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. Cases 10–CA–32861, 10–CA–32862, 10–CA–32992, 10–CA–33062, and 10–CA–33157

December 29, 2006

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On October 17, 2002, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondents collectively filed exceptions, a supporting brief, and a reply brief. The Charging Parties filed an answering brief. The Charging Parties also filed cross-exceptions, to which the Respondents filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and affirms the judge's rulings, findings[1] and conclusions and adopts the recommended Order as modified.[2]

[1] Member Schaumber did not participate in *Georgia Power Co.*, 325 NLRB 420 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999), cert. denied 528 U.S. 1061 (1999), and *Trojan Yacht*, 319 NLRB 741 (1995), which are cited in the judge's decision, and expresses no view as to whether these cases were correctly decided. Member Schaumber would find that the judge's decision was correct under either a contract coverage or a waiver analysis.

[2] We find that the judge's recommended general affirmative bargaining orders in his recommended Order are not necessary to remedy the Respondents' unlawful unilateral changes in terms and conditions of employment. We shall modify the judge's recommended Order accordingly. See, e.g., *Eugene Iovine, Inc.*, 328 NLRB 294 (1999), enfd. 1 Fed. Appx. 8 (2d Cir. 2001). In addition, we shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.,* 325 NLRB 17 (1997). We shall also substitute new notices to conform to the Orders as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that:

A. Respondent Southern Nuclear Operating Company, Birmingham, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph I.2(a).

"(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the International Brotherhood of Electrical Workers Local 84 and 796 as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> 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.

2. Substitute the following for paragraph I.2(b).

"(b) Within 14 days after service by the Region, post at their facilities copies of the attached notice marked 'Appendix A.'[25] 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 Southern Nuclear Operating Company 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 Southern Nuclear Operating Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Southern Nuclear Operating Company has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since November 30, 2000."

3. Substitute the attached notice marked "Appendix A" for that of the administrative law judge.

B. Respondent Alabama Power Company, Birmingham, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph II.2(a).

"(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the International Brotherhood of Electrical Workers Local

Unions 345, 833, 904, 391, 801, 841, 1053, 796, and 2077 and System Council U-19, as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> 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."

2. Substitute the following for paragraph II.2(b).

"(b) Within 14 days after service by the Region, post at their facilities copies of the attached notice marked 'Appendix B.'[26] 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 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 Alabama Power Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Alabama Power Company has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since November 27, 2000."

3. Substitute the attached notice marked "Appendix B" for that of the administrative law judge.

C. Respondent Savannah Electric and Power Company, Savannah, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph III.2(a).

"(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the International Brotherhood of Electrical Workers Local 1208 as the exclusive collective-bargaining representative of employees in the following bargaining unit:

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

2. Substitute the following for paragraph III.2(b).

"(b) Within 14 days after service by the Region, post at their facilities copies of the attached notice marked 'Appendix C.'[27] 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 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 Savannah Electric and Power Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Savannah Electric and Power Company has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since April 20, 2001."

3. Substitute the attached notice marked "Appendix C" for that of the administrative law judge.

D. Respondent Gulf Power Company, Pensacola, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph IV.2(a).

"(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the International Brotherhood of Electrical Workers Local 1055 as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> 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)."

2. Substitute the following for paragraph IV.2(b).

"(b) Within 14 days after service by the Region, post at their facilities copies of the attached notice marked 'Appendix D.'[28] 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 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 Gulf Power Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Gulf Power Company has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since May 8, 2001."

3. Substitute the attached notice marked "Appendix D" for that of the 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 make unilateral changes in bargaining unit employees' future retiree health insurance benefits and future retiree welfare life insurance benefits, without providing notice of the proposed changes and adequate opportunity for the Unions to bargain about those changes.

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

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the International Brotherhood of Electrical Workers Locals 84 and 796 as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

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

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

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

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the International Brotherhood of Electrical Workers Local Unions 345, 833, 904, 391, 801, 841, 1053, 796, and 2077, and System Council U-19, as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

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

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 make unilateral changes in bargaining unit employees' future retiree health insurance benefits and future retiree welfare life insurance benefits, without providing notice of the proposed changes and adequate opportunity for the Union to bargain about those changes.

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

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the International Brotherhood of Electrical Workers Local 1208 as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

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

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 make unilateral changes in bargaining unit employees' future retiree health insurance benefits and future retiree welfare life insurance benefits, without providing notice of the proposed changes and adequate opportunity for the Union to bargain about those changes.

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

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the International Brotherhood of Electrical Workers Local 1055 as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

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

Katherine Chahrouri, Esq., for the General Counsel.
Laura H. Kriteman, Esq. and *Terance Madden, Esq.,* for the Respondent.
Robert H. Weaver, Esq., for the Charging Party.

DECISION

PARGEN ROBERTSON, Administrative Law Judge. 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.[1] The Unions include several local unions and a system council, of the International Brotherhood of Electrical Workers. I have considered the full record[2] in reach-

[1] Respondents are affiliates of the Southern Company.

[2] Respondent filed a motion to dismiss. That motion is denied. The Charging Party filed a request for attorney's fees. That request is de-

ing this decision, including briefs filed by counsel for the General Counsel, Respondent, and the Charging Party.

I. JURISDICTION[3]

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, 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, 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, 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, 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 (the Act).

II. LABOR ORGANIZATIONS[4]

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 U19 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 Locals 345, 833, 904, 801, 841, 1053, 796, and 2077, and Local Un-

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nied. The bases for those rulings are apparent by the rulings shown herein.

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

[4] Respondents stipulated to being parties with the Unions in collective-bargaining agreements at material times. (See Stipulation 7(a)–(e), Jt. Exh. 2.)

ions 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.

III. 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.[5] On or about November 27, 2000, Alabama Power Company refused a request of System Council U19; on or about November 30, 2000, Southern Nuclear Operating Company refused a request of System Council U19; 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.[6]

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 percent of each retirees' medical premium up to $7500 annually and would provide $2000 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.[7]

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 the 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[8] in *Georgia Power Co.,*[9] 325 NLRB 420 (1998), 176 F.3d 494 (1st Cir. 1999), cert denied 528 U.S. 1061 (1999).[10]

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 agree-

[5] See Stipulation 9, Jt. Exh. 2.

[6] See Stipulation 10(a)–10(e), Jt. Exh. 2.

[7] 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. (Jt. Exh. 2, "Miscellaneous Stipulations-OPRB Cases".)

[8] See Stipulation 12, Jt. Exh. 2.

[9] *Georgia Power Co.* is also affiliated with the Southern Company.

[10] See also *Mississippi Power Co*., 332 NLRB 530 (2000), 284 F.3d 605 (5th Cir. 2002). Jt. Exh. 2, pars. 12 and 13.

ments 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.

A. 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 Local 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971). The Board pointed to *Pittsburgh Plate Glass* in its *Mississippi Power Co.,* 332 NLRB 530 (2000),[11] 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 Local 1 v. Pittsburgh Plate Glass Co.,* supra; *Georgia Power Co.,* 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.,*[12] 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.[13]

In *Mississippi Power Co.*[14] *v. NLRB,* 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[15] 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.

B. Changes after ERISA

Respondents next argued that *Pittsburgh Plate Glass*, supra, was decided before the passage of ERISA and that ERISA more clearly articulated the distinction that the Supreme Court has made between vested and nonvested 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 Co.,* supra, which was decided by the Eleventh Circuit in 1999 and *Mississippi Power Co.,* supra, 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 Co.* did mention at footnote 34 that Mississippi Power Company had argued that ERISA granted it authority to alter its medical benefits plan at will.[16] However, the court concluded that the Unions waived

[11] *Mississippi Power Co.,* 332 NLRB 530, 284 F.3d 605 (5th Cir. 2002).

[12] *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 180 (1971).

[13] *Georgia Power Co.,* supra; *Mississippi Power Co.,* 284 F.3d 605 (5th Cir. 2002).

[14] Mississippi Power Co. is also affiliated with the Southern Company.

[15] Other postretirement benefits.

[16] The ERISA argument mentioned by the court at fn. 34 is actually an argument advanced herein and discussed below at "(3) ERISA requires that Employers reserve the right to change."

their right to demand bargaining regarding those benefits and it did not consider *Mississippi Power Co.'s* ERISA argument.

The court in *Georgia Power Co.,* 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.

C. 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,* supra, 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.

D. Nonmandatory 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' Local 252,* 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 Co.,* 325 NLRB 420 (1998), 176 F.3d 494 (11th Cir. 1999); *Mississippi Power Co. v. NLRB,* 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.

E. 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, 540–541 (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 ex-

panded 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.

F. The Unions did not Complain about the 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 Co.,* 325 NLRB 420, 421 (1998).][17]

I must reject this similar argument by Respondents.

G. 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 Joint Exhibit 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 Xl, 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.

H. 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 pro-

[17] See also *Mississippi Power Co.,* 332 NLRB 530 (2000).

vide 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 Joint 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 included 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 5c 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.[18]

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 Co.,* 328 NLRB 1220 (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 Co. v. NLRB,* 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, supra, 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 Co.,* 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.

[18] 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.

IV. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCALS 345, 833, 904, 391, 801, 841, 1053, 796, AND 2077, AND THEIR DESIGNATED REPRESENTATIVE SYSTEM COUNCIL U19, 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 U19 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),[19] article VIII(e) and Memorandum of Understanding benefits section at pages 125–130,[20] 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 Corn Plan will be determined annually by the Company. . . .
>
> c. During the term of this contract, the Company will meet with the Union semi-annually to discuss trend data, the APC medical reserves, and premium to costs rations 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.

[19] See also Jt. Exh. 1(e) pp. 124–129 and Jt. Exh. 1(g) pp. 111–116.

[20] Although *Alabama Power Co.* cited a memorandum of understanding the document covering those pp. 125–139 among others, is entitled "MEMORANDUM OF AGREEMENT DISTRIBUTION & SUPPORT 1998 NEGOTIATIONS," rather than a memorandum of understanding.

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 Co., 328 NLRB 1220 (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[21] 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

[21] Jt. Exhs. 1(e), (f), and (g).

U19's unfair labor practice charges, System Council U19 responded that it did not seek rescission of those changes. Therefore, according to Alabama Power Company, System Council U19 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 U19 requested negotiations. Therefore, System Council U19 had a continuing interest in these matters and, regardless, System Council U19 was authorized to file the instant unfair labor practice charges.

V. 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.[22]

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 Co.,* 328 NLRB 1220 (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[23] 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).

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

[22] See Stipulations 10(a)–(e), Jt. Exh. 2.
[23] See Jt. Exh. 1(c).

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 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:

> 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 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:

> 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 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:

> 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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

I. Pursuant to Section 10(c) of the National Labor Relations Act, 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.[25] 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

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.[26] 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.

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.

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

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.[27] 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.

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.[28] 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 ell places where notices to employees are customarily posted. Reasonable steps shell 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.