

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

AMERICAN ELECTRIC POWER
AND ITS SUBSIDIARIES APPALACHIAN
POWER COMPANY, INDIANA MICHIGAN
POWER COMPANY, KENTUCKY POWER
COMPANY, KINGSPORT POWER COMPANY,
OHIO POWER COMPANY, PUBLIC SERVICE
COMPANY OF OKLAHOMA AND
SOUTHWESTERN ELECTRIC POWER COMPANY

and

Case 9-CA-095384

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, SYSTEM COUNCIL U-9
AND LOCALS 329, 386, 696, 738, 876, 934, 978,
1002, 1392 AND 1466, AFL-CIO

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING
BRIEF TO RESPONDENTS' EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION
AND ITS BRIEF FILED IN SUPPORT THEREOF**

I. INTRODUCTION:

This case is before the Board on Respondents' exceptions to the Administrative Law Judge's decision, which issued on July 31, 2013. In his decision, Administrative Law Judge Eric M. Fine concluded that Respondents violated Section 8(a)(1), (5) and 8(d) of the Act by modifying the parties' master collective-bargaining agreement. (ALJD p. 28) ^{1/} For the reasons set forth herein, Respondents' exceptions are without merit and Judge Fine's factual findings, analysis and legal conclusion are accurate.

^{1/} References to the Administrative Law Judge's Decision will be designated as (ALJD p. ___); references to Respondents' exceptions and brief in support thereof will be designated as (R. Ex. p. ___) and (Resp. Br. p. ___) respectively; references to the trial transcript will be designated as (Tr. p. ___); references to the General Counsel's, Respondents', and Stipulated trial exhibits are designated as (G.C. Ex. ___), (Resp. Ex. ___), and (S. Ex. ___) respectively.

II. RESPONSE TO RESPONDENTS' EXCEPTIONS

A. **The ALJ correctly concluded that individuals hired on or after January 1, 2014 are bargaining unit employees. (Respondents' Exception 1)**

Judge Fine found that individuals who have not yet been hired, but who will be hired during the term of the collective-bargaining agreement, are bargaining unit employees. In doing so, Judge Fine found that future employees are employees within the meaning of the Act and that the plain language of the parties' collective-bargaining agreement was in accordance with this definition. He rejected Respondents' assertion that future employees should be treated as "prospective" employees and distinguished Board law finding that applicants for employment are not employees within the meaning of the Act. Judge Fine's thoughtful analysis is consistent with Board law and the policies of the Act.

Respondents' assertion that future employees are not employees within the meaning of the Act runs contrary to the language in Article I, Section 8 of the Master Agreement, which defines employees covered by the contract as "regular full time and probationary employees *who are now or hereafter in the employment* of a Company and represented by a Local Union." (S. Ex. 1) (emphasis added) Given this language, the Union and Respondents clearly intended the contract to cover all present and future employees employed in bargaining unit divisions.

The Board has rejected attempts to divide bargaining units into chronological divisions. In *Mississippi Power Company*, 332 NLRB 530, *enfd.* in relevant part, 284 F.3d 605 (5th Cir. 2002), the ALJ found that the employer violated the Act by announcing planned retirement benefit changes for future retirees to union locals and by refusing to bargain with the locals over those changes. However, in making that finding, the ALJ concluded that the violation was limited only to changes affecting employees currently employed in the bargaining unit and not future employees. 332 NLRB 530, 536. The ALJ set forth the same rationale that Respondents attempt to present here: that the unions were "the bargaining representative of a unit of active employees and, as such, do not represent future employees." *Id.*, citing *Exxon Research &*

Engineering Co., 317 NLRB 675, fn. 3 (1995). However, the Board disagreed with the ALJ's rationale and held:

As a preliminary matter, we note that the issue in *Exxon* was whether the Board's Order should encompass the unilateral changes at issue there on a corporate wide or unit basis, i.e., the geographical extent of the Board's Order. ***By contrast here, the judge would, in effect, divide the bargaining unit into chronological divisions based on whether unit employees were hired prior to or after the Respondent's April 21, 1995 OPRB changes. We decline to make such a division.***

Id. at 533, fn. 10 (emphasis added). Although Respondents cite to *Mississippi Power Company*, they seem to have intentionally missed its import: that employees who have yet to be hired are also bargaining unit employees. Accordingly, Respondents' argument that they did not violate the Act because the unilateral change in question applies only to future employees fails.

In *Pittsburgh Plate Glass*, the Supreme Court distinguished *current retirees*, who are not employees within the meaning of the Act, from *future retirees*, (bargaining unit employees) who will eventually retire and seek to avail themselves of negotiated retiree benefits. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). The Court was not faced with the question of whether *future employees* are employees within the meaning of the Act. Rather, it is clear from the Court's discussion that it referenced "active employees" solely to distinguish them from "current retirees," and not to distinguish them from future hires. But Respondents seize on this language to advance an argument that finds no support in the underlying rationale of *Pittsburgh Plate Glass* or in any other Board precedent: the faulty notion that Respondents are not required to bargain over changes to retiree medical benefits for future employees, even though such changes would affect employees hired into bargaining unit positions during the term of the contract. Respondents misread the *Pittsburgh Plate Glass* decision, and in doing so, mischaracterize the holding and drastically extend its import.

Respondents' argument, when followed to its logical conclusion, would permit employers to make unilateral changes to any and all terms and conditions of employment for employees that have not yet been hired. According to Respondents' position, an employer could, for example,

“sign a 3 year agreement with wage and benefit provisions following good faith bargaining with the Unions, and the next day unilaterally re-set all wages and benefits for employees hired the following week under the guise that they are not part of the bargaining unit because they have not yet been hired.” (ALJD p. 17:4-7) Such a result, if permitted, would contravene the purpose of the Act.

B. The ALJ correctly concluded that Respondents’ elimination of retiree medical coverage for bargaining unit employees hired on or after January 1, 2014 is a mandatory subject of bargaining. (Respondents’ Exception 2)

Based on the structure of Respondents’ Exceptions and their Brief in support thereof, it appears that Respondents’ Exception 2 is a derivative argument based on Exception 1, addressed above, and Exception 3, addressed below. Respondents have erroneously asserted that employees hired on or after January 1, 2014, should be treated in a similar fashion to job applicants. In seeking to place future bargaining unit employees outside the bargaining unit, Respondents are attempting *post hoc* to justify an inexcusable mid-term contract modification.

C. The ALJ correctly concluded that the “vitality affects” test is inapplicable. (Respondents’ Exception 3)

Respondents assert that Judge Fine erroneously concluded that the “vitality affects” test, as developed in *Pittsburgh Plate Glass* and applied in *Star Tribune*, does not apply. Respondents’ reliance on *Star Tribune* and its progeny is misplaced. In *Star Tribune*, 295 NLRB 543 (1989), the Board concluded that an employer’s unilateral implementation of a drug and alcohol testing policy for job applicants did not violate Section 8(a)(5) and (1) of the Act because a policy applicable to job applicants was not a mandatory subject of bargaining. In so concluding, the Board relied on *Pittsburgh Plate Glass* and found “no economic relationship between the employer and an applicant, and the possibility that such a relationship may arise is speculative.” *Star Tribune*, 295 NLRB at 546. Unlike the instant case, *Star Tribune* involved job applicants who may or may not be offered a job by the employer, and who may or may not in turn accept that offer of employment. In this case, the elimination of retiree healthcare benefits

affects all bargaining unit employees hired on or after January 1, 2014; there is nothing speculative about the economic relationship between the employer and these employees. The distinction between current unit employees and future unit employees is purely temporal. As previously noted, the Board has declined to divide employees on this basis. See *Mississippi Power Company*, 332 NLRB 530. Accordingly, the “vitally affects” test is inapplicable.

D. The ALJ correctly concluded that the language of the parties’ recognition clause includes future employees in the bargaining unit. (Respondents’ Exception 4)

Judge Fine found that the language of the parties’ Master Collective Bargaining Agreement includes employees who have not yet been hired by Respondents. Indeed, section 8(c) of that Agreement provides that, “The word ‘employee’ or ‘employees’ wherever used in this Agreement shall mean and refer only to those regular full-time and probationary employees who are now *or hereafter* in the employment of [Respondents] and represented by a Local Union.” (S. Ex. 1) (emphasis supplied.) Respondents do not dispute that this language plainly includes future employees. Rather, Respondents insist that the language should not be controlling. Respondents contend that Judge Fine “relies heavily” on the contractual definition of “employee” in the Agreement in finding that future employees are represented by the Unions. This is patently false. Contrary to Respondents’ assertion, Judge Fine simply found that the terms of the parties’ agreement “are consonant with Board law.” Whether or not the parties contemplated the inclusion of future employees in the definition of covered employees, Board law clearly establishes that an employer may not unilaterally establish separate terms and conditions for bargaining unit employees based on their hire date. (See discussion, section A, *supra*.)

E. The ALJ correctly concluded that Respondents failed to establish a past practice of unilaterally eliminating retiree medical benefits for an entire class of employees and that Respondents similarly failed to establish that the Unions waived their right to bargain over such changes. (Respondents' Exception 5)

Judge Fine concluded that Respondents had not established a past practice that would permit Respondents to unilaterally eliminate retiree health benefits for bargaining unit employees hired after January 1, 2014. (ALJD, p. 20:7-9) In so finding, Judge Fine specifically noted that Respondents own witness admitted that they had never previously eliminated a complete medical benefit for a group of employees or retirees during the term of an agreement. (ALJD p. 21:5-8)

The bargaining provisions of the Act prohibit an employer party to an existing collective-bargaining agreement from modifying the terms and conditions set forth in that agreement without the consent of the union. See *Bath Iron Works Corp.*, 345 NLRB 499, 502. Section 8(d) provides, in relevant part, that “where there is in effect a collective-bargaining contract . . . no party to such contract shall terminate or modify such contract.” The Board applies a “sound arguable basis” standard in determining whether an employer’s midterm unilateral change constitutes an impermissible contract modification within the meaning of the Act. See *Hospital San Carlos Borromeo*, 355 NLRB No. 26 (2010); *Bath Iron Works*, 345 NLRB 499, 501; and *Westinghouse Electric*, 313 NLRB 452, 453 (1993), *enfd. sub nom. Salaried Employees Assn v. NLRB*, 46 F.3d 1126 (4th Cir. 1995), *cert denied* 115 S.Ct. 1403 (1995).

Here, the evidence clearly establishes that Respondents unlawfully modified their contract with the Union. Employees, under Article X the 2012 Master Agreement, “shall be permitted to participate in the [AEP] Comprehensive Medical Plan . . .” (S. Ex. 1) Respondents do not dispute that the retiree medical plan is part of its Comprehensive Medical Plan. By prohibiting bargaining unit employees hired on or after January 1, 2014, from participating in its retiree medical benefit plan, Respondents modified the contract. More particularly, Respondents implemented the unilateral modification over the Union’s objection, and thus did so without the

Union's consent. The next question is whether Respondents' interpretation of the contract, that it was permitted to eliminate the retiree medical benefit, had a sound arguable basis.

The Board assesses whether a party's contract interpretation has a sound arguable basis by applying traditional principles of contract interpretation. *Conoco, Inc.*, 318 NLRB 60, 62 (1995), enf. denied 91 F.3d 1523 (D.C. Cir. 1996). The parties' actual intent, as reflected by the underlying contractual language, is paramount and is determined by reviewing the plain language of the agreement. *Mining Specialists*, 314 NLRB 268, 269 (1994). The Board will also consider extrinsic evidence, such as past practice and bargaining history relating to the provision itself. *Id.*

In the instant case, the plain language of Article X, Section 1 permits employees to participate in Respondents' benefit plans. (S. Ex. 1) Thus, Respondents unilaterally modified this term when they, without obtaining the Unions' consent, eliminated retiree medical benefits for employees hired on or after January 1, 2014. In doing so, and by blatantly disregarding the plain language of the contract, Respondents eliminated a contractually guaranteed benefit without a sound arguable basis.

Plain language notwithstanding, Respondents assert they were nonetheless privileged to completely eliminate retiree healthcare coverage for employees hired on or after January 1, 2014, and cite in support of its position, *inter alia*, a healthy menu of minor programmatic changes made over the course of several years. But Respondents failed to establish a past practice of unilaterally eliminating plan benefits. Of paramount importance, Respondents admitted that they had *never* eliminated medical coverage for active employees or future employees. (Tr. 155) The plethora of minor programmatic changes cited by Respondents does not establish a past practice of eliminating benefits. While Respondents occasionally eliminated certain vendors from its benefits programs, it never completely eliminated coverage; participants always had other coverage options available under the plans. (Tr. 155)

Moreover, Respondents' purported "elimination" of life insurance benefits for employees hired on or after January 1, 2011, was merely the elimination of *employer-paid* base coverage. (R. Ex. 16) On retirement, employees who were hired after the operative date would still be permitted to participate in Respondents' group life insurance plan by porting elective supplemental coverage purchased while employed. (Tr. 170) Judge Fine specifically found that this elimination of life insurance coverage was a "one-time event" and that it was not "the equivalent of establishing a past practice that occurred with such regularity and frequency that the subsequent unilateral elimination of health benefits for future retirees constituted a continuation of the status quo.

Other changes, such as Respondents' move from a defined benefit to a cash balance retirement plan, did not result in the complete elimination of a benefit. Additionally, money earned by employees under the federal stock ownership plan was transferred to their savings plans. (Tr. 241) Respondents failed to demonstrate a past practice of making changes to benefits that establishes a sound arguable basis for its wholesale elimination of the contractual retiree medical benefit.

Nor does the parties' bargaining history establish a sound arguable basis for the elimination of retiree medical benefits. Respondents presented limited evidence that Charging Party Local 1392 had proposed an increased ability to negotiate benefits, but that Respondents had rejected all such proposals. Respondents presented no evidence that negotiations between other American Electric Power subsidiaries and IBEW locals were conducted in a similar manner. More importantly, nothing suggests that Local 1392 and Respondent Indiana Michigan Power contemplated the situation presented here, in which an entire class of employees would be eliminated from coverage under a plan. Respondents' witness Thomas Dawson frequently referenced the participation concept in rejecting union proposals seeking freezes on employee premiums or increased input into benefit changes, and during negotiations with Local 1392 in

2002, Dawson cited examples of the types of changes that the participation concept gave Respondent discretion to make: programmatic changes such as increases in savings plans, the cash balance retirement plan, sick pay, and medical premiums. (Tr. 222; R. Ex. 30)

Respondents presented no evidence that the parties contemplated that Respondents would be permitted to completely eliminate benefit plan coverage under the participation concept.

F. The ALJ correctly denied Respondents' motion to admit into evidence an irrelevant partial dismissal letter. (Respondents' Exception 6)

At trial, Respondents' counsel attempted to introduce evidence related to the regional determination of charges related to the allegations in the instant complaint. Judge Fine permitted questioning concerning the Regional Director's partial dismissal of those allegations, but advised counsel that he would not base his decision on what the Regional Director did. (Tr. 46) When Respondents' counsel later attempted to introduce the partial dismissal letter into evidence, Judge Fine rejected the exhibit, stating that Respondents could use the Regional Director's rationale in making their argument, but that he would not rely on the Regional Director's decision not to issue complaint in rendering his decision.

Respondents' insistence on the significance of this document underscores just how far-fetched their theory of the case is. The Regional Director's decision not to issue a complaint as to the two other alleged changes was a matter within his prosecutorial discretion. The fact that he determined not to issue complaint on those allegations is not a conclusive resolution that those changes were lawful, at least for purposes of this proceeding, and the bare fact of dismissal of these charges is irrelevant to the Board's decision as to whether Respondents' unilateral contractual modification and elimination of retiree health benefits for bargaining unit employees hired after January 1, 2014, without the Unions' consent, violated of Section 8(a)(5) and (1) and 8(d) of the Act.

G. The ALJ correctly distinguished *Courier-Journal* from the instant case. (Respondents' Exception 7)

After concluding that employees hired by Respondents on or after January 1, 2014 were bargaining unit employees within the meaning of the Act, and that, therefore, changes to those employees' retiree healthcare benefits were a mandatory subject of bargaining, Judge Fine maintained that Respondents failed to establish that the unilateral change in those benefits was nonetheless permissible. Judge Fine found that Respondents had failed to establish that the elimination of this major benefit for bargaining unit employees was part of its past practice. In doing so, Judge Fine distinguished several cases on which Respondents relied.

In one such case, *Courier Journal*, the Board found that the alleged unilateral changes, which included increases in employee contributions to healthcare insurance premiums, were made pursuant to the employer's 10 year practice of sharing premium costs with employees according to fixed percentages. 342 NLRB 1093, 1093-94. Judge Fine observed that a contractual provision in the parties' master agreement was distinguishable from the provision in *Courier-Journal*, because there the provision specifically linked changes in the benefit plans to those of non-bargaining unit employees. Contrary to Respondents' assertion, Judge Fine did not "mischaracterize" the Board's holding in *Courier-Journal*. Rather, he distinguished the two cases on one key point (a point that Respondents cannot dispute), and then continues on to further analyze the question of whether the previous changes Respondents have made to the benefits plans constitute a past practice that could support their position.

Respondents failed to establish a past practice of eliminating retiree medical benefits. The evidence Respondents presented demonstrates only that it has made changes to the content of the plans it provides to its employees; Judge Fine found that Respondents failed to present any evidence that it has ever eliminated any benefit in its entirety without first bargaining with the Union. (ALJD, p. 21:5-8) Respondent's reliance on cases like *Courier-Journal*, 342 NLRB 1093 (2004), and *E.I. Du Pont de Nemours and Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012) is,

thus, misplaced. In *Du Pont*, the union alleged that the employer unilaterally implemented changes to its employee benefits program between collective-bargaining agreements. 682 F.3d at 66. The changes included increases in premiums for medical, life, vision, and dental insurance, changes in coverage, and the addition and elimination of plan options. *Id.* In overturning the Board’s finding of a Section 8(a)(1) and (5) violation, the D.C. Circuit found that the employer had made the changes pursuant to a longstanding past practice and that the changes were “similar in scope to those it had made in prior years.” *Id.*, citing *Courier Journal*, 342 NLRB 1093. The court found that *Du Pont* had annually made changes to the package of benefits during the annual enrollment period during the life of the collective-bargaining agreement, and that it had continued that practice following the expiration of the contract. *Id.* Here, there is no comparable showing of past practice. While Respondents did make programmatic changes to its benefits plans of the sort that were at issue in *Du Pont*, those changes are not at issue in this case. It is the unilateral elimination of retiree medical benefits that is at issue in this case, and Respondents failed to show a past practice of eliminating such benefits.

H. The ALJ correctly concluded that the Master Agreement guaranteed that employee participation in the retiree health insurance plan be offered through contract expiration. (Respondents’ Exception 8)

The crux of the dispute between the Unions and Respondents in the instant case is the extent to which Respondents were privileged to make unilateral changes, including the wholesale elimination of the retiree healthcare benefit for employees hired on or after January 1, 2014. Judge Fine carefully considered Respondents’ evidence and determined that Respondents failed to demonstrate a past practice of eliminating benefits guaranteed under the contract, such that Respondents could show a sound arguable basis for eliminating the benefit here without first obtaining the Unions’ consent. Respondents’ exception to Judge Fine’s conclusion on this point appears to be a derivative argument.

Respondents would have the Board believe that their practice of changing health insurance premiums and making other programmatic changes to benefit plans privileges them to completely eliminate a significant benefit for an entire class of bargaining unit employees. However, Board law does not permit such a warped result.

I. The ALJ correctly concluded that “reservation of rights” language included in plan documents were not incorporated by reference into the Master Agreement. (Respondents’ Exception 9)

In his detailed analysis, Judge Fine concluded that the “reservation of rights” language did not privilege Respondents to unilaterally eliminate the retiree healthcare plan for employees hired on or after January 1, 2014. Respondents failed to establish a sound arguable basis for eliminating the retiree medical benefit for employees because the “reservation of rights” language in the Summary Plan Descriptions (SPDs) were not incorporated by reference into the Master Agreement. See *Bender v. Newell Window Furnishings, Inc.*, 681 F.3d 253, 264-65 (6th Cir. 2012) (“simply referring to an SPD that was to be distributed to qualifying employees was not sufficient to constitute incorporation by reference.”)

Decisions from the D.C. Circuit, finding that references to benefit plan SPDs in a collective-bargaining agreement incorporate the reservation-of-rights clauses in those SPDs, are inapposite. See, e.g. *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350 (D.C. Cir. 2008); *BP Amoco Corp. v. NLRB*, 217 F.3d 869 (D.C. Cir. 2000). In *Southern Nuclear* and *BP Amoco*, the unilateral modifications of medical benefits did not include the wholesale elimination of the right of employees to participate in those plans. Unlike the situation in those two cases, where the employers invoked the reservation-of-rights language to support their right to make programmatic changes to their benefit plans, Respondent, here, attempted to invoke the reservation of rights clause to eliminate coverage entirely. The Board has consistently held that the right of an employer to act unilaterally with respect to mandatory subjects of bargaining is so contrary to labor relations experience that such should not be inferred absent corroborative

contractual language or historical bargaining practices. *Provena St. Joseph Medical Center*, 350 NLRB 808, 813 (2007). Here, the language of the contract plainly states that employees shall be permitted to participate in Respondents' benefit plans. Clearly, future retiree benefits, such as the one at issue here, is a mandatory subject of bargaining. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). Respondents' argument that it has the right to unilaterally eliminate the retiree medical benefit is simply not supported by sufficient evidence to demonstrate such unqualified discretion.

J. The ALJ correctly relied on language in the parties' Master Agreement in concluding that it superseded all prior agreements and excluded the "reservation of rights" provisions. (Respondents' Exception 10)

In concluding that the plan documents' "reservation of rights" provisions were not incorporated by reference into the Master Agreement, Judge Fine relied on part on a zipper clause in the Master Agreement. Respondents maintain that the zipper clause did not affect the *status quo* and that it was privileged to unilaterally eliminate employees' retiree medical benefits. But as explained by Judge Fine, nothing in the parties' bargaining history or past practice evinces a precedent for the unilateral, wholesale elimination of an employee benefit.

Contrary to Respondents' assertion, Judge Fine's conclusion does not prevent Respondents from making *any* changes in any of their employee benefit plans. (Resp. Br. p. 19) Rather, it merely prevents Respondents from making the sort of unprecedented, major change that is at issue in this case. Unlike Respondents, Judge Fine did not consider the zipper clause in a vacuum. Rather, Judge Fine considered the zipper clause in concluding that the "reservation of rights" language in benefit plan descriptions and Respondents' past practice of making minor, programmatic changes to its health plans did not establish a "sound, arguable basis" for the contract modification.

K. The ALJ correctly concluded that Respondents violated Section 8(a)(1) and (5) and 8(d) of the Act when they eliminated retiree medical coverage for employees hired on or after January 1, 2014, without the Unions' consent. (Respondents' Exceptions 11, 12 and 13)

It is well established that Section 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer party to an existing collective-bargaining agreement from modifying the terms and conditions set forth in that agreement without the consent of the union. See *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005), *affd. sub nom. Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). As discussed in the ALJ's decision and in the discussion above, the Unions did not consent to the elimination of retiree medical benefits for bargaining unit members hired on or after January 1, 2014.

Section 8(d) defines the obligation to bargain collectively. It states that "where there is in effect a collective-bargaining contract . . . no party to such contract shall terminate or modify such contract." It is not itself an unfair labor practice section of the Act. See *Accurate Die Casting Co.*, 292 NLRB 284 fn. 5 (1989). As discussed above, Respondents have failed to establish a sound arguable basis for their interpretation of the contract.

Respondents take exception to Judge Fine's finding that the Acting General Counsel sufficiently pleaded a violation of Section 8(d) of the Act in the complaint. As explained above, Section 8(d) only establishes the bargaining obligations of the parties. Judge Fine observed that the Acting General Counsel did not specifically list Section 8(d) in the complaint, but found that it was clear from the pleadings that the Acting General Counsel was pleading an unlawful mid-term contract modification. (ALJD p. 28: fn 9) Indeed, paragraph 8 of the complaint alleges that Respondents "failed to continue in effect all the terms and conditions of the Master Agreement . . . by eliminating retiree medical benefits for all employees hired after January 1, 2014" and that Respondents engaged in said conduct "without the Union's consent." Respondents had clear notice of the allegations against it. Moreover, Respondents were not prejudiced because the matter was fully litigated.

- L. The ALJ correctly distinguished the cases relied on by Respondents in support of their faulty argument that they had a sound arguable basis for eliminating the retiree healthcare benefit for employees hired on or after January 1, 2014. (Respondents' Exception 14)**

As more fully set out in Judge Fine's decision and in Sections G and I, supra, the cases relied on by Respondents are distinguishable.

- M. Respondents derivative exceptions to the ALJ's conclusions of law, proposed remedy, and proposed order lack merit. (Respondents' Exception 15-17)**

Respondents also except to paragraph 3 of Judge Fine's conclusions of law, his proposed remedy, and his proposed order. Judge Fine correctly concluded that Respondents had violated Section 8(a)(1) and (5) of the Act by unilaterally modifying terms of an existing collective-bargaining agreement when they eliminated the retiree healthcare benefit for employees hired on or after January 1, 2014. His proposed remedy and order appropriately redress Respondents' violation.

III. CONCLUSION:

Based on the record as a whole, and for the reasons referred to herein, Counsel for the Acting General Counsel submits that Respondents' exceptions should be rejected in their entirety and that the Administrative Law Judge's legal and factual conclusions be affirmed.

Dated at Cincinnati, Ohio this 25th day of October 2013.

Respectfully submitted,



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