

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRSTENERGY GENERATION CORP.

and

Case 6-CA-36631

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL UNION  
NO. 272, AFL-CIO

ANSWERING BRIEF BY COUNSEL FOR THE ACTING GENERAL  
COUNSEL IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO  
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Dated at Pittsburgh, Pennsylvania,

this 29<sup>th</sup> day of October, 2010

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**ANSWERING BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS**

Counsel for the Acting General Counsel hereby files this Answering Brief in Opposition to Respondent's Exceptions to Administrative Law Judge David I. Goldman's Decision in the above-entitled matter, which issued on September 17, 2010. Counsel for the Acting General Counsel does not concede or agree to the validity or applicability of any of the statements or arguments raised by Respondent in its Exceptions, including those which are not specifically answered or referred to herein.

**I. PROCEDURAL HISTORY**

Based on a charge filed by International Brotherhood of Electrical Workers, Local Union No. 272, AFL-CIO (Union), Complaint and Notice of Hearing in this matter issued on May 20, 2010. The Complaint alleged that Respondent failed to bargain concerning a mandatory subject of bargaining, a change in the future retirement benefits of currently active employees, in violation of Section 8(a)(5) and (1) of the Act. The matter was tried before Administrative Law Judge David I. Goldman on July 27, 2010 and all parties subsequently filed briefs with the

Judge. In his Decision,<sup>1</sup> the Administrative Law Judge found that the future retirement benefits of the current bargaining unit members are a mandatory subject of bargaining (ALJD 12); that Respondent changed those benefits (ALJD 13); and, that Respondent failed to bargain with the Union over this change (ALJD 12). In so doing, the Administrative Law Judge rejected Respondent's defense that the Union waived its right to bargain either by its acquiescence to Respondent's past practice of such changes (ALJD 15) or because the matter had been explored during contract negotiations (ALJD 16). Respondent filed Exceptions to the Decision of the Administrative Law Judge and Brief in Support of Exceptions on about October 13, 2010. This answering brief is filed in response thereto.

## II. FACTS

At the hearing the parties stipulated to the following facts. (JX 1)

1. FirstEnergy Generation Corp. (Employer) headquartered in Akron, Ohio is in the business, inter alia, of operating electricity generation plants in various states including Pennsylvania. IBEW, Local 272 (Union) has represented a bargaining unit of production and maintenance employees at the Employer's Bruce Mansfield plant (BMP) in Shippingport, Pennsylvania for many years. There are currently about 360 employees in the bargaining unit.
2. The Union and the Employer have been parties to a series of collective-bargaining agreements and the most recent one is effective by its terms for the period from December 5, 2009 to February 15, 2013. Prior to the signing of this agreement, the parties had been in contract negotiations for almost two years, since the previous collective bargaining agreement expired on February 16, 2008. There were no contract extensions during the period from February 2008 until December 2009.<sup>2</sup>

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<sup>1</sup> Transcript pages are referenced as Tr ; Acting General Counsel exhibits are referenced as GCX, Respondent exhibits are referenced as RX, Joint exhibits are referenced as JX; references to the Decision of the Administrative Law Judge are cited as ALJD, and references to Respondent's Brief in Support of Exceptions are cited as RBrf

<sup>2</sup> During the interim period between agreements, the Union filed Case 6-CA-36056 and Complaint issued alleging a unilateral change to the health care benefits provided to bargaining unit employees upon their retirement in the absence of a new agreement. Prior to hearing, a non-Board settlement was reached on October 30, 2008 which essentially extended the contractual health care provisions of the expired

### **Active Employees**

3. Article XVIII of the parties' current agreement contains health insurance provisions, beginning on page 59. Under the current agreement, the Employer provides all employees with subsidized health insurance under its Group Health Insurance Plan for individuals and families at various levels of coverage. During the current and previous (2005-2008) agreement, as set forth in Article XVIII (at page 62), the Union has elected to "opt out" of the Employer's Group Health Insurance Plan and provide separate health care coverage for the bargaining unit.
4. Beginning in mid-2006 (under the 2005-2008 agreement) and continuing to date (under the 2009-2013 agreement), the Union has exercised its opt-out right and obtained separate coverage through the UPMC Health Plan (for 2009) and Highmark (since 2010) for the bargaining unit. In accordance with the parties' agreement, the Employer contributes and forwards payment to the Union-selected health care provider an amount per covered employee equal to the contribution the Employer would normally make per employee for each employee represented by the Union under the Employer Group Health Insurance Plan. The Union opts out because of its assertion that it was able to find better and less expensive coverage for the bargaining unit so its members have a smaller monthly contribution and more comprehensive coverage than they would have enjoyed under the Employer's Group Health Insurance Plan. The net cost to the Employer is the same.

### **"In the Box" Retirees**

5. The parties' current agreement further provides, similar to the prior agreement, that a bargaining unit employee who retired after February 16, 2008,<sup>3</sup> through the term of the current agreement, would continue participation under the same health care coverage plan as an active employee for the life of the current agreement, which is until February 15, 2013. Since the Union has "opted out" in favor of the UPMC Health Plan and then Highmark as of the date of these Stipulations of Fact, these new retirees will continue to

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agreement throughout the duration of negotiations and for the entire period of the yet-to-be-agreed-upon collective bargaining agreement, which is now the 2009-2013 agreement.

<sup>3</sup> This date precedes the effective date of the 2009 Agreement as it is the incorporation of the terms of the non-Board agreement referenced in footnote 3

receive health care coverage under those plans, rather than the Employer's health care plan. The bargaining unit retirees who receive this extension of the active employee health care plan for the duration of the current agreement are referred to by the parties as being "in the box." This is a shorthand reference to Article XVIII, Section 3.

6. While the "in the box" retirees are currently permitted to remain in the Union's, "opt-out" plan, depending on the age and service of the retiree "in the box," the Employer contribution could be less than or equal to that of an active employee. As a general rule, with at least 30 years of service, an "in the box" retiree who is 65 or older would get an Employer contribution about equal to that which an active employee receives. An "in the box" retiree who is less than 65 years old will get a lesser amount, according to the chart on page 61 of the current agreement, which is at Article XVIII, Section 3.

**Retirees who are not "In the Box"**

7. The Employer has a health care plan which is available to all eligible non-bargaining unit employees of the Employer, certain bargaining unit employees, and eligible retirees of the Employer. This includes former bargaining unit employees who were "in the box" prior to February 16, 2008, and who are eligible and elect to participate. The Employer provides a monthly contribution for health care cost for each retiree who elects to participate, including the retirees in the Union's bargaining unit, but this amount is sometimes less than the same retiree enjoyed while actively employed (due to age and/or service as noted above.)

The Employer's Compensation & Benefits Handbook provides as follows:

Retirement health care benefits are not vested. The level of benefits and retiree contributions required toward those benefits is subject to change at the discretion of the Company (At page 6)

and

Retirement health care benefits are not vested. Medical benefits and the contributions required for coverage including retiree health care benefits and contributions may be amended or terminated at any time by the Chief Executive Officer of FirstEnergy Corp. or his appointed designee. (At page 62)

[end of JX 1]

During the negotiations for the 2009-2013 contract (GCX 12), the Union offered several proposals involving various options regarding health care. The Union proposed, inter alia, that Respondent vest retirement health care for all retirees, current and future, as well as provide the same subsidy for monthly health care to both current and future retirees from the bargaining unit as that received by active employees. This would have eliminated the tables contained in Article XVIII of the expired contract. (Tr. 15, 75, GCX 2, RX 11, 12) The Union's proposals were rejected by Respondent (Tr. 15, 76) There was no agreement on new language for Article XVIII and, as of July 15, 2009, health care was still on the table in the negotiations which continued until December 2009. (Tr. 102)

Prior to 2009 and the events of the instant case, Respondent had long provided a monthly subsidy to the health care costs of all retirees in its Plan and this contribution continued indefinitely, as long as the retiree remained in the Plan or until the retiree became eligible for Medicare. (Tr. 16) The amount of Respondent's monthly contribution for a retiree varied, depending on the age and service of the individual in accordance with Article XVIII of the contract. (JX 1, paragraph 7)

As of June 1, 2009,<sup>4</sup> the parties had been in negotiations for about 18 months and there was still no agreement on the terms of a new contract. Impasse had not been declared and Respondent had not implemented any of its proposals (Tr. 18) In its Employee Update dated June 2, Respondent announced that its monthly subsidy to retiree health care costs would be limited to the first three years of an individual's retirement. After the first three years, access to Respondent's health care plans would remain but Respondent's monthly subsidy would cease and each retiree would be responsible for 100% of the cost of his or her health insurance premium. (GCX 13, page 5, GCX 16) Respondent's June 11 Employee Update further reiterated and informed employees that the three-year limit was scheduled to take effect on July 1, for

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<sup>4</sup> Hereafter all dates are in 2009 unless otherwise stated

current retirees and clarified that current employees would be limited to three years of health care contributions commencing on their future retirement dates. (GCX 14, page 3 at "Health Care")

The Union was not notified by Respondent of the new three-year limitation on health care subsidies other than by the referenced Employee Updates, which were provided to all employees including the Union officials (Tr. 17) Union President Herman Marshman, who was the spokesperson for the Union throughout negotiations, immediately sent a letter requesting a meeting and asking to negotiate concerning the announced change in the subsidy as well as other subjects. (Tr. 13, 17, GCX 3) A meeting was subsequently scheduled for July 15.

When negotiations first began in January 2008, James Cole, then-Manager, Industrial Relations, was the chief spokesperson for Respondent. (Tr. 67) Cole continued in this role until February of 2009 when he was reassigned James Deimling, Manager, Labor Relations, then took over the role of spokesperson for Respondent in the negotiations with the Union and remained in that position throughout the events pertinent to this case. (Tr. 95) Pursuant to the ongoing contract negotiations, on about June 3, 2009, Respondent, through Deimling, provided a contract offer to the Union.

At the July 15 meeting, Deimling wanted to discuss Respondent's latest offer with the Union in hopes of reaching an agreement (Tr. 97, 103) Union President Marshman's intention at the meeting was to discuss matters other than the contract offer, notably the retirement health care change for future retirees as announced in the Employee Updates. (Tr. 99, 102) Deimling took the position that since January 2008, the parties had discussed the Union's proposals on this issue and rejected them and their position had not changed. (Tr. 100) Deimling told the Union that the change in retiree health care was a permissive subject and that Respondent did not choose to discuss the changes announced in the Update about health care. (Tr. 20, 102, 104, GCX 5, page 18, at the last paragraph marked "JD") The parties bickered about whether the July 1 change was a permissive or mandatory subject of bargaining. However, no actual bargaining

concerning future retiree health care took place at the July 15 meeting. Neither was any agreement reached on Respondent's June 3 offer.

Thereafter, in a letter to the Union dated July 24, Respondent reiterated its position relative to future retiree health care as Deimling had already stated it at the July 15 meeting. In Respondent's July 24 letter, signed by Cole in Deimling's name, Respondent stated that it had "no interest" in discussing the June 2 announced "changes" for future retirees with the Union as its position on vesting health care for retirees had been discussed throughout negotiations and it had not changed. (Tr. 77, 89, GCX 6, page 2) In its July 24 letter, Respondent also declared impasse on certain subjects and announced its intent to implement portions of its June 3 offer, effective August 1. Notably, Respondent did not declare impasse on the health care provisions that had been proposed and it did not implement any of its proposals concerning Article XVIII at that time.

In August, Respondent implemented Voluntary Enhanced Retirement Option (VERO) for the Union's bargaining unit. (Tr. 23) The terms of the VERO offered and later applied to eligible Union members included the three year limitation on Respondent's health care subsidies following the bargaining unit employees' retirement that was put into effect by Respondent as of July 1. (GCX 8, page 2 at "Health Care Benefits")

### **III. RESPONDENT'S EXCEPTIONS**

#### **A. Exception Nos. 2, 3, 4, 5 and 6**

Respondent excepts to the Administrative Law Judge's findings that the future retirement benefits of currently active bargaining unit employees is a mandatory subject of bargaining and that Respondent had a statutory duty to bargain over this subject with the Union. Contrary to Respondent's contentions, the Administrative Law Judge correctly interpreted applicable law to the issue herein and his findings in this regard were appropriate

It is well settled that current retirees are not “employees” within the meaning of Section 2(3) of the Act, and that benefits paid to current retirees do not vitally affect the wages or terms and conditions of current employees. NLRB v Pittsburgh Plate Glass Co., 404 U.S. 157, 180 (1971). As such, health care benefits of current retirees are a permissive subject of bargaining. Id. at 180; See also In Re Mississippi Power Co., 332 NLRB 530, 530-531 (2000), *enfd.* in part, 284 F.3d 605 (5<sup>th</sup> Cir. 2002). However, health care benefits for future retirees are a mandatory subject of bargaining. See, PPG, *supra* at 180; Mississippi Power, *supra* at 530-531. In Midwest Power Systems, Inc., 323 NLRB 404 (1997),<sup>5</sup> the Board noted that the Supreme Court has clearly stated that the future retirement benefits of active workers are a mandatory subject of bargaining under the Act. Id. at 406 Future retirement benefits of active employees are bargained for as “part and parcel” of the employees’ current overall compensation package and are therefore “wages” and a mandatory subject of bargaining. PPG, *supra* at 180

It is the status of the employee at the time that the change is made and not at the time that the change takes effect, that is probative of whether the employee is a future retiree or a current retiree. See, Mississippi Power, *supra* at 530-531. Indeed, if the timing of the effect was determinative, employers would never have an obligation to bargain over retirement benefits of active employees as retirement benefits are necessarily received only *after* employees retire. Mississippi Power, *supra* at 530, fn 6. As recognized by the Supreme Court in PPG, future retirement benefits are part of the current overall compensation package bargained for by unions and the promise to pay active employees’ benefits after they retire is often given in exchange for the employees accepting a lower current wage or other tradeoff. 404 U.S. at 180.

Respondent argues (RBrf 11-12) that a change in terms and conditions affecting employees is determined by the extent to which it departs from employees’ existing terms and

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<sup>5</sup> Enforcement denied on other grounds, 159 F 3d 636 (D C Cir. 1998).

conditions, and that the 2009 agreement contains the employees' existing terms. This assertion is not supported by the facts of this case and Respondent's argument based on Southern California Edison Company, 284 NLRB 1205 (1987) must fail.

First, the effective date of the 2009 contract is December 5, 2009, five months after the operative events of this case. It is clear that the governing agreement for health care during the time period of this case, prior to the effective date of the 2009 contract, is the non-Board agreement in Case 6-CA-36056 which was reached in October 2008. (JX 1, fn.3) However, that agreement as well as the 2009 contract address only the continuation of active employee insurance for any retiree who retired since February 15, 2008, until the expiration of the 2009 agreement (which was yet to be negotiated at the time of the non-Board.) Neither of those agreements addresses the *terms* of the FirstEnergy retiree health care plan but only recognize that the bargaining unit employees will eventually enter that plan.

The terms of Respondent's retiree health care plan, until the events of the instant case, provided bargaining unit employees (i e., future retirees) an indefinite subsidy to their monthly health care premium by the Respondent. (Tr. 16, ALJD 4) The indefinite subsidization<sup>6</sup> is the existing term to which the July 1 change is to be compared, not the 2009 agreement. Therefore, the unilateral change is indefinite Employer contribution as opposed to three (3) years of contributions. The fact that current employees will not be impacted by the effects of this policy until their future retirement does not mean it has no effect on them. It clearly affects their decision of whether to retire if they are more than three years away from eligibility for Medicare coverage (Tr. 15-17, ALJD 12) This is direct evidence of the current bargaining unit employees' interest in this matter.

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<sup>6</sup> Until the retiree is age-eligible for Medicare.

Contrary to Respondent's assertions, Respondent's unilateral change to future retirement health care benefits affected not only current retirees but future retirees as well.<sup>7</sup> This is evidenced by the fact that any employees who retire after July 1, 2009 were future retirees at the time of the change as they were actively employed when the change was made.

There is ample evidence that Respondent's unilateral change affected current employees, as the Administrative Law Judge found Respondent's Employee Updates of June 2 and June 11 clearly state that Respondent was abandoning its past practice of contributing indefinitely to future retiree health care benefits and that contributions would now be limited to the first three years of retirement as each employee becomes a Health Care Plan retiree. (GCX 13 and 14) It is equally clear that Respondent incorporated its new three-year limitation into the terms of its VERO program which it offered to eligible bargaining unit employees in August 2009. (GCX 8, page 2)

The Administrative Law Judge correctly found that the future retirement benefits of currently active bargaining unit employees had been changed by Respondent. The Administrative Law Judge also correctly found that this change was a mandatory subject of bargaining and that Respondent had a statutory duty to bargain with the Union over this unilateral change in the terms and conditions of employment for its currently active employees. Accordingly, Counsel for the Acting General Counsel asserts that Respondent's Exceptions regarding these issues should be denied.

B. Exception No. 7

Respondent excepts to the Administrative Law Judge's findings that Respondent's failure to bargain with the Union over the subsidy cap violated the Act. Contrary to

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<sup>7</sup> It is clear under PPG and Mississippi Power that Respondent had no duty to bargain over the change in health benefits provided to current retirees at the time of the July 1 change as it would have been a permissive subject of bargaining

Respondent's contentions, the Administrative Law Judge correctly interpreted and applied current Board law to the issue herein.

The Administrative Law Judge correctly found that the parties never bargained over Respondent's announced new three-year limitation on health care benefits for future retirees. (ALJD 10-11) Respondent gave the Union no notice of its July 1 change prior to its general announcement to all employees that was published corporate-wide in the June 2 Employee Update. The matter was thus presented to the Union as a *fait accompli*. Upon learning of Respondent's intended change, however, the Union immediately requested to bargain with Respondent. The July 15 meeting was the next occasion on which the parties were assembled for the purposes of negotiation.

At the July 15 meeting, the Union continually raised the issue of the new three year limitation on Respondent's contribution to retiree health care benefits but there is no evidence that the parties actually bargained concerning this issue. Respondent took the position that it was a permissive subject of bargaining and refused to bargain. Respondent's July 24 letter affirms Respondent's position in this regard as presented at the meeting. (GCX 6, page 2)

In its defense, Respondent raised the fact that some of the Union's earlier bargaining proposals suggested increasing Respondent's funding to the VEBA ("Voluntary Employee Benefit Association") and these proposals were rejected by Respondent. (GCX 12, Appendix G, page 83, Tr. 76, RX 12) The fact that the Union made a proposal and that Respondent refused to change Appendix G (regarding VEBA) is irrelevant and can not excuse Respondent's actions in this case. The issue herein is whether Respondent changed future retiree health care benefits for current bargaining unit employees without bargaining with the Union, not whether the source of funding for post-retirement benefits was or was not changed.

While VEBA was also raised at the July 15 meeting, it is clearly unrelated to Respondent's unilateral change in the duration of its contributions to the bargaining unit

employees' future retirement health care benefits. VEBA is merely a funding tool created under IRS regulations which may be used by employers to pay post-retirement benefits and which provides favorable tax treatment for employers. Although in negotiations Respondent rejected the Union's proposals and took the position that it was unwilling to limit its discretion to fund VEBA, this is beside the point. There is no evidence that Respondent made any specific proposal to cut off or limit its funding to current employees' future retirement health care benefits during any bargaining sessions although it had ample opportunity to do so. Respondent's unlawful unilateral change is the issue here and it has nothing to do with whether or not any bargaining occurred concerning VEBA.

Moreover, any bargaining prior to June 2009 which may have occurred concerning the Union's VEBA proposal would not excuse Respondent's refusal to bargain over its July 2009 change at issue herein as a new obligation arose at the time of the June announcement of the July change to current employees' future retirement health care benefits. It is clear that Respondent refused to negotiate concerning the July 1 change at the July 15 meeting and thereafter.

Based on the above, it is clear that Respondent failed to notify the Union of its proposed change to a mandatory subject of bargaining. Thereafter, Respondent continually refused to bargain and, in fact, did not bargain with the Union over its change to a mandatory subject of bargaining, notwithstanding the Union's repeated requests. Counsel for the Acting General Counsel asserts that the Administrative Law Judge correctly found that Respondent unilaterally changed the future retirement health care benefits of current bargaining unit employees and refused to bargain with the Union concerning that matter in violation of its statutory duty, thereby violating Section 8(a)(5) and (1) of the Act. Respondent's Exception No. 7 has no merit and should be denied.

C. Exception Nos. 8, 9, 10 and 11

Respondent excepts to the Administrative Law Judge's rejection of its defense based on past practice, specifically that the Union had a history of acquiescing to Respondent's changes in retirement health care coverage for its bargaining unit employees. Counsel for the Acting General Counsel asserts that the Administrative Law Judge correctly found that there was not a status quo of acquiescence by the Union which permitted Respondent's unlawful in this case.

The exception to the rule that an employer must bargain over mandatory subjects of bargaining is in situations where it can be shown that the union has waived its statutory right to do so. It is well settled that a clear and unmistakable relinquishment of the right to bargain is necessary to demonstrate a waiver of this right. Exxon Research & Engineering Company, 317 NLRB 675 (1995), enf. denied on other grounds, 89 F.3d 228 (5<sup>th</sup> Cir. 1996). Waiver may be established by express contract language, by conduct of the parties (including past practice, bargaining history or the actions or inaction of a party), or a combination of the two. Chesapeake & Potomac Telephone Co. v. NLRB, 687 F.2d 633, 636 (2d Cir. 1982) An employer who asserts waiver bears the high burden of demonstrating that the union has clearly and unequivocally relinquished its right Bath Iron Works Corp., 345 NLRB 499, 501 (2005), enfd. 475 F.3d 13 (1st Cir. 2007)

In this case, Respondent's unilateral change occurred in July 2009. It is beyond dispute that at the time of the alleged violation, the 2004-2008 contract had expired and there had been no extension of that agreement. The parties had also not agreed upon new language for Article XVIII, the health care provision, and health care was still on the table in the ongoing negotiations.

Respondent did not declare impasse on health care in July when it declared impasse on several other items which had been under consideration in contract negotiations. Respondent did not implement any part of Article XVIII in August when it implemented these other proposals

that the parties were at impasse concerning. The 2009-2013 contract, including new language in the health care provisions, did not go into effect until December 5, 2009.

Respondent has not pointed to any express language in the expired contract that would support an argument that the Union waived its right to bargain in this case. Respondent argues that the insertion of language referencing the FirstEnergy Employee Compensation and Benefits Handbook ("Benefits Handbook") into the 2009-2013 contract at Article XVIII, section 2. As referenced in JX 1 as well as other exhibits in the record, the Benefits Handbook contains language which states that retirement benefits are not vested and that they may be subject to change by Respondent.

Whatever meaning Respondent may attempt to attach to the language of the current contract at Article XVIII, Section 2 (Rbrf 8) is irrelevant to the instant issue for two reasons. First, as has been noted above, it is clear that this language was not in effect at the time of Respondent's unlawful conduct at issue herein. There was no agreement on any part of Article XVII as it appears in the current contract except for the terms contained in the non-Board agreement between the parties referenced previously. (JX 1, fn. 3) The language of Section 2 cited by Respondent is new to the current contract and was not in the parties' expired agreement. (GCX 11) It simply cannot be used to justify conduct which occurred five months prior to the effective date of the 2009 agreement.

Secondly, the referenced Benefits Handbook is not a negotiated agreement. It is Respondent's document and there is no evidence in the record that the Union was consulted with, bargained with, or that it agreed to any specific provision in Respondent's Benefits Handbook. To the contrary, the Union's Recording Secretary and member of the negotiations team, testifying for the Acting General Counsel, credibly testified that he was not familiar with [the Benefit Handbook referenced by Respondent's attorney], did not have one, and had not reviewed it. (Tr. 56) The mere fact that a Respondent-originated publication is mentioned in

any agreement hardly fulfills the requirement that there must be full discussion and conscious yielding of a statutory right to establish waiver. See Georgia Power, 325 NLRB 420 (1998)

Respondent also argues that the parties fully discussed retiree benefits during the negotiations for the 2009-2013 contract and thus the issue was waived by the Union. This argument is substantiated by the record and was correctly rejected by the Administrative Law Judge. Respondent's July 24 letter to the Union (GCX 6 at page 2) concedes that Respondent had "no interest" in discussing a mandatory subject of bargaining with the Union at the July 15 meeting. The letter then explains that Respondent's position had been "consistently and exhaustively explained" in bargaining since January 2008. However, Respondent's witness Cole, who took credit for drafting that letter (Tr. 85) along with others, testified that it was not the July 1 unilateral change that had been exhaustively discussed but the Union's proposals in negotiations to vest retiree benefits. (Tr. 89)

Thus, at the July 15 meeting Respondent had no interest in discussing its unilateral change of the three year limitation on health care contribution and did not do so. The parties never again met to negotiate the subject. It certainly can not be said that the subject was fully discussed by *prior* discussions on a different topic which may only have been a permissive subject of bargaining. There were literally no discussions on the change itself. Thus, there is no evidence that the Union clearly and unmistakably waived its right to bargain over this mandatory subject of bargaining.

The Union also did not waive its right to bargain in this case by past practice and the Administrative Law Judge was correct in finding that acquiescence by the Union was not the status quo in the parties' relationship. Respondent argues that alleged changes in retirement benefits had been previously enacted and were not protested by the Union, thus establishing waiver through past practice. This argument is unpersuasive for the reasons that follow

Counsel for the Acting General Counsel initially asserts that RX 5 is irrelevant as the changes listed therein concern only current retirees (Tr. 112-113) who, by definition, are not represented by the Union and no action on their behalf by the Union would have been appropriate. Respondent's Manager of Benefits and Compliance testified that RX 6 was a list of changes in benefits for non-bargaining unit employees for the years 2003-2009 (Tr. 114), so this exhibit has no probative value. The witness further testified that some of the changes would have affected Local 272 employees but that any changes that were made regarding these employees were made in coordination with the applicable collective bargaining agreement. (Tr. 114) By the testimony of Respondent's own witness, the items listed in RX 6 did not all involve bargaining unit members. Based on this evidence, the Administrative Law Judge was correct to find no reliable evidence of past practice in this case.

Further, as the record establishes that the Union opted out of Respondent's plan in 2006 (see GCX 18) any changes in the medical coverage for 2006-2009 could not have applied to the Union's bargaining unit employees in any event. Therefore, Respondent failed to produce reliable evidence of a past practice of acquiescence by the Union to changes in mandatory subjects of bargaining. Any such argument is specious and was properly rejected by the Administrative Law Judge.

Respondent relies upon The Courier Journal, 342 NLRB 1093 (2004), in support of its defense in this case. Counsel for the Acting General Counsel contends this case is inapposite as a critical factor in Courier Journal, contract language that permitted the employer's actions, is absent here. In Courier-Journal, the Board relied upon regularly-made unilateral changes enacted by the employer in reliance on contractual language through which the parties agreed that non-bargaining unit and bargaining unit employees would be kept on the "same basis." The Board found that these regular, agreed-upon changes evidenced past practice and were accepted by the union as they were provided for under the contract. As argued above, there is

no contractual basis to permit Respondent's actions in the instant case. No pattern of uncontested unilateral changes has been shown. As then-Member Liebman noted in her dissent in Courier-Journal, for unilateral changes to be lawful, there must be "reasonable certainty" as to both their timing and criteria. Id. at 1096. Neither of these factors is present here.

Equally unpersuasive as evidence of waiver is RX 9, a 2004 letter to the Union explaining a change in policy affecting future employees yet-to-be-hired. Regarding this letter, a witness for the Acting General Counsel testified, "We disputed this at the bargaining." (Tr. 37) As the issue was disputed and discussed at the bargaining table it does not appear to have been a matter waived by the Union and, thus, it is not evidence of a past practice of acquiescence by the Union to Respondent's unilateral changes in terms and conditions of employees.

Moreover, it has been long held that a union's failure to act on past occurrences of unilateral change does not establish a clear and unmistakable waiver. The Board as well as various courts have held that "a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time." Owens-Corning Fiberglas Corp., 282 NLRB 609 (1987) cited in Caterpillar, Inc., 355 NLRB No. 91 (2010). The Board has also noted a union's 'historical acquiescence' in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to those in which the union may have acquiesced in the past. Exxon Research, *supra* at 685.

Contrary to Respondent's contentions, the Administrative Law Judge correctly relied upon Caterpillar, *supra*, in his analysis and Decision. In Caterpillar, the employer's unilateral change in the type of prescriptions available through the employees' health plan was found to be material, substantial and significant as, *inter alia*, the change affected employee choice or discretion as it relates to employee benefits. As noted above, the Administrative Law Judge found the instant change affected the decision of any bargaining unit employee contemplating

retirement. (ALJD 12) It is clear that the three year limitation of Respondent's contribution to health care in the instant case is a considerable departure from the previous level of indefinite subsidization. Recognizing this, the Administrative Law Judge correctly found concerning Respondent's proffered evidence of past practice, "None of the prior changes-typically changes in carriers or medical options under the plan-were remotely similar to the elimination of the employer subsidy that is at stake here." (ALJD 15)

Based on the above, the Administrative Law Judge correctly found that there was insufficient evidence of a status quo of acquiescence and that the Union did not clearly and unmistakably waive its right to bargain over Respondent's July 1 change in future retirement health benefits for current employees. Respondent's Exceptions to the Administrative Law Judge's findings on these grounds should be denied.

D. Exception Nos. 1, 12, and 13

Based on its arguments, Respondent also excepts to the overall findings of the Administrative Law Judge and to his recommended Remedy and proposed Order. Inasmuch as Respondent's Exceptions 2 through 11 are not supportable for the reasons argued above, Exception Nos. 1, 12, and 13 are likewise without merit.

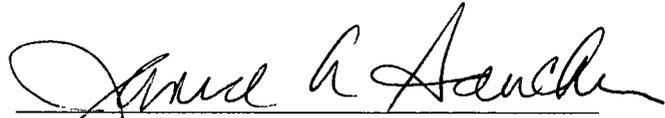
**IV. CONCLUSION**

Respondent's Exceptions do not merit serious consideration. The findings of fact and conclusions of law by the Administrative Law Judge are amply supported by the record evidence. Moreover, Respondent's Exceptions, constitute, in large measure, a repeat of arguments made in Respondent's post-hearing brief to the Administrative Law Judge, which arguments were cogently considered and correctly rejected by the Administrative Law Judge

Therefore, Counsel for the Acting General Counsel respectfully requests that the Board deny all of Respondent's Exceptions and adopt the recommended Decision and Order of the Administrative Law Judge in its entirety

Dated at Pittsburgh, Pennsylvania, this 29<sup>th</sup> day of October, 2010.

Respectfully submitted,



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