creek Mine in Galatia, Illinois from 1991 until November 1999.² While the Mine was in operation, Brushy Creek management negotiated and signed a series of CBAs with the UMWA governing wages and conditions of employment for the Mine’s employees. Prior to 1991, Brushy Creek’s predecessor, Kenellis Energies, Inc., was a “Me-too” signatory to the National Bituminous Coal Wage Agreements (“NBCWA”) negotiated by representatives of the Bituminous Coal Operators Association (“BCOA”) and the UMWA. From 1991 to 1993, Brushy Creek adopted the pre-existing Kenellis/UMWA CBA, although Brushy Creek was *not* a member of the BCOA. However, upon the contract’s expiration in 1993, Brushy Creek negotiated its first CBA with the UMWA, and declined to be a “Me-too” signatory to the NBCWA. Instead, the parties agreed to the Brushy Creek Coal Wage Agreement of 1993. This agreement was effective from 1993 to 1995. Under the terms of this agreement, Brushy Creek created a Health Benefit Plan for covered employees completely separate and distinct from the NBCWA Plan. (PA 71–72).

Upon the expiration of the first Brushy Creek CBA in 1995, Brushy Creek and the UMWA entered into negotiations for a new CBA. As a result of these negotiations, the parties executed a Memorandum of Understanding in 1995 (“1995 MOU”), which adopted some of the provisions of the 1995 NBCWA but with substantial revisions. The 1995 MOU was effective

² Defendant Western Fuels-Illinois, Inc., is Brushy Creek’s corporate parent and has denied that it has any obligation of any kind to plaintiffs.

from 1995 to 1998. The 1995 MOU provided that the parties re-incorporated the non-NBCWA Health Benefit Plan from the 1993 Brushy Creek CBA. In 1997, the parties agreed to “reopen” the 1995 MOU because Brushy Creek needed work rule changes and financial relief from rising medical benefit costs. A 1997 MOU resulted from this 1997 reopener, reducing health care benefit costs to Brushy Creek. (PA 72–73).

When the 1995 MOU expired in 1998, the parties engaged in negotiations for a new agreement. The negotiations which followed led to the execution of the parties’ 1998 Memorandum of Understanding (“1998 MOU”). A key aspect of the negotiations concerned control of medical costs. Like the 1995 MOU, the 1998 MOU did not represent a “Me-too” adoption of the 1998 NBCWA. Instead, the 1998 MOU incorporated certain provisions of the 1998 NBCWA but with completely different fringe benefits. The 1998 MOU was effective from February 1, 1998 to January 31, 2001, more than a year shorter than the NBCWA. (PA 73). For convenience, the 1998 MOU and the portions of the 1998 NBCWA incorporated into the 1998 MOU are referred to below as the Brushy Creek CBA.

A 1998 NBCWA provision adopted by the parties into the 1998 MOU provides that medical and other non-pension benefits for miners and retirees are to be specified in an Employee Benefit Plan separately negotiated by individual employers and the union. (PA 73–74). The provision guaranteed those benefits but only while the CBA was in effect. Article XX(c)(3)(i) of the 1998 NBCWA provides:

Each signatory Employer shall establish and maintain an Employee Benefit Plan to provide, implemented through an insurance carrier(s), health and other non-pension benefits for its Employees covered by this Agreement, as well as pensioners under the 1974 Pension Plan and Trust whose last signatory classified employment was with such Employer and who are not eligible to receive benefits from a plan maintained pursuant to the Coal Act. The benefits provided by the Employer to its eligible Participants pursuant to such plan shall be guaranteed *during the term of this Agreement* by that Employer at levels set forth in such

plan. The plans established pursuant to this subsection are incorporated by reference and made a part of this Agreement, and the terms and conditions under which the health and other non-pension benefits will be provided under such plans are as to be set forth in such plans. (Emphasis added). (PA 206).

The 1998 NBCWA also included a “General Description of the Health and Retirement Benefits” specified under that national agreement. However, the “General Description” is qualified in its entirety by, and subject to the more detailed provisions contained in, the Employee Benefit Plans separately negotiated between individual mine operators and the UMWA. More specifically, the 1998 NBCWA provides that “the benefits to be provided” under the “specific provisions of the plans will govern in the event of any inconsistencies between the General Description and the Plans.” (PA 204, 215). Accordingly, Brushy Creek and the UMWA negotiated replacement provisions for Article XX in their separate 1998 MOU as follows:

Article XX(10) and (11) and XXA of the NBCWA *are amended and replaced* with medical, vision and dental coverages listed in the Schedule of Benefits attached to the Memorandum of Understanding. The Health Benefits Package (Plan) is compiled as a separate document. Each employee will receive a copy. (PA 284). (Emphasis added).

As a result, the parties’ 1998 MOU created a separate and free-standing Employee Group Health Care Plan (“Brushy Creek Plan”) negotiated by Brushy Creek and the UMWA (PA 1167–1212). Brushy Creek submitted an initial draft of the proposed Plan to the UMWA on or about April 1998, and a final Plan was agreed upon in February 1999, and made retroactive to February 1, 1998. (PA 1167–1212). This was the last agreement entered into by Brushy Creek and the UMWA. Brushy Creek was designated as the Administrator of the Plan pursuant to ERISA, 29 U.S.C. § 1002(5). (PA 1212). The final provision of the parties’ Plan, entitled “Plan Termination,” provides that “[t]he Plan Administrator may terminate, suspend, withdraw, amend or modify the Plan, in whole or in part, with respect to any class or classes of employees, subject

to the Collective Bargaining Agreement, with proper notification and subject to the terms of the Plan and any applicable laws.” (PA 1211). For convenience, this provision is referred to as the Plan Termination Provision.

Brushy Creek ceased all mining operations in December 1999. Thereafter, Brushy Creek gave the UMWA 60-day written notice of termination of the Brushy Creek CBA by letter dated March 15, 2001. (PA 91). By the terms of the parties’ 1998 MOU, all of the terms of that MOU, including the adopted provisions of the 1998 NBCWA, were terminated 60 days thereafter, on May 15, 2001. (PA 1078, DA 1 - 25).³

On March 8, 2004, with the 1998 MOU having expired, and with the Mine no longer in operation, Brushy Creek provided written notice to its retirees that, pursuant to the Plan Termination Provision, it was making certain changes to Plan benefits effective May 1, 2004. (PA 1213–1215). The Plan was revised to provide continuing health care benefits for those retirees who were enrolled in the Plan on or before the date of the March 8, 2004 Notice. (PA 1216–1277). Accordingly, Brushy Creek continued to fund medical benefits for those retirees who were then receiving coverage but under modified terms. However, Brushy Creek also notified the retirees in its March 8, 2004 notice that it would not provide benefits to retirees who were not enrolled in the Brushy Creek Plan at the time of the notice. (PA 1215–1213).

Brushy Creek below also asserted the right, under the 1998 Brushy Creek CBA and Plan, to terminate the Plan completely as to all retirees given that the Brushy Creek CBA is no longer in existence. Brushy Creek continues to assert this right, as discussed below. While Brushy Creek, as of this writing, has not terminated retiree benefits to currently enrolled retirees, the matter is under active consideration.

³ Pages from Defendants-Appellees’ Appendix, will be cited as “DA ____.”

SUMMARY OF THE ARGUMENT

The district court properly entered summary judgment on behalf of defendants-appellees. This Court has repeatedly ruled that a promise of lifetime benefits in a CBA must give way to a reservation of rights clause in that agreement or in the applicable welfare plan. *See Cherry v. Auburn Gear, Inc.*, 441 F.3d 476, 483–484 (7th Cir. 2006) and cases cited therein and discussed below. In this Court, a reservation of rights clause is one which reserves the right of the employer to modify or terminate benefits at the expiration of the collective bargaining agreement or which provides that the benefits are provided for the term of the agreement. *Id.*

This case involves a straightforward application of this law. Although the parties' CBA refers to "for life" and "until death" benefits, it also three times states that those benefits are provided only for the term of the agreement. The Plan document also specifically reserves to the Plan Administrator (in this case Brushy Creek) the right to modify or terminate benefits after expiration of the CBA. Under this Court's well-established law, therefore, Brushy Creek was within its rights in modifying its benefits package after the CBA expired.

Under ERISA, medical benefits are "welfare" benefits that do not vest absent employer agreement. *Bland v. Fiatallis North America, Inc.*, 401 F.3d 779, 783 (7th Cir. 2005). An employer's agreement to vest welfare benefits must be evidenced by "clear and express" language. *Vallone v. CNA Financial Corporation*, 375 F.3d 623, 632 (7th Cir. 2004). Moreover, a party asserting vested benefits bears a "high burden" to show the employer's agreement. *Cherry*, 441 F.3d at 481.

Plaintiffs failed to meet this burden. Their reading of the Brushy Creek Plan and CBA is strained and would require the Court to read the four reservation of rights provisions out of those documents. Their reading therefore violates elementary principles of contract law.

Plaintiffs attempt to place this case within a historical narrative they have created of the history of health care benefits in the coal industry. In plaintiffs' narrative, coal industry CBAs have always provided for guaranteed lifetime benefits, and changes made to these agreements in the 1993 and 1998 versions eliminated any issue as to the validity of this guarantee. Plaintiffs assert that these language changes were included in the Brushy Creek CBA through reference to the general industry agreement.

The problem with plaintiffs' narrative is that it is inaccurate. As the district court found, *every* one of the many cases that examined this issue prior to 1993 concluded that the industry agreements did *not* guarantee medical benefits beyond the term of the agreement. Jan. 18, 2006 Order at 14. (PA 14). These decisions were based on language in those agreements specifically limiting the benefits guarantee to the term of the agreement. Thus, contrary to plaintiffs' claim, there was never any long-standing historical guarantee of medical benefits to coal industry retirees that survived expiration of the last CBA.

The language changes to the 1993 and 1998 industry agreements to which plaintiffs refer did not accomplish the purpose plaintiffs assert. To the contrary, as the district court found, the agreements carried forward the limitation of the benefits guarantee to the term of the agreement. In the face of the continued existence of the reservation of rights provisions, the new language on which plaintiffs rely does not clearly and expressly provide a right to vested benefits.

Plaintiffs' attempt to prove a latent ambiguity in the Brushy Creek CBA through extrinsic evidence is unavailing. The evidence establishes only that Brushy Creek representatives referred to the retirees as having lifetime benefits. Such statements are perfectly accurate but do not take away from the fact that, given the reservation of rights provisions, those benefits may be modified post-contract expiration. Moreover, the statements offered are not proper extrinsic

evidence explaining latent ambiguity because they do not furnish evidence of some special meaning that the parties or the industry in which they operate ascribe to otherwise commonly understood terms.

The district court also properly found that Brushy Creek was authorized to close the Brushy Creek Plan to retirees who were not enrolled in the Plan on March 8, 2004. Consistent with ERISA, the Plan Termination Provision of the Brushy Creek Plan authorizes Brushy Creek to modify or terminate benefits and to treat different classes of beneficiaries differently. Brushy Creek was thus within its rights to modify benefits for those enrolled in the Plan prior to March 8, 2004 and to terminate benefits for those not so enrolled. Indeed, under both the Plan Termination Provision and the reservation of rights provisions in the Brushy Creek CBA, Brushy Creek could terminate benefits for all of the retirees, and may do so in the future. Moreover, the Brushy Creek CBA and Plan each require that, to be eligible for Plan benefits, retirees must be fifty-five years of age at the time they retire. Those not enrolled in the Plan prior to March 8, 2004 do not meet this criterion.

Finally, under well-established labor law principles, plaintiffs are incorrect in asserting that Brushy Creek was prohibited from modifying benefits after expiration of the Brushy Creek CBA. At most (and assuming *arguendo* that all of plaintiffs' contentions in this case are true), Brushy Creek is obligated only to bargain with the UMWA. Assuming an impasse is reached, Brushy Creek is authorized to implement benefits changes.

ARGUMENT

I. Scope of Review

A review of a district court's grant of summary judgment is *de novo*. *Cherry*, 441 F.3d at 481 (citing *Matuszak v. Torrington Co.*, 927 F.2d 320, 322 (7th Cir. 1991)); *Bland*, 401 F.3d at

782 (citing *Forseth v. Village of Sussex*, 199 F.3d 363, 368 (7th Cir. 2000)). Summary judgment is appropriate if the evidence presents no issue of material fact, so the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In making this determination, “we draw all reasonable inferences from the evidence in the light most favorable to the nonmoving party.” *Vallone*, 375 F.3d at 631 (citing *Williamson v. Ind. Univ.*, 345 F.3d 459, 462 (7th Cir. 2003)).

Contract interpretation issues lend themselves to resolution on summary judgment. *International Union of United Automobile, Aerospace and Agricultural Implement Workers of America v. Rockford Powertrain, Inc.*, 350 F.3d 698, 703 (7th Cir. 2003); *Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 305 (7th Cir. 1996). As this Court recently said in the context of a welfare benefits dispute, “[a]s this issue is essentially one of contract interpretation, it lends itself to resolution by summary judgment because while any disputed facts are settled in the nonmovant’s favor, the determination of whether a contract is ambiguous is a matter of law.” *Barnett v. Ameren Corp.*, 436 F.3d 830, 833 (7th Cir. 2006), citing *Diehl*, 102 F.3d at 305. Indeed, within the last four years, this Court has affirmed the entry of summary judgment by district courts in cases involving disputed issues of medical benefits entitlements under CBAs in four cases. *See Cherry, supra; Barnett, supra; Rockford Powertrain, supra; Vallone, supra.*

II. Plaintiffs Are Not Entitled to Lifetime Benefits Unless Those Benefits Are Clearly and Expressly Set Forth in the Brushy Creek Plan.

Because of the number of cases the Court has decided in this area over the last fifteen years, the issues raised in this case are familiar to the Court. These decisions create a set of rules that argue strongly for affirmance of the district court.

A. Under ERISA, Medical Benefits Are “Welfare Benefits” Subject to Modification or Termination by the Employer.

Welfare benefits generally may be modified by employers “for any reason at any time.” *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). Under ERISA, medical benefits, such as those at issue in this case, are “welfare” benefits that do not vest and are subject to modification by the employer unless the parties have agreed otherwise. *Bland*, 401 F.3d at 783; *Vallone*, 375 F.3d at 632. Although employers and unions may choose to enter into agreements for welfare benefits to vest, “in the absence of an agreement to the contrary, a company is not obligated to continue retiree welfare benefits after the expiration of the contract.” *Senn v. United Dominion Industries*, 951 F.2d 806, 814 (7th Cir. 1992) (citing *Hansen v. White Farm Equipment Co.*, 788 F.2d 1186 (6th Cir. 1986)).

B. Vested Benefits Must be Evidenced by “Clear and Express” Language.

According to this Court, “[t]he Supreme Court, followed by several courts of appeals, has indicated that a modification that purports to vest welfare benefits must be contained in the plan documents and *must be stated in clear and express language.*” *Vallone*, 375 F.3d at 632 (citing *Inter-Modal Rail Employees Ass’n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997) and decisions of the Fourth, Fifth, Sixth and Seventh Circuits (emphasis added)). For this reason, “an employer’s commitment to vest such benefits is not to be inferred lightly....” *Bland*, 401 F.3d at 784 (citing *UAW v. Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999)). To the contrary, “[t]he plan participant bears the burden of proving, by a preponderance of the evidence, that the employer intended the welfare benefits to be vested.” *In re Unisys Corp. Retiree Medical Ben. “ERISA” Litigation*, 58 F.3d 896, 902 (3d Cir. 1995) (citing *Howe v. Varsity Corp.*, 896 F.2d 1107 (8th Cir. 1990)).

The “default rule” in this Circuit is that “entitlements established by collective bargaining agreements do not survive their expiration or modification.” *Senn*, 951 F.2d at 814 (citing *Merk v. Jewel Cos., Inc.*, 848 F.2d 761, 763 (7th Cir. 1988), *cert. denied*, 488 U.S. 956 (1988)). This “default rule” reflects a “presumption” against the vesting of benefits. *Vallone*, 375 F.3d at 632; *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 566 (7th Cir. 1995). According to this Court, “the presumption that healthcare benefits do not exceed the life of an agreement imposes a *high burden of proof* upon the retirees.” *Cherry*, 441 F.3d at 481 (emphasis supplied).

Further, the National Labor Relations Act provides that, after expiration of a CBA, an employer may terminate or modify any retiree health benefit provided pursuant to that agreement unless the parties contracted otherwise. 29 U.S.C. § 185; *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991).

C. Reservation of Rights Clauses Supersede Lifetime Benefits Clauses.

This Court has had a number of occasions to examine the relationship between a promise of lifetime benefits in a CBA and a reservation of rights provision. It is the law of this Circuit, as confirmed in decisions in 2003, 2004, 2005 and twice in 2006, that lifetime benefits, even if explicitly promised in a CBA or plan, are subject to modification or termination if the plan or CBA reserves to the employer or the plan administrator the right to modify or terminate the plan or if the CBA specifies that benefits are provided for the term of the agreement. *Cherry*, 441 F.3d at 483-484; *Barnett*, 436 F.3d at 834; *Bland*, 401 F.3d at 786; *Vallone*, 375 F.3d at 633-34; *Rockford Powertrain*, 350 F.3d at 703-05. Indeed, this Court recently held that, even in the absence of a reservation of rights clause, a promise of lifetime benefits does not conclusively prove that the employer is barred from terminating the benefits. *Bland*, 401 F.3d at 786-87; *Vallone*, 375 F.3d at 637.

A leading case is *Rockford Powertrain*, in which the Court affirmed the lower court's entry of summary judgment allowing the employer to terminate lifetime benefits. The Court held that an explicit reservation of rights to the employer to modify or terminate benefits superseded an explicit promise in its health benefits plan that benefits would be provided for life. The Court ruled that any perceived conflict between the lifetime benefits promise and the reservation of rights must, as a matter of law, be resolved in favor of allowing the employer to modify or terminate benefits. *Id.* at 702-04. According to the Court:

We must resolve the tension between the lifetime benefits clause, and the plan termination and reservation of rights clauses, by giving meaning to all of them.... Reading the document in its entirety, the clauses explain that although the plan in its current iteration entitles retirees to health coverage for the duration of their lives, and the lives of their eligible surviving spouses, the terms of the plan – including the plan's continued existence – are subject to change at the will of [the employer].

Id. at 703 (citations omitted); *see also Cherry*, 441 F.3d at 483–84; *Vallone*, 375 F.3d at 633-34.

The Third Circuit's decision in *In re Unisys*, cited with approval by this Court in *Vallone*, 375 F.3d at 633–34, and *Rockford Powertrain*, 350 F.3d at 703-04, is equally compelling precedent. The *Vallone* decision noted that, in *Chiles v. Ceridan Corp.*, 95 F.3d 1505, 1512 n.2 (10th Cir. 1996), the Tenth Circuit decided that “the weight of case authority supports the *Unisys* approach, that a reservation of rights clause allows the employer to retroactively change the medical benefits of retired participants, even in the face of clear language promising company-paid lifetime benefits.” *Vallone*, 375 F.3d at 634.

In *In re Unisys*, the relevant plan documents plainly provided that “post-retirement medical benefits would be provided for life.” 58 F. 3d at 902. On the other hand, as in the instant case, the plan documents reserved the employer's right to modify or terminate the plan after expiration of the underlying CBA. *Id.* at 902-03. The Court sustained the District Court's

grant of summary judgment in favor of the plan administrator noting that “... an important and proper purpose of reserving a general right to amend is to permit the conditioning or cessation of any participant’s benefits, not vested by virtue of the mandate of ERISA, in ways not originally foreseen in order to meet unanticipated changes of circumstances....” 58 F.3d at 903. According to the Court:

We agree with the district court that the fact that the Sperry plans used terms such as “lifetime” and “for life” to describe the duration of retiree medical benefits, while at the same time expressly reserving the company’s right to terminate the plans under which those benefits were provided, did not render the plans “internally inconsistent” and therefore ambiguous here. An employer who promises lifetime benefits, while at the same time reserving the right to amend the plan under which those benefits were provided, has informed plan participants of the time period during which they will be eligible to receive benefits *provided* the plan continues to exist. In this case, *the Sperry retirees’ eligibility for benefits was qualified because it was subject to Unisys’ reserved right to terminate the plan under which those benefits were provided.*

Id. at 903-04 (emphasis added, citations and footnotes omitted); *see also Senn*, 951 F.2d at 816; *Murphy*, 61 F.3d at 565-67.

D. These Rules Must Be Applied Notwithstanding Possible Hardship.

This Court has repeatedly noted that these rules may create hardship. *See e.g., Vallone*, 375 F.3d at 626, 642. But the Court has also repeatedly instructed lower courts to apply these “well-established” rules notwithstanding possible hardship. *Id.* at 626. “That the retirees had worked in earlier years in expectation that they were receiving money today and health benefits later would not matter. Because of the time limit on the collective bargaining agreement, any subjective expectation they may have had is not enforceable.” *Senn*, 951 F.2d at 814 (*quoting Merk*, 848 F.2d at 763, *cert. denied*, 488 U.S. 956 (1988)).

In *Bidlack v. Wheelabrator*, 993 F.2d 603, 607-08 (7th Cir. 1993), this Court enunciated the presumption against the vesting of welfare benefits in the face of contractual silence and

required the intent to vest to be expressed in contract language. In *Rosetto v. Pabst Brewing Co., Inc.*, 217 F.3d 539, 544 (7th Cir. 2000), the Court stated that “[a]s word of the *Bidlack* presumption spreads and collective bargaining agreements are renegotiated, it will become obvious to unions that if they want to assure that employer-paid health benefits for the workers they represent are vested they will have to insist on explicit language to this effect.” *Bidlack* was decided in 1993, five years before the 1998 Brushy Creek CBA and Plan was negotiated. *Murphy*, 61 F.3d at 565, in which the Court explained that a reservation of rights clause supersedes a clause argued to create lifetime benefits, was decided in 1995, three years before the 1998 Brushy Creek CBA and Plan. The CBA and Plan, therefore, were negotiated against a legal backdrop in which the UMWA, if its goal was to achieve vested welfare benefits that would survive expiration of the CBA, had the burden of negotiating plain and specific language in its CBAs setting forth the right to such benefits. If the UMWA was unable to meet that burden, the retirees would not be entitled to benefits after the agreement expired.

III. Plaintiffs Failed to Carry Their “High Burden” of Establishing Through “Clear and Express” Language the Right to Lifetime Health Care Benefits that Survive Expiration of the Collective Bargaining Agreement.

A. The Plan and CBA Reservation of Rights Provisions Explicitly Authorize Brushy Creek to Modify or Terminate Benefits After Expiration of the Brushy Creek CBA.

Both the Plan and Brushy Creek CBA contain reservation of rights clauses authorizing Brushy Creek to modify or terminate medical benefits. There was a great deal of discussion in plaintiffs’ brief about the reservation of rights in the Plan Termination Provision of the Plan, and of the meaning therein of the phrase “subject to the Collective Bargaining Agreement” (“The Plan Administrator may terminate, suspend, withdraw, amend or modify the Plan in whole or in part, with respect to any class or classes of employees at any time, *subject to the Collective*

Bargaining Agreement, with proper notification and subject to the terms of the Plan and any applicable laws”). (PA 1212). (Emphasis supplied). Plaintiffs’ point was that the reservation of rights in this provision, being “subject to the Collective Bargaining Agreement,” is subject to the guarantee of lifetime benefits set forth in that agreement. But what plaintiffs miss is that the Brushy Creek CBA itself contains three provisions considered by this Court to be reservation of rights provisions and therefore, even just with respect to the Brushy Creek CBA itself, the promise of lifetime benefits does not survive expiration of that agreement.

Thus, the General Description language of Article XX of the 1998 NBCWA provides that “[t]he benefits and benefit levels provided by an employer under its Employer Plan are *established for the term of this Agreement only . . .*” (PA 963). Article XX(c)(3)(i) of the 1998 NBCWA provides that employers shall establish and maintain employee benefit plans, but that “[t]he benefits provided by the Employer to its eligible Participants pursuant to such plan shall be *guaranteed during the term of this Agreement* by that Employer at levels set forth in such plan.” (Emphasis added.) And Article XX(h) provides that “. . . *notwithstanding any other provision in this Agreement . . .* each signatory Employer hereby agrees to fully guarantee the health benefits provided under its own Employer [welfare] Plan described in Section (c) of this Article XX *during the term of this Agreement.*” (Emphasis added.)

As this Court recently held, provisions limiting benefits to the term of the CBA constitute reservation of rights clauses. As a result, any right to lifetime benefits ceases when the agreement expires. As the Court said:

The provision in section 1 of the CBIA, limiting benefits to the “period of this agreement,” is a reservation of rights clause. *See Barnett*, 436 F.3d at 834 (7th Cir. 2006). At the end of each CBIA, lifetime benefits ceased and Auburn Gear was free to revoke or modify benefits. *See id* at 833-34 (citing *Vallone*, 375 F.3d at 633). So long as the CBIA was in effect, benefits remained valid; when the CBIA ceased to be effective, “lifetime benefits” ceased as well.

Cherry, 441 F.3d at 484.

In sum, the three Brushy Creek CBA reservation of rights clauses and the Plan Termination Provision are in perfect harmony as to Brushy Creek's right to modify or terminate benefits after the Brushy Creek CBA expired. They are all reservation of rights provisions. Accordingly, Brushy Creek had a clear right to modify or terminate its retirees' benefits, even benefits provided for life. *See also Bland*, 401 F.3d at 786; *Vallone*, 375 F.3d at 633-34; *Rockford Powertrain*, 350 F.3d at 703-05.

B. Nothing in the Brushy Creek CBA Invalidates These Reservation of Rights Provisions.

Plaintiffs do not dispute that a reservation of rights provision supersedes a lifetime benefits provision. However, plaintiffs believe that other language in the Brushy Creek CBA clearly and expressly provides that Brushy Creek could not terminate or modify benefits when that agreement expired, or at least creates sufficient ambiguity to entitle plaintiffs to a trial. Plaintiffs' arguments are unconvincing.

1. The NBCWAs Historically Did Not Create a Right to Medical Benefits that Survived the Expiration of the NBCWA.

Plaintiffs' introduce their argument that the Brushy Creek CBA provides for vested medical benefits with a lengthy historical discussion of the NBCWAs as interpreted by numerous courts. App. B. 22-24.⁴ The discussion is intended to show that the NBCWAs have always been interpreted as providing for lifetime benefits, but as the district court found, "[t]he string citation offered in support of this proposition is as long as it is irrelevant." Jan. 18, 2006 Order at 14. (PA 14). The district court correctly found that the holding of every federal court of appeals that has addressed this issue, including all the appellate court authority cited by plaintiffs, is that

⁴ Pages from Appellants Brief will be cited as "App. B. ____."

signatories of the various iterations of the NBCWAs were *not* obligated to provide lifetime benefits to retirees once the last CBA they entered into expired. *See, e.g., In re Chateaugay Corp.*, 945 F.2d 1205 (2d Cir. 1991); *United Mine Workers of America v. Nobel*, 720 F.Supp. 1169 (W.D. Pa. 1989), *aff'd*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991); *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988); *District 17, UMWA v. Allied Corp.*, 735 F.2d 121 (4th Cir. 1984), *on reh'g en banc*, 765 F.2d 412 (4th Cir. 1985); *District 29, UMWA v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985). In reaching the conclusion that the lifetime benefit obligation under the NBCWAs did not survive expiration of the agreement, each of these courts relied on provisions of the NBCWAs limiting the employers' benefit obligation to the term of the CBA.

As the district court correctly noted, “[t]hough the benefits [construed in these cases] are ‘lifetime’ in a sense, this line of cases dispels the notion that for 50 years the NBCWAs have been construed to provide lifetime benefits after expiration of a collective bargaining agreement.” (PA 14). Indeed, even plaintiffs are forced to admit that “[i]t is true that the courts in the *Nobel* and *Royal* cases construed the NBCWAs to limit the employer’s obligation to the term of the contract” App. B. 24. *See also* discussion in *In re Chateaugay Corp.*, 945 F.2d at 1209-10.

Thus, the appellate authority and historical background cited by plaintiffs supports defendants’ position in this case, not plaintiffs’. The lifetime benefit obligation historically provided in the NBCWAs did *not* survive expiration of the CBA. General ERISA law of this Circuit is to the same effect. As shown above, a provision limiting benefits (even lifetime benefits) to the term of a CBA means just that – the benefits do not survive expiration of that agreement. *See also Murphy*, 61 F.3d at 566. In short, the legal framework within which the

1998 Brushy Creek CBA and Plan were negotiated – both in terms of the coal industry and this Court’s ERISA jurisprudence – was that lifetime benefits would not survive expiration of the CBA in the face of a provision stating that benefits were provided for the term of that agreement.

2. The 1998 Brushy Creek CBA Did Not Clearly and Expressly Provide for Vested Medical Benefits.

Plaintiffs next claim that the following provision from the General Description of Title XX of the 1998 NBCWA, as incorporated into the Brushy Creek CBA, clearly and expressly provides for vested medical benefits:

The parties expressly agree that the language references to “for life” and “until death” that are retained in this General Description are intended to mean that each Employer will provide, for life, only the benefits of its own eligible retirees who retire during the term of this Agreement . . . The benefits and benefit levels provided by an Employer under its Employer Plan are established for the term of this Agreement only, and may be jointly amended or modified in any manner at any time after the expiration or termination of this Agreement.

PA 963 – 964. For ease of reference this provision is hereinafter termed the “Benefits Provision.” It is important to emphasize that this is the only language plaintiffs point to in support of their claim of vested benefits. In plaintiffs’ view, this language meets their “high burden” of showing through “clear and express” language, and notwithstanding the plain reservation of rights provisions, that they are entitled to vested benefits. As the district court properly found, however, this provision does not accomplish plaintiffs’ goal. Jan. 8, 2006 Order at 16-19 (JA 16-19).⁵

⁵ Plaintiffs discuss the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701, *et seq.* (“Coal Act”) in two places in their brief, App. B. 8-9, 26-27, but it is not clear for what purpose. As plaintiffs recognize, the Coal Act was enacted to address the problem of “orphaned” coal industry retirees, those who were not receiving benefits because their previous employers had gone out of business. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). The Act did not address benefits for retirees retiring under post-Coal Act collective bargaining agreements and left that issue for future collective bargaining.

Plaintiffs focus on two parts of the provision. They first claim that the language retaining “for life” and “until death” benefits from previous agreements indicates an intent to provide lifetime benefits. App. B. 26. But, under the law of this Court, in light of the three reservation of rights clauses in the 1998 NBCWA incorporated into the 1998 MOU and the reservation of rights in the Plan Termination Provision, that language does not mean that the lifetime benefits survive expiration of the Brushy Creek CBA.

The other part of the Benefits Provision on which plaintiffs focus is the clause “may be jointly amended or modified. . . after expiration of this Agreement.” Plaintiffs read this clause as a prohibition against unilateral modification or termination of benefits by the Employer after the agreement expires. App. B. 27. But plaintiffs’ reading is strained and ignores the context of the clause in the entire sentence. The first part of the sentence clearly provides that both the benefits and benefit levels set forth in the employer medical plans are established for the term of the Agreement “only.” Under plaintiffs’ reading, the second part of the sentence emasculates the first part by providing that, after termination of the agreement, benefits must be continued and can be modified only through joint agreement. In other words, according to plaintiffs, the sentence reads that the benefits expire at the end of the agreement, except that they don’t and can’t even be modified unless the union agrees. That reading makes no sense and contradicts fundamental contract interpretation rules. *Sprague v. Central States SE and SW Airlines Pension Fund*, 269 F.3d 811, 816 (7th Cir. 2001) (all parts of a contract and related documents must be given effect); *Vallone*, 375 F.3d at 635 (on summary judgment, rejecting contract reading as not being “sensible”).

The more logical reading of the Benefits Provision is that the benefits expire at the end of the contract term, but the parties “may” (but are not required to) mutually agree to extend them

as they previously existed or in modified form. This reading comports with the parties' use of the permissive term "may" rather than the mandatory term "shall," comports with black letter law on contract modification (under which contract parties may always mutually agree to modifications), and allows the entire Benefits Provision to be read as a coherent whole and in harmony with the other reservation of rights provisions of the Brushy Creek CBA and Plan. *See Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers v. Schreiber Foods, Inc.*, 213 F.3d 376, 380 (7th Cir. 2000) (holding on summary judgment in contract case, possible ambiguity should be resolved by choosing the "more sensible interpretation"); *Murphy*, 61 F.3d at 565 (a contract is ambiguous only if it is subject to more than one *reasonable* interpretation); *In re Unisys Corp.*, 58 F.3d at 903 ("[i]f the Court finds "but one reasonable interpretation, then *a fortiori* there can be no ambiguity," quoting *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 231 (3d Cir. 1994)).

Contrary to plaintiffs' assertion, this reading does not deprive the "may mutually agree" clause of meaning. There are many reasons, such as the desire for labor peace, why an employer such as Brushy Creek "may" want to mutually agree to benefits changes post-termination rather than achieving those changes through unilateral action. For that reason, the employer could find value in signaling in the contract its possible willingness to *mutually* agree to post-contract benefits modifications. But the fact that the agreement states that the parties "may" agree to post-contract benefits modifications does not unavoidably mean that, as plaintiffs claim, the right to benefits continues when the contract ends unless the UMWA agrees otherwise. The four reservation of rights clauses clearly nullify any such right.

Plaintiffs repeatedly argue that the two clauses of the last sentence of the Benefit Provision can be harmonized to create the meaning they seek if the first clause is read as

referring to “the level of benefits rather than the duration of the entitlement for retirees.” App. B. 18, 38, 43. But that reading contradicts the express language itself, which provides that “[t]he benefits and benefit levels provided by an employer under its Employer Plan are established for the term of this Agreement only. . . .” It is not just the benefit levels that are guaranteed only for the term of the agreement but the entitlement to benefits as well.

Indeed, plaintiffs unwittingly demonstrate the fallacy of their reading of this language in the following sentence in their brief: “Language in the agreement that states that ‘the benefits and benefit levels’ are guaranteed *at a specific level* for the term of the agreement are a guarantee of a particular level of benefits during the term of the contract, and not a limitation on the right of retirees to benefits after the expiration of the agreement.” App. B. 18 (emphasis supplied). The italicized phrase “at a specific level” does not appear in the Benefits Provision. Plaintiffs inserted it into their paraphrase to create a meaning that does not exist. If that language is left out of plaintiffs’ sentence, it would read: “Language in the agreement that states that ‘the benefits and benefit levels’ are guaranteed for the term of the agreement are a guarantee of a particular level of benefits during the term of the contract.” This statement is internally inconsistent because it transforms a guarantee of “the benefits and benefit levels” for the term of the agreement to a guarantee of only the “benefit levels.” That is simply not what the contract language says.⁶

⁶ Moreover, the distinction plaintiffs ascribe to the terms “benefits and “benefit levels” is one that lacks a difference. A lifetime guarantee of certain “benefit levels” is superseded by a reservation of rights in the same way as a lifetime guarantee of “benefits.” See *Rockford Powertrain*, 350 F.3d at 703, quoting *Abbruscato v. Empire Blue Cross and Blue Shield*, 274 F.3d 90, 99 (2d Cir. 2001) (“Here . . . we have Summary Plan Description language that *both* appears to promise lifetime life insurance coverage at a particular level and clearly reserves Empire's right to amend or terminate such coverage. Because the same document that potentially provided the ‘lifetime’ benefits also clearly informed employees that these benefits were subject to modification, we conclude that the language contained in the 1987 SPD is not susceptible to an interpretation that promises vested lifetime life insurance benefits,” italics in original, underline supplied).

Plaintiffs' interpretation is also textually self-refuting because it depends on moving the word "only" from the first clause to the second clause of the last sentence of the Benefits Provision. In the contract, the sentence reads: "The benefits and benefit levels provided by an Employer under its Employer Plan are established for the term of this Agreement *only*, and may be jointly amended or modified in any manner at any time after the expiration or termination of this Agreement." (Emphasis supplied.) Under plaintiffs' reading, the sentence is rewritten to read: "The benefits and benefit levels provided by an Employer under its Employer Plan are established for the term of this Agreement, and may *only* be jointly amended or modified in any manner at any time after the expiration or termination of this Agreement." But plaintiffs must live with the bargain they struck, not the one they wished they had struck.

Perhaps recognizing the weakness of their textual position, plaintiffs repeatedly venture outside the contract and cite to affidavits of the UMWA negotiators to the negotiation of the 1998 and 1993 NBCWAs to the effect that the Benefits Provision was inserted in these agreements to ensure that lifetime medical benefits would be vested. App. B. 26-28. Plaintiffs' citation of these self-serving statements violates the rule that extrinsic evidence cannot be used to vary the meaning of a plain contract term nor to create patent ambiguity where none exists. *Murphy*, 61 F.3d at 565. There is nothing ambiguous about a clause limiting benefits to the term of the agreement. Indeed, this Court has held that the use of the phrase "during the term of this agreement," *as a matter of law*, indicates that benefits are not vested. *Rosetto*, 217 F.3d at 547 ("If the agreement makes clear that the entitlement expires with the agreement, as by including such phrase as 'during the term of this agreement,' then, once again, the plaintiffs lose as a matter of law unless he can show a latent ambiguity by means of objective evidence"). *See also Cherry*, 441 F.3d at 484 (reiterating this same language from *Rosetto*).

The rule of contract construction barring use of self-serving extrinsic evidence to create patent ambiguity or vary the meaning of plain contract terms is particularly appropriate here. Plaintiffs are relying on extrinsic statements of their union negotiators to create a narrative of the historical development of the NBCWAs to support vested benefits that simply don't exist in the documents they negotiated. As seen, all of the case law construing the NBCWAs prior to the 1993 NBCWA goes against plaintiffs' theory of the case. The language changes in the 1993 agreement and carried over into the 1998 agreement on which they rely do not clearly and expressly create these benefits. Plaintiffs can cite only a single district court case in the fourteen years since the 1993 NBCWA agreement was adopted that supports their theory, App. B. 28, and the court below had no trouble distinguishing that case.⁷ Plaintiffs thus appear to be trying to use extrinsic statements of their union negotiators to create a vested benefit entitlement that these negotiators were unable to obtain in plain language on the face of the CBA. These experienced negotiators knew the law and knew the burden they carried if they wanted to obtain vested welfare benefits in negotiations. They did not meet that burden, and plaintiffs should not be allowed to use their extrinsic statements now to prove that they did. *Cf Cherry* 441 F.3d at 486 ("Either lack of communication or an inadequate performance on the part of the Union led the retired employees and their survivors to believe their benefits could not be terminated").

In the end, the single clause on which plaintiffs rely from the Benefits Provision (providing the parties "may" mutually modify benefits post-contract) cannot bear the weight plaintiffs put on it. As the district court found, "[t]he repeated inclusion of the phrase 'during the

⁷ Jan. 18, 2006 Order at 17 (PA 17), discussing *District 17, UMWA v. Brunty Trucking Co.*, 269 F.Supp.2d 702 (S.D.W.Va. 2003). The case was not decided under the same law that this Court must apply, where a reservation of rights clause supersedes a lifetime benefits clause. The Court's decision below discusses other district court cases on which plaintiffs sought to rely, but perhaps for the reasons set forth in the Court's decision, plaintiffs no longer cite those cases on this point.

term of this Agreement’ deprives the NBCWA itself, apart from its construction as part of the 1998 MOU, of the clarity of purpose that Plaintiffs assert.” Jan. 18, 2006 Order at 20 (PA 20). Without that clarity, plaintiffs cannot meet their burden.⁸

3. Brushy Creek’s Right to Terminate or Modify Benefits Is Not Limited to Active Miners But Includes Retired Miners.

Plaintiffs point to the Plan Termination Provision language referring to the right of Brushy Creek to modify or terminate benefits of “employees” and claim that the provision must only apply to active miners rather than retirees. App. B. 32-33. Because there have not been any active miners since 1999, plaintiffs’ argument would bar Brushy Creek from relying on this provision to modify or terminate benefits.

Plaintiffs, however, cannot make this argument here because they did not make it below. *See Boyers v. Texaco Refining & Marketing, Inc.*, 848 F.2d 809, 811-812 (7th Cir. 1988). Moreover, plaintiffs’ argument can be easily rebutted. The term “employee” is defined in the Plan to include not only active miners but “Retired Employees (Pensioners)” as well. PA 1180. There is no dispute that the Plan was always applied to both active employees (while the Mine was open) and retirees. Thus, as with other Plan provisions, when the Plan Termination Provision refers to “employees,” it is referring to retired employees as well as active employees.

C. The Phrase “Subject to the Collective Bargaining Agreement” Does Not Negate Brushy Creek’s Right to Modify or Terminate Benefits After Contract Expiration Nor Does It Create Ambiguity.

The district court properly rejected plaintiffs’ claim that the phrase “subject to the Collective Bargaining Agreement” in the Plan Termination Provision preserves the retirees’ right

⁸ Plaintiffs’ allege that Brushy Creek is a “Me-Too” signatory of the 1998 NBCWA. App. B. 28. As shown in the Statement of Facts above, that is not correct. But this distinction does not matter in this case. Whether or not Brushy Creek is termed a “me-too” signatory, its rights can be determined only pursuant to the contracts it signed, including the 1998 MOU and the specifically included provisions of the 1998 NBCWA, and the Brushy Creek Plan, negotiated pursuant to the 1998 MOU.

to vested benefits established in that agreement. As seen, the Brushy Creek CBA does not clearly and expressly provide for medical benefits that survive termination of that agreement; in fact, it provides just the opposite. Hence, the phrase “subject to the Collective Bargaining Agreement” cannot preserve a right that didn’t exist in the first place.⁹

Moreover, the use of the phrase “subject to the Collective Bargaining Agreement” does not create ambiguity as to whether Brushy Creek can, in fact, modify or terminate benefits once the Brushy Creek CBA expires. Since the Brushy Creek CBA guarantees benefits for the life of that agreement, the “subject to the Collective Bargaining Agreement” clause means that Brushy Creek cannot unilaterally modify or terminate benefits so long as that agreement is in place. But since the Brushy Creek CBA did not guarantee benefits after the CBA expires, the “subject to the Collective Bargaining Agreement” phrase does not limit Brushy Creek’s right to modify or terminate benefits post-expiration. This reading harmonizes the Plan Termination Provision with the Brushy Creek CBA language guaranteeing benefits “only” for the life of the agreement and gives meaning to both. *See Diehl*, 102 F.3d at 307 (when “potentially conflicting provisions coexist within the same document ... the rule that contractual provisions be read as parts of an integrated whole will lead a court to seek an interpretation that reconciles those provisions”). It

⁹ For this reason, *McCoy v. Meridian Automotive Systems*, 390 F.3d 417 (6th Cir. 2004), *Yolton v. El Paso Pipeline Co.*, 435 F.3d 571 (6th Cir 2006) and other cases cited at App. B. 30-31 are inapposite. Moreover, the Sixth Circuit’s analytical framework for resolving issues of lifetime benefits under CBAs, as set forth in *UAW Local 134 v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), see *McCoy*, 390 F.3d at 422-23, is different than in this Court. *Yard-Man* created an inference that “status” benefits, including retiree benefits, continue as long as that status is maintained. *Yard-Man*, 390 F.3d at 1482. The *Yard-Man* rationale has been rejected by this Court, see *Rosetto*, 217 F.3d at 543, and even the Sixth Circuit has noted that *Yardman* has “generated controversy.” *Yolton*, 435 F.3d at 579. Apart from the *Yardman* inference, under the Sixth Circuit’s analytical framework, medical benefits are vested if the benefits plan provides that employees retiring under the employer’s pension plan are eligible for medical benefits (on the theory that, under ERISA, pension benefits are vested). *Id.* at 580, 582; *McCoy*, 390 F.3d at 422. This concept also is not found in this Court’s jurisprudence and is not even argued in this case.

also comports with the law of this Court that benefits are limited to the term of the CBA unless otherwise provided for in “clear and express” language.

Indeed, the Plan Termination Provision would allow Brushy Creek to modify or terminate benefits post-contract termination even if, as in plaintiffs’ view, the Brushy Creek CBA provided for vested benefits that survived the termination of the agreement. Assume, for the sake of argument, that the Brushy Creek CBA provided for vested lifetime benefits that could be read as arguably surviving contract expiration. There could then be two possible meanings of the phrase “subject to the Collective Bargaining Agreement,” one advanced by Brushy Creek and one advanced by plaintiffs. The meaning advanced by Brushy Creek is that the Plan, negotiated subsequent in time to the Brushy Creek Plan, controls the CBA, except that the right to modify or terminate benefits cannot be exercised while the CBA is in existence (because of the “subject to the Collective Bargaining Agreement” language). This reading is bolstered by the, at best, ambiguous grant of vested benefits in the CBA, and by the fact that this grant of benefits is made in the General Description of Article XX of the 1998 NBCWA. The General Description states in its introductory paragraph that:

This description is intended merely to highlight certain information; it is not a complete statement of all of the provisions of the Plans and Trusts, nor is it intended to be a Summary Plan Description as defined in the Employee Retirement Income Security Act of 1974, and is qualified in its entirety by, and subject to the more detailed information contained in the Plans and Trusts . . . *The specific provisions of the plans will govern in the event of any inconsistencies between the general description and the plans.* (Emphasis added.) (PA 962–963).

This admonition is repeated at the beginning of Article XX:

A general description of the benefits to be provided appears immediately following this Article. The specific provisions of the plans will govern in the event of any inconsistencies between the general description and the plans. (PA 941).

Thus, there is every reason why the parties would have viewed the supposed grant of lifetime benefits in the General Description as weak and generic and as subject to further negotiation by Brushy Creek and the UMWA in the context of the subsequent adoption of the specific Brushy Creek benefits Plan. The parties would also have been mindful of the rule of contract interpretation in the General Description that the Plan would control the CBA, not the other way around. *See Int'l Truck and Engine Corp. v. United Steel Workers of Am.*, 294 F.3d 860, 862-63 (7th Cir. 2002) (holding rules of interpretation set forth in collective bargaining agreement must be followed).

In contrast, plaintiffs' attempt to harmonize the Plan Termination Provision, including the "subject to the Collective Bargaining Agreement" clause, with their reading of the Benefits Provision in the General Description makes no sense. App. B 35–36. Plaintiffs argue, in essence, that (1) the Plan Termination Provision states that Brushy Creek may unilaterally modify or terminate benefits at any time but makes that right subject to the Brushy Creek CBA; (2) the Brushy Creek CBA provides that benefits cannot be modified or terminated at any time, even after the CBA expires, unless the UMWA agrees; and therefore (3) Brushy Creek does not in fact have a unilateral right to modify or terminate benefits at any time. This reading renders the Plan Termination provision a nullity; under this reading, the provision has no meaning and may as well not have been included in the Plan. *Schreiber Foods*, 213 F.3d at 380 (holding on summary judgment, "a proposed contractual interpretation that would read out of a contract language obviously important to one of the parties faces and ought to face a distinctly uphill struggle for judicial acceptance") (quoting *In re Kazmierczak*, 24 F.3d 1020, 1022 (7th Cir. 1994)).

Stated another way, under plaintiffs' reading, in the very same sentence (the Plan Termination Provision), the parties gave Brushy Creek a unilateral right to modify or terminate benefits and then took that right away in the "subject to the Collective Bargaining Agreement" clause. *Cf. Syndia Corp. v. Lemelson Medical, Education, and Research Foundation Limited Partnership*, 165 F. Supp. 2d 728, 751 (N.D. Ill. 2001) ("an exception cannot be read to swallow the rule"). Such a result cannot be correct and would violate the fundamental presumption that all provisions in a contract are inserted for a purpose. *Archer-Daniel-Midlands Company v. Phoenix Assurance Co. of New York*, 936 F. Supp. 534, 538 (S.D. Ill. 1996); *see also Sprague*, 269 F.3d at 816 (all parts of a contract and related documents must be given effect); *Murphy*, 61 F.3d at 567 (refusing to read out of the contract a plan provision allowing the plan administrator to terminate benefits upon expiration of the collective bargaining agreement).

In sum, the "subject to the Collective Bargaining Agreement" language can be read as supporting plaintiffs' position, or even as creating ambiguity, only if the reservation of rights provisions are ignored. Such reading is unreasonable and must be rejected. *Murphy*, 61 F.3d at 565 (contract is ambiguous only if it is subject to more than one *reasonable* interpretation).

D. There Are No Latent Ambiguities in the Contract and Plan that Overcome Plaintiffs' Burden to Demonstrate Vested Benefits Through "Clear and Express" Language.

Plaintiffs allege there is latent ambiguity in the Brushy Creek CBA and Plan that justifies consideration of extrinsic evidence in interpreting these documents. App. B. 46-49. Plaintiffs are incorrect.

The doctrine of latent ambiguity "rests on a recognition that a contract which might appear to be perfectly clear to someone who read it in ignorance of its context might, once context was restored, seem either unclear, or clear the opposite way." *PMC, Inc. v. Sherwin*

Williams Co., 151 F.3d 610, 614 (7th Cir. 1998). The classic case frequently cited to illustrate the doctrine is *Raffles v. Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864), where the contract provided for the shipment of cotton on a ship named *Peerless*. While such agreement would seem to be unambiguous, the fact that there were two ships named *Peerless* demonstrated a latent ambiguity that required extrinsic evidence to resolve. See, e.g., *Confold Pacific, Inc. v. Polaris Industries, Inc.*, 433 F.3d 952, 955-56 (7th Cir. 2006).

Following on the *Peerless* example, in applying the extrinsic evidence doctrine, courts have looked to whether “the contract used common words in a technical sense,” *PMC*, 151 F.3d at 614, or for other instances where custom and usage might supply the meaning of terms at variance with common understanding, *Pierce v. The Atchison, Topeka and Santa Fe RR Co.*, 65 F.3d 562, 568 (7th Cir. 1995). While courts have applied the doctrine to allow other forms of “objective” evidence, they have emphasized that the doctrine “should not be stretched too far” to the point where parties are deprived of the bargain plainly set forth in their contract. *PMC*, 151 F.3d at 614. “We ordinarily invoke that doctrine to allow parties to show that ‘they couldn’t have meant what they seem to have said,’ *Matter of Stoecker*, 5 F.3d 1022, 1029 (7th Cir. 1993), because of ‘the context in which the contract had been intended to apply,’ *Homes Ins.* 56 F.3d at 768 (7th Cir. 1995) [*Homes Ins. Co. v. Chicago & Northwestern Trasnp. Co.*, 56 F.3d 763, 768 (7th Cir. 1995)].” *Pierce*, 65 F.3d at 568. Moreover:

Especially when dealing with a substantial contract between “commercially sophisticated parties ... who know how to say what they mean and have an incentive to draft their agreement carefully, there is great merit to a rule that the meaning of an unambiguous contract is a question of law rather than of fact, with the consequence “that unambiguous contractual language must be enforced as written.” The rule enables contracts to be resolved quickly and cheaply, “protects the parties against the vagaries of the litigation process – a major reason for committing contracts to writing – without too great a risk of misinterpretation,” and by thus minimizing both contractual transaction costs and uncertainty increases the value of contracts as a means of conducting business.

Confold Pacific, 433 F.3d at 955 (citations omitted).

Plaintiffs offer two pieces of evidence they believe show that the Brushy Creek CBA and Plan do not say what they mean. The first is a memorandum of understanding between Brushy Creek and the UMWA, entered concurrently with the 1998 MOU, in which the parties agreed that Brushy Creek would contract out certain reclamation work in order to generate savings which would be used in part to fund retiree “lifetime benefits.” The other is statements by a Brushy Creek attorney during negotiations with the UMWA in which Brushy Creek offered the retirees a lump sum payment in settlement of their claims of lifetime benefits. Brushy Creek’s attorney made a number of statements as to “lifetime benefits” as to which the retirees were “entitled” or for which Brushy Creek was “obligated.”

None of these statements are the type of objective evidence admissible to show extrinsic ambiguity, for two reasons. First, the references in the reclamation memorandum and by the Brushy Creek attorney to “lifetime benefits” and the use of phrases such as “guaranteed,” “entitled,” or “obligated” do nothing more than restate the provisions of the Brushy Creek CBA. No one questions that the Brushy Creek CBA guaranteed lifetime benefits for the retirees. However, the CBA also provided that those benefits could be terminated at any time after expiration of that agreement. Thus, this evidence does not show that the parties “could not have meant what they said,” in the CBA, *Pierce*, 65 F.3d at 568; the evidence merely restates contract terms. It certainly does not “undisputedly bolster [plaintiffs’] story.” *Id.*

It is true that these statements did not restate *all* of the contract terms, by also informing the UMWA that the lifetime benefit guarantee was subject to the right of Brushy Creek to terminate the benefits under the reservation of rights clauses. But there is no claim here that the UMWA or retirees detrimentally relied on these statements or that the Brushy Creek CBA and

Plan were somehow modified as a result of these statements. Moreover, Brushy Creek was under no obligation to inform the UMWA of Brushy Creek's right to terminate or modify benefits. As the almost exclusive union representing coal miners since the beginning of the labor movement, the UMWA may be presumed to know the law and understand its potential exposure. Similarly, Brushy Creek's desire to make a lump sum payment in return for settlement of the retirees' claim for lifetime benefits does not demonstrate Brushy Creek's understanding that it had an irrevocable long-term obligation to the retirees. *See Cherry*, 441 F.3d at 486 ("Any statements made by Auburn Gear indicating a fear of long-term payments to a particular individual are limited by the clear language of the contract, in which 'lifetime benefits' are only operable so long as they are provided for in the current CBIA").

Second, whatever the reclamation MOU and the statements by Brushy Creek's attorney may have meant, they are not the type of evidence that should be admitted as extrinsic evidence. As described above, the terms in dispute in this case – a guarantee of lifetime benefits offset by reservations of rights clauses – are very familiar to this Court and do not raise issues of special industry meaning or context. The Court has construed very similar terms in CBAs in many different types of industries; there is nothing unusual about the language in the documents here. The material on which the UMWA relies does not offer evidence of any specific industry context or usage; it is simply offered as purportedly supporting plaintiffs' interpretation of the contract. *See Pabst Brewing Co., Inc. v. Corrao*, 161 F.3d 434, 441-42 (7th Cir. 1998) (declining to consider whether notes from the employer's negotiator asserted to be an admission should be considered as objective evidence under the latent ambiguity doctrine, because the term "for the term of this agreement" is clear on its face and "we see no room in the language of the agreement to turn to [plaintiff's] extrinsic evidence"). The material offered by plaintiffs, thus, is far

removed from the underpinnings of the extrinsic evidence doctrine in the *Peerless* case. It cannot be considered here consistent with the narrow application of that doctrine required by this Court's decisions.

IV. The Plan Termination Provision of the Brushy Creek Medical Plan Allowed Brushy Creek to Deny Coverage to Plaintiffs Who Were Not Enrolled in the Plan as of March 8, 2004 and, Indeed, Allows Termination of Benefits to All Brushy Creek Retirees.

A. Background

Plaintiffs challenge the district court's determination that Brushy Creek could terminate benefits for the class of retirees who were not receiving medical benefits as of March 8, 2004. App. B. 43-45. In briefing below, Brushy Creek asserted two alternative reasons why it could terminate benefits for these retirees. The first reason was that, consistent with ERISA, the Plan Termination Provision explicitly authorized Brushy Creek to modify or terminate benefits and to treat different classes of retirees differently. Hence, Brushy Creek could modify benefits to those enrolled in the medical benefits program as of March 8, 2004 and terminate benefits for those not enrolled as of that time. Indeed, under this provision, Brushy Creek is also authorized to terminate benefits to all retirees.

Brushy Creek's second argument assumed *arguendo* that, notwithstanding the reservation of rights clauses, the Brushy Creek CBA entitled retirees to vested medical benefits even after the CBA expired. Brushy Creek argued that, as a condition to receipt of vested benefits, the retirees were required to meet both of the eligibility criteria for medical benefits at the time of their retirement: they had to be fifty-five years of age and have had twenty years of service. Brushy Creek argued that since miners seeking to enroll in the medical plan after March 8, 2004 were not age fifty-five when they ceased working for Brushy Creek, they were not entitled to be enrolled in the Plan.

The district court, in its April 6, 2006 Memorandum and Order, agreed with Brushy Creek's first argument but did not reach the second. It agreed with Brushy Creek that the Plan Termination Provision authorizes Brushy Creek to modify or terminate benefits and to treat different classes of retirees differently so long as such treatment was consistent with applicable law. It also agreed with Brushy Creek that there was no applicable law to the contrary and that ERISA authorizes discriminatory treatment of welfare beneficiaries. See *Curtiss-Wright Corporation*, 514 U.S. at 78 (“[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans”); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90-91 (1983) (in holding that, under ERISA, welfare plan may discriminate on the basis of pregnancy notwithstanding state law to the contrary, Court stated that “ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits”); *Rockford Powertrain*, 350 F.3d at 701-02 (employer terminated health care benefits for retirees while only modifying benefits for active employees); *McGann v. H&H Music Company*, 946 F.2d 401, 406-408 (5th Cir. 1991) (ERISA does not bar plan amendment excluding coverage for AIDS).

Plaintiffs do not appear to contest the district court's ruling in this regard and confine their argument to Brushy Creek's second argument which the Court did not reach. However, plaintiffs' contentions on this point are in error. Regardless of how the Court rules on the other issues in this case, Brushy Creek is not obligated to provide medical benefits to those not enrolled in the Brushy Creek Plan as of March 8, 2004.

B. The Brushy Creek Retirees Are Not Entitled to Medical Benefits Unless They Were Fifty-Five Years of Age at the Time the Brushy Creek CBA Expired.

Plaintiffs claim that the Brushy Creek retirees became entitled to vested medical benefits on the day they retired from Brushy Creek whether or not they met the applicable eligibility

criteria at that time. Neither the Brushy Creek CBA nor the Brushy Creek Plan supports this contention. The only language in the 1998 NBCWA, 1998 MOU or Brushy Creek Plan on which plaintiffs rely for their claim of lifetime benefits for *any* retiree is in the Benefits Provision, as follows: “The parties expressly agree that the language references to “‘or life’ and ‘until death’ that are retained in this General Description are intended to mean that each Employer will provide, for life, only the benefits of its own *eligible retirees* who retire during the term of this Agreement.” (Emphasis supplied). For convenience, this will be referred to in this section as the Lifetime Benefits Provision. As can be seen, the provision requires more for medical benefits eligibility than that the miner ceases work during the term of the CBA. To qualify for medical benefits, the miner also must be “an eligible retiree” at that time.

The 1998 NBCWA (in a provision incorporated into the 1998 MOU) defines the criteria for an “eligible retiree” “who retire[s] on or after the effective date” of that agreement. It provides that “[t]he earliest retirement age is 55. *A miner may retire at 55 with 10 or more years of signatory service.*” (PA 970). (Emphasis supplied). The Brushy Creek Plan, in the section entitled “Eligible Employees,” makes the service criterion stricter by limiting participation in the Plan to those with at least 20 years of service. (PA 1180). Plainly, under this language, to be an “eligible retiree” the miner must “retire” (cease work) having both attained age fifty-five and having met the 20-year service criterion. Those who did not meet these criteria “during the term of the Agreement” were properly denied Plan benefits.

Plaintiffs mistakenly rely on Art. I.B, p. 4, of the 1974 Pension Plan, which provides that “[f]or purposes of this Plan, in the case of any Participant, retirement shall be considered to occur on the last day of credited service ..., provided that on such day he was eligible for an

immediate or deferred pension under this Plan.”¹⁰ (Emphasis supplied.) The use of the phrase “[f]or purposes of this Plan,” meaning the 1974 Pension Plan, explicitly limits the provision’s applicability to eligibility for the 1974 Pension Plan. Plaintiffs’ contention that the provision also defines eligibility criteria for medical plan benefits is inconsistent with this explicit limitation.

Apponi v. Sunshine Biscuits, Inc., 809 F.2d 1210 (6th Cir. 1987) is analogous.¹¹ In *Apponi*, employees with fifteen years of continuous service, but who were not 55 years old, ceased employment with defendant when defendant closed its bakery. The applicable benefits plan provided that “[a]n employee will be eligible to retire early, provided he is at least 55 years of age and has completed 15 or more years of continuous service.” *Apponi*, 809 F.2d at 1214. The court denied the employees early retirement, reasoning that “[t]hose individuals who left Sunshine’s employ before they reached age fifty-five were not ‘employees’ when they reached age fifty-five and thus could not ‘retire’ on that date.” *Apponi*, 809 F.2d at 1219 (citations omitted). Similarly, the Brushy Creek retirees who were not age fifty-five at the time the Brushy Creek Mine closed were not “full-time employees,” “eligible retirees” or “pensioners,” and therefore do not qualify for medical benefits.¹²

¹⁰ The 1974 Pension Plan is attached at PA 303 – 347.

¹¹ The two appellate decisions cited at App. B. 45 address the issue of whether, for purposes of meeting the statutory September 30, 1994 deadline for benefits under the Coal Act, a retiree had to merely cease work as of that date or cease work and apply for a pension. See *Holland v. Big Rivers Minerals Corp.*, 181 F.3d 597 (4th Cir. 1999), *cert. denied*, 120 S.Ct. 936 (2000); *Pennsylvania Mines Corporation v. Holland*, 197 F.3d 114 (3d Cir. 1999). These decisions are not relevant to the rights of Brushy Creek retirees under the Brushy Creek Plan. Plaintiffs’ reliance on *United Mine Workers of America v. Bethenergy Mines, Inc.*, 2001 WL 737558 (S.D. W.Va.), an unreported district court case from a different circuit, is equally unavailing. In the Seventh Circuit, the precedential value of unpublished decisions is determined by the value given in the rules of the court which issued the decision. *Aetna Cas. & Sur. Co. v. Kerr-McGee Chem. Corp.*, 875 F.2d 1252, 1255 n.2 (7th Cir 1989). The Fourth Circuit disfavors the citation of unpublished decisions. See Fourth Circuit Local Rule 36(c).

¹² See PA 1180, and *Apponi*, 809 F.2d at 1219.

V. Brushy Creek Did Not “Clearly and Unmistakably” Waive Its Right to Implement Changes to the Plan if Discussions with the Union Yielded No Agreement.

Plaintiffs’ contention that Brushy Creek was prohibited absent UMWA agreement from modifying the Brushy Creek Plan after the Brushy Creek CBA terminated violates well-established principles of labor law. Under this law, retiree benefits are not mandatory subjects of bargaining at any time, including following the expiration of a CBA. *Georgia Power Co.*, 1997 WL 33315930, 1997 NLRB Lexis 1041 (NLRB Div. of Judges) (February 14, 1997); *Southern Nuclear Operating Co.*, 2002 WL 31386013, 2002 NLRB Lexis 512 (NLRB Div. of Judges) (October 17, 2002); *Midwest Power Systems, Inc.*, 323 NLRB 404 (1997). Therefore, no employer has any legal obligation to bargain with regard to retiree benefits upon the expiration of the CBA under the National Labor Relations Act. *Id.*

Thus even assuming *arguendo* that plaintiffs’ contentions are correct, and Brushy Creek agreed to negotiate changes to retiree benefits after expiration of the Brushy Creek CBA, it does not follow that Brushy Creek must have UMWA approval before making changes. Rather, an employer is permitted to make changes to provisions that are subjects of mandatory bargaining after the parties have failed to reach an agreement and an impasse in negotiations has been reached. *See NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Almeida Bus Lines*, 333 F.2d 729 (1st Cir. 1964); *Eddie’s Chop House, Inc.*, 165 NLRB 861 (1967). In other words, if the parties are unable to reach agreement, the employer retains, as a matter of law, the right to implement changes. Further, the right to implement changes post-impasse may be waived only by “clear and unmistakable” language reflecting an express agreement by the employer to surrender its right to make changes. *See Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 902 (6th Cir. 1996); *Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258 (8th Cir. 1994).

Conspicuously absent from the 1998 NBCWA, 1998 MOU, or Plan is any provision reflecting an agreement by Brushy Creek to “clearly and unmistakably” waive its right to implement changes in retiree benefits post-impasse. To the contrary, the specific Plan language at issue in this case preserved the Company's right to “terminate, suspend, withdraw, amend or modify the Plan,” subject to the CBA, which has expired by its terms. Neither the provision of the 1998 NBCWA providing that retiree benefits “may” be “jointly amended or modified” by the parties post-expiration, nor the phrase included in the Plan reserving to Brushy Creek the right to “terminate, suspend, withdraw, amend or modify the Plan . . . subject to the Collective Bargaining Agreement” constitutes a “clear and unmistakable” waiver by Brushy Creek of its right to implement changes post-impasse.

In sum, even if the Court were to accept plaintiffs’ reading of the collective bargaining agreement and Plan, the most the Court could conclude is that retiree benefits are to be treated as mandatory subjects of bargaining post-expiration. As a result, Brushy Creek would retain the right, as a matter of law, to implement changes in such benefits post-impasse.

CONCLUSION

For the reasons stated herein, the Defendants-Appellees respectfully request this Court deny plaintiffs’ appeal and affirm the Judgment of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel certifies that this foregoing brief of Defendants-Appellees Brushy Creek Coal Company and Western-Fuels Illinois, Inc. complies with the page limitation of Rule 32(a)(7)(A) of the Federal Rules of Appellate Procedure Circuit Rule. Counsel further certifies that this Brief complies with the requirements of Rule 32(a)(5) & (6). This brief was prepared in Times New Roman, using 12 point type in the body and 11 point type in the footnotes, on Microsoft Word on a Windows XP. The word count is 12,631.

/s/ Thomas M. Lucas
Thomas M. Lucas

CIRCUIT RULE 30(D) STATEMENT

Counsel certifies that all materials required by Circuit Rule 30(a) and (b) are included in the appendices. The material required by Circuit Rule 30(a) is attached to this brief, and the material required by Circuit Rule 30(b) is being filed separately.

/s/ Thomas M. Lucas
Thomas M. Lucas

CIRCUIT RULE 31(E) CERTIFICATION

Counsel certifies that a digital version of the brief and all of the appendix items that are available in non-scanned PDF format have been filed with the Court by upload to the Court's website, that the digital version is in a PDF format and was generated by printing to a PDF from the original word processing file, and that the uploaded digital version is virus-free. The documents in the appendix are not available electronically.

/s/ Thomas M. Lucas
Thomas M. Lucas

CERTIFICATE OF SERVICE

The undersigned, counsel for the Defendants-Appellees, Brushy Creek Coal Company and Western-Fuels Illinois, Inc., hereby certify that on May 22, 2007, two copies of the Brief and Appendix of Defendants-Appellees, Brushy Creek Coal Company, *et al.*, as well as a virus-free CD-ROM containing a digital version of the brief in PDF format, were delivered by U.S. first class mail to:

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ADDENDUM



1997 WL 33315930 (N.L.R.B. Div. of Judges)

National Labor Relations Board
Division of Judges
Atlanta Branch Office

GEORGIA POWER COMPANY

AND

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 84,
AFL-CIO-CLC

10-CA-28441
JD(ATL)-07-97
Atlanta, GA

February 14, 1997

Katherin Chahrouri, Esq., Atlanta, Ga., for General Counsel.

Laura Kriteiman, Esq. and Bentina Chisolm, Esq., Atlanta, Ga., for Respondent.

J. Michael Walls, Esq., Atlanta, Ga., for Charging Party.

Decision

William N. Cates, Administrative Law Judge. This hearing was on November 18, 1996 [FN1], in Atlanta, Georgia. The charge was filed on May 5, 1995. The complaint issued on August 10, 1995.

Jurisdiction:

Respondent, is a Georgia corporation with its principal place of business in Atlanta, Georgia where it is engaged in the business of generating and distributing power utility services. During the past year, a representative period, it purchased and received at its Atlanta, Georgia facilities goods valued in excess of \$50,000 directly from suppliers located outside Georgia. Respondent admitted and I find that at all times material herein it has been an employer

engaged in commerce as defined in the National Labor Relations Act (Act).

The parties stipulated that Respondent is a wholly owned subsidiary of the Southern Company. Other wholly owned subsidiaries of the Southern Company include Mississippi Power Company, Alabama Power Company, Savannah, Gulf Power and SEL.

Labor Organizations:

Respondent admitted that International Brotherhood of Electrical Workers Local 84, AFL-CIO-CLC, (Union, IBEW or Local) is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (Act).

The Unfair Labor Practice Allegations:

It is alleged that Respondent unilaterally changed working conditions for employees represented by the Union.

Business Manager and Financial Secretary of the Union Doyle Howard testified that the Union has had a collective bargaining relationship with Respondent since back in the 1920's. The Union currently represents a unit of some 5,000 employees.

This litigation deals with retirement benefits that are called OPRB (Other Post-Retirement Benefits).

Respondent admitted that on or about April 21, 1995, it announced changes to retirement benefits without bargaining with the Union; that it was at material times party to a collective bargaining agreement with the Union; and that the Union is the exclusive collective bargaining representative of its employees in an appropriate bargaining unit described at Article II, Section 2 of that agreement (Memorandum of Agreement).

Respondent's April 21, 1995, announcement made to its managers is as follows:

I'd like to inform you of several changes we're making in retiree life and medical benefits that will affect many future retirees. The changes will be communicated to all employees in the next issue of *The Citizen Weekly*, which will be mailed Monday, April 24. I've attached an advance copy of those articles. Please review this information thoroughly so that you'll be familiar with the

changes in case you receive questions from employees.

Although covered more completely in the attachments, there are several points that need to be emphasized:

The major changes

A maximum ceiling is being established for the company-paid portion of the cost of coverage - often referred to as premiums - for retiree life and medical coverage. (Specific limits have been approved and are included in the attached.)

The level of company contributions will be tied to length of service (Specific levels for each year of service have not been approved and will be communicated later.)

Transition period for the changes

The changes do not impact those in the following groups:

Current retirees;

Any employee who has at least 30 years of accredited service (as defined in the pension plan) on or before January 1, 2002; or

Employees age 55 or over as of January 1, 2002, with 15 years of accredited service.

The changes apply to all other employees not covered in the groups above. Generally, this includes those who become retirement eligible after January 1, 2002.

Reasons for the changes

To adjust for changes in accounting rules, which have led to an increase in accounting costs for these benefits of about \$70 million annually for The Southern Company.

To support the company's cost-competitive goals.

It's important to keep in mind that, even with these changes, the company is maintaining a competitive and generous retiree benefits package. At a time when many companies are dramatically

reducing or simply eliminating retiree medical and life insurance benefits altogether, we are adopting a solution that both clarifies our commitment to retiree benefits and continues to provide our retirees access to these benefits. *As we continue to review our benefits practices, changes to these and other benefits plans may be necessary in the future.*

Respondent called principal compensation of benefits of The Southern Company, David Settle. Settle testified that the driving force behind Respondent's April 21, 1995, changes in OPRB was a change in Federal Accounting Standard 106. Effective with FAS 106 companies must account for retirement cost as a liability while the employee is in active service. Formerly that liability could be shown during retirement rather than while the employee was in active service. FAS 106 does not apply to pension plans but it applies to welfare benefits that would include life and medical insurance. Settle agreed that the new FAS 106 requirements applied to current employees regarding future retirement rather than to current retirees.

The parties are not in dispute regarding a matter mentioned by Respondent in its opening argument. Respondent commented, in part, regarding the parties relationship regarding other post retirement benefits (OPRB):

Retiree benefits have been offered by the company for decades, as have benefits to active, covered (unit) and non-covered employees. Up to 1978, all employees and retirees were covered under one medical plan.

In 1978, the plan offered was the Provident Plan. In 1978-79, the medical plan split, with the Union employees voting to take coverage under Blue Cross/Blue Shield; and the non-covered (non-unit) employees and retirees remaining with the Provident Plan...

Unit and non-unit employees have again received the same medical insurance converge since the 1991 collective bargaining agreement. Business Manager Howard testified that although unit employees rejected going under the same plan with non-unit employees in 1989, they joined in the same plan two years later.

Lynn Martin, who was employed in Respondent's compensation benefits department, testified regarding the different plans. Martin testified that she was involved in negotiations with the Union from 1991. She testified that at times since 1978 the benefits plans

for active and retired employees have not always been the same. In 1989 Respondent adopted the "Provident Plan" in-house that covered active non-unit employees and retirees. In 1989 unit employees were covered by Blue Cross/Blue Shield. The Union terminated its Blue Cross/Blue Shield coverage in 1991 and agreed to join other employees and retirees in the Provident Plan. However, differences in coverage have remained for unit and non-unit employees. For example unit employees were not initially covered for prescription drugs in 1991. From 1991 through January 1, 1993, separate lists were maintained for 100% outpatient surgeries. During 1992 there was a different premium structure for family coverage between non-unit and retirees and unit employees. Currently unit employees are covered under a life insurance policy issued by Provident Life and Accident Insurance. Non-unit and retirees whether formerly unit or non-unit employees, are covered by a Metropolitan Life Insurance policy.

In 1996 there was a change in pension plans. Respondent's witness David Settle testified that non-unit employees may now retire at age 50 with 10 years service. The Union declined to accept that change in eligibility for unit employees.

Respondent contends (1) that the Union has waived bargaining over the OPRB by historically permitting Respondent to make changes without bargaining; and (2) that the Union specifically waived bargaining through a clause contained in the benefits package.

(1) Have the parties historically bargained about retirement benefits:

Respondent contended that since 1978 it has made changes to medical benefits provided to retirees and non-unit employees without bargaining with the Union and without receiving requests or demands to bargain over those changes.

Doyle Howard agreed that unit employees had a different insurance plan from 1979 to 1991.. Non-unit employees and retirees had the same plan. During that period the Respondent made changes to the non-unit employees and retirees' insurance without negotiating with the Union.

Lynn Martin testified that Respondent has never negotiated with the Union over future retirement benefits for active unit employees. She recalled that Respondent has made changes to retirees' benefits and that those changes have not been negotiated with the Union. The Union has never negotiated retirees' benefits.

Rueben Pierce Head, who retired from Respondent in 1984, confirmed that Respondent and the Union did not negotiate over retirees' benefits. Head was Respondent's chief negotiator between 1975 and 1986. He recalled that the Union made inquiries during those years about present retired employees. Head did not object to those discussions but he never agreed those were negotiable matters. During 1980 the Union requested information including retiree information. Head's response to the Union dated August 18, 1980, included a comment that the retiree information concerned a nonnegotiable item. However, Head noted that he was supplying the Union with the summary plan description for retired employees.

Gene Ussery was Respondent's manager of labor relations from May 1992 until October 1995. Ussery testified that Respondent did not negotiate with the Union over benefits for non-unit employees and retirees. He testified that to his knowledge negotiations did not involve future retirees' benefits. Before April 1995, the Union did not seek to negotiate with Respondent for the medical benefits that active unit employees would have if those employees retired from Respondent. He recalled that Doyle Howard used to joke that he was negotiating on behalf of Ussery on occasions when Respondent offered to extend whatever had been negotiated with the Union to non-unit employees and retirees.

Business Manager Howard testified that medical and life insurance benefits are included in the total compensation package that the Union negotiated with Respondent and that total compensation package includes medical insurance for current employees who later retire. Howard testified that to his knowledge Respondent never attempted to change its practice of paying full medical insurance premiums for employees who later retired, until April 21, 1995.

According to Howard, although medical and life insurance benefits have been negotiated for unit employees those benefits have never been mentioned in the collective bargaining agreement. Occasionally negotiations for medical and life insurance benefits occurred during regular contract negotiations. On other occasions those negotiations were held separately from the regular contract negotiations.

It is the parties' practice to negotiate only proposed changes. The parties do not negotiate over contract items when the particular items are not included in a proposed change.

During the most recent negotiations Respondent proposed changes regarding medical and life

insurance. There was no agreement and that matter was postponed. Doyle Howard testified that an example of Respondent and the Union negotiating changes in medical insurance occurred in 1991 when the parties negotiated an agreement to include coverage for prescription drugs. Before that time drugs had not been included in health insurance for unit employees. Howard recalled that change covered both current unit employees and unit employees who would later retire. Benefit changes were also negotiated in 1993.

General Counsel introduced documents to support its contention that the parties have negotiated medical and life insurance benefits.

In a document entitled "Company Package Proposal Submitted to the Union Committee, December 1, 1977," Respondent proposed to modify the insurance program to provide additional life and medical coverage. That document also includes a proposal to revise the pension plan to:

Revise Pension Plan to include all full-time Union representatives, who are employees of the Company, on a leave of absence provided the entire cost is borne by Local Union #84 as sole bargaining representative, as submitted to the Union on August 5, 1977.

Doyle Howard identified Respondent's description of the settlement for a three year contract. That document, "Resume of Georgia Power Company - I.B.E.W. Negotiations with Respect to Working Conditions and Rates of Wages," is dated August 24, 1987. It contained a provision whereby the Respondent agreed to contribute more toward medical insurance premiums upon increases in those premiums expected in October 1987 and 1988. It outlines the insurance program under "Summary of Economic Proposals."

In a 1989 resume of negotiations signed by Respondent's manager of labor relations, there is an indication that Respondent asked the Union Committee if it had decided to rebid the insurance coverages of covered (unit) employees. That document shows there were design changes agreed to by the Union including improved control of psychiatric and substance abuse treatment and chiropractic treatment plus the deletion of the mandatory second opinion for proposed surgeries. Howard testified that the insurance agreement applied to current employees and to insurance benefits that the employees would receive upon retirement.

In a memorandum of understanding signed by the

Union and Respondent on April 26, 1990, there is a provision providing for life insurance equal to three times the employees annual salary. That provision includes a program for the payment of life premiums from Company and employee reserves. Following that provision is the following paragraph:

After the Company and the employee reserves are utilized as set forth above the parties agree to negotiate issues of funding and continuation of coverage, including but not limited to, the amount of coverage, setting new experience rated rates and what percentage of that rate will be paid by the Company and by the employees, respectively.

In a package proposal presented to the Union by Respondent on January 14, 1991, in the context of contract negotiations, Respondent proposed several modifications to the medical insurance program. That proposal also provided that Respondent was agreeable to make the changes in the medical insurance plan retroactive to January 1, 1991, if the contract was approved. Under Respondent's January 1991, proposal both non-covered and covered (unit) employees would receive the same medical insurance. Howard testified that the parties agreed to insurance changes that applied to current employees and current employees who later retired.

On November 12, 1992, Respondent wrote the Union and included 5500 copies of their summary of proposed benefit changes for 1/1/93. Those copies were submitted in order to permit the Union to mail them to its unit employees for a vote on the proposals. The proposals had been negotiated between the Union and Respondent. According to Doyle Howard the parties agreed during negotiations that those proposed changes applied to current employees and to current employees who might later retire.

On February 2, 1992, the Union and Respondent signed a memorandum of understanding, medical benefits in which Respondent agreed to amend the schedule of benefits to provide unit employees 100% surgical coverage in accord with a schedule.

On April 5, 1994, Respondent wrote the Union and included 4600 copies of the summary of medical plan options effective 6/1/94 for mailing to unit employees. The summary had been agreed to by the Union and Respondent subject to vote by the unit employees.

On May 12, 1995, the Union and Respondent signed an agreement to provide specific coverage for treatment of varicose veins. Howard testified that represented an agreement to re-include the varicose veins coverage. On that same date the parties signed

an agreement for reimbursement for non network physicians.

Findings:

The record showed that Respondent and the Union have negotiated on numerous occasions regarding welfare benefits for unit employees. The record also shows that Respondent frequently considered retirees and non-unit employees separate from unit employees for the purpose of welfare considerations. Before 1991 non-unit employees and retirees were covered under a different medical insurance plan from the unit employees. During the period before 1991 Respondent made changes to the plan for non-unit employees and retirees without bargaining with the Union. On occasion the Union requested negotiations regarding retiree benefits and frequently Respondent refused to engage in those negotiations on the claim that retiree benefits were not negotiable.

In making my findings herein I credit the testimony of Doyle Howard that shows that Respondent frequently told the Union that negotiated benefits would be applied to retirees. I make that credibility determination on the basis of Howard's demeanor and the full record. The testimony of Gene Ussery, Respondent manager of labor relations until October 1995, supports my findings by showing that Respondent did offer to extend some unit employees' benefits to retirees.

The record including especially the testimony of Reuben Pierce Head shows that Respondent frequently discussed and provided the Union with information regarding retirees' benefits. I am also convinced and credit the testimony showing that Respondent frequently told the Union that retirees' benefits were not negotiable. I make that decision on the basis of the full record.

I credit the testimony of Lynn Martin that Respondent has never negotiated with the Union over future retirement benefits for active unit employees. Martin testified that at times since 1978 the benefits plans for active and retired employees have not always been the same. In 1989 Respondent adopted the "Provident Plan" in-house that covered active non-unit employees and retirees. In 1989 unit employees were covered by Blue Cross/Blue Shield. The Union terminated its Blue Cross/Blue Shield coverage in 1991. However, differences in coverage have remained for unit and non-unit employees. For example unit employees were not initially covered for prescription drugs in 1991. From 1991 through January 1, 1993, separate lists were maintained for

100% outpatient surgeries. During 1992 there was a different premium structure for family coverage between non-unit and retirees and unit employees. Currently unit employees are covered under a life insurance policy issued by Provident Life and Accident Insurance. Non-unit and retirees whether formerly unit or non-unit employees, are covered by a Metropolitan Life Insurance policy.

I also credit Doyle Howard's testimony that Respondent never advised the Union of its intention to change its practice of paying full medical insurance premiums for employees who later retired until April 21, 1995.

An employer has a duty to bargain over terms and conditions of employment for bargaining unit employees. However, an employer has no duty to bargain regarding current retirees. Respondent contends that the instant matter involves bargaining over benefits for retirees and that it did not make changes in terms and conditions of employment of present members of the bargaining unit. See for example [Murphey Diesel Co., 184 NLRB 757, 763\(1979\)](#); [Civil Service Employees Ass'n, Inc., 311 NLRB 6, 7 \(1993\)](#). Respondent argued that courts have refused to hold that decisions that are merely tangential to the rights of present members of the bargaining unit constitute mandatory subjects of bargaining. See for example [Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 \(1971\)](#); [Keystone Steel & Wire v. NLRB, 41 F.3d 746 \(D.C. Cir. 1994\)](#); [The Torrington Co., 305 NLRB 938 \(1991\)](#).

There is a clear difference between bargaining over future retirement benefits for active employees and benefits for current retirees. Here the discussion involves employees that will not retire before 2002. As shown above the changes mentioned in Respondent's OPRB Update affect the premiums to be paid by employees that retire after January 1, 2002, and were not grandfathered into the previous plan. Those employees grandfathered into the current (previous) plan include those that retire on or before January 1, 2002, those that are 55 with 15 years service on January 1, 2002, and those with 30 years service before January 1, 2002.

Obviously current retirees, having retired before January 1, 2002, fall within the above exceptions and are not affected by the OPRB changes. As shown above David Settle testified that FAS 106 apply to current employees regarding future retirement rather than to current retirees.

The OPRB changes involve bargaining unit employees. They do not involve retirees and as such do not involve non-mandatory subjects of bargaining. Moreover, since the unit employees are not retirees or other non-statutory employees, the “vitally affects” test is not applicable. *Allied Chemical & Alkali Workers (Pittsburgh Glass)*, supra.

Even though the OPRBs are not included in the parties contract, Respondent has an obligation to bargain in good faith before instituting the changes. [St. Vincent Hospital, 320 NLRB 42 \(1995\)](#).

(2) Does the language of the plan documents permit Respondent's action:

Lynn Martin testified that there are reservation of rights clauses in plan documents for unit, non-unit and retirees. According to Martin, Doyle Howard did object to that language during a September 1995 negotiation meeting.

The reservation of rights reads as follows:
AMENDMENT AND TERMINATION OF PLAN

Amendment of Plan. The Vice President of Human Resources of the Company shall have the right at any time by instrument of writing, duly executed, to modify, alter or amend, in whole or in part, the Plan, provided that any Covered Expense that has been incurred and has become payable as a Benefit but is unpaid shall not be affected by such amendment.

Termination of Plan. The Vice President of Human Resources of the Company shall have the right at any time by instrument of writing, duly executed, to terminate the Plan provided, however, that notice of such termination shall be furnished to Covered Employees.

As shown above the Union did not agree to the plan until 1991. The above language was included in the plan before that date. Moreover, as shown above, the Union never agreed to the same plan held by non-unit and retirees. As shown by Lynn Martin's testimony the Union terminated its Blue Cross/Blue Shield coverage in 1991 and agreed to join other employees and retirees in the Provident Plan. However, differences in coverage have remained for unit and non-unit employees.

Gene Ussery agreed that Doyle Howard objected to

the reservation of rights language around September or October 1995. According to Ussery he sensed that Howard had been unaware of that language before that time. Ussery responded that the reservation of rights language had been in the plan for many years and that he was surprised that Howard did not know of that language.

Findings:

I credit the testimony of Lynn Martin showing that the Plan contained reservation of rights language similar to the above quoted language, since at least 1989.

As shown above Gene Ussery agreed that Doyle Howard objected to the reservation of rights language around September or October 1995. According to Ussery he sensed that Howard had been unaware of that language before that time.

Respondent's witnesses Martin, Ussery and Rueben Pierce Head could not recall a time when Respondent and the Union negotiated over the insurance plan reservation of rights language.

The fact that the current collective bargaining agreement does not include the OPRB benefits and the inclusion of a reservation of rights clause in insurance plans without negotiation, does not constitute waiver of the Union's right to bargain. The evidence failed to show that the Union ever “consciously yielded” or “clearly and unmistakably waived” its interest in future retirement benefits. [T.T.P. Corp., 190 NLRB 240 \(1971\)](#). In fact, as shown above, the parties did not negotiate over the reservation of rights language until the Union objected to the language in 1995.

Language in the plan, without negotiations, does not provide a legitimate basis for Respondent to make a unilateral change in OPRB. [Trojan Yacht, 319 NLRB 741 \(1995\)](#).

Respondent pointed out that its representatives frequently told the Union that it did not negotiate over retirees' health and life insurance benefits. However, Respondent and the Union did negotiate over health and life benefits and oftentimes those benefits were extended to retirees.

I find that this matter must be distinguished from *I.B.E.W. v. Northeast Utilities*, C.A. No. 92-30086-F, cited by Respondent. In that action to enforce a collective bargaining agreement the Court found that the collective bargaining agreement did not contain a provision requiring the employer to maintain health

coverage. Here the situation is similar to that in [Trojan Yacht, 319 NLRB 741 \(1995\)](#). In *Trojan Yacht* where there were applicable collective bargaining provisions, the Board held that in “order to establish a waiver of the statutory right to bargain over mandatory subjects of bargaining, ..., there must be clear and unmistakable relinquishment of that right.” [Trojan Yacht, 319 NLRB at 744](#).

Here unlike *Trojan Yacht*, there was no applicable collective bargaining provisions. Therefore, the instant situation makes for an even stronger case for General Counsel than *Trojan Yacht*.

Here credible evidence received through Respondent's witness Lynn Martin showed that the plan adopted by the Union in 1991 was not the exact same plan applicable to non-unit employees and retirees.

Moreover the testimony of Gene Ussery proved there was never a clear and unmistakable relinquishment of the right to bargain over future retirees OPRB. Ussery agreed that Doyle Howard objected to the reservation of rights language around September or October 1995. According to Ussery he sensed that Howard had been unaware of that language before that time.

Neither the parties' memorandum of agreement nor any other agreement between the parties, included terms that are “incisive, direct, and specific in their assault on the existence of any negotiating responsibility during the term of the contract, and their desire to commit unresolved issues to management prerogatives as they existed on entry of the agreement.” [Rockford Manor Care Facility, 279 NLRB 1170, 1174 \(1986\)](#).

The record failed to establish there was a clear and unmistakable relinquishment of the right to bargain over OPRB changes. [Trojan Yacht, 319 NLRB 741 \(1995\)](#). The record proved that the Union did not waive its right to bargain over OPRB changes.

(3) Retirees are not entitled to receive a particular level of benefits:

(4) OPRB Benefits are not vested:

Respondent argued that the Union has no right to maintain a particular level of benefits and that OPRB benefits are not vested, in light of ERISA. The Board has not held nor does the General Counsel seek in the instant matter, maintenance of a particular level of benefits. Nor is there a contention that OPRB benefits

are vested. Instead the Board has held that an employer must offer bargaining before unilaterally changing benefits that affect unit employees. The Board found in *Trojan Yacht*, supra, that the employer must offer bargaining before deciding upon a precise change.

(5) The changes are not substantial and material:

(6) The changes do not vitally affect benefits of active employees:

Respondent cited [Civil Service Employees Ass'n, 311 NLRB 6 \(1993\)](#), in arguing that the changes here are not material, substantial and significant. However, *Civil Service* must be distinguished. There the Board found there had been no actual unilateral change since the unilateral requirement that employees carry beepers did not materially change the practice of having employees call in and for it to call places listed on the itinerary. Here there was a clear unilateral change.

Respondent argued that the Board is bound by the “vitally affects” doctrine citing among others [Allied Chemical & Alkaline Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 \(1991\)](#). However, the Court in *Pittsburgh Plate Glass* noted,

To be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining. [404 U.S. 157, 180](#).

The Board has held:

Changes in retirement benefits that affect current employees are a mandatory subject of collective bargaining, and a unilateral modification of such benefits, during the term of an agreement is in derogation of the bargaining obligation and constitutes and unfair labor practice. [Titmus Optical, Inc., 205 NLRB 974, 981 \(1973\)](#).

The Board has continued to find that future retirement benefits constitute a mandatory subject of bargaining. [Britt Metal Processing, Inc., 322 NLRB No. 69 \(1996\)](#); [Able Contracting Co., 320 NLRB No. 140 \(1996\)](#). In view of the current state of Board decisions I find I cannot rule for Respondent in its contentions that the unilateral changes are not substantial and material or that they do not vitally affect benefits of active employees.

Conclusions:

The record is not in dispute that the Union requested bargaining over OPRB changes announced by Respondent on April 21, 1995. Respondent rejected the Union's request on and after April 21, 1995. I find that Respondent has continued to refuse to bargain over its OPRB changes.

There is no dispute but that Respondent had a bargaining obligation with the Union. At issue is whether that obligation extended to the instant issue, i.e., the OPRB changes. In determining that issue I must question whether the alleged unilateral changes involve a mandatory subject of bargaining. NLRB v. Wooster Div. of Borg-Warner, Corp., 356 U.S. 342, 349 (1957); NLRB v. Katz, 369 U.S. 736, 743 (1962).

The Board and courts, have held that pension plan benefits for future retirees is a mandatory subject of bargaining. T.T.P. Corp., 190 NLRB 240 (1971); Allied Chemical & Alkali Workers (Pittsburgh Glass), 404 U.S. 157 (1971). As noted, for example, in United Hospital Medical Center, 317 NLRB 1279 (1995) "(h)ealth and life benefit plans are a mandatory subject of collective bargaining. They may not be altered or eliminated without bargaining to mutual agreement or to a good faith impasse on such action. NLRB v. Katz,". In as much as health and life benefit plans are mandatory subjects of bargaining and in as much as the Board and courts have concluded that pension benefit plans for future retirees are mandatory subjects of bargaining, I am persuaded that health and life insurance coverage in retirement is a matter relating to wages, hours and other terms and conditions of employment such as to constitute a mandatory subject of bargaining.

Respondent argues that the distinction of importance is one involving employees and retirees. However, there is another distinct group involved in the instant dispute. In its April 21, 1995, notice Respondent discussed benefits for some employees that would first become eligible to retire on and after January 1, 2002. Obviously that group does not involve current retirees. That group would potentially involve some current unit employees. It is not possible to determine at this time which unit employees other than those in the excluded or grandfathered group, will fall within those affected by Respondent's April 21 notice. Nevertheless, it is apparent that retirement benefits are important conditions of employment for all unit employees that may first qualify for retirement after January 1, 2002.

I find that Respondent's April 21, 1995, announcement affects current unit employees. Only current employees and those that may be hired in the

future may be affected by Respondent's OPRB changes. No current retirees may be affected as shown in Respondent's announcement. Those April 21 OPRB changes involve terms and conditions of employment of current unit employees.

By announcing its planned OPRB changes, announcing that the changes would be implemented and refusing to bargain regarding current unit employees' future retirement welfare benefits after the Union's request, Respondent failed to fulfill its bargaining obligation and thus violated Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. Georgia Power Company, is an employer engaged in commerce within the meaning of section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers Local 84, AFL-CIO-CLC, is a labor organization within the meaning of section 2(5) of the Act.

3. Respondent, by unilaterally changing its other post retirement benefits (OPRB) for unit employees without bargaining with the Union as representative of the employees in the bargaining unit described at Article II, Section 2 of their collective bargaining agreement, has engaged in conduct violative of section 8(a)(1) and (5) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of section 2(2), (6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent has illegally changed other post retirement benefits (OPRB) for bargaining unit employees without bargaining with the Union as representative, Respondent is ordered to restore OPRB to pre-April 21, 1995 status and upon request bargain in good faith with the Union regarding OPRB..

Upon the foregoing findings, conclusions of law and the entire record, and pursuant to section 10(c) of the Act, I issue the following recommended:

ORDER [FN2]

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is hereby ordered that Respondent, Georgia Power Company, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Making unilateral changes in bargaining unit employees' OPRB without providing notice of the proposed changes and adequate opportunity for the Union to bargain about those changes.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain collectively with International Brotherhood of Electrical Workers Local 84, AFL-CIO-CLC as exclusive representative of the employees in the appropriate bargaining unit described in Article II, Section 2 of their collective bargaining agreement (memorandum of agreement) and, if an understanding is reached, embody that understanding in a signed contract.

(b) Restore OPRB to the pre-April 21, 1995, level.

(c) Within 14 days after service by the Region, post at its facilities in Atlanta, Georgia, copies of the attached notice. [FN3] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Region, file with the Regional Director, Region 10, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C. February 14, 1997

William N. Cates
Administrative Law Judge

“APPENDIX”

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally change terms and conditions of employment including other post retirement benefits (OPRB) for employees in bargaining units represented by **International Brotherhood of Electrical Workers Local 84, AFL-CIO-CLC**, or any other labor organization.

WE WILL, on request of the Union, bargain collectively regarding other post retirement benefits (OPRB) as they may affect bargaining unit employees, with **International Brotherhood of Electrical Workers Local 84, AFL-CIO-CLC**, as the exclusive representative of the employees in the appropriate bargaining unit described at Article II, Section 2 of our memorandum of agreement.

WE WILL, within 14 days of this Order, restore other post retirement benefits (OPRB) for bargaining unit employees to the pre-April 21, 1995, level.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

Georgia Power Company

(Employer)

Dated _____ **By** _____

(Representative)

(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, 101 Marietta Street NW, Suite 2400, Atlanta, Georgia 30323-3301, Telephone (404) 331-3212.

FN1

. The hearing originally opened on February 2, 1996, before Administrative Law Judge Albert A. Metz. At that time the hearing was postponed pending settlement negotiations.

FN2

. If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

FN3

. If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

1997 WL 33315930 (N.L.R.B. Div. of Judges)
END OF DOCUMENT

2002 WL 31386013 (N.L.R.B. Div. of Judges)

National Labor Relations Board
Division of Judges
Atlanta Branch Office

SOUTHERN NUCLEAR OPERATING COMPANY

AND

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, SYSTEM COUNCIL
U19

ALABAMA POWER COMPANY

AND

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, SYSTEM COUNCIL
U19

SOUTHERN NUCLEAR OPERATING COMPANY

AND

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 84

SAVANNAH ELECTRIC AND POWER
COMPANY

AND

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 1208

GULF POWER COMPANY

AND

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 1055

Case 10-CA-32861
JD(ATL)-58-02
Birmingham, AL

October 17, 2002

Katherine Chahrouri, Esq. for General Counsel.

Laura H. Kriteman, Esq. and Terance Madden, Esq.
for Respondent.

Robert H. Weaver, Esq. for Charging Party.

Decision

This hearing was initiated with all-party telephone conferences and concluded in Birmingham, Alabama on May 3, 2002. The Respondents herein include Southern Nuclear Operating Company, Alabama Power Company, Savannah Electric and Power Company, and Gulf Power Company. [FN1] The unions include several local unions and a system council, of the International Brotherhood of Electrical Workers. I have considered the full record [FN2] in reaching this decision, including briefs filed by Counsel for General Counsel, Respondent and Charging Party.

Jurisdiction: [FN3]

Respondent Southern Nuclear Operating Company is a wholly owned subsidiary of an investor-owned utility, which generates electricity and is a corporation with a place of business in Birmingham, Alabama as well as facilities in Alabama and Georgia. During the past year, which period is representative of all times material herein, Southern Nuclear Operating Company purchased and received at its Birmingham facility goods valued in excess of \$50,000 directly from suppliers located outside Alabama.

Respondent Alabama Power Company is an investor-owned electric utility, which generates and distributes electrical and utility service, and is a corporation with various places of business throughout Alabama. During the past year, which period is representative of all times material herein, Alabama Power Company purchased and received at its Birmingham, Alabama facility goods valued in excess of \$50,000 directly from suppliers located outside Alabama.

Respondent Savannah Electric and Power Company is an investor-owned electric utility, which generates and distributes electrical and utility services and is a corporation with various places of business in Georgia.

During the past year, which period is representative of all times material herein, Savannah Electric and Power Company purchased and received at its Savannah facility goods valued in excess of \$50,000 directly from suppliers located outside Georgia.

Respondent Gulf Power Company is an investor-owned electric utility, which generates and distributes electrical and utility services and is a corporation with a place of business in Pensacola, Florida. During the past year, which period is representative of all times material herein, Gulf Power Company purchased and received at its Pensacola facility goods valued in excess of \$50,000 directly from suppliers located outside Florida.

Respondents Southern Nuclear Operating Company, Alabama Power Company, Savannah Electric and Power Company and Gulf Power Company were employers at all material times, engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act (Act).

Labor Organizations: [FN4]

International Brotherhood of Electrical Workers, Local 796 is the representative of a majority of Respondent Southern Nuclear Operating Company “employees who are engaged in the operation and maintenance of the generating properties of the Company employed at its Farley Nuclear Plant” and Southern Nuclear Operating Company and Local 796 are parties to a Memorandum of Agreement, effective from August 15, 2001 through August 15, 2006. International Brotherhood of Electrical Workers, Local 84 is the representative of a majority of Respondent Southern Nuclear Operating Company “employees engaged in the operation and maintenance of Edwin I. Hatch Nuclear Plant and Vogtle Electric Generating Plant” and Southern Nuclear Operating Company and Local 84 are parties to a Memorandum of Agreement effective from August 30, 1999 through June 30, 2002.

System Council U-19 is the representative designated by International Brotherhood of Electrical Workers, Locals 345, 833, 904, 391, 801, 841, 1053, 796 and 2077 which represent a majority of Alabama Power Company employees in the units described below, and Alabama Power Company was party to a Memorandum of Agreement with those Locals, effective August 15, 1998 through August 15, 2001:

Employees in the Power Delivery Construction, Transmission Line Maintenance, Substation Maintenance, General Shops and Equipment Maintenance personnel in the Fleet Services

Department of the company with certain exceptions as set forth in Article 1 of Memorandum of Agreement with System Council U19.

Employees in the distribution, Meter Test, Garage, Stores, Appliance Repair, and the Meter Readers with certain exceptions as set forth in Article 1 of Memorandum of Agreement with System Council U19.

Employees in Power Generation and Steam Heat with certain exceptions as set forth in Article 1 of Memorandum of Agreement with System Council U19.

International Brotherhood of Electrical Workers, Local 1208 is the representative of a majority of Savannah Electric and Power Company “employees engaged in the delivery of power with certain exceptions as set forth in Article 1 of Memorandum of Agreement with Local 1208” and Savannah Electric and Power Company and Local 1208 are parties to a Memorandum of Agreement, effective April 16, 1999 through April 15, 2003.

International Brotherhood of Electrical Workers, Local 1055 is the representative of the below described bargaining unit of Gulf Power Company employees and Gulf Power Company and Local 1055 were parties to a Memorandum of Agreement effective August 15, 1998 through August 15, 2001:

Line Construction and Maintenance; Electric Service; Substation Construction and Maintenance; Communications, Construction and Maintenance; Meter Testing, Installation and Repair; Pensacola Repair Shops; Garage Facilities; Warehouse Section; Field Service Representatives; and Steam-Electric Generating Plants (Crist, Scholz and Smith).

Respondents Southern Nuclear Operating Company, Alabama Power Company, Savannah Electric and Power Company and Gulf Power Company admitted or stipulated that the relevant charging parties and all the Local Unions named in the Complaint, are party to one or more memoranda of agreement with one of the Respondents, and are labor organizations within the meaning of Section 2(5) of the Act. The parties stipulated that International Brotherhood of Electrical Workers Local Union Numbers 345, 833, 904, 801, 841, 1053, 796 and 2077, and Local Unions 84, 1208 and 1055 have been at all material times certified representatives of a majority of the employees in respective units described above, for the purpose of collective bargaining.

The Alleged Unfair Labor Practices:

On October 20, 2000, Respondents Southern Nuclear Operating Company, Alabama Power Company, Savannah Electric and Power Company, and Gulf Power Company unilaterally and without consultation with the Unions, announced changes (to be effective January 1, 2006) to the retiree health insurance benefits and retiree welfare life benefits without affording the Unions an opportunity for meaningful bargaining. [FN5] On or about November 27, 2000 Alabama Power Company refused a request of System Council U 19; on or about November 30, 2000 Southern Nuclear Operating Company refused a request of System Council U 19; on or about December 5, 2000 Southern Nuclear Operating Company refused a request of International Brotherhood of Electrical Workers Local 84; on or about April 20, 2001 Savannah Electric and Power Company refused a request of International Brotherhood of Electrical Workers Local 1208; and on or about May 8, 2001 Gulf Power Company refused a request of International Brotherhood of Electrical Workers Local 1055; to bargain over the announced retiree health insurance benefits and retiree welfare life benefits changes. [FN6]

Respondents point to Federal Accounting Standard 106 (FAS 106) as the reason they were required to change their accounting of retiree medical or life insurance benefits. Before FAS 106, Respondent was not required to account for liability toward an employee regarding those retiree benefits during the tenure of the employee's active employment. After FAS 106, Respondents were required to account for those retirees' benefits while each employee was actively employed.

Subsequent to FAS 106, Respondents announced changes to their retirees' health insurance and welfare life insurance benefits in April 1995. Respondents announced that they would pay between 60% and 90% of each retirees' medical premium up to \$7,500 annually and would provide \$2,000 life insurance up to a maximum of \$50,000, for every year of accredited service, for any employee that retired on or after January 1, 2002; but that those changes would not affect current retirees, all employees that retired before January 1, 2002, and all employees with 30 years of accredited service or that would be age 55 with at least 15 years of accredited service on January 1, 2002.

In October 2000 Respondents announced additional changes to retirees health insurance and welfare life insurance benefits: Employees that would not be affected by the April 1995 changes were expanded to

include, (1) employees at least 55 years of age with 10 years accredited service on January 1, 2002; and (2) active employees on January 1, 2002 with at least 25 years accredited service that did not retire before reaching the age of 55. Moreover, Respondents announced that the retirees' medical and life insurance cost-sharing changes would be postponed from January 1, 2002 to January 1, 2006. [FN7]

There were no unfair labor practice charges filed over the April 1995 changes. The instant unfair labor practice charges and complaint refer to the October 2000 changes. Neither the charging parties nor General Counsel seek to rescind the October 2000 changes.

The parties stipulated that the retiree health insurance benefits and retiree welfare life benefits changes referred to above, relate to the changes at issue [FN8] in *Georgia Power Company*, [FN9] [325 NLRB 420 \(1998\)](#), [176 F.3d 494 \(11th Cir. 1999\)](#), cert denied [528 U.S. 1061 \(1999\)](#). [FN10]

Findings:

Credibility:

The parties stipulated the record and I find there were no conflicts as to material facts.

Findings:

On October 20, 2000, Respondents Southern Nuclear Operating Company, Alabama Power Company, Savannah Electric and Power Company and Gulf Power Company unilaterally and without consultation with the Unions, announced changes (to be effective January 1, 2006) to the retiree health insurance benefits and retiree welfare life benefits. Those changes would not apply to current retirees. Instead they applied only to some future retirees that were either current employees or future employees. All the Respondents rejected demands by their employees' unions to bargain over their changes to the retiree health insurance benefits and retiree welfare life benefits.

Respondents and the Unions are parties to several collective bargaining agreements. Those agreements include instruments called Memoranda of Agreement as shown above in the section "Labor Organizations." Additionally, there were other agreements involving

Respondents and the Unions, which were called Memoranda of Understanding. None of the memoranda of agreement or memoranda of understanding contains provisions for handling future retirees medical and life insurance benefit changes.

(1) Employees are not involved:

Respondents argue there were no unfair labor practices despite the stipulated record. Initially Respondents argued that they did not have an obligation to bargain. Respondents argued that retirees are not employees.

The Supreme Court has considered the question of whether an employer is obligated to bargain regarding retirement benefits. In essence the Court held that an employer is not obligated to bargain over current retirees' benefits but the employer is obligated to bargain over future benefits which may include retirement benefits, of active bargaining unit employees. *Chemical Workers v. Pittsburgh Plate Glass Co.* 404 U.S. 157 (1971). The Board pointed to *Pittsburgh Plate Glass in its Mississippi Power Company*, 332 NLRB No. 52 (2000), [FN11] decision.

Here, Respondents unilaterally announced changes to retirees' health insurance benefits and retiree welfare life benefits that were to be effective on January 1, 2006. Respondents' October 20, 2000 announcement did not affect people that had retired at or before that time. Instead it announced a change in retiree benefits for many of its current bargaining unit employees. Both the Supreme Court and the Board have held that while retirees are not employees, benefits for future retirees are matters that materially or significantly affect unit employees' terms and conditions of employment. *Chemical Workers v. Pittsburgh Plate Glass Co.*, supra; *Georgia Power Company*, 325 NLRB 420 (1998), 176 F.3d 494 (11th Cir. 1999), cert denied 528 U.S. 1061 (1999).

Respondents argued that the Board misconstrued the Court's language in *Pittsburgh Plate Glass Co.*, [FN12] that "future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining."

Respondents' argument illustrated why I cannot apply its rationale. Respondents tacitly agreed that the Board has consistently applied a rule that future retirees' benefits for bargaining unit employees is a mandatory subject of bargaining. In fact in two recent

United States Courts of Appeal cases, neither the Fifth Circuit nor the Eleventh Circuit rejected the NLRB's application of the so-called *Pittsburgh Plate Glass* dicta. [FN13]

In *Mississippi Power Company* [FN14] v. *N.L.R.B.*, 284 F.3d 605 (5th Cir. 2002), the Fifth Circuit Court of Appeals rejected that employer's argument that changes in future retirees' benefits are not mandatory bargaining subjects. There, among other things, the Court overruled arguments by the employer Mississippi Power Company that: (1) future retirees are not "employees" under the Act; (2) the announced changes in life insurance benefits were not material, substantial, or significant; (3) the announced changes did not vitally affect a mandatory subject of bargaining for current employees; and (4) the announced changes did not have a tangible effect on a mandatory subject of bargaining.

The Court stated on page 614,

*The Company first asserts that the Board erred when it categorized the "future retirees" affected by the OPRB [FN15] changes as "employees" under the Act, leading in turn to the erroneous conclusion that the OPRBs were mandatory bargaining subjects. The Company appears to argue, in essence, that the Board has misinterpreted the seminal case on this issue, *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.* It is well settled, however, that *Pittsburgh Plate Glass* stands for the proposition that the retirement benefits of a company's current retirees are not mandatory bargaining subjects but that "future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining." Even if there were merit to the company's argument that *Pittsburgh Plate Glass* has been misconstrued and in fact establishes a distinction between non-vested retirement benefits and contractually enforceable ones, we would still conclude that the Board's interpretation of *Pittsburgh Plate Glass*, and the resulting construction of the statutory term "employee," is "reasonably defensible," at least as applied to materially; adverse changes in a subsisting retirement benefit. Thus, this initial challenge to the Board's ruling fails. (Footnotes omitted)*

I find that future retiree benefits do involve employees and is a mandatory subject of bargaining.

(2) Changes after ERISA:

Respondents next argued that *Pittsburgh Plate Glass* was decided before the passage of ERISA and that ERISA more clearly articulated the distinction that the Supreme Court has made between vested and non-vested benefits. Therefore, by reading ERISA along with *Pittsburgh Plate Glass* it is more evident that the Board's rationale is faulty and future retirees' benefits do not constitute a mandatory subject of bargaining.

However, several cases have been decided since ERISA became law, including *Georgia Power Company*, which was decided by the Eleventh Circuit in 1999 and *Mississippi Power Company*, which was decided by the Fifth Circuit in 2002, and nothing was said by those Courts illustrating that *Pittsburgh Plate Glass* should be viewed differently after ERISA. The Court in *Mississippi Power Company* did mention at footnote 34 that Mississippi Power Company had argued that ERISA granted it authority to alter its Medical Benefits Plan at will. [FN16] However, the Court concluded that the Unions waived their right to demand bargaining regarding those benefits and it did not consider *Mississippi Power Company's* ERISA argument.

The Court in [Georgia Power Company, 325 NLRB 420 \(1998\)](#), [176 F.3d 494 \(11th Cir. 1999\)](#), upheld the Board's determination that future retiree benefits constitute a mandatory subject of bargaining.

I am unable to find merit in Respondents' argument.

(3) ERISA requires that Employers reserve the right to change:

Respondents also argued that ERISA requires that employee benefit plans be established and maintained pursuant to written instruments. ERISA required that plan documents can be and will be amended by the plan sponsor. Therefore, it is vitally important to interpret the Plans in accordance with those requirements and revocation of rights clauses have valid force in permitting employers to amend or terminate welfare benefits plans. Respondents cited [Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 \(1995\)](#) for the proposition that "employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."

An examination of *Curtiss-Wright Corp. v. Schoonejongen* shows that opinion was never concerned with the matters at issue herein. Retirees

sued after Curtiss-Wright terminated retiree health benefits upon closing the facilities where the retirees formerly worked. There was no question of unfair labor practices before the Court and there is nothing in that decision which relieves Respondents of their bargaining obligations. The Court did state that ERISA Section 402(b)(3) actually requires * * a "procedure for amending (the) Plan." However, nothing was said to show that ERISA required that plans include a procedure for amendment that denies collective-bargaining representatives an opportunity to negotiate changes in the plan. Reservations of rights provisions in welfare plans may be valid under both ERISA and the NLRA.

As shown above, there is nothing in the NLRA that prevents employers and unions from agreeing on procedures for amending ERISA sanctioned plans. Moreover, there was no showing that Respondents were required to engage in unfair labor practices in order to satisfy ERISA.

Perhaps, Respondents failed to include proper amendment provisions in its plans in consideration of both ERISA and the NLRA. However, no legal authority was cited for the proposition that employers may violate the NLRA in order to cure such errors.

In any event, I found no substantive evidence supporting Respondent's contention that it is required or authorized, by ERISA to unilaterally changed future retirees' medical and life insurance benefits.

(4) Non-mandatory because it will have no impact until expiration of contract:

Respondents argued that the NLRB has determined that an issue is a nonmandatory subject if it can have no impact on the unit employees citing [NLRB v. Columbus Printing Pressmen & Assistants' Union, 543 F.2d 1161, 1165 \(5th Cir. 1976\)](#) (affirming [219 NLRB 268 \(1975\)](#)).

The Board in *Columbus Printing* held that a contract arbitration clause is not a mandatory subject of collective bargaining since its effect on terms and conditions of employment during the contract period is at best remote. The contract arbitration provision required arbitration in the event the parties could not agree to a successor contract.

However, both the Board and Courts of Appeal have, since the holding in *Columbus Printing*, found that the specific matters at issue herein do constitute mandatory subjects of bargaining ([Georgia Power](#)

[Company](#), 325 NLRB 420 (1998), 176 F.3d 494 (11th Cir. 1999); [Mississippi Power Company v. N.L.R.B.](#), 284 F.3d 605 (5th Cir. 2002)).

Therefore, I find that the October 2000 changes (to be effective January 1, 2006) to the retiree health insurance benefits and retiree welfare life benefits did constitute mandatory subjects of bargaining.

(5) Prospectively effective:

Respondents argued that, in analyzing *Pittsburgh Plate Glass* the Board has taken the “illogical position that bargaining is mandated if modifications to retiree welfare benefits are made prospectively effective, but bargaining is not required if an employer makes unilateral modifications to retiree benefits that are immediately, or more immediately, effective.” Respondents cited [Rossetto v. Pabst Brewing Co.](#), 128 F.3d 538, 540-41 (7th Cir. 1997), where retirees’ benefits that would not go into effect for one month, was the matter at issue. The Court held that despite the prior announcement, retiree benefits are merely a permissive subject of bargaining.

Respondents’ argument misses the point. It is not the prospective nature of the benefits that turns the issue. Rather it is the fact that the benefits are for employees rather than for retirees. One needs only to look at Respondents’ April 1995 unilateral changes to recognize the distinction between employees and retirees. There Respondents announced among other things, that it was changing retirees health insurance and welfare life insurance benefits, but those changes did not apply to current retirees or to current employees who had 30 years of accredited service or who would be age 55 with at least 15 years of service on January 1, 2002. Instead the retirees’ health insurance and welfare life insurance benefits changes applied to employees with less than 30 years service or employees with less than 15 years service on January 1, 2002, that retired after January 1, 2002.

It is true that those April 1995 changes were prospective in the sense that the announcement occurred long before the effective date of the changes. However, that point was not significant. What was significant was the fact that all the people involved in the announced changes were employees. No retiree or, for that matter, no one that retired before January 1, 2002 with some exceptions not significant to this issue, would be involved in the 1995 changes. All the retirees at that time plus some employees were not affected by the April 1995 announcement. Only some of the April 1995 employees and employees hired

after that date, were affected by the April 1995 announcement. Consequently, the October 2000 changes also involved only employees and people that would be hired before January 1, 2006. The changes announced in 2000 only expanded the group of employees that would not be affected by the April 1995 changes. That announcement like the one in April 1995, did not affect any of the retirees nor did it affect (1) employees at least 55 years of age with 10 years accredited service on January 1, 2002; and (2) active employees on January 1, 2002 with at least 25 years accredited service that did not retire before reaching the age of 55.

I reject Respondents’ prospective effects argument.

(6) The Unions did not complain about earlier changes:

Respondents also argued that the Unions failed to demand bargaining or complain about previous unilateral changes in benefits. For example, Respondents made changes to retiree medical insurance and life insurance benefits in April 1995 and the Unions did not complain or file unfair labor practice charges over those changes. However, the Board recently considered that argument:

* * * *The Board has consistently held that a union that acquiesces in an employer’s unilateral changes in terms and conditions of employment does not irrevocably waive its right to bargain over such changes in the future.* [Georgia Power Company](#), 325 NLRB 420, 421 (1998). [FN17]

I must reject this similar argument by Respondents.

(7) Reservation of Rights:

Then, Respondents argued that their various memoranda of agreement include management rights clauses and the alleged unlawful changes fit within the broad category of rights reserved through those clauses. Respondents argued that the alleged unlawful changes involved a means to preserve the economic direction of the business including a response to the promulgation of FAS-106.

Management rights clauses are included in relevant agreements. One is included in JExh. 1(a) and is entitled “MANAGEMENT:”

11. The right to hire, discipline, and/or discharge employees for reasonable or sufficient cause, and the full right of Management of the properties is reserved to and shall be vested

exclusively with Management of the Company. Such rights shall include, but not be limited to, the right of Management to determine at any and all times how many employees it will employ or retain, together with the right to exercise full control and discipline in the interest of proper service, operation, and efficient and economical conduct of its business, subject to the other provisions of this agreement. In making promotions, transfers and job assignments as provided for in Article VII hereof, Management shall be the sole judge of competency. The foregoing rights shall be subject to the grievance and arbitration provisions of Article X and XI, only to the extent they are modified or limited by other specific provisions of this agreement.

There is nothing in the above language that shows that the alleged unlawful changes fit within the broad category of rights reserved through that management clause. The rights reserved to management are specified in the management provision above. Nothing was said about management having the right to unilaterally change future retirees' health and life insurance benefits. I find that the management clauses do not contain relevant reservation of rights to management language.

(8) Arguments regarding specific Respondents:

Next, Respondents make several arguments regarding specific Respondents and specific bargaining units:

1. International Brotherhood of Electrical Workers, Local 796 is the representative of bargaining unit employees of Southern Nuclear Operating Company (Farley).

(a) Its collective agreement expressly referenced medical and life benefits:

(i) The Memorandum of Agreement:

Southern Nuclear Operating Company (Farley) argued that its Memorandum of Agreement with International Brotherhood of Electrical Workers Local 796 expressly referenced medical benefits and life benefits. Its Memorandum of Agreement dated August 18, 1998, is Joint Exhibit 1(b) and Southern Nuclear Operating Company cited Article VIII, paragraph (e), which is found at page 36. Only the first

paragraph involves relevant benefits:

(e) The Company will continue its present policy of carrying group life insurance at its own expense on all full-time employees who have been in the employ of the Company for an continuous period of six (6) months or more, so long as such insurance continues to be available to the Company at substantially the present rates and under substantially the present conditions.

The issue here regards both future retirees' health insurance benefits and future retirees' welfare life benefits. The above paragraph applies to full-time employees' group life insurance and it does not specifically include retirees' or future retirees' welfare life benefits.

I find that although the above-quoted provision does involve a promise from Southern Nuclear Operating Company (Farley) to continue its present policy, in consideration of the Union accepting that provision, it does not apply to future retirees. Moreover, even if I should find that the above-quoted provision does apply to future retirees, Southern Nuclear Operating Company did not continue its policy as it promised in that provision. Instead it changed its policy in regard to future retirees in 1995 and in October 2000. Therefore, under that assumption, Respondents breached their agreements with the unions.

The above-quoted contract provision provides only two avenues for change. One occurs if the group life insurance policy is no longer available at substantially the present rates and the other occurs if the group life insurance policy is no longer available at substantially the present conditions. Neither of those conditions was shown to be involved in the instant matter. That above-quoted provision did not provide that Southern Nuclear Operating Company (Farley) could institute a changed policy under the circumstances that existed in October 2000. The law is well settled that before changing a policy regarding a mandatory subject of bargaining, an employer must first provide the Union an opportunity to bargain over that change. Here, that did not occur. Therefore, under the assumption that the above-quoted provision applied to future retirees (which assumption I do not adopt), Respondent, by its own action, breached that provision. Therefore, Respondents are not in position to complain that the Unions are bound by that provision which allegedly incorporates the October 2000 future retirees medical and life insurance benefits change.

Moreover, in any event, it is clear from the above-quoted language that the provision did not include medical benefits. If referred to only life

insurance and that was limited to “full-time employees.”

I find that Joint Exhibit 1(b) and Southern Nuclear Operating Company cited Article VIII, paragraph (e) did not refer to future retirees' benefits that are relevant to the issues herein.

(ii) Exhibit “I:”

Southern Nuclear Operating Company also cited Exhibits I and J. Exhibit “I” is a Memorandum of Understanding dated August 15, 1995 and it included “contract language changes.” The only possibly relevant contract language is that shown above at Article VIII (e).

The contract language change regarding Article VIII starts at page 112 of Joint Exhibit 1(b). However, Exhibit “I” did not include a contract change to Article VIII, paragraph (e).

Exhibit I does include a provision regarding “Flexible Benefits Plan:”

Management and the union will meet during the year 1996 to discuss the issue of revising the existing benefits package and instituting a flexible benefits plan. Such a flexible plan might include a number of new and innovative benefits choices, and would include a dental insurance option.

If the parties are unable to agree regarding a flexible benefits plan, then the existing benefits package will continue during the term of this agreement.

With the exception of the benefits changes agreed herein, it is intended that current insured benefit plan premium amounts and plan coverages will remain unchanged from 8/15/95 until 7/1/96; however, any new insured benefits or enhancements that may arise during this period, will be discussed with Local 796 before implementation. In the event of unforeseen catastrophic plan expenses during this time, both parties agree to discuss the impact on insured benefit premium amounts and/or plan provisions.

In other words, the parties agree through the above language to negotiate regarding changes and if no agreement was reached, to continue the current benefits plan. However, that agreement did not include future retirees' existing benefits package or a future retirees' flexible plan. Future retirees were not included in any of the above-quoted language.

I find that Exhibit I did not refer to medical benefits

and life insurance benefits for future retirees.

(iii) Exhibit “J:”

Southern Nuclear Operating Company also cited Exhibit “J.” Exhibit “J” purports to be a 1998 contract settlement agreement between Southern Nuclear Operating Company and Local 796. It includes, among other things, a Memorandum of Understanding. That Memorandum of Understanding includes discussions of benefit programs including the implementation of a flexible benefits plan called SouthernFlex. and the following is typical of its language regarding negotiations:

Any changes in the coverages available and the employee cost of any benefits included in SouthernFlex will be negotiated with the Union prior to implementation.

Then, at paragraph 5 c. of the Memorandum of Understanding:

c. During the term of this contract, the Company will meet with the Union semi-annually to discuss trend data, the SNC (Southern Nuclear Operating Company) medical reserves, and premium to cost ratios in order to communicate premium estimates for years 2000 and 2001.

I find that Exhibit J, as Exhibit I above, did not refer to medical benefits and life insurance benefits for future retirees. Nothing is included in the above-quoted provision regarding retirees or future retirees. In fact the language in Exhibit J illustrated that the parties intended to continuing bargaining regarding matters, which could result in a need to change benefits for employees. There was no language showing the parties ever intended to incorporate benefit plans in their collective bargaining agreements. More importantly, there was no showing that retirees or future retirees were included in the above-quoted provisions.

(b) Local 796 waived its right to bargain:

Southern Nuclear Operating Company also argued that Local 796 waived its right to bargain over retirees' benefits. It and Local 796 agreed to a Memorandum of Understanding dated November 19, 1991, which includes the following:

Southern Nuclear will be bound by the terms and conditions of the MOA, as a continuing employer, subject to the following negotiated terms:

** * **

(2) Insured benefits for employees covered by the Memorandum of Agreement will be Southern Nuclear Operating Company's insured benefits as set forth in the attached summary. Insured benefit changes negotiated after this agreement shall also be included.

It is clear from the language “(i)nsured benefit changes negotiated after this agreement shall also be included,” that neither party intended to curtail future negotiations regarding benefit changes. In fact, that language shows it was the intent of the parties to negotiate changes made after the agreement. That language shows that Local 796 never intended to waive its bargaining rights.

(c) Southern Nuclear Operating Company (Farley) reserved its rights and the Union waived its right to bargain:

Southern Nuclear Operating Company (Farley Plant) argued that its benefit plans include reservation of rights clauses, which were incorporated into the respective collective-bargaining agreements.

However, the relevant collective bargaining agreements did not mention specific benefit plans. The agreements did mention particular matters that must be included as benefits to employees. But, there is no mention of specific plans or of intent to incorporate a plan or plans into one of the collective bargaining agreements. Therefore, I find that the parties did not include any plans in their agreements and, consequently, the parties did not intend to incorporate reservation of rights language from plan documents in their collective-bargaining agreements.

Nevertheless, out of an abundance of caution, I shall question whether the insurance plans alone serve to block any rights the employees' representatives may have to negotiate over changes. Obviously, where an employer agreed with a union to provide retirees' benefits under a specific insurance plan (e.g., the Georgia Power plan) and subsequently the employer decided to provide future retirees' benefits under a different plan (e.g., the Mississippi Power plan), the Union would have a right to negotiate over that change.

Here, there is a change in plans even though the name of the plan may have remained the same. Whenever, as here, an employer announces changes in benefits, the situation that existed at the time the parties agreed to the respective collective bargaining agreement, changes as well. A reference to a specific

insurance or benefit plan on a certain date would encompass that plan, as it existed on that date. The parties could, if they desired, express that the employer would be free to make changes in the benefits plan without incurring a bargaining obligation by simply stating that in the collective bargaining agreement or in a side agreement. However, that is not what occurred regarding Southern Nuclear Operating Company (Farley) and Local 796.

Nothing was said in the collective bargaining agreements or in any side agreement about the Union abandoning any rights if the employer decided to change benefits. Southern Nuclear Operating Company (Farley) by announcing changes to respective plans was in effect announcing a different plan than the one referenced in the collective-bargaining agreement and in the absence of a specific waiver by the Union, the Union had the right to bargain before Southern Nuclear Operating Company (Farley) made changes in future retirees' medical and life insurance benefits.

Nor was there anything in the parties' collective bargaining agreements that showed it was the parties' intent to incorporate insurance plans into any of those agreements. As shown herein, Southern Nuclear Operating Company (Farley) and the Local 796 agreed to a Memorandum of Agreement and Memoranda of Understanding. However, Southern Nuclear Operating Company (Farley) also referred to both insurance plans and summary plan descriptions. Local 796 was party to the memoranda of agreement and understanding but was not party to Southern Nuclear Operating Company (Farley)'s “Plan” or “Summary Plan Description” documents. [FN18]

The question here involves Southern Nuclear Operating Company (Farley)'s contention that the parties incorporated the plans into the collective bargaining agreements. Plan documents included reservation of rights which, according to Southern Nuclear Operating Company (Farley)'s argument, enabled Southern Nuclear Operating Company (Farley) to amend medical or life insurance plans.

When, as here, plan descriptions or summary plan descriptions, are the primary reference for identifying the medical or life insurance benefits that the employers have agreed to provide, those plans or summary plan descriptions are not incorporated into the collective bargaining agreements absent specific agreement to that effect ([*Amoco Chemical Company*, 328 NLRB No. 174 \(1999\)](#)). I find there was no specific agreement to incorporate the plan or summary plan documents into the collective bargaining

agreement.

Moreover, besides not agreeing to incorporate plans into their agreement Local 796 did not waive its right to bargain over changes in plans. Under applicable law, there must be “clear and unmistakable relinquishment of that right (to negotiate) (*Trojan Yacht*, 319 NLRB 741 (1995)). Respondents argued that *Mississippi Power Company v. N.L.R.B.*, 284 F.3d 605 (5th Cir. 2002) shows that when unions agree to waive bargaining in exchange for concessions from the employer, there is a binding waiver.

Mississippi Power was found to have negotiated with the Union for an insurance side letter, which included both a waiver by the Union and consideration for that waiver. The Court found the NLRB’s rationale was faulty. The NLRB rationale was to the effect that the insurance side-letter did not address the unilateral changes at issue, because those changes were to become effective only after the expiration of the collective-bargaining agreement and insurance side-letter.

Here, the question does not ride on whether the change in benefits occurred during or after the parties’ agreement, which allegedly included a waiver by the union. Instead, the question here is did the parties have a meeting of the minds on what would happen if the employer ever changed the benefits plan. It is in that situation that I must consider whether the evidence is clear and unmistakable and it is there where I find that the language does not meet the test.

As shown above, it is evident that Southern Nuclear Operating Company and the Union anticipated future bargaining during the life of the 1991 Memorandum of Understanding. Paragraph (2) concludes with the sentence, “Insured benefit changes negotiated after this agreement shall also be included.” That sentence obviously anticipates negotiations between the Company and the Union over “insured benefit changes.”

As stated above, in order to find that the Unions waived their right to bargain over changes in mandatory bargaining issues, there must be a “clear and unmistakable” waiver (*Georgia Power Company*, 325 NLRB 420 (1998)).

I find no evidence that the parties intended to incorporate insurance plans into their agreement. It is clear that the parties did not intend to include any Plan reservation of rights provisions in the agreements between Southern Nuclear Operating Company (Farley) and Local 706. Moreover, the language in the

agreements shows that the parties intended to negotiate regarding future changes to those plans and there was no showing that the Union ever agreed to waive any negotiating rights.

II. *International Brotherhood of Electrical Workers, Locals 345, 833, 904, 391, 801, 841, 1053, 796 and 2077, and their designated representative System Council U-19, are the representatives of bargaining unit employees of Alabama Power Company.*

On or about November 27, 2000 Alabama Power Company refused a request of System Council U 19 to bargain over the announced retiree health insurance benefits and retiree welfare life benefits changes.

(a) The collective agreements referenced medical and life benefits, which included reservation of rights to Alabama Power Company:

Alabama Power Company argued that its agreements with the unions expressly referenced medical and life insurance benefits. The respective benefit plans included reservation of rights clauses, which were incorporated into the respective collective-bargaining agreements.

Alabama Power Company cited Joint Exhibit 1(f), [FN19] Article VIII (e) and Memorandum of Understanding benefits section at pages 125-130, [FN20] in support of its argument that its memorandum of agreement referenced life and medical benefits.

At page 126 that agreement provides that the Company will continue to offer a choice of healthcare plans and will appropriately share the cost of medical premiums. The following is found at page 126:

*b. During 2000 and 2001, the Company's monthly premium contributions and Core Plan selection will be as follows: The Core Plan will be determined annually by the Company. * * * **

*c. During the term of this contract, the Company will meet with the Union semiannually to discuss trend data, the APC medical reserves, and premium to costs ratios in order to communicate premium estimates for years 2000 and 2001. * * **

f. During 1999, the Company agrees to designate the chief negotiator, labor relations manager, regional human resources director, and a Southern Company benefits specialist to meet quarterly with IBEW representatives to discuss the current status and outstanding issues in APC

plans.

At page 128, specific provisions are included for inpatient mental health, outpatient mental health, inpatient chemical dependency, outpatient chemical dependency and EAP. At page 127 specific provisions are included for LTD insurance and premiums and accidental death and dismemberment insurance and premiums as well as the Insurance Company for 1999. Dental insurance for employees is specified at page 130.

There is nothing in the above language showing that Alabama Power Company's and the unions, intended to incorporate the major medical insurance plan in their memorandum of agreement and I do not find that reservation of rights provisions were intended to be incorporated in the memorandum of agreement. The language is specific as to many of the provisions required in a medical insurance plan but specific reference to required provisions does not establish intent to incorporate insurance plan documents. There is nothing in the language of the agreements that suggest the unions were party to or intended to be bound by, Alabama Power Company's health insurance plan.

As shown above, when, as here, plan descriptions or summary plan descriptions, are the primary reference for identifying the medical or life insurance benefits that the employers have agreed to provide, those plans or summary plan descriptions are not incorporated into the collective bargaining agreements absent specific agreement to that effect ([*Amoco Chemical Company*, 328 NLRB No. 174 \(1999\)](#)). I find there was no specific agreement to incorporate the plan or summary plan documents into the collective bargaining agreement.

(b) The unions waived their rights to bargain:

One provision cited by Alabama Power Company [FN21] raises questions of waiver regarding life insurance benefits. That provision is Article VII (e) and relevant portions include:

(e) The Company will continue its present policy of carrying group life insurance at its own expense on all full-time employees who have been in the employ of the Company for a continuous period of six (6) months or more, so long as such insurance continues to be available to the Company at substantially the present rates and under substantially the present conditions. Alabama Power Company memorandum of agreement, Article VIII (e)

The above language relates specifically to life insurance for full-time employees. In dealing with life insurance, the matters at issue herein originated when Respondents announced both changes in future retirees' welfare life insurance benefits in April 1995 and the caveat that those changes would not affect current retirees, all employees that retired before January 1, 2002, and all employees with 30 years of accredited service or that would be age 55 with at least 15 years of accredited service on January 1, 2002. The group of employees that were not affected by the April 1995 change was expanded by Respondents' unilateral changes in October 2000.

However, those changes affected future retirees while the alleged waiver language quoted above, refers to "all full-time employees." There was no showing that the above-quoted provision has ever applied to retirees or to future retirees.

Therefore, I find nothing in the above-cited provision that would constitute a waiver of the unions right to bargain regarding future retirees' life insurance benefits.

(c) Waiver because the unions did not want to rescind the changes:

Alabama Power Company also argued that after it offered to rescind the October 2000 changes because of System Council U-19's unfair labor practice charges, System Council U-19 responded that it did not seek rescission of those changes. Therefore, according to Alabama Power Company, System Council U-19 has no status to challenge or to demand bargaining over those October 2000 changes.

However, there is no requirement that charges under the NLRA are limited to those able to show "status" or standing. In fact it is well established that anyone may file charges with the NLRB. Moreover, in the very letter cited by Alabama Power Company, System Council U-19 requested negotiations. Therefore, System Council U-19 had a continuing interest in these matters and, regardless, System Council U-19 was authorized to file the instant unfair labor practice charges.

III. *International Brotherhood of Electrical Workers, Local 1208 is the representative of bargaining unit employees of Savannah Electric and Power Company.*

On or about April 20, 2001 Savannah Electric and Power Company refused a request of International Brotherhood of Electrical Workers Local 1208 to bargain over the announced retiree health insurance benefits and retiree welfare life benefits changes. [FN22]

(a) Express reference to medical and life benefits:

Savannah Electric and Power Company argued that its negotiated agreements with Local 1208 expressly referenced and incorporated medical benefits. Its medical plan allegedly included reservation of rights provisions and was incorporated into the negotiated collective-bargaining agreements.

Savannah Electric and Power Company's memorandum of agreement did refer to medical benefits. However, there was nothing in collective-bargaining agreements showing the parties' intended to incorporate medical benefit plans into the agreements.

When, as here, plan descriptions or summary plan descriptions, are the primary reference for identifying the medical or life insurance benefits that the employers have agreed to provide, those plans or summary plan descriptions are not incorporated into the collective bargaining agreements absent specific agreement to that effect ([Amoco Chemical Company, 328 NLRB No. 174 \(1999\)](#)). I find there was no specific agreement to incorporate the plan or summary plan documents into the collective bargaining agreement.

(b) The Unions waived their right to bargain:

The Memorandum of Agreement between Savannah Electric and Power Company and Local Union 1208 [FN23] includes Article XXII Medical Insurance:

The Company shall provide a comprehensive group major medical insurance program-covering employees who comply with the eligibility and qualification requirements. Costs of the program will be shared 80% by the Company, 20% by employees. Future increases or decreases in the cost will be shared similarly. (Added 4/16/93)

Although, the above-quoted language appears to constitute a waiver, it does not refer to retirees or future retirees' benefits.

The language is specifically limited to "employees" and there is nothing in the language regarding future retirees. Neither Savannah Electric and Power Company nor Local 1208 is obligated to do anything pursuant to the above-cited provisions regarding future retirees. Therefore, I find that the unions did not waive their bargaining rights regarding future retirees.

(c) Section 10(b):

Savannah Electric and Power Company also argued that a complaint might not issue based on Local 1208's May 18, 2001 unfair labor practice charge. Savannah Electric and Power Company argued that charge followed by more than six months its October 20, 2000 announcements.

A defense based on Section 10(b) must be affirmatively alleged. Savannah Electric and Power Company failed to make that argument in its Answer or during the hearing. Therefore, Savannah Electric and Power Company's Section 10(b) defense is untimely and must be rejected. [Continental Winding Co., 305 NLRB 122 \(1991\)](#); [O'neil, Ltd., 288 NLRB 1354 \(1988\)](#).

(d) Additional basis supporting waiver:

Savannah Electric and Power Company also argued that Local Union 1208 waived its right to bargain over changes to the retirees health insurance and welfare life insurance benefits on an additional basis. Savannah Electric and Power Company argued that it and Local Union 1208 agreed to a collective bargaining agreement in 1993 called a Memorandum of Understanding and that agreement has remained alive through it and Local 1208's consecutive memorandum of agreements.

That April 1993 Memorandum of Understanding included the following:

(F)or the life of this Memorandum, the Company will provide its employees covered under the collective bargaining agreements with the respective Unions the same benefits as may be provided to Georgia Power Company employees in accordance with the terms of the "Georgia Power Company Medical Benefits Plan" unless otherwise provided above. The "Georgia Power Company Medical Benefits Plan" document is the controlling document and governs in all respects.

Savannah Electric and Power Company argued that the Memorandum of Understanding further stated that

“the Unions agree to waive negotiations on all issues regarding the ‘Georgia Power Company Medical Benefits Plan’ except the ratio of employee and employer contributions and the lifetime maximum for Medicare eligible participants,” in consideration for the medical benefits.

There was no showing that the above-quoted provisions have ever applied to retirees. Moreover, there is no showing in the 1993 Memorandum of Understanding, that the parties agreed to be bound by future Georgia Power Company medical benefits plans if those plans were different from the 1993 Plan.

That is not to say that the language in the Memorandum of Understanding is crystal clear. In fact, the language is vague especially as to one sentence. That is the reference to “the same benefits as may be provided to Georgia Power Company employees in accordance with the terms of the “Georgia Power Company Medical Benefits Plan.” By stating, “as may be provided” that sentence may be construed to mean what Georgia Power may do in the future even if Georgia Power makes changes in its plan. However, by referencing the “Plan,” the same sentence appears to refer to the one specific plan that existed at the time of the making of the 1993 Memorandum of Understanding.

Under both those two possible interpretations, a serious question remains as to whether Local 1208 waived bargaining rights. In any event, the above language does not mention retirees or future retirees. Instead it specifically relates to “employees covered under the collective bargaining agreements.” Additionally, those covered employees are entitled to only those benefits provided Georgia Power “employees in accordance with the terms of the Georgia Power Company Medical Benefits Plan.” Again, the benefits are limited to employees' benefits. Neither retirees nor future retirees are included in the referenced Georgia Power medical benefits plan.

I find there was no waiver to bargain over changes in Savannah Electric and Power Company future retirees' medical benefits.

Conclusions of Law

1. Southern Nuclear Operating Company, Alabama Power Company, Savannah Electric and Power Company and Gulf Power Company, are employers engaged in commerce within the meaning of section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers

Local Union Number 796, 345, 833, 904, 391, 801, 1053, 796 and 2077, Local Union 84, 1208 and 1055 and System Council U19, are labor organizations within the meaning of section 2(5) of the Act, and respectively represent employees of the Respondents in the bargaining units shown below.

3. Respondent Southern Nuclear Operating Company by unilaterally changing its future retiree health insurance benefits and retiree welfare life benefits, for its employees in the bargaining units described below, without bargaining with the Unions as representative of the employees has engaged in conduct in violation of section 8(a)(1) and (5) of the Act:

Employees who are engaged in the operation and maintenance of the generating properties of the Company employed at its Farley Nuclear Plant.

Employees engaged in the operation and maintenance of Edwin I. Hatch Nuclear Plant and Vogtle Electric Generating Plant.

4. Respondent Alabama Power Company by unilaterally changing its future retiree health insurance benefits and retiree welfare life benefits, for its employees in the bargaining units described below, without bargaining with the Unions as representative of the employees has engaged in conduct in violation of section 8(a)(1) and (5) of the Act:

Employees in the Power Delivery Construction, Transmission Line Maintenance, Substation Maintenance, General Shops and Equipment Maintenance personnel in the Fleet Services Department of the company with certain exceptions as set forth in Article 1 of Memorandum of Agreement with System Council U19.

Employees in the distribution, Meter Test, Garage, Stores, Appliance Repair, and the Meter Readers with certain exceptions as set forth in Article 1 of Memorandum of Agreement with System Council U19.

Employees in Power Generation and Steam Heat with certain exceptions as set forth in Article 1 of Memorandum of Agreement with System Council U19.

5. Respondent Savannah Electric and Power Company by unilaterally changing its future retiree health insurance benefits and retiree welfare life benefits, for its employees in the bargaining units described below, without bargaining with the Unions as representative of the employees has engaged in conduct in violation of section 8(a)(1) and (5) of the Act:

Employees engaged in the delivery of power with certain exceptions as set forth in Article 1 of Memorandum of Agreement with Local 1208.

6. Respondent Gulf Power Company by unilaterally changing its future retiree health insurance benefits and retiree welfare life benefits, for it employees in the bargaining units described below, without bargaining with the Unions as representative of the employees has engaged in conduct in violation of section 8(a)(1) and (5) of the Act:

Line Construction and Maintenance; Electric Service; Substation Construction and Maintenance; Communications, Construction and Maintenance; Meter Testing, Installation and Repair; Pensacola Repair Shops; Garage Facilities; Warehouse Section; Field Service Representatives; and Steam-Electric Generating Plants (Crist, Scholz and Smith).

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of section 2(6), (7) and (8) of the Act.

The Remedy

Having found that Respondents Southern Nuclear Operating Company, Alabama Power Company, Savannah Electric and Power Company and Gulf Power Company have engaged in unfair labor practices, I shall recommend that they be ordered to cease and desist from refusing to negotiate with the respective Unions before making changes in matters that constitute mandatory subjects of bargaining and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondents Southern Nuclear Operating Company, Alabama Power Company, Savannah Electric and Power Company and Gulf Power Company have unilaterally changed their bargaining unit employees' future retiree health insurance benefits and future retiree welfare life benefits, without affording the Unions opportunities for meaningful bargaining, the normal remedy would include rescission of those unlawful changes. However, neither the Charging Parties nor General Counsel seek rescission of the unilateral changes and, for that reason, rescission is not ordered.

Upon the foregoing findings, conclusions of law and the entire record, and pursuant to section 10(c) of the Act, I issue the following recommended:

ORDER [FN24]

I. Pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is hereby ordered that Respondent Southern Nuclear Operating Company, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Making unilateral changes in bargaining unit employees' future retiree health insurance benefits and retiree welfare life benefits without providing notice of the proposed changes and adequate opportunity for the Unions to bargain about those changes.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain collectively with International Brotherhood of Electrical Workers Local 84 and 796, as exclusive representatives of the employees in the appropriate bargaining unit described below:

Employees who are engaged in the operation and maintenance of the generating properties of the Company employed at its Farley Nuclear Plant.

Employees engaged in the operation and maintenance of Edwin I. Hatch Nuclear Plant and Vogtle Electric Generating Plant.

(b) Within 14 days after service by the Region, post at their facilities copies of the attached notice marked Appendix A. [FN25] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by Southern Nuclear Operating Company's authorized representative, shall be posted by the Southern Nuclear Operating Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director, Region 10, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the

Respondent has taken to comply.

II. Pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is hereby ordered that Respondent Alabama Power Company, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Making unilateral changes in bargaining unit employees' future retiree health insurance benefits and retiree welfare life benefits without providing notice of the proposed changes and adequate opportunity for the Unions to bargain about those changes.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain collectively with International Brotherhood of Electrical Workers Local Unions 345, 833, 904, 391, 801, 841, 1053, 796 and 2077 and System Council U-19, as exclusive representatives of the employees in the appropriate bargaining unit described below:

Employees in the Power Delivery Construction, Transmission Line Maintenance, Substation Maintenance, General Shops and Equipment Maintenance personnel in the Fleet Services Department of the company with certain exceptions as set forth in Article 1 of Memorandum of Agreement with System Council U19.

Employees in the distribution, Meter Test, Garage, Stores, Appliance Repair, and the Meter Readers with certain exceptions as set forth in Article 1 of Memorandum of Agreement with System Council U19. Employees in Power Generation and Steam Heat with certain exceptions as set forth in Article 1 of Memorandum of Agreement with System Council U19.

Employees in Power Generation and Steam Heat with certain exceptions as set forth in Article 1 of Memorandum of Agreement with System Council U19.

(b) Within 14 days after service by the Region, post at their facilities copies of the

attached notice marked Appendix B. [FN26] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Alabama Power Company's authorized representative, shall be posted by Alabama Power Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director, Region 10, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

III. Pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is hereby ordered that Respondent Savannah Electric, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Making unilateral changes in bargaining unit employees' future retiree health insurance benefits and retiree welfare life benefits without providing notice of the proposed changes and adequate opportunity for the Unions to bargain about those changes.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain collectively with International Brotherhood of Electrical Workers Local 1208 as exclusive representatives of the employees in the appropriate bargaining unit described below:

Employees engaged in the delivery of power with certain exceptions as set forth in Article 1 of Memorandum of Agreement with Local 1208.

(b) Within 14 days after service by the Region, post at their facilities copies of the attached notice marked Appendix C. [FN27] Copies of the notice, on forms provided by the Regional Director for Region 10, after

being signed by the Savannah Electric and Power Company's authorized representative, shall be posted by Savannah Electric and Power Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director, Region 10, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IV. Pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is hereby ordered that Respondent Gulf Power Company, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Making unilateral changes in bargaining unit employees' future retiree health insurance benefits and retiree welfare life benefits without providing notice of the proposed changes and adequate opportunity for the Unions to bargain about those changes.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain collectively with International Brotherhood of Electrical Workers Local 1055 as exclusive representatives of the employees in the appropriate bargaining unit described below:

*Line Construction and Maintenance;
Electric Service; Substation
Construction and Maintenance;
Communications, Construction and
Maintenance; Meter Testing,
Installation and Repair, Pensacola
Repair Shops; Garage Facilities;
Warehouse Section; Field Service
Representatives; and Steam-Electric
Generating Plants (Crist, Scholz and
Smith).*

(b) Within 14 days after service by the

Region, post at their facilities copies of the attached notice marked Appendix D. [FN28] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Gulf Power Company's authorized representative, shall be posted by Gulf Power Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director, Region 10, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C. October 17, 2002

Pargen Robertson
Administrative Law Judge

“APPENDIX A”

NOTICE TO EMPLOYEES

**Posted by Order of the National Labor Relations
Board**

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with International Brotherhood of Electrical Workers Locals 84 and 796, by unilaterally changing

bargaining unit employees' future retiree health insurance benefits and future retiree welfare life insurance benefits, without the Unions consent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith regarding future retiree health insurance benefits and future retiree welfare life insurance benefits, with International Brotherhood of Electrical Workers Locals 84 and 796, as the exclusive representative of the employees in the appropriate bargaining unit described below:

Employees who are engaged in the operation and maintenance of the generating properties of the Company employed at its Farley Nuclear Plant.

Employees engaged in the operation and maintenance of Edwin I. Hatch Nuclear Plant and Vogtle Electric Generating Plant.

SOUTHERN NUCLEAR OPERATING COMPANY

(Employer)

Dated: _____ **By:** _

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

233 Peachtree Street NE, Harris Tower, Suite 1000,
Atlanta, GA 30303-1531

(404) 331-2896, Hours: 8a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (404)331-2877.

“APPENDIX B”

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with International Brotherhood of Electrical Workers Locals 345, 833, 904, 391, 801, 841, 1053, 796 and 2077, and System Council U-19, by unilaterally changing bargaining unit employees' future retiree health insurance benefits and future retiree welfare life insurance benefits, without the Unions consent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith regarding future retiree health insurance benefits and future retiree welfare life insurance benefits, with International Brotherhood of Electrical Workers

Locals 345, 833, 904, 391, 801, 841, 1053, 796 and 2077, and System Council U-19, as the exclusive representative of the employees in the appropriate bargaining unit described below:

Employees in the Power Delivery Construction, Transmission Line Maintenance, Substation Maintenance, General Shops and Equipment Maintenance personnel in the Fleet Services Department of the company with certain exceptions as set forth in Article 1 of Memorandum of Agreement with System Council U19.

Employees in the distribution, Meter Test, Garage, Stores, Appliance Repair, and the Meter Readers with certain exceptions as set forth in Article 1 of Memorandum of Agreement with System Council U19.

Employees in Power Generation and Steam Heat with certain exceptions as set forth in Article 1 of Memorandum of Agreement with System Council U19.

ALABAMA POWER COMPANY

(Employer)

Dated:

By: _

(Representative)

(Title)

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THIS NOTICE MUST REMAIN POSTED

FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (404)331-2877.

“APPENDIX C”

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with International Brotherhood of Electrical Workers Local 1208, by unilaterally changing bargaining unit employees' future retiree health insurance benefits and future retiree welfare life insurance benefits, without the Unions consent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith regarding future retiree health insurance benefits and future retiree welfare life insurance benefits, with International Brotherhood of Electrical Workers Local 1208, as the exclusive representative of the employees in the appropriate bargaining unit described below:

Employees engaged in the delivery of power

with certain exceptions as set forth in Article 1 of Memorandum of Agreement with Local 1208.

SAVANNAH ELECTRIC AND POWER COMPANY

(Employer)

Dated:

_____ **By:** _

(Representative)

(Title)

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"APPENDIX D"

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with International Brotherhood of Electrical Workers Local 1055, by unilaterally changing bargaining unit employees' future retiree health insurance benefits and future retiree welfare life insurance benefits, without the Unions consent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith regarding future retiree health insurance benefits and future retiree welfare life insurance benefits, with International Brotherhood of Electrical Workers Local 1055 as the exclusive representative of the employees in the appropriate bargaining unit described below:

Line Construction and Maintenance; Electric Service; Substation Construction and Maintenance; Communications, Construction and Maintenance; Meter Testing, Installation and Repair; Pensacola Repair Shops; Garage Facilities; Warehouse Section; Field Service Representatives; and Steam-Electric Generating Plants (Crist, Scholz and Smith).

GULF POWER COMPANY

(Employer)

Dated:

_____ **By:** _

(Representative)

(Title)

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FN1

. Respondents are affiliates of the Southern Company.

FN2

. Respondent filed a motion to dismiss. That motion is denied. Charging Party filed a request for attorney's fees. That request is denied. The bases for those rulings are apparent by the rulings shown herein.

FN3

. All the conclusionary statements found under the heading "Jurisdiction" are supported by Respondents' Answer or by the parties' stipulation of facts.

FN4

. Respondents stipulated to being parties with the Unions in collective bargaining agreements at material times. (See stipulation 7(a) -(e), Joint Exhibit 2.)

FN5

. See stipulation 9, Joint Exhibit 2.

FN6

. See stipulation 10(a) - 10(e), Joint Exhibit 2.

FN7

. The parties stipulated:

"The changes announced April 1995 affected retiree medical and retiree life insurance only. These changes defined how the company would share medical premiums with future retirees and announced coverage limits for retiree life insurance in the future.

Prior to April 1995, the company did not have a retiree medical premium "cap" and had not defined to what extent it would pay retiree medical premiums in the future. Pre-65 retirees typically paid the same medical premium amount that they paid while an active employee. Post-65 retiree medical premiums were fully paid by the company.

For all business units except Savannah Electric, retiree life insurance coverage remained at the same level (typically 3x annual base salary) until age 65 when a coverage reduction schedule began for each post-65 retiree. Pre-65 retiree paid the same life insurance premium amount as when they were active employees. Savannah Electric's retiree life insurance program allowed a maximum of 1x annual salary in life insurance coverage during retirement.

* * *

The labor unions and Counsel for the General Counsel stipulate that Respondents' representatives would testify that prior to 1995, the levels of benefits, schedules of benefits, plan providers and premiums pertaining to retiree medical and retiree life benefits often differed from the levels of benefits, schedules of benefits, plan providers and premiums available to active covered employees and were unilaterally changed by the Respondent companies. (JExh. 2, "Miscellaneous Stipulations -OPRB Cases")

FN8

. See stipulation 12, Joint Exhibit 2.

FN9

. Georgia Power Company is also affiliated with the Southern Company.

FN10

. See also [Mississippi Power Company, 332 NLRB No. 52 \(2000\)](#), No. 00-60794 (5th Cir. March 14, 2002). Joint Exhibit 2, paragraphs 12 and 13.

FN11

. [Mississippi Power Company, 332 NLRB No. 52 \(2000\)](#), 284 F.3d 605 (5th Cir. 2002).

FN12

. [Chemical Workers v. Pittsburgh Plate Glass Co.](#) 404 U.S. 157, 180 (1971).

FN13

. [Georgia Power Company, 176 F.3d 494 \(11th Cir. 1999\)](#), cert denied [528 U.S. 1061 \(1999\)](#); [Mississippi Power Company, 284 F.3d 605 \(5th Cir. 2002\)](#).

FN14

. Mississippi Power Company is also affiliated with the Southern Company.

FN15

. Other Post-Retirement Benefits.

FN16

. The ERISA argument mentioned by the Court at footnote 34 is actually an argument advanced herein and discussed below at “(3) ERISA requires that Employers reserve the right to change.”

FN17

. See also [Mississippi Power, 332 NLRB No. 52 \(2000\)](#).

FN18

. As shown herein the Unions and Respondents agreed to both memoranda of agreements and memoranda of understandings. The documents referred to as “Plan” or “Plans” or “Summary Plan Descriptions” do not represent agreements between Respondents and the Unions.

FN19

. See also JExh. 1(e) pages 124-129 and JExh. 1(g) pages 111-116.

FN20

. Although Alabama Power Company cited a memorandum of understanding the document covering those pages 125-139 among others, is entitled “MEMORANDUM OF AGREEMENT DISTRIBUTION & SUPPORT 1998 NEGOTIATIONS,” rather than a memorandum of understanding.

FN21

. JExh. 1(e), 1(f) and 1(g).

FN22

. See stipulation 10(a) - 10(e), Joint Exhibit 2.

FN23

. See JExh. 1(c).

FN24

. If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

FN25

. If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading “**POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD**” shall read ‘**POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.**’

FN26

. If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice

reading “**POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD**” shall read ‘**POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.**’

FN27

. If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read ‘POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.’

FN28

. If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading “**POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD**” shall read ‘**POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.**’

2002 WL 31386013 (N.L.R.B. Div. of Judges)
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United Mine Workers of America Intern. Union v.
 Bethenergy Mines, Inc.
 S.D.W.Va.,2001.

Only the Westlaw citation is currently available.

United States District Court, S.D. West Virginia.
 UNITED MINE WORKERS OF AMERICA
 INTERNATIONAL UNION, James L. Perkins, et al.,
 Plaintiffs,

v.

BETHENERGY MINES, INC., a corporation, and
 Eagle Nest, Inc., a corporation, Defendants.
No. Civ.A. 2:99-0738.

March 19, 2001.

MEMORANDUM OPINION AND ORDER

[GOODWIN, J.](#)

*1 This is an action for damages for a breach of a collective bargaining agreement, and for injunctive and other relief requiring defendants to provide health care benefits to the individual plaintiffs and their dependents. Pending before the court are the parties' cross-motions for summary judgment. Each side has represented to the court that no genuine issues of material fact are in dispute and that the court should dispose of this case at the summary judgment stage.

Considering the evidence of record, the court finds that there are no genuine issues of material fact and that the plaintiffs are entitled to judgment as a matter of law. Accordingly, the court GRANTS the plaintiffs' Motion for Summary Judgment and DENIES the defendants' Motion for Summary Judgment.

I. UNDISPUTED FACTS

Defendants, BethEnergy Mines Inc. and Eagle Nest, Inc. (collectively referred to as "the Companies") were "me-too" signatories to the National Bituminous Coal Wage Agreement of 1993 ("the 1993 NBCWA" or "the agreement").^{[FN1](#)} The individual plaintiffs are former employees of the Companies. Each plaintiff ceased employment during the term of the 1993 NBCWA, having at least 20 years of signatory service. Accordingly, each plaintiff had a vested right to a pension from the Companies upon reaching the age of 55 under the UMWA 1974 Pension Plan. However, none of the plaintiffs had reached age 55 prior to the

expiration of the 1993 NBCWA. Rather, each of the plaintiffs turned 55 in 1999, and began receiving their pensions from the 1974 Pension Plan shortly thereafter. At that time, the plaintiffs also applied for benefits from the Companies' health plan and were denied coverage on the basis that they had not retired prior to the expiration of the 1993 contract.

[FN1](#). The NBCWA is a collective bargaining agreement between the Bituminous Coal Operators' Association ("BCOA") and the United Mine Workers of America ("UMWA"). Although the Companies were not members of the BCOA in 1993, they agreed to be bound by an agreement that contained the same terms and conditions as the 1993 NBCWA. Non-member employers who agree to sign the NBCWA are commonly referred to as "me-too" signatories.

Article XX of the 1993 NBCWA contains a section entitled "General Description of the Health and Retirement Benefits" which states that the Companies agreed to provide lifetime health benefits to "eligible retirees who retired between February 1, 1993 and the Effective Date, or who retire during the term of this Agreement." The health benefits were to be provided under an Individual Employer Plan ("IEP"), which is incorporated by reference and made a part of the 1993 NBCWA. The issue before the court is whether the plaintiffs were "eligible retirees" under the Agreement.

II. JURISDICTION

The Court has jurisdiction of this matter pursuant to Section 301 of the Labor-Management Relations Act of 1947 (LMRA), [29 U.S.C. § 185](#) and [Section 502](#) of the Employment Retirement Income Security Act of 1974 (ERISA), [29 U.S.C. § 1132](#).

III. SUMMARY JUDGMENT STANDARD

To obtain summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). In considering

a motion for summary judgment, the Court will not “weigh the evidence and determine the truth of the matter.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Instead, the Court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986).

*2 Although the Court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some “concrete evidence from which a reasonable juror could return a verdict in his [or her] favor.” Anderson, 477 U.S. at 256. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere “scintilla of evidence” in support of his or her position. Anderson, 477 U.S. at 252.

IV. ANALYSIS

ERISA regulates two types of employee benefit plans: pension benefits and welfare benefits. 29 U.S.C.A. § § 1002(1), (2). It provides for automatic vesting of pension benefits, but does not extend automatic vesting to welfare benefits, such as those provided under the 1993 IEP. *Id.* § 1051(1); *see Aguilar v. Basin Resources, Inc.*, No. 98 N 0885 (Colo. April 16, 1999) at 1. Generally, an employer may unilaterally terminate or modify welfare benefits, provided that the employer follows the amendment procedures consistent with the plan and ERISA. *Aguilar*, No. 98 N 0885 (Colo. April 16, 1999) at 1. “Under both ERISA and the LMRA, however, a court will enforce a promise concerning welfare benefits contained in a collective bargaining agreement” such as the agreement at issue here. *Id.* Whether, and to whom, a collective bargaining agreement promises vested health benefits are matters of contract interpretation. *Id.* Thus, the intent of the contracting parties, as expressed in the language of the agreement, ultimately determines the employer's obligation to provide health benefits. *Id.*

At issue in the instant case is the meaning of the word “retire” under the 1993 NBCWA. The plaintiffs contend that a miner retires when he leaves employment, for any reason, if he has met the required

years of signatory service to be eligible to receive a pension. The defendants, on the other hand, state that a miner is not eligible to retire until he has the requisite years of signatory service, has turned 55, and has begun to receive a pension. In interpreting the language of a collective bargaining agreement, the court may examine the structure of the contract, the bargaining history and the conduct of the parties. Teamsters Indus. Employees Welfare Fund v. Rolls-Royce Motor Cars, Inc., 989 F.2d 132, 135 (3d Cir.1993). The parties have admitted that they did not negotiate the meaning of the term “retire,” nor did they specifically discuss a scenario such as that of the plaintiffs, in the collective bargaining process. Thus, the court must look to the agreement as a whole and to the parties' bargaining history in interpreting their intent. A brief account of the collective bargaining history is helpful.

A. Collective Bargaining History

*3 Over the years, the UMWA and the BCOA have entered into numerous collective bargaining agreements governing various terms and conditions of employment and the obligations of both the employers and the union employees. The UMWA and the BCOA first negotiated an agreement regarding health and retirement benefits in 1946. Eastern Enterprises v. Apfel, 524 U.S. 498, 504-05 (1998). They subsequently established the 1950 Welfare and Retirement Fund (“the 1950 Fund”), which provided health benefits for a broad group of active and retired miners, as well as their spouses and dependents. From 1950 to 1974, health benefits were provided through this multi-employer fund, which was supported by signatory employer contributions. *Id.* The trustees of the 1950 Fund, by resolution, provided lifetime health benefits to retirees, but retained discretion to modify or terminate benefits. *Id.* at 507.

In 1974, in order to comply with ERISA requirements, the 1950 Fund was split into four separate trusts, the 1950 and 1974 Pension Plans and the 1950 and 1974 Benefit Plans, which continued to be funded by signatory employer contributions. *Id.* at 509. The 1974 NBCWA, which created the 1974 Pension and Benefit Plans, defined and set forth, for the first time, the benefits provided to miners, pensioners and their dependents. *Id.* Included in that agreement was specific language stating that retirees would be entitled to retain their health cards “until death” and that widows of retirees would be entitled to retain their cards “until death or remarriage.” *Id.* The 1974 agreement guaranteed that the employers would pay

the health benefits of active and retired miners during the term of the contract, and then, after the expiration of the contract, the retirees' lifetime benefits would be paid out of the trust funds. Any miner who retired before January 1, 1976 was paid a pension and health benefits out of the 1950 plans, and any miner who retired after that date was paid out of the 1974 plans. *Id.*

In the 1978 NBCWA, however, in response to financial strife and the rapid depletion of the trusts, the parties amended the language of the contract and gave each signatory employer the responsibility for funding the lifetime health benefits of its own active and retired employees who retired on or after January 1, 1976. *Id.* at 510. At that time, the parties also negotiated a standard Individual Employer Plan ("IEP") for those participating employers. The previously-established multi-employer trusts remained in effect only to cover retirees whose employers were no longer in business. Those miners were known as "orphaned retirees." *Id.*

Throughout the 1980s, and into the 1990s, the trusts continued to be depleted and, as more and more employers left the mining industry, the remaining companies were forced to absorb the cost of all of the orphaned retirees. Nevertheless, the "for life" language concerning health benefits was carried forward in each successive collective bargaining agreement (1981, 1984 and 1988). See [UMWA Int'l Union v. Nobel, 720 F.Supp. 1169, 1175 \(W.D.Pa.1989\)](#). Eventually, the trusts were facing collapse. In response to this looming crisis, Congress enacted the Coal Industry Retiree Health Benefits Act of 1992 (the "Coal Act").

*4 The Coal Act guaranteed lifetime health benefits for a specific group of miners: those who retired prior to September 30, 1994 and their dependents. It also combined the 1950 Benefit Plan and the 1974 Benefit Plan (now called the "Combined Fund") and also established a new multi-employer benefit fund, known as "the 1992 Plan." The Coal Act required any signatory to an NBCWA or other coal wage agreement, or, if the signatory had gone out of business, any related person to that entity, to pay benefits for its own retirees who met the eligibility requirements of the statute. It also required those entities to share in the cost of benefits to orphaned retirees, which were to be paid out of the Combined Fund or the 1992 Plan, depending on a miner's date of retirement. The funds would not pay for the health benefits of miners who retired after September 30, 1994. Those retirees were to be handled by the next contract. The 1993 NBCWA

was negotiated and signed in the wake of the Coal Act.

The undisputed facts demonstrate that the parties negotiated new language in the 1993 NBCWA which placed the obligation of providing lifetime health benefits on the last signatory employer of a retiree. ^{FN2} However, the employer was only responsible to pay lifetime health benefits to those miners who retired during the term of the 1993 contract. Specifically, the parties agreed as follows:

^{FN2}. The 1993 agreement also established the 1993 Benefit Plan (the "1993 Plan"), which was created only for payment of lifetime benefits to orphaned retirees who did not meet the requirements for coverage under the Coal Act. During the term of the 1993 agreement, the Companies phased out their coal mining operations. However, the Companies did not cease to do business as defined by the 1993 Plan. Hence, the plaintiffs are not "orphaned retirees" and are not eligible for benefits under the 1993 Plan. The defendants would have the court believe that this set of facts places the plaintiffs in a "Catch-22" position, but the bargaining history and the language of the agreement persuades the court to the contrary.

The parties expressly agree that the language references to "for life" and "until death" that are retained in this General Description are *intended to mean that each employer will provide for life, only the benefits of its own eligible retirees who retired between February 1, 1993 and the Effective Date, or who retire during the term of this Agreement.* A retiree shall be considered to be a retiree of an Employer if his last signatory classified employment was with such Employer....

1993 NBCWA, General Description of Plan Benefits, p. 163 (emphasis added). Hence the question, what does it mean to retire?

B. Meaning of "Retire"

The 1993 NBCWA incorporates by reference the 1993 IEP, ^{FN3} which governs the terms and conditions of non-pension benefits for both active and retired miners. In describing who is eligible to receive benefits, the IEP differentiates among active employees, pensioners and disabled employees. The IEP states, *inter alia*, that:

[FN3](#). The 1993 NBCWA also contains language which states that “[t]he benefits and benefit levels provided by an Employer under its Employer Plan are established for the term of this Agreement only, and may be jointly amended or modified in any manner at any time after the expiration or termination of this Agreement.” 1993 NBCWA, General Description of Plan Benefits, p.163.

Health benefits under Article III hereof shall be provided to Pensioners as follows: (1) Any Pensioner who is not again employed in classified signatory employment subsequent to (a) such Pensioner's initial date of retirement under the 1974 Pension Plan and (b) February 1, 1993, shall be eligible for coverage as a Pensioner under, and subject to all other provisions of this Plan....

1993 Individual Employer Plan (“IEP”), Article II, § B, p. 2. The IEP further defines “Pensioner” as follows:

“Pensioner” shall mean any person who is receiving a pension other than (i) a deferred vested pension based upon less than 20 years of credited service, or (ii) a pension based in whole or in part on years of service credited under the terms of Article II G of the 1974 Pension Plan, or any corresponding paragraph of any successor thereto, under the 1974 Pension Plan (or any successor thereto), whose last classified signatory employment was with the Employer, subject to the provisions of Article II B of this Plan. “Pensioner” shall not mean any individual entitled to benefits under the [Coal Act.]

*5 1993 IEP, Article I § 5, p. 1. Thus, a deferred vested pensioner with more than 20 years of credited service would be a “Pensioner” under the IEP.

The 1974 Pension Plan, which is also incorporated by reference in the 1993 NBCWA, contains a provision which defines “Deferred Vested Retirement.” That provision states as follows:

(1) Any Participant who ceases working in a classified job for an Employer for any reason, except as provided in (2) below, and who is not eligible to receive a pension under any other provision of this Article II, shall be eligible for a pension (hereinafter “Deferred Vested Pension”) upon attaining age 62, or at the election of the Participant, such Participant shall be eligible for a reduced pension beginning at any time after attaining age 55 provided (a) the Participant's last day of Credited Service is on or after December 16, 1993, but prior to attainment of age 55; [and] (b) the Participant has (i) at least 10 years of signatory service,

or (ii) at least 20 years of Credited Service....

UMWA 1974 Pension Plan, Article II E. The plaintiffs were each eligible to receive Deferred Vested Pensions under the 1974 Pension Plan. They each ceased employment after December 16, 1993, prior to reaching age 55, and each had at least 20 years of signatory service. Because they were deferred vested pensioners with more than 20 years of signatory service, the plaintiffs were also considered “Pensioners” as defined by the IEP.

The 1974 Pension Plan also contains a provision that defines when retirement occurs for purposes of that plan:

For the purposes of this Plan, in the case of any Participant, retirement shall be considered to occur on the last day of credited service ..., *provided that on such day he was eligible for an immediate or deferred pension* under this Plan.

Id., Article I B (emphasis added). In other words, a miner has “retired” under the 1974 Pension Plan when he ceases working in covered employment (for any reason), so long as he is vested in a pension, whether that pension is immediate or deferred.

The lengthy bargaining history indicates that the parties have consistently used the last day of signatory service as the retirement date in determining what pension and health benefits a retiree is entitled to receive. For example, miners whose last date of signatory service was before January 1, 1976 received their pensions and health benefits from the 1950 plans; whereas those whose last day of signatory service was on or after January 1, 1976 received their pension and health benefits from the 1974 plans. Likewise, the language of the 1993 agreement states that “[a] retiree shall be considered to be a retiree of an Employer if his last signatory classified employment was with such Employer.” This phrase, read in conjunction with the 1974 Pension Plan's definition of when retirement occurs, clearly suggests that the parties considered retirement to occur on the last day of signatory or credited service.

*6 Because the 1993 IEP and the 1974 Pension Plan are incorporated by reference into the 1993 NBCWA, those documents must be read as a collective whole in order to fully examine the parties' intent. When all of the cited provisions are read together, and in light of the parties' bargaining history, it is clear that the plaintiffs retired during the term of the 1993 NBCWA and, thus, are entitled to lifetime health benefits from the defendants.

The undisputed facts indicate that the plaintiffs ceased work, for various reasons, during the term of the 1993 contract. Furthermore, all of the plaintiffs had more than 20 years of signatory service, but had not yet reached age 55. Thus, they were Deferred Vested Pensioners under the 1974 Pension Plan, and, hence, "Pensioners" as defined by the 1993 IEP. "Pensioners" are entitled to lifetime health benefits under the 1993 NBCWA, so long as they are not again employed in classified signatory employment subsequent to their initial retirement date under the 1974 Pension Plan (which is their last day of signatory service). The record indicates that none of the plaintiffs have returned to classified signatory service. Accordingly, they retired during the term of the 1993 NBCWA and are entitled to lifetime health benefits to be paid by the defendants.

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Not Reported in F.Supp.2d, 2001 WL 737558
(S.D.W.Va.)

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V. CONCLUSION

The language of the 1993 NBCWA, read in conjunction with the parties' bargaining history regarding pension and health benefits, clearly demonstrates an intent to provide "Pensioners," such as the plaintiffs, lifetime health benefits to be paid by the employer with whom they had their last classified signatory service. It is undisputed that the plaintiffs had their last classified signatory service with these defendants.

Accordingly, the court GRANTS the plaintiffs' Motion for Summary Judgment, and DENIES the defendants' Motion for Summary Judgment. The court DECLARES that the defendants, BethEnergy Mines, Inc. and Eagle Nest, Inc. breached their obligations under the 1993 NBCWA and ERISA by not providing these plaintiffs with lifetime health benefits as provided for under the Agreement. These defendants are hereby PERMANENTLY ENJOINED from failing or refusing to provide the health and other insurance benefits to which the plaintiffs are entitled. The court ORDERS the defendants to enroll the plaintiffs immediately in the Companies' health benefits plan. The issue of any damages, including health care expenses incurred by the plaintiffs since the date they were denied coverage, remains pending and must be proved by a preponderance of the evidence.

The court DIRECTS the Clerk to send a copy of this Order to counsel of record and any unrepresented party.