

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

SW GENERAL, INC. d/b/a SOUTHWEST
AMBULANCE,

Respondent,

and

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL I-60,

Charging Party.

Case No. 28-CA-177361

**INITIAL BRIEF OF RESPONDENT
SW GENERAL, INC. d/b/a SOUTHWEST AMBULANCE**

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I. INTRODUCTION

This is a simple case that can be decided based on the plain language of the memorandum of understanding between the parties. Regrettably, the Union, with the assistance of the General Counsel, is attempting to renege on its agreement to freeze a defined benefit plan provided to its bargaining unit members. The memorandum of understanding states that the plan “*shall be frozen for all participants*,” yet the Union now claims that one of two critical components required to freeze the plan—the future accrual of a participant’s compensation—should not be frozen at all. But “frozen” means “frozen,” and there is nothing in the MOU or anywhere else in the record supporting the Union’s after-the-fact position that it did not agree to a plan freeze. Thus, the Board should reject the Union’s improper attempt to use the prosecutorial powers of the General Counsel, and an unfair labor practice charge, to attempt back out of or rewrite its agreement and force Respondent to renegotiate the terms of a collectively bargained MOU.

The facts are simple. For years, Respondent has provided members of the Union’s Bargaining Unit with a defined benefit pension plan. On February 1 and 2, 2016, the Union and Respondent met to negotiate changes to the plan, changes which were clearly intended to reduce the financial burden of the plan on Respondent and to transition from a defined benefit plan to a defined contribution 401(k) plan. On February 2, 2016, the Union and Respondent signed the MOU in which they agreed that “effective on June 30, 2016, the Local-I-60 defined pension plan *shall be frozen for all participants*.”

Because years of service and earnings are the two components needed to calculate a participant’s retirement benefit under the plan, in order to freeze the plan under the terms of the MOU, on April 8, 2016, Respondent amended the plan to provide, among other things: “[n]o Hours of Service completed after June 30, 2016 will be credited (i.e., taken into account) in determining a Participant’s Credited Service under the Plan,” and “[n]o Earnings earned after

June 30, 2016 will be credited (i.e., taken into account) in determining a Participant's Average Annual Earnings under the Plan." Because a participant's benefit is always the product of years of service times earnings, unless both of those components were frozen, the plan would not be frozen, which would violate the MOU.

The MOU contains only one exception to the parties' agreement to freeze the plan, namely allowing future years of service with Respondent to count toward a participant's vesting requirement (but not benefits calculation). The MOU does not include any language indicating that future increases in compensation will be counted when calculating a participant's accrued benefit upon retirement. Yet, the Union and the General Counsel are attempting to amend the MOU with a new and unstated exception to the plan freeze for a participant's future compensation increases, while disregarding new 401(k) plan benefits which were negotiated as a tradeoff for the pension plan freeze. In doing so, they are attempting to rewrite the MOU to have the best of both worlds.

There is absolutely no evidence supporting the Union's and the General Counsel's argument. All the linguistic acrobatics in the world cannot overcome the plain language of the MOU, and a commonsense understanding of the term "frozen," both of which support Respondent's position that the Union and Respondent agreed to a complete freeze of accrual of benefits under the plan. Moreover, the fact that the parties specifically excluded years of vesting service from the plan freeze, but did not do so with respect to years of service or earnings for benefits calculation, is strong and compelling evidence that they had no intent of doing so.

Unless the express agreement that the plan would be "frozen" is rendered meaningless, and the terms of the MOU are ignored, the General Counsel cannot satisfy its burden of proving Respondent violated the Act. Moreover, because at its core this is a dispute over the

interpretation of the terms of the MOU, and the General Counsel alleges Respondent unlawfully modified the MOU, the complaint should be dismissed as long as Respondent had a “sound arguable basis” for believing that its amendments complied with the MOU. Because Respondent easily establishes that its interpretation of the MOU is not only reasonable, but is correct, dismissal is warranted.

Accordingly, Respondent respectfully submits that the terms of the MOU should not be disturbed and the General Counsel’s Complaint should be dismissed.

II. ISSUE PRESENTED

The stipulated issue before the Board is whether Respondent unilaterally implemented the method for calculating Unit employee’s Average Annual Earnings, without bargaining with the Union to an overall good-faith impasse and without the Union’s consent, and thus violating Sections 8(a)(1) and (5) of the Act within the meaning of Section 8(d) of the Act, by adopting an amendment to the Southwest Ambulance Pension Plan which provided that “[n]o earnings earned after June 30, 2016 will be credited (i.e. taken into account) in determining a Participant’s Average Annual Earnings under the Plan.” (Joint Motion and Stipulation, pp. 5-6.) To meet its heavy burden of proof, the General Counsel must prove that Respondent implemented amendments to the Plan that were outside the scope of the terms agreed to in the MOU, and that its actions were not based upon a reasonable interpretation of the MOU. *See American Elect. Power*, 362 NLRB No. 92 (2015) (where the General Counsel alleges an unlawful modification to a contract, the complaint should be dismissed if the Board finds that the employer’s interpretation of the contract was “reasonable,” even if the General Counsel chooses to plead its claim as a unilateral change and failure to bargain).

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Pension Plan

Since about 2004, Respondent has maintained the Southwest Ambulance Pension Plan (“Plan”), a defined benefit pension plan, for the benefit of eligible members of International Association of Fire Fighters, Local I-60 (“Bargaining Unit”). The most recent Plan document is dated January 1, 2012, and was included in the stipulated record as Joint Exhibit 9.

Under the Plan, a participant’s Accrued Benefit is calculated based on two variables: (1) a participant’s years of credited benefit service, and (2) a participant’s average compensation. *See* Exhibit 9, Article 1.1, Accrued Benefit (“A Participant’s Accrued Benefit as of any date means the portion of his monthly normal retirement benefit . . . based on his years of Credited Service and his Average Annual Earnings determined as of that date.”).

A participant’s average compensation, or Average Annual Earnings as it is described in the Plan, is defined as follows: “a Participant’s average annual Earnings received during the 36 Earnings Computation Periods immediately preceding the date the Participant’s employment terminates.” (Joint Motion and Stipulation, ¶ 5(p); Exhibit 9, Article 1.8.) The term “Earnings Computation Period” means “each calendar month.” (Joint Motion and Stipulation, ¶ 5(p); Exhibit 9, Article 1.16.) Thus, under the Plan, an employee’s Accrued Benefit, which is the pension benefit he or she receives upon retirement, must be calculated based upon the participant’s years of Credited Service and his or her average annual earnings during the last 36 months of employment.

Finally, a participant’s vested interest in his or her Accrued Benefit is based upon the number of full years of service credited to him or her. An employee with 1-4 years of service is 0% vested, and an employee with 5 or more years of service is 100% vested. (Exhibit 9, Article

7.1.) In other words, an eligible employee must have 5 or more years of service before his or her accrued retirement benefit is vested and he or she is entitled to receive it.

B. The Memorandum of Understanding

On February 1 and February 2, 2016, Respondent and the Union met to bargain over employee benefits. (Joint Motion and Stipulation, ¶ 5(n).) On February 2, 2016, the Union and Respondent executed an MOU, in which they agreed to the following amendments to the Plan:

- “The parties agree that any individual employed into a bargaining unit position on or after March 1, 2016 shall not be eligible for participation in the Local I-60 defined pension plan.” (Exhibit 12, ¶ 3.)
- “The parties agree that effective on June 30, 2016, the Local-I-60 defined pension plan shall be *frozen for all participants*.” (Exhibit 12, ¶ 4, emphasis added.)
- “The parties agree that effective after June 30, 2016 covered employees service time shall continue to count toward an employee’s vesting time but shall not count toward credited service under the plan.” (Exhibit 12, ¶ 5.)

In exchange, Respondent agreed to provide a new 401(k) matching contribution for employees who chose to participate in the Company’s 401(k) plan:

- “Employee’s hired on after March 1, 2016 - The Employer will make a matching contribution equal to 50% of each eligible employee’s Elective Contributions to his/her 401(k) plan for the payroll period that do not exceed 6% of the employee’s wages for the payroll period.” (Exhibit 12, ¶ 5(o)(a).)
- “Current Employee’s with less than five (5) years of employment - The Employer will make a matching contribution dollar for dollar of each eligible employee’s Elective Contributions to his/her 401(k) plan for the payroll period

that do not exceed 5% of the employee's wages for the payroll period." (Exhibit 12, ¶ 5(o)(b).)

- "Current Employee's with five (5) years but less than 10 years of employment - The Employer will make a matching contribution dollar for dollar each eligible employee's Elective Contributions to his/her 401(k) plan for the payroll period that do not exceed 6% of the employee's wages for the payroll period." (Exhibit 12, ¶ 5(o)(c).)
- "Current Employee's with 10 or greater years of employment - The Employer will make a matching contribution dollar for dollar of each eligible employee's Elective Contributions to his/her 401(k) plan for the payroll period that do not exceed 7% of the employee's wages for the payroll period." (Exhibit 12, ¶ 5(o)(d).)

C. Implementation of the Memorandum of Understanding

On April 8, 2016, Respondent implemented the pension plan terms of the MOU by adopting an Amendment to the Plan. (Joint Motion and Stipulation, ¶ 5(q); Exhibit 13.) The Amendment provides, in pertinent part, as follows:

- "After July 1, 2017, in no event will any Eligibility Service be credited under the Plan for any individual and in no event will any individual commence (or recommence) participation in the Plan." (Exhibit 13, Recital C(iii).)
- "No Hours of Service completed after June 30, 2016 will be credited (i.e., taken into account) in determining a Participant's Credited Service under the Plan." (Exhibit 13, Recital C(iv).)

- “No Earnings earned after June 30, 2016 will be credited (i.e., taken into account) in determining a Participant’s Average Annual Earnings under the Plan.” (Exhibit 13, Recital C(v).)
- “Hours of Service completed after June 30, 2016 will be credited (i.e., taken into account) in determining a Participant’s Service for vesting purposes.” (Exhibit 13, Recital C(vi).)

Consistent with the MOU and the Amendment, Respondent sent Bargaining Unit employees and the Union an Employee Retirement Income Security Act (ERISA) 204(h) notice for the Plan, which explained that amounts participants earned after June 30, 2016, “the Freeze Date,” “will not be included determining your Average Compensation and the time you work after the Freeze Date will not be included in determining your Years of Benefit Service.” (Exhibit 14.) The Notice also explained that “[t]he amendment does not affect: (1) the benefit you accrued under the Plan before the Freeze Date, (2) your ability to earn additional years of service for vesting purposes, or (3) your ability to purchase additional Years of Benefit Service in accordance with the terms of the Plan.” (Exhibit 14.)

D. The Charge and Complaint

On May 27, 2016, the Union filed an unfair labor practice charge with the Board alleging Respondent violated Sections 8(a)(1) and (5) of the Act by “modifying defined benefit pension documents which are outside the scope of the parties’ memorandum of understanding.” (Exhibit 1(a).)

The General Counsel issued a Complaint, which alleged that “Respondent and the Union entered into a Memorandum of Understanding (the MOU) pertaining to the Union’s defined pension plan,” and “Respondent failed to continue in effect all the terms and conditions of the

MOU by implementing two recitals that changed the eligibility language of the MOU.”

(Complaint, ¶¶ 6(a)-(b).) The recitals that the General Counsel alleged changed the eligibility language in the MOU were Recital C(iii), which explained that individuals would not commence (or recommence) participation in the Plan after July 1, 2017, and Recital C(v), which explained that earnings earned after June 30, 2016 would not be credited in determining a Participant’s Average Annual Earnings under the Plan. (Exhibit 2, ¶ 6(b)(1)-(2).) AMR filed an Answer to the Complaint, denying all material allegations. (Exhibit 3.)

The General Counsel subsequently withdrew its allegation that Recital C(iii) of the Amendment was outside the scope of the MOU. (Joint Motion and Stipulation, ¶ 5(c).) Thus, the only remaining issue is whether Recital C(v) of the Amendment unlawfully modified the parties’ agreement in the MOU.¹ It did not.

IV. THE GENERAL COUNSEL CANNOT SATISFY ITS BURDEN OF PROVING RESPONDENT UNLAWFULLY MODIFIED THE TERMS OF THE MOU

The General Counsel has the burden of proving that Respondent violated the Act. Because the General Counsel alleges Respondent made a unilateral change to the MOU, thereby violating Section 8(a)(5) of the Act, the General Counsel must prove that Respondent made a significant change to the terms of the MOU without bargaining. *Bath Iron Works Corp. & Local Lodge S-7, Dist. Lodge 4, Int’l Ass’n of Machinists*, 345 NLRB 499, 501 (2005).

“[A] company *does not* violate Section 8(a)(5) in this respect where there has in fact been no change from the status quo Thus, to prove a violation, the General Counsel must prove

¹ The Union, the General Counsel, and Respondent filed a joint motion to transfer the case to the Board, waive a hearing, and have the case decided based upon a stipulated record and briefs, which the Board granted. (Joint Motion and Stipulation; Order Granting Joint Motion.) Thus, the record in this matter consists of the parties’ joint motion and stipulation of facts, joint exhibits, statements of position by the General Counsel and the Respondent, and statement of issues presented. (*Id.*)

that the Respondent initiated a change from the status quo affecting a mandatory subject of bargaining without first giving [the Union] a reasonable opportunity to bargain concerning it.

Failure to establish these facts by a preponderance of the evidence necessarily requires dismissal of the allegation.” *Motor Car Dealers Ass’n*, 225 NLRB 1110, 1112 (1976)

(emphasis added); *see also Lm Waste Serv. Corp.*, 360 NLRB 856 (2014). “It goes without saying that in order to prevail, the General Counsel must show that there was, in fact, ***a change.***” *Overnite Transp. Co.*, 330 NLRB 1275, 1289 (2000) (emphasis added). Indeed, “where the employer’s action does not involve a unilateral change in the status quo, ... its action does not violate the Act.” *Citizens Publ’g & Printing Co. v. NLRB*, 263 F.3d 224, 233 (3d Cir. 2001).

Further, where the General Counsel pleads a violation of Section 8(a)(5), but the theory of the case is that the employer modified a collectively-bargained contract, not that the employer changed a non-contractual term or condition of employment, the allegation is properly understood and analyzed as a violation of Section 8(d) of the Act, which restricts modifications to existing contracts. *American Elect. Power*, 362 NLRB No. 92 (2015) (agreeing with the administrative law judge’s finding that “although the complaint did not specifically cite Section 8(d) of the Act, the pleadings established that the General Counsel was alleging that the Respondent unlawfully modified the contract during its term, as opposed to unilaterally changing a noncontractual term or condition of employment.”) In such cases, it is appropriate to analyze the allegations under the standard for Section 8(d) violations. *Id.*

Pursuant to Board law, an employer’s implementation of the terms of a contract do not violate Section 8(d) if the employer “establishes it had a ‘sound arguable basis’ for its belief that the contract authorized its unilateral action.” *Id.* “Where, as here, the dispute is solely one of contract interpretation and there is no evidence of animus, bad faith, or an intent to undermine

the Union, the Board does not seek to determine which of the two equally plausible contract interpretations is correct.” *Id.* Instead, the complaint should be dismissed if the Board finds that the employer’s interpretation of the contract was “reasonable.” *Id.* The Board, explaining this standard, provided:

The General Counsel’s interpretation of the contract may also have merit, and we do not pass on which contract interpretation is the better view. Rather, we find that ***because the Respondent has presented a reasonable interpretation of the applicable contract language, the General Counsel has failed to prove that the Respondent modified the contract with the Union, within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1).***

(*Id.*, emphasis added.)

Here, the General Counsel’s own allegations plainly reveal that its claims are properly understood and analyzed as an alleged unlawful modification to the MOU, and not as a unilateral change to non-contractual terms and conditions of employment. In the Complaint, the General Counsel alleges that “Respondent failed to continue in effect all of the terms and conditions of the MOU by implementing two recitals that changed the eligibility of the MOU.” (Exhibit 2, ¶ 6(b).)

Because the dispute, as framed by the General Counsel’s allegations, is actually about an alleged modification to a contract, the General Counsel cannot prevail if Respondent’s actions were based upon a reasonable interpretation of the terms of the MOU. As set forth below, Respondent’s interpretation of the MOU is not only reasonable, it is also the best and most plausible interpretation of the parties’ agreement that the Plan “shall be frozen for all participants.”

V. **RESPONDENT REASONABLY AND CORRECTLY INTERPRETED THE MOU TO REQUIRE A COMPLETE FREEZE OF THE PENSION PLAN**

A. **Respondent Complied with the MOU By Freezing the Plan Except for Vesting Service, Which Required Freezing Both Credited Service and Earnings**

When interpreting contracts, a court, or in this case the Board, must “first consider the plain meaning of the words in the context of the contract as a whole. *Grosvenor Holdings, L.C. v. Figueroa*, 218 P.3d 1045, 1050 (Ariz. App. 2d Div. 2009). Here, when Paragraph 4 of the MOU is given its plain meaning and read in the context of the MOU as a whole, it is clear that the parties agreed to freeze the Plan (except for vesting service) in exchange for new 401(k) plan benefits, which necessarily required freezing both years of service and earnings.

In Paragraph 4 of the MOU, the Union and Respondent agreed that effective June 30, 2016, the Plan “shall be *frozen for all participants*.” (Exhibit 12, Paragraph 4, emphasis added.) Under a common sense view of the Plan, there were only three ways in which the Plan could have been frozen: eligibility (getting into the Plan), vesting (having sufficient service to have a nonforfeitable right to benefits), and benefits (a function of years of services times earnings). The MOU first froze eligibility. (Exhibit 12, ¶ 3.) It then froze the Plan for all participants. (Exhibit 12, ¶ 4.) It then carved out an exception to the Plan freeze for service credited toward vesting (not benefits). (Exhibit 12, ¶ 5.)

As noted above, the monthly benefit a participant receives upon retirement is determined from two components: (1) a participant’s years of credited service, and (2) a participant’s average earnings during the last 36 months of their employment. (Joint Motion and Stipulation, ¶ 5, Exhibit 9, Articles 1.1, 1.8, and 1.16.) Thus, in order to freeze the Plan as required by the MOU, counting of both credited service and earnings had to stop. Otherwise, the Plan would not

be frozen because participants would continue accruing benefits after June 30, 2016, based on earnings after June 30, 2016. That would violate Paragraph 4 of the MOU.

Contrary to the Union's and the General Counsel's allegations, Recital C(v) does not add or modify any terms or conditions not already in the MOU. It simply implements the agreement in the MOU in a manner that is consistent with the terms of the Plan by freezing the two variables used to calculate a participant's Accrued Benefit. Thus, the Plan Amendment was based upon a reasonable and correct interpretation of the terms of the MOU.

B. The Plain Language and Dictionary Meaning of “Frozen” or “Freeze” Support Respondent’s Position that Both Years of Service and Earnings Were Frozen

The plain language and ordinary meaning of Paragraph 4 of the MOU, which states the Plan “shall be *frozen for all participants*,” support Respondent’s position that it was required to stop counting both variables—years of service and earnings—when calculating an employee’s Accrued Benefit. Any lay person knows that when something is frozen, it does not continue to move or change. This commonsense or plain language reading of Recital C(v) is also supported by the dictionary definition of the term “frozen.”

Merriam-Webster Dictionary defines frozen as: “*incapable of being changed, moved, or undone* : FIXED; specifically : debarred by official action from movement or from change in status”; and “*not available for present use.*” See Merriam-Webster, Frozen, <https://www.merriam-webster.com/dictionary/frozen> (last visited November 16, 2017).

Merriam-Webster also defines “freeze” as “to cause to become fixed, immovable, unavailable, or unalterable”; and “to render motionless.” See Merriam-Webster, Freeze, <https://www.merriam-webster.com/dictionary/frozen> (last visited November 16, 2017). These dictionary definitions of the terms “frozen” and “freeze” simply confirm what one understands through common sense

and life experience, that the term “frozen” means a complete cessation of movement or change in status.

“In construing the language of a contract, *it is presumed that the parties intended to give the words employed their ordinary meaning* and that the language used was placed in the contract for a specific purpose.” *Tucker v. Byler*, 27 Ariz. App. 704, 207, 558 P.2d 732, 735 (Ariz. App. 1st Div. 1976) (emphasis added). Thus, the Board should assume that when the Union and Respondent agreed that the Plan “shall be frozen for all participants,” that (except for the one area they specifically carved out) they meant a complete cessation of the Plan and the components needed to cease the Plan, namely years of service and earnings.

C. If the Union and Respondent Did Not Intend “Frozen” to Mean a Freeze of an Employee’s Compensation, They Would Have Excluded It Just as They Did With Vesting Service

It is undisputed that the Union and Respondent agreed that the Plan “shall be frozen for all participants” effective June 30, 2016. Both a plain language reading of Article 4 of the MOU, and the dictionary definition of the term “frozen,” support Respondent’s position that the parties agreed to completely freeze the Plan, including accrual of benefits and the variables used to calculate a participant’s Accrued Benefit. If the Union only intended the freeze to be a partial freeze, it should have negotiated that term before signing the MOU.

More specifically, if the Union wanted earnings not to be frozen, it should have included an express exception indicating that, despite Paragraph 4, future increases in earnings would continue to count for purposes of calculating a participant’s Accrued Benefit. Paragraph 5 of the MOU, which immediately follows the clause stating the Plan “shall be frozen for all participants,” clarifies that “after June 30, 2016 *covered employees service time shall continue to count toward an employee’s vesting time* but shall not count toward credited service under the plan.” (Exhibit 12, ¶ 5.)

Including this exception to the Plan freeze was important, as it ensures that employees who are not yet fully-vested (i.e., they have less than 5 years of credited service) can still reach the vesting threshold and will not forfeit their retirement benefit by virtue of the Plan freeze.² The fact that the parties did so with regard to counting a participant's vesting service is strong evidence that they had no intention of including increases in benefits service or earnings after the freeze date.

It is a well-settled principle of contract interpretation that “contracts that specify certain exceptions imply that there are no other exceptions, and those that expressly include some guarantees in an agreement are thought to exclude other guarantees.” Elkouri & Elkouri, *How Arbitration Works*, 9-40 (8th ed. 2016). This principle is known as “*expressio unius est exclusio alterius* (‘the expression of one thing is the exclusion of another’).” *Id.* Pursuant to this principle, inclusion of an express exception to the Plan freeze for vesting, but not for other components of the Plan, implies that there are no other exceptions or guarantees for components such as earnings. In other words, because the parties agreed to continue crediting service toward vesting, but did not provide a similar guarantee or exception from the freeze for crediting future increases in earnings, the Board should assume they did not intend to allow for future increases in earnings when calculating a participant's Accrued Benefit after June 30, 2016.

² From a tax or ERISA law perspective, it makes perfect sense that the parties included an express exception to the freeze for counting years of service toward vesting. The Internal Revenue Service has made clear that if plan accruals are frozen but the plan is not terminated, and the accruals later resume, all years of service for the plan sponsor, including those during the frozen period, need to be taken into account for vesting purposes. Lewis, Rumeld, & Lebeau, *Employee Benefits Law*, 5-30 (3rd ed. 2012); Rev. Rul. 2003-65, available at <https://www.irs.gov/pub/irs-irbs/irb03-25.pdf>. Thus, by including an exception to the freeze for vesting, the Union and Respondent ensured that the freeze did not violate the IRS guidance in the event conditions were such that accruals could resume.

D. The General Counsel’s Interpretation Should Be Rejected Because It Would Render Paragraph 4 of the MOU Meaningless

The General Counsel may attempt to argue that the Union and Respondent must have intended the term “frozen” to only mean the cessation of service for calculating an accrued benefit because they stated in Paragraph 5 that “*service time* shall continue to count toward an employee’s vesting time but *shall not count toward credited service under the plan*,” but did not separately address the compensation component. This argument should be rejected because it misconstrues the effect of Paragraph 5 and would render Paragraph 4 meaningless.

First, the phrase, “shall not count toward credited *service* under the plan” clarifies the exception for *vesting* service, but nothing in this language excludes other components of the Plan from being frozen. Because the parties decided to include an exception for vesting—whereby service time would still be counted for purposes of an employee’s vesting—they properly explained that the service time exception only applied to vesting but not to the calculation of an Accrued Benefit. Otherwise, Paragraph 5 might be ambiguous. The General Counsel wants to flip this clarification on its head and turn it into an implied endorsement for the continuing accrual of earnings, when Paragraph 5 is only about vesting and it does not contain any language relating to compensation or continued accrual of earnings.

Further, if the General Counsel’s argument—that the parties only intended to freeze credited service time but not compensation—were accepted, Paragraph 4, which unequivocally states the Plan “shall be frozen for all participants,” would be rendered meaningless or superfluous. In other words, under the General Counsel’s view, the scope of the freezing of the Plan was defined by Paragraph 5 (i.e., a freeze on credited service, but no freeze on vesting service, and thus, no freeze on compensation by implication), so Paragraph 4 would not be necessary.

“It is a cardinal rule of contract interpretation that we do not construe one term of a contract to essentially render meaningless another term.” *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 479, 224 P.3d 960, 975 (Ariz. App. 1st Div. 2010); *see also Scholten v. Blackhawk Partners*, 184 Ariz. 326, 329, 909 P.2d 393, 396 (Ariz. App. 1st Div. 1995) (“[A] contract should be construed to give effect to all its provisions and to prevent any of the provisions from being rendered meaningless.”) As one labor arbitrator explained, “an interpretation that tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect.” *John Deere Tractor Co.*, 5 LA 631, 632 (Updegraff, 1946). Indeed, “[s]ince an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous.” *Restatement (Second) of Contracts*, § 203, cmt. b. (1981).

The Board may only treat the term “frozen” as superfluous or meaningless if the Board can say that no reasonable meaning can be given to it. *See Tucker*, 558 P.2d at 735 (“a court should not interpret a contract so as to render meaningless the language used by the parties, if a reasonable construction can be effected utilizing all the language of the contract”). Because Paragraph 4 states, without limitation or qualification, that the Plan “shall be frozen for all participants,” the best and most reasonable interpretation of the MOU is that the Union and Respondent actually meant what they said: they intended to freeze, stop or cease the Plan except for vesting service, with vesting service being the *only* express exception to the freeze. Thus, the Board should give effect to MOU’s agreement to freeze the Plan, rather than indulge the General Counsel’s improper attempt to rewrite the terms of the MOU through an implied modification without any direct evidence to support its argument.

E. The MOU's Inclusion of a New 401(k) Matching Plan Supports Respondent's Position that the Pension Plan Was Completely Frozen

The Plan was not frozen in a vacuum. It was negotiated in exchange for a new 401(k) plan benefit. Yet, the Union and the General Counsel now want the benefit of those 401(k) plan enhancements while removing the pension Plan tradeoffs they gave up to get them.

Under Paragraph 7 of the MOU, Respondent would begin providing employees with generous matching contributions if they participate in a 401(k) plan. For example, Respondent is required to contribute 50% of every dollar newly-hired employees contribute, up to 6% of the employee's wages for the payroll period. Respondent's contributions for more senior employees are even more generous. For employees with 10 or more years of employment, the MOU requires Respondent to match the employee's contributions dollar for dollar, up to a maximum of 7% of the employee's wages per pay period. (Exhibit 12, ¶ 7.)

The Union and the General Counsel want to ignore these increased benefits, which were negotiated in exchange for the pension plan freeze. Put another way, there would be no need (or certainly a less compelling need) to implement a 401(k) matching contribution as a replacement benefit if years of benefit service and earnings continued to increase under the pension plan. Thus, the inclusion of the 401(k) matching program supports Respondent's position that the pension plan freeze was a complete freeze of both components upon which an employee's Accrued Benefit is based.

VI. CONCLUSION

Respondent's adoption of Recital C(v) was based upon a reasonable and correct interpretation of the terms of the MOU. Adopting Recital C(v), which froze the accrual of compensation, was required in order to correctly implement Paragraph 4 of the MOU, which provided that effective June 30, 2016, the Plan "shall be frozen for all participants." Thus,

Respondent respectfully submits that the Board should find in favor of Respondent and dismiss the Complaint in its entirety, because the General Counsel cannot establish that Recital C(v) was an unlawful modification of the MOU.

Dated this 16th day of November, 2017.

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CERTIFICATE OF SERVICE

Attorneys for Respondent hereby certify that a copy of Respondent's Initial Brief in the above-referenced matter was electronically filed on November 16, 2017, using the National Labor Relations Board's E-Filing System, and was served via electronic mail on the following counsel and representatives:

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