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* International Brotherhood of Electrical Workers, System Council U-9 and Locals 329, 386, 696, 738, 876, 934, 978, 1002, 1392, and 1466, AFL–CIO. Case 09–CA–095384

May 28, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On July 31, 2013, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Parties filed answering briefs, and the Respondent filed a reply brief. The Respondent also filed a motion to dismiss the complaint, the General Counsel and the Charging Parties filed briefs opposing the Respondent's motion, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions, briefs, and motion to dismiss and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

At issue in this case is the lawfulness of the Respondent's decision to eliminate retiree medical benefits for all employees hired after January 1, 2014. The Respondent made this decision without the Union's consent at a time when a collective-bargaining agreement (CBA) between the parties was in effect. The judge found that the Respondent's decision to eliminate retiree medical benefits was unlawful, but we disagree. Because this case involves the alleged midterm modification of a CBA, it is governed by the "sound arguable basis" standard, and not the "clear and unmistakable waiver" standard that applies to other unilateral changes in terms and conditions of employment. See *Bath Iron Works Corp.*, 345 NLRB 499, 501–502 (2005), affd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).[2] Applying that standard, we dismiss the complaint because the Respondent had a sound arguable basis for believing that the CBA allowed it to make the change at issue.

I. FACTS

The Respondent is a public utility that operates in 11 States and employs over 18,000 employees.[3] Approximately 3500 of these employees are represented by various locals of the International Brotherhood of Electrical Workers. The Charging Party, IBEW System Council U-9 (the Union), consists of 10 IBEW locals, including Local 1392. In 2004, the Respondent and the Union began negotiating for a master CBA to cover all the locals.[4] The parties eventually agreed on a CBA, which first became effective in 2009 (and expired February 16, 2012). The CBA in effect at the time of the hearing was effective through February 16, 2015.

Article X, section 1 of the CBA (the "participation clause") says that employees "shall be permitted to participate in the American Electric Power System . . . Comprehensive Medical Plan . . ., Retirement Plan . . . ."[5] All of the Respondent's employees, both union and non-

[1] In its motion to dismiss, the Respondent argues that the complaint should be dismissed because the then-Acting General Counsel was not validly appointed and therefore lacked the authority to issue the complaint in this case. We reject this argument for the reasons stated in *Benjamin H. Realty Corp.*, 361 NLRB No. 103, slip op. at 1 (2014) (finding that the Acting General Counsel was properly appointed under the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345, et seq.). We also reject the Respondent's argument that the complaint is invalid because the Board lacked a quorum at the time the complaint was issued. The authority of the General Counsel to investigate unfair labor practice charges, and to issue and prosecute unfair labor practice complaints, is derived directly from the language of the National Labor Relations Act (the NLRA), not from any "power delegated" by the Board. Accordingly, the presence or absence of a valid Board quorum has no bearing on the General Counsel's prosecutorial authority in this matter. See *Pallet Cos., Inc.*, 361 NLRB No. 33, slip op. at 1 & fn. 1 (2014).

[2] No party has asked us to revisit this standard here. Members Hirozawa and McFerran express no opinion on whether *Bath Iron Works*, supra, was correctly decided.

[3] American Electric Power (AEP) and seven of its subsidiaries are collectively referred to as the Respondent.

[4] The Respondent's history with individual IBEW locals dates back to at least 1976 and, in addition to the master CBA, the Respondent has accompanying local agreements with a number of locals. The contents of those agreements are not at issue here.

[5] In its entirety, art. X, sec. 1 states: "Employees shall be permitted to participate in the American Electric Power System Comprehensive Dental Plan, Comprehensive Medical Plan [or alternate medical coverage such as the Health Maintenance Organization (HMO) or Preferred Provider Organization (PPO) should such be made available by the Company], Spending Accounts, Group Accidental Death and Dismemberment Insurance Plan, Group Life Insurance Plan, Dependent Life Insurance Plan, Dependent Care Plan, Long Term Care Plan, Long Term Disability Plan, Retirement Plan, Retirement Savings Plan and Sick Pay Plan." This provision is identical in the 2009 CBA and the 2012 successor agreement.

union, receive the same systemwide benefit programs offered by the Respondent.

The Respondent has made various changes to its benefit plans over the years. Prior changes that affected medical insurance benefits for both active employees and retirees included increases to copay amounts for prescription drugs (change made January 1, 2012), requiring prior authorization for certain prescriptions (January 1, 2011), and other changes in prescription drug coverage in 2003, 2006, 2008, and 2010.

In January 2011, the Respondent also made changes to its retiree life insurance benefit. Instead of offering life insurance equal to half an employee's salary at the time of retirement, the Respondent provided a flat $30,000 life insurance benefit for employees retiring after April 1, 2011. Employees hired or rehired on or after January 1, 2011, however, were not eligible for any company-paid life insurance upon retirement. The Union did not object to or demand bargaining over any of these changes.

On November 27, 2012, Thomas Dawson, the Respondent's manager of labor relations, sent an email to Local 1392 Business Manager Charles Coleman announcing changes that the Respondent was making to retirees' medical benefits. The email stated that there would be no changes to the health plans of current retirees, but that there would be a maximum company contribution for employees who retire after January 1, 2013, and that preage 65 retirees would no longer be included in the same trust as active employees (effectively increasing employee premiums). The email also stated that employees hired on or after January 1, 2014, would not be eligible for retiree medical coverage at all. The email said that the changes would be announced to all employees later that day or early the next.

Chairman of System Council U-9 Stan Stamps emailed Thomas Householder[6] and Dawson on December 3, 2012, requesting bargaining over the announced changes. Householder responded to Stamps by email on December 4. Householder stated that the "participation" language in the master agreement allowed AEP to make unilateral changes to the benefit plans without having to negotiate concerning the changes. Householder stated that the changes to retiree benefits were "simply the most recent in a long line of changes made by the Company under the authority granted to it by the participation clause."

In the parties' subsequent dealings about the changes, the Respondent maintained that the participation language in the master agreement and its history of making unilateral changes to benefits programs allowed it to make the changes at issue. The Union argued that the participation language and prior "small" changes to benefits for represented employees did not preclude the Union from requesting negotiations over substantial changes that affect future retiree benefits for currently represented employees.

[6] The judge identified Householder as an "official" of the Respondent.

II. ANALYSIS

A. The Respondent's Due Process Argument

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act when it "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," without the Union's consent.[7] The judge found 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.

On exceptions, the Respondent argues that it had no notice of a potential 8(d) contract modification violation and no opportunity to respond through evidence at the hearing or in its posthearing brief. Because we dismiss the complaint, any error by the judge was harmless to the Respondent. In any case, we agree with the judge that the complaint alleged a claim of an unlawful contract modification.[8] Although the wording of the complaint allegation may not have been ideal,[9] any ambiguity was clarified by the General Counsel's opening statement at the hearing.[10] Moreover, in light of our dismissal of the

[7] The Union filed an unfair labor practice charge that pertained to all three changes made to retirees' health plans. The Regional Director for Region 9 dismissed the charge with respect to two of those changes, concluding that the Respondent's implementation of fixed caps and increased cost sharing for future retirees fell into the category of past changes that the Union had acquiesced in and that it therefore could not be established that the Respondent was obligated to bargain over them prior to their implementation. The judge denied the Respondent's request to admit the Regional Director's partial dismissal letter into evidence. We take administrative notice of the letter, which the judge included in the rejected exhibits file. See *Independent Stave Co.*, 278 NLRB 593, 593 fn. 1 (1986). We do not, however, rely on the Regional Director's dismissal rationale in analyzing the alleged unlawful modification before us.

[8] We do not, however, rely on the judge's citation to *Walt Disney World Co.*, 359 NLRB No. 73 (2013).

[9] A more precise allegation would be that the Respondent modified the contract, within the meaning of Sec. 8(d) of the Act, in violation of Sec. 8(a)(5) and (1) of the Act. See *Bath Iron Works*, supra, 345 NLRB at 501.

[10] Counsel for the General Counsel stated:

> This case involves changes made to Respondent's retiree healthcare benefits program for employees represented by the Charging Party during the term of a collective bargaining agreement. . . . The evi-

complaint, no prejudice has resulted from the General Counsel's failure to specifically reference Section 8(d) in the complaint. Accordingly, we find no merit to the Respondent's argument that it was denied due process in this case.

B. The Respondent had a Sound Arguable Basis for Its Interpretation of the Contract

We turn now to the merits of the complaint allegation. The Board will not find a midterm contract modification violation if the respondent establishes that it had a "sound arguable basis" for its belief that the contract authorized its unilateral action. See, e.g., *Bath Iron Works*, supra, 345 NLRB at 502. 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 two equally plausible contract interpretations is correct. See *Phelps Dodge Magnet Wire Corp.*, 346 NLRB 949, 951 (2006) (citing *Atwood & Morrill Co.*, 289 NLRB 794, 795 (1988)).

Although the judge stated that he was analyzing the alleged violation as an unlawful contract modification within the meaning of Section 8(d), he did not clearly analyze the evidence under the "sound arguable basis" standard. Rather, he appeared to apply a "clear and unmistakable waiver" standard, which is the standard used for allegations of 8(a)(5) unilateral changes. See *Bath Iron Works*, supra, 345 NLRB at 501. The judge examined the Respondent's past practice of making unilateral changes to its benefits programs, the bargaining history between the parties, and the participation language of the CBA and found that none of these factors authorized the Respondent's unilateral termination of retiree benefits or established that the Union had clearly and unmistakably waived its right to bargain over the change.[11] The judge then summarily concluded that the Respondent lacked a sound arguable basis for its interpretation of the contract.

Contrary to the judge, we conclude that the Respondent had a sound arguable basis for its interpretation of the contract. We base our finding on the participation clause of the CBA, which provides that employees "shall be permitted to participate in the American Electric Power System . . . Comprehensive Medical Plan. . . [and] Retirement Plan," viewed in light of the parties' past practice under this contractual language. The Respondent argues that this clause (and its traditional practice) requires that it provide the same benefits to represented employees that it provides to unrepresented employees. As a result, the Respondent asserts that the contract requires that when it makes any change to the plans affecting nonbargaining unit employees, it must automatically extend those changes to the unit employees as well. The General Counsel, on the other hand, argues that the participation clause requires that the Respondent provide benefits to the unit employees at an unchanged level throughout the term of the contract.

We find that the Respondent's interpretation of the participation clause is reasonable. Being "permitted to participate" in the Respondent's benefit plans arguably suggests that unit employees participate only for so long as the plans are offered and on whatever terms they are offered. In other words, *if* the plans exist, then unit employees cannot be excluded from the plans, such as they are. As the Respondent argues, this reading of the contract is strongly bolstered by the Respondent's history of providing the same benefits to represented and unrepresented employees and—most notably—of making unilateral changes to its benefits plan, some of which have been significant, including the elimination of an entire benefit (company-paid life insurance) for future retirees. Whether or not the Respondent's interpretation of the contract is correct, we conclude that its assertion that the participation clause allowed it to eliminate retiree medical benefits for employees hired after January 1, 2014, is plausible and satisfies the "sound arguable basis" standard.

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). See *Bath Iron Works*, supra, 345 NLRB at 503. Compare *Hospital San Carlos Borromeo*, 355 NLRB 153, 153 (2010) (finding that respondent had no sound arguable basis for its "implausible" contract interpretation).[12]

---

dence will demonstrate that this elimination of healthcare benefits . . . has been implemented before such terms and conditions may be reopened under the current collective bargaining agreement and that by implementing this change without the Union's consent, Respondent has violated the Act.

[11] The judge also rejected the Respondent's argument that it was under no obligation to bargain with the Union about the elimination of retiree benefits because the change affected only "prospective," "not-yet-hired" individuals who are not employees under the Act. We affirm the judge's finding, for the reasons he stated, that the elimination of retiree benefits was a mandatory subject of bargaining.

[12] Because we find that the Respondent had a sound arguable basis for interpreting the language of the participation clause as authorizing its unilateral action, we need not rely on the language in the Respond-

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 28, 2015

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Joseph Tansino, Esq., for the Acting General Counsel.
Franck G. Wobst, Esq., of Columbus, Ohio, for the Respondent.
Ronald H. Snyder, Esq., of Columbus, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on April 29 and 30, 2013. The charge was filed by the International Brotherhood of Electrical Workers, System Council U-9 and Locals 329, 386, 696, 738, 876, 934, 978, 1002, 1392, and 1466, AFL–CIO (collectively the Unions), on December 21, 2012, against American Electric Power (AEP) 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 (collectively the Respondents). The complaint, issued on February 28, 2013, alleges the Respondents violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by, without the Unions' consent, on about November 27, 2012, failing to continue in effect all the terms of the parties' master agreement effective from March 12, 2012, to February 16, 2015, by eliminating retiree medical benefits for all employees hired after January 1, 2014.

On the entire record, including my observation of the witnesses' demeanor, and after considering the briefs filed by the Acting General Counsel, the Unions, and the Respondents, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

The Respondents are corporations headquartered in Columbus, Ohio, and have been engaged as public utilities in the generation and distribution of electricity in the States of Ohio, Arkansas, Indiana, Kentucky, Louisiana, Michigan, Oklahoma, Tennessee, Texas, Virginia, and West Virginia. In conducting their operations annually, The Respondents performed services valued in excess of $50,000 in States other than Ohio. The Respondents admit and I find they are employers engaged in commerce under Section 2(2), (6), and (7) of the Act and the Unions are a labor organizations under Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Curt Cooper has worked for AEP for 23 years and he assumed his current position as director of employee benefits in 2003. As per Cooper's testimony, AEP's prime business is generating, transmitting, and distributing electricity to customers across an 11 State territory. AEP and its subsidiaries employ a little over 18,000 employees and there are about 13,000 retirees in the AEP system of companies. Around 5000 of the 18,000 AEP system employees are represented by labor unions. Cooper testified as follows: "The employees of all these companies participate in the AEP system of benefits which are benefit programs Respondents offer across the entire enterprise. There are about 20 to 30 union represented bargaining units in the AEP system of companies, and with the exception of about 50 employees represented by the United Mine Workers, the remainder of AEP's union represented employees participate in the same systemwide benefit programs as the nonunion employees." These benefits are described in article X of the current master collective-bargaining agreement between the Unions and the Respondents.

Thomas Dawson, the manager of labor relations and EEO for AEP, testified he is involved with all the union represented employees at issue in this case. Dawson has held positions with AEP's subsidiaries in the area of labor relations dating back to October 1, 1979. Dawson testified AEP ranks near the top of the nation's largest energy suppliers serving more than

ent's benefit plan documents stating that the Respondent reserved the right to change or end the benefits plans at any time or the CBA clause excluding disputes relating to benefit plans from the contractual grievance-arbitration procedures.

Member Miscimarra believes that the Respondent also had a sound arguable basis for interpreting the CBA as incorporating the reservation of rights language in the plan documents, privileging the Respondent to make the change at issue here. Such a reading is consistent with the D.C. Circuit Court of Appeals decisions in *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1359–1360 (D.C. Cir. 2008), and *BP Amoco Corp. v. NLRB*, 217 F.3d 869, 873–874 (D.C. Cir. 2000). Without passing on whether the Respondent's reading is correct, Member Miscimarra notes that the Federal courts are vested with authority to interpret collective-bargaining agreements under Sec. 301 of the Act, and that an interpretation that accords with that of the court of appeals is certainly at least plausible. He agrees with his colleagues, however, that it is unnecessary to rely on the reservation of rights language in order to decide this case.

[1] In making the findings, I have considered the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951).

5.2 million customers. Dawson estimated systemwide about 3500 of the Respondents' employees are represented by the IBEW, 1200 by the Utility Workers, 400 by the Steelworkers, 250 by the United Mineworkers, and 2 by the Operating Engineers. The Respondents have 51 collective-bargaining agreements. Dawson testified that, with the exception of about 60 employees represented by the United Mine Workers at the Cook Coal Terminal, all of the remaining hourly employees employed by the Respondent whether they are union represented or not are covered under the AEP system benefit plans. Dawson testified that all salaried employees, except for those working at the Cook Coal Terminal, also participate in the AEP system benefit plans.

Cooper testified that during his tenure dating back to 1990, AEP has made changes in some of its system benefit plans. Cooper explained there are a number of reasons for making changes in the benefit plans, including: the cost of the benefits are not sustainable; to keep pace with benefits offered by competitors; and changes in the law and government regulations. Cooper testified the Respondents have also implemented changes or new plans as a result of employee input.

Cooper identified a document which he described as a historical summary going back to 1981 listing changes made in their benefit plans or programs. Cooper testified it summarized benefit plan changes including those in the annual enrollment guides to employees and retirees and surviving dependents for the time period 2001 to 2013.[2] Cooper reviewed, during the course of his testimony, the changes included in Respondent's historical summary, that he testified were shown in the 2001 to 2013 annual enrollment guides, copies of which the Respondents have placed into evidence.[3]

Cooper testified he was aware of changes made prior to November 2012 concerning retiree medical insurance. Cooper testified on January 1, 2012, the coinsurance amounts for prescription drugs for both retail and mail order increased from 20 percent to 35 percent, and this change applied to retiree drug coverage. Cooper testified that another change that applied to retiree health insurance was implemented on January 1, 2011, requiring certain prior authorization information from an employee's physician before prescriptions for certain classes of drugs could be filled. Cooper also identified other changes in prescription drug coverage taking place in 2003, 2006, 2008, and 2010 that he testified would have applied to retiree health plans and for which underlying documents were provided by the Respondents to document the changes listed in the summary.

Cooper identified the AEP "Administrative & General Benefits for Active Employees" as a summary plan description (SPD) for 2005, which he testified was an umbrella document for AEP benefit plans. The document states it provides "an overview of AEP's health, welfare and retirement benefits program." The booklet states at page 26:

> Plan Amendment or Termination
>
> The Company reserves the right to change or end the benefits plans, in whole or in part, at any time and for any reason, which could result in modification or termination of benefits to employees, retirees or other participants.

The Respondents introduced pages from the "Comprehensive Medical Plan for Retirees and Surviving Dependents," effective 2005; and pages from the "Comprehensive Medical Plan for Active Employees," effective 2005. Included in each is the statement that "AEP reserves the right to modify, amend, suspend or terminate the plan(s) at any time." Cooper testified there was similar language to the plan amendment and termination provision in the 2010 summary plan description for the Comprehensive Medical Plan for active employees and in the plan descriptions for all three plans.

Respondents introduced a booklet entitled, "Portraits of Choice 2001 Benefits Enrollment Guide For Active Employees." It is stated at page 23 of the enrollment guide that "AEP reserves the right to change or terminate any of the plans at any time. Enrollment in these benefits is not a guarantee of benefits or continued employment." The Respondents submitted the "2001 Benefits Enrollment Guide For Retirees and Surviving Dependents" which contained similar language regarding AEP's right to change or terminate any of the plans at any time. The Respondents also submitted into evidence the 2002 to 2013 annual benefits enrollment guides for active employees and for retirees and surviving dependents. The documents for each year contained statements reserving AEP's right to change or terminate any of the plans at any time.

On January 14, 2011, Dawson sent an email to IBEW Local 1392 (Local 1392) stating certain changes in retiree life insurance would be announced to all AEP employees later that day. The email stated the change is effective for employees retiring after April 1, 2011, that the Respondents would provide them with a flat $30,000 life insurance benefit for eligible employees; as opposed to the current benefit which was life insurance equal to half an employee's salary at the time of retirement. Dawson stated, in addition, employees hired or rehired on or after January 1, 2011, will not be eligible for company-paid life insurance upon retirement. Dawson testified he did not know the monthly cost to the Respondents for retirees who receive the $30,000 life insurance coverage. Dawson testified that health insurance is far more expensive per month for an individual than a $30,000 life insurance policy. Cooper testified that on April 5, 2011, the Respondents sent an email to all employees the subject of which was "Updates to Benefit Plan

[2] The summary also included other benefits not covered by the referenced distributions for which the Respondents did not provide the underlying documentary evidence of the amendments. When asked if those benefits without the underlying documentary support were relevant to this proceeding, the Respondents' counsel stated, "They are not. I mean they're not essential to our case in chief."

[3] There was a dispute between the parties as to whether the history of changes of all benefit plans covered by the parties' master agreement art. X, sec. 1 should be admitted into evidence, or whether only evidence pertaining to changes to the medical plans were relevant to this proceeding. Over the objections of the Acting General Counsel and the Unions, I admitted evidence of historical changes for all of the benefit plans for which the underlying documents for the summary were produced. This was to ensure completeness of the record since all the plans were covered by the same collective-bargaining agreement provision and all were excluded from the collective-bargaining agreement grievance procedure by the terms of the agreement.

Documents." It is stated in the email that "retiree life insurance coverage changes from one-half base pay to a flat $30,000 for employees retiring after April 1, 2011. Employees hired or rehired on or after January 1, 2011, are not eligible to continue company paid life insurance coverage into retirement." Cooper testified the change from one-half base pay to a flat $30,000 was a reduction in benefits for most employees.

Cooper testified that: "Prior to the January 1, 2011 change in life insurance, Respondents paid for some term life insurance for active employees and for retirees." Prior to the change the Respondents paid for two times the employee's salary for life insurance coverage for active employees and the employee had the option to elect additional coverage on their own currently up to eight times their salary. Prior to the change in 2011 retirees received a company provided portion of life insurance and they could to elect to port any additional coverage they had as an active employee and pay for it. After the January 1, 2011 change, for employees hired prior to January 1, the Respondents paid for $30,000 life insurance when they retired; and those hired after January 1 would not receive company paid for life insurance after they retired. Cooper testified that whatever coverage packages anybody had after they retired, beyond that, they paid for themselves.

Cooper testified concerning Respondents' historical summary of benefit changes that on page 7 where it states "1–1–2007, Eliminated The Health Plan of the Upper Ohio Valley for 2007" this was discussing an HMO. Cooper explained the HMO was only one of the Respondents' medical plan offerings for employees in Eastern Ohio and West Virginia. Cooper testified the change was the elimination of a vendor who administered a healthcare plan. He testified that would be true anywhere on page 7 of the summary where it shows a plan was eliminated it was referring to the elimination of the vendor who administered a plan. Cooper testified the same thing took place as described on page 6 of the summary dated January 1, 2004, "Wellborn HMO is eliminated." Cooper testified the elimination of healthcare vendors are not examples of times when the Respondents eliminated a benefit. When the Respondents eliminated HMO healthcare vendors as options for employees or retirees they would still have other medical plan options they could enroll in. Cooper testified that, prior to the elimination of retirement medical benefits announced in November 2012, the Respondents had not eliminated medical coverage for active employees or future retirees.

A. The Bargaining History Pertaining to Local 1392

Dawson testified in the 1976 to 1978 collective-bargaining agreement between Indiana Michigan Power and Local 1392 there was no provision allowing employee participation in AEP system benefit plans. He testified at that time Indiana Michigan did not participate in the AEP system benefit plans. Dawson testified in the 1979 Local 1392 agreement the parties agreed to the participation in the AEP system benefit plans. Dawson testified that from the time the 1979 collective-bargaining agreement took effect to date, there has never been a time where AEP has bargained with a union over changes in any of the benefit plans that are offered under the AEP system of benefits. In this regard, Dawson testified the Respondent has had the "participation" concept since November 1, 1979.

In the collective-bargaining agreement between Indiana Michigan Power and Local 1392 for the period 1979 through 1981, article XI reads:

> Employees shall be permitted to participate in the American Electric Power System Retirement Plan, Medical Plan, Long Term Disability Plan, Life Insurance Plan, Sick Leave and Layoff Allowance Plan, and Savings Plan.

Dawson identified a written document containing Local 1392's proposals for a new contract in 1981.[4] The document contained proposals relating to a retirement plan, medical plan, life insurance plan, sick leave and layoff allowance plan, and savings plan. Dawson testified that, at the time AEP did not have a vision care plan, but Local 1392 proposed providing one. Dawson testified the Respondent did not agree to any of Local 1392's benefit plan proposals. Rather, they stayed with the participation in the AEP system of benefit plans. For the agreement for the period 1981 through 1984, article XI reads:

> Employees shall be permitted to participate in the American Electric Power System Retirement Plan, Medical Plan, Long Term Disability Plan, Life Insurance Plan, Sick Leave and Layoff Allowance Plan, Savings Plan, and Dental Assistance Plan.

Dawson identified a written document containing Local 1392's proposals for a contract in 1984. He testified some of the proposals pertain to the AEP system of benefit plans and related such things as health insurance, retirement plans, and sick leave. Dawson testified the Employers did not agree to any of the proposals except for proposal 30 which he testified was to give Local 1392 updated SPD's for the AEP system benefit plans. For the agreement for the period 1984 through 1987, article XI reads:

> Employees shall be permitted to participate in the American Electric Power System Retirement Plan, Medical Plan, Dental Assistance Plan, Long Term Disability Plan, Life Insurance Plan, Sick Leave and Layoff Allowance Plan, Savings Plan, Payroll Based Employee Stock Ownership Plan, Dependent Life Insurance Plan and Voluntary Accidental Death and Dismemberment Plan.

The language in article XI remained the same in the 1987 through 1990 agreement, and virtually unchanged in the 1990 to 1993 agreement just replacing "Voluntary" with the word "Optional."

Dawson identified a document containing the proposals from Local 1392 for a new contract in 1993. Dawson's handwritten note on the last page of the document reflects for proposal 37 "freeze medical premiums." Dawson testified Local 1392 wanted to freeze medical premiums for the 3-year term of the contract. He testified the Employers did not agree to the proposal because of the participation in the AEP benefit system

[4] Dawson testified the proposals for negotiations from 1981 through 2002 from Local 1392 were for five bargaining units with five separate contracts, but only pertained to Local 1392 and no other local union.

which allowed the Respondents to make changes. For the Local 1392 agreement for the period 1993 through 1996, article XI reads:

> Employees shall be permitted to participate in the American Electric Power System Retirement Plan, Medical Plan, Dental Assistance Plan, Long Term Disability Plan, Life Insurance Plan, Sick Leave and Layoff Allowance Plan, Savings Plan, Payroll Based Employee Stock Ownership Plan, Dependent Life Insurance Plan, Optional Accidental Death and Dismemberment Plan, Long Term Care Plan, and Dependent Care Plan.

Dawson identified a document containing Local 1392's proposals for a new contract in 1997. He testified proposal 12 was to change the bargaining unit retirement formula. Dawson testified Local 1392's proposal was rejected because it was not part of the participation concept in the AEP system benefit package and because Local 1392's proposal did not address the entire benefit package. For the Local 1932 agreement for the period 1997 through 1999, article XI reads:

> Employees shall be permitted to participate in the American Electric Power System Retirement Plan, Medical Plan, Dental Assistance Plan, Long Term Disability Plan, Life Insurance Plan, Sick Leave and Layoff Allowance Plan, Savings Plan, Dependent Life Insurance Plan, Optional Accidental Death and Dismemberment Plan, Long Term Care Plan, and Dependent Care Plan.

Dawson identified proposals from Local 1392 for a new contract that were offered in 1999. Dawson testified proposal 20 relates to employee benefits and article XI. The proposal reads "Company and Union will negotiate bargaining unit employees' benefits." Dawson testified Local 1392 wanted to negotiate employee benefits and individual benefits rather than participate in the AEP system benefits. Dawson testified the Employer response was they had the participatory plans and the Local 1392 could participate in those plans. Dawson testified he asked if Local 1392 had an alternative to present concerning the AEP plans, but the local never presented one. Dawson testified from time to time Local 1392 floated a proposal for an individual plan, such as dental or retirement but they never gave a full benefit package. Dawson testified the Local 1392's individual proposals for specific plans were never accepted during negotiations because the local never proposed a full benefit package.

Dawson identified proposals presented from Local 1392 in 2002 for a new collective-bargaining agreement. Dawson testified proposal 14 related to the AEP Benefit Plans. He testified the local's proposal was to negotiate the benefit plans and the Employers did not agree to the proposal. Dawson testified the discussion as reflected in Dawson's notes was the Local 1392 Business Manager Dave Schimmel wanted to negotiate the benefit plans and Local 1932 had a concern about the Employers' ability to change the plans at any time. Dawson testified he asked Schimmel if he had any particular proposals for Respondent to look at and he said, "No," and that Local 1392 just wanted the ability to negotiate. Dawson testified when they got back together, Dawson responded, "We have negotiated the participation concept. We have made changes." Dawson testified his notes for October 1 state, "Have made changes, increased savings plan, cash balance, sick pay, 20 percent on medical premiums. Would plan to continue benefits under participation concept unless you have specific proposals for all plans for us to look at." As per Dawson's notes, Schimmel replied, "Don't have any particular proposals. Want more input than the letter of changes." Dawson testified that later that day Local 1392 withdrew their proposal. Dawson testified this exchange occurred for the negotiations of the contract between Indiana Michigan Power Company and Local 1392 running from November 1, 2002, to October 31, 2005. Dawson testified that the language in article XI, section 1 concerning benefits was the same in all five of Local 1392's contracts with AEP's subsidiaries. Dawson testified the proposal from Local 1392 was that the Respondents agree to negotiate a benefit plan, but the local never submitted a written plan proposal at the time of that negotiation.

For the Local 1392 agreement for the period 2002 through 2005, article XI, section 1 reads:

> Employees shall be permitted to participate in the American Electric Power System Comprehensive Dental Plan, Comprehensive Medical Plan [or alternate medical coverage such as the Health Maintenance Organization(HMO) or a Preferred Provider Organization(PPO) should such be made available by the company], Spending Accounts, Group Accidental Death and Dismemberment Insurance Plan, Group Life and Dependent Life Insurance Plan, Long Term Care Plan, Long Term Disability Plan, Retirement Plan, Retirement Savings Plan and Sick Pay Plan, Layoff Allowance Plan.

For the agreement for the period 2005 through 2008, article XI, section 1 reads the same as article XI, section 1 in the predecessor agreement.

Dawson identified a document containing excerpts from the collective-bargaining agreement between Indiana Michigan Power Company and Local 1392 with the signature date of October 21, 2008. Dawson testified it became effective on November 1, 2008. The contract at article XI, section 1 contained the following language:

> Employees shall be permitted to participate in the American Electric Power System Comprehensive Dental Plan, Comprehensive Medical Plan [or alternate medical coverage such as the Health Maintenance Organization(HMO) or a Preferred Provider Organization(PPO) should such be made available by the company], Spending Accounts, Group Accidental Death and Dismemberment Insurance Plan, Group Life and Dependent Life Insurance Plan, Long Term Care Plan, Long Term Disability Plan, Retirement Plan, Retirement Savings Plan, and Sick Pay Plan.

Dawson testified the Payroll Based Stock Ownership Plan (PBSOP) started in 1983 and that at that time utilities were allowed to provide stock to their employees. He testified AEP added the program to its contractual benefits participation clause and then took it out because the Government ended the program. Dawson testified AEP did not bargain with the Unions over the addition or the elimination of the program. Daw-

son testified the law did not require the Respondents to add the program and that it was optional. Dawson testified when the government program ended the Respondents could no longer keep the plan in existence. The Respondents stopped the plan and allowed the money there to transfer to the employee's savings plan. Dawson testified the plan was eliminated in 1986 although it was still listed in Local 1392's collective-bargaining agreements through and including the 1993 to 1996 contract. Dawson testified Local 1392 agreed to remove the language from the contract. Dawson testified no language could have been changed in Local 1392's collective-bargaining agreements without Local 1392 and AEP's applicable subsidiaries agreeing to that change.

Dawson testified the Respondents have a layoff allowance program which changed over the years. Dawson testified the Respondents started a new sick leave plan in 2001. He testified the prior sick leave plan provided for a layoff allowance with the employee being able to use unused sick leave in the event of a layoff. Dawson testified when the sick leave plan was changed in 2001, the Respondents did away with the layoff allowance on January 1, 2001. However, Dawson testified the 2002 to 2005 and 2005 to 2008 contracts between Indiana Michigan Power Company and Local 1392 at article XI, section 1 lists "Layoff Allowance Plan." He testified that its being listed in these contracts was an error because there was no such a plan at that time because they changed the sick leave plan and eliminated sick leave use for layoff purposes in 2001.

Dawson testified that when they bargained for the initial master agreement in 2006 the Unions wanted the sick leave layoff allowance back. Dawson testified the return of the layoff allowance was something Respondents negotiated with the Unions. Dawson testified they added a separate section to the master agreement on the layoff allowance, which appears in the benefits section. Dawson testified at the Union's request they negotiated a layoff allowance back in the agreement but it is different from the prior program. Dawson testified they eliminated layoff allowance plan in 2001, negotiated it back in 2006 for the master agreement which was not ratified until 2009. Dawson testified the new layoff allowance plan does not include use of sick leave. Rather they put in a formula where employees were given a onetime layoff allowance bank.

B. The Negotiation of a Master Agreement between the Respondents and the Unions

Charles Coleman is the business manager of IBEW Local 978 (Local 978). Coleman currently represents 18 bargaining units with the Respondents located in West Virginia, Virginia, and Kentucky. Coleman testified System Council U-9 (SC U9) is made up of 10 IBEW locals all within the AEP operation covering 11 States. Coleman testified SC U9 was chartered around 2001. He testified the local unions under SC U9 are party to a master collective-bargaining agreement (master agreement) with the Respondents. Coleman testified the IBEW locals also have separate local bargaining agreements with AEP and/or its subsidiaries. Coleman testified benefits come under the master agreement and they are systemwide.

Dawson testified that in 2004, the IBEW approached Respondents about having one contract for all of its locals. Dawson testified the locals could not jointly agree on various issues so the parties wound up with one master contract covering all the locals and accompanying local agreements at 33 locations. Dawson testified he is the only person who attended every bargaining session for the master agreements dating back to 2005 when they started negotiations for the initial master agreement. Dawson testified the initial master agreement was not ratified by the Unions until sometime in 2009.

Dawson identified a document which he testified contained contract provisions from the Unions' proposal for the initial master agreement. Dawson testified the Unions reviewed the 33 local union contracts and took provisions from those contracts as part of their proposal. Dawson testified that, under benefits, the Unions proposed section 1 which Dawson described in his testimony as the Unions proposing their continued participation in the AEP system benefit plans. The language in the Unions' proposal reads:

> Employees shall be permitted to participate in the American Electric Power System Comprehensive Dental Plan, Comprehensive Medical Plan [or alternate medical coverage such as the Health Maintenance Organization (HMO) or Preferred Provider Organization (PPO) should such be made available by the company], Spending Accounts, Group Accidental Death and Dismemberment Insurance Plan, Group Life Insurance Plan, Dependent Life Insurance Plan, Dependent Care Plan, Long Term Care Plan, Long Term Disability Plan, Retirement Plan, Retirement Savings Plan, Sick Leave Plan and Layoff Allowance Plan.

Dawson testified the Unions also proposed the establishment of a joint committee for health care utilization. Dawson thought he first saw the Unions' proposal in October 2005.

Dawson testified Respondents did not agree to a joint committee for healthcare utilization because the Unions' proposal just dealt with the IBEW but the AEP system of benefits covered all employees. He testified Respondents did not want to just deal with the IBEW represented employees on a separate basis. Dawson testified it was Respondents' position it had to be a joint committee involving all participants and the Unions were not interested. The Unions' proposal for a joint committee did not become part of the master agreement. Dawson testified the parties negotiated in late 2005 and throughout early 2006. He testified Respondents made an offer to the Unions on June 22, 2006, and all of the locals had to ratify for it to become effective. They did not ratify it until February 17, 2009. Thus, the initial master agreement had effective dates of February 17, 2009, to February 16, 2012.

Concerning the current master agreement which has effective dates of March 12, 2012, to February 16, 2015, Dawson testified the Unions made a written proposal on July 20, 2011, which included a 3-year freeze on employee contributions for health care benefits. Dawson testified that on August 17, Respondents responded stating Respondents used the "participation" concept, and the Unions' proposal would shift costs to non-IBEW represented employees, that significant costs were involved, and Respondents had no interest in the proposal. On August 18, the Unions withdrew the proposal.

Both the initial and current master agreements contain the following provisions:

> Article I, section 8(c) provides:
>
> 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 a Company and represented by a Local Union.
>
> Article III, section 2 provides:
>
> It is the intent of the parties that the provisions of this Agreement (meaning Master Agreement and respective Local Agreement for each individual Bargaining Unit) will supersede all prior agreements and understandings, oral or written, expressed or implied, between such parties and shall govern their entire relationship and shall be the sole source of any and all rights or claims which may be asserted in arbitration hereunder or otherwise.
>
> The parties for the life of this Agreement hereby waive any rights to request to negotiate or to negotiate or to bargain with respect to any matters contained in this Agreement.
>
> Article X, section 1 provides:
>
> Employees shall be permitted to participate in the American Electric Power System Comprehensive Dental Plan, Comprehensive Medical Plan [or alternate medical coverage such as the Health Maintenance Organization (HMO) or Preferred Provider Organization (PPO) should such be made available by the Company], Spending Accounts, Group Accidental Death and Dismemberment Insurance Plan, Group Life Insurance Plan, Dependent Life Insurance Plan, Dependent Care Plan, Long Term Care Plan, Long Term Disability Plan, Retirement Plan, Retirement Savings Plan and Sick Pay Plan.
>
> Article XI, section 1 Grievance Procedure provides:
>
> Should any dispute or disagreement arise between an employee or Local Union and the Company, except disputes or disagreements arising under the Mutual Responsibilities (Article IV, above) or disputes or disagreements relating to the Benefit Plans or the Companywide Incentive Plan specified in Article X, such dispute or disagreement shall constitute a grievance and be disposed of in the following manner.

Coleman testified that none of the benefit plans described in article X of the master agreement are exclusive to IBEW represented employees. Coleman testified he has received SPDs of Respondents' benefit plans described in article X. Coleman identified the SPD for active employees for the AEP Comprehensive Medical plan issued in 2010. It is stated there at page 54 under the heading "Plan Amendment and Termination" that, "The Company reserves the right to change or end the Comprehensive Medical Plan, in whole or in part, at any time and for any reason, which could result in modification or termination of medical benefits to employees, former employees, retirees or other participants." Coleman also testified he has seen the SPD for retirees and surviving dependents under age 65 for the AEP Comprehensive Medical Plan issued in 2010; and the one for retirees and surviving dependents age 65 and older for the AEP Comprehensive Medical Plan issued in 2010. Both of those summary plan descriptions contained identical amendment and termination language to that set forth above. Coleman testified he was aware of the plan amendment and termination language when he participated in negotiations for the current master agreement as well as when he participated in the negotiations for the predecessor master agreement.

C. The Current Dispute

The parties introduced an email from Dawson to Local 1392's business manager as well as another IBEW official dated November 27, 2012. The email referenced a prior conference call that day, and the subject of the email is "Retiree Medical Plan changes." It states for current retirees there is no change. It states for those who retire after January 1, 2013, that there will be a cap or maximum contribution for the company and it discussed the terms of that cap. It states that pre-65 retirees will no longer be included in the same trust as active employees and this would effectively increase the employee premiums for those retiring after January 1, 2013. It also states that, "Employees hired on or after 1/1/14 will no longer be eligible for retiree medical coverage." The latter change being the subject of the current litigation. The email states the changes would be announced to all employees later that day or early tomorrow. The email states, "Obviously, this is a fundamental change for the Company and many employees will not be excited about the cost increases." Cooper testified the elimination of retirement medical insurance coverage for newly hired employees on or after January 1, 2014, applied to future union as well as nonunion employees.

By email dated December 3, 2012, from Chairman of SC U9 Stan Stamps to Respondents' officials, Thomas Householder and Dawson; Stamps requested bargaining over recent announced changes affecting benefits for future retirees. The changes in the email were alleged as a unilateral change and there was a request by Stamps on behalf of SC U9 and the affiliated local unions that AEP cease, desist, and rescind the changes for all IBEW represented employees until such time as good-faith bargaining occurred. Householder responded to Stamps by email dated December 4, which was copied to a series of individuals including Dawson. In the email, Householder stated:

> We have reviewed your request to negotiate the recently-announced medical plan changes for retirees.
>
> As you are aware, we negotiated the "participation" language allowing for represented employees to participate in the System Benefit Plans. This participation extends to the Comprehensive Medical Plan and does include retiree medical as an option for employees to choose. This "participation" concept was first negotiated in the IBEW labor agreements in 1979 and has been a continuous fixture in subsequent collective-bargaining agree-

ments, including the current IBEW Master Collective Bargaining Agreement, since its inception.

You may recall that the "participation" concept was necessitated by the Company's need to make benefit plan changes that affect many, if not all, AEP System employees—including those who are represented by various unions, as well as non-represented employees—without having to separately bargain with each of the unions over changes. The "participation" clause allows the company to make unilateral changes to the benefit plans listed in collective-bargaining agreements without having to negotiate with one or more the unions concerning the changes. The significance to the Company of having this right was further reinforced by the language in the collective bargaining agreements that precludes an arbitrator from passing on any issues relating to the covered benefit plans.

Throughout the years of participation in the AEP System Benefit Plans, there have been numerous Company-initiated unilateral changes—some involved increased premiums and some changes affected benefit levels—but all were accomplished pursuant to the "participation" clause. The changes that were recently announced by the Company concerning the retiree medical plan are simply the most recent in a long line of changes made by the Company under the authority granted to it by the "participation" clause. The claim that the changes are a mandatory subject of bargaining flies in the face of more than 30 years of bargaining history to the contrary.

Our goal is to make sure that the Union representatives understand the changes being made and that employees have the information they need to make the necessary choices they face over the next month. With those goals in mind, we are certainly willing to sit down with the IBEW leadership to further discuss the changes and address any questions that you may have, just as HR representatives are currently meeting with employees on a daily basis to address any questions they may have.

Stamps responded to Householder by email dated December 13, 2012, stating SC U9 would consider Householder's response as a "No" to the Unions' request for bargaining. Stamps stated the Unions believed in their position and would seek other avenues to resolve the issue. By email dated December 14, addressed to Householder and copied to Respondents' officials, Timothy Bowmar and Dawson, Stamps stated SC U9 was filing a grievance over changes announced by Respondents for future retiree medical benefits. Stamps cited various collective-bargaining agreement provisions in support of the grievance and stated the "Participatory language and small changes to benefits for represented employees does not" preclude the IBEW from requesting negotiations or filing grievances when substantial changes that affect future retiree benefits for current represented employees or future employees. Stamps stated the remedy requested for this grievance included that AEP cease and desist in implementing changes for all IBEW represented employees.

On December 26, Bowmar sent an email to Stamps the subject of which was "Third Step Grievance Response S-12-37 (U-9—Changes to Retiree Medical Benefits)." It discussed a grievance meeting on December 20 attended by representatives of the SC U9 with Bowmar and Dawson attending for Respondents. In the email Bowmar, after citing contractual provisions at issue, states, "The Union believes the Company has the right to make 'reasonable and customary (or small) changes' to the participatory benefits but any 'significant changes' must be negotiated." Thereafter, Bowmar discussed the Unions' claims with respect to each of contractual provisions in dispute. With respect to the benefits provision under contract article X, section 1, Bowmar stated:

> Violation of Article X Benefits, Section1. Benefit Plans and Section 4, VEBA
>
> The Union claims since the retiree medical plan is not specifically identified in Section 1, Benefit Plans that it is covered under Section 4, VEBA and therefore not part of the participatory language of Section 1.

Bowmar responded to this assertion stating that:

> Section 1 identifies the various benefit plans the parties have agreed to that the IBEW will allow their membership to participate in, including the Comprehensive Medical Plan. The Summary Plan Description (SPD) for the Comprehensive Medical Plan includes two subsections, one for "Retirees & Surviving Spouses and Dependents Under Age 65" and "Retirees & Surviving spouses and Dependents Age 65 and Older", both of which were sent to the Union on November 19, 2012 as a result of a request for information.

Bowmar further stated VEBA is a tax exempt trust, and does not govern how a plan works.

Bowmar cited other reasons for Respondents' denial of the grievance, one of which was that article XI, Adjustment of Difference, section 1 specifically states that disputes or disagreements relating to the Benefit Plans in article X are not subject to the grievance procedure.[5] Bowmar stated concerning the Union's claims as to article III, section 2, which states, "the parties agree to waive any rights to negotiate during the life of the agreement," that:

> The Company maintains the parties have negotiated in good faith and we agreed to the participating language which allows the Company to make changes to the benefit plans. There is no contractual language or agreement between the parties which limits the Company's right to make changes to "reasonable and customary (or small) changes" and "significant changes" are to be negotiated.

Coleman testified around November 2012, he was informed Respondents were making three changes to retiree medical insurance. Coleman testified the Unions filed an unfair labor practice charge that pertained to all three changes, and the Re-

[5] Dawson testified this provision or one like it has been in effect in labor agreements since 1979. Dawson explained the various benefit plans have appeals processes and the Unions were informed Respondents were not willing to subject the plans to the grievance or the arbitration procedure. Dawson testified any appeals have to go through the appeal process in the individual plans.

gional Director dismissed the charge with respect to two of those changes.[6]

D. Positions of the Parties

Counsel for the Acting General Counsel argues that: By eliminating the retiree medical benefits for certain employees hired during the term of an existing contract, Respondents modified their contract with the Unions without the Unions' consent in violation of the Act. It is argued the standard for unilateral change cases differs from those in which there is a contract modification. It is stated that in unilateral change cases, the Board considers whether a union has clearly and unmistakably waived its right to bargain over the change. In contract modification cases the General Counsel must show a contractual provision and the employer has modified the provision. It is asserted that the remedy for a contract modification case is to honor the contract. It is argued that master agreement article X, section 1 states employees shall be permitted to participate in the AEP comprehensive medical plan. It is argued that Respondents asserted to the Unions in Respondents' December 26 grievance response that its SPD's cited therein establish that retiree medical benefits are included in the comprehensive medical plan listed in the collective-bargaining agreement provision. Thus, it is asserted that by prohibiting bargaining unit employees hired on or after January 1, 2014, from participating in the retiree medical plan Respondents have modified the collective-bargaining agreement over the Unions' objection.

It is argued that the elimination of the plan lacked a sound arguable basis under the collective-bargaining agreement in that the plain language of article X, section 1 permits employees to participate in Respondents' benefit plans. It is stated that Respondents' argument that future employees are not part of the bargaining unit is undermined by article I, section 8 of the master agreement which defines unit employees as being "now or hereafter" employed. It is argued Respondents' position that they do not have a bargaining obligation with the Unions for future employees contravenes the contract as well as Board law. It is argued the reservation of rights language accorded to Respondents in its comprehensive medical plan SPD does not alter the result because the SPD's were not incorporated into the collective-bargaining agreement by reference and because the Unions had no opportunity to bargain over the SPDs. It is also asserted that the numerous minor programmatic changes made by Respondents to the benefit plans do not establish that Respondents have a past practice of eliminating benefits as Respondents admitted they have never previously eliminated medical coverage for active or future employees. It is asserted Respondents presented no evidence that the parties contemplated the elimination of benefits as part of their bargaining history.

The Unions argue the elimination of retiree medical benefits is a mandatory subject of bargaining. The Unions argue by contractual definition future employees are covered by the master collective-bargaining agreement. The Unions argue their right to bargain over the elimination of retiree health insurance is not barred by the doctrines of waiver, acquiescence, and/or estoppel. The Unions argue that at no time in its practice of modifying benefits had Respondents ever eliminated medical insurance for a whole class of employees. Thus, it is asserted the changes made here are far different from prior changes in benefits and do not establish a practice unilaterally allowing Respondents to eliminate the benefits at issue. The Unions also argue the parties bargaining history shows the Unions have made proposals concerning Respondents benefit plans. It is asserted Respondents not agreeing to the proposals does not mean the parties did not bargain over the issues. The Unions also argue the reservation of rights language included in the benefit plan SPDs were not included in the master collective-bargaining agreement.

Respondents argue that, for the past 30 years, virtually all of AEP's employees, whether or not represented by a union, have been covered by the same system wide AEP employee benefit plans. It is asserted that for more than 30 years IBEW represented employees have participated in AEP's systemwide benefits via the "Participation Clause" in the applicable collective-bargaining agreements. It is asserted that at various points in the bargaining history between AEP and the IBEW, the IBEW has proposed changes to AEP's system benefit plans and to the participation clause approach. Each time, except for one, AEP declined to agree to any such changes citing the advantages to AEP and its employees to provide systemwide plans that were the same for both union and nonunion employees. It is asserted the one exception occurred in the negotiations for the first master agreement with the IBEW when AEP agreed to provide a layoff allowance for IBEW represented employees. It is asserted that this benefit, however, was intentionally made separate from the participation clause in the collective-bargaining agreement. Respondents assert dating back to 1979 they have consistently negotiated to exclude disputes over the AEP system benefit plans from the contractual grievance and arbitration provisions. AEP has explained at the bargaining table that its various benefit plans have their own appeals processes. It is

[6] Respondent, over the objections of opposing counsel, sought to admit the Regional Director's February 27, 2013 partial dismissal letter into evidence. In the letter, the Regional Director made statements to the effect that over a long period the Unions had not bargained about changes in the costs or levels of benefits contained in the Employer's plans which were made on an annual basis. The Regional Director concluded Respondents' November 27, 2012 implementation of fixed caps on Employer subsidy for retiree medical coverage and increased cost sharing for future pre-65 retirees fell into the category of past changes that the Unions had acquiesced in, and therefore it could not be established that Respondents were obligated to bargain over them prior to their implementation. I excluded the Regional Director's partial dismissal letter from evidence. First, the issue of the mentioned unilateral changes was not before me. I am also not aware of what evidence was available to the Regional Director at the time he made the factual findings in the letter, which were made during an administrative investigation, not a trial where documents were presented that were not likely available to the Regional Director, and where witnesses were cross-examined by all parties. The Board has held that Regional Director's decisions do not have precedential value, and administrative dismissal letters would not control later cases. See, *Virtual Health, Inc.*, 344 NLRB 604, 616 fn. 42 (2005); *North Hills Office Services*, 342 NLRB 437, 437 (2004); and *S. H. Kress & Co.*, 212 NLRB 132 fn. 1 (1974). Accordingly, I adhere to my decision to exclude the partial dismissal letter from evidence.

also asserted individual benefit plans contain reservations of rights provisions, which include plan amendment and termination provisions. It is asserted that IBEW witness Coleman admitted knowing that the SPDs contain such provisions and that he was aware of this when he participated in negotiations with AEP for the current master agreement as well as for the predecessor master agreement in which the participation clause was negotiated and agreed to. Respondents argue that since the early 1980s AEP has regularly made unilateral changes in its system wide benefit plans including its comprehensive medical plans. Some of the changes enhanced the plans others were administrative and some reduced or eliminated benefits. The ones that reduced or eliminated benefits included increased employee medical plan contribution rates, increased monthly contribution rates under medical, dental and vision plans, increased medical plan deductibles, changed company paid life insurance benefit pay to a flat $30,000 for all employees retiring after April 1, 2011, and altogether eliminated it for all employees hired or rehired on or after January 1, 2011, increased employee percentage for copayment of nonpreferred prescriptions, instituted monthly spousal and domestic partner surcharges for AEP medical plan coverage, urgent care and emergency room visits. It is asserted that dating back to 1979, Respondents have never bargained with any labor organization regarding any of the changes that comprise the AEP system benefit package. Rather, Respondents' practice has been to give the representatives of the various unions advance notice of the changes just as was done with respect to the change at issue in this proceeding.

Respondents contend they have no duty to bargain with the Unions about the decision to cease providing retiree medical benefits for yet to determined employees for at least two alternative reasons. First, the change pertains to a permissive subject of bargaining because it does not affect existing bargaining unit members. Second, the reservation of rights clauses contained in the benefit plan documents and the established past practice of having all IBEW represented employees participate in the AEP systemwide benefit plans authorized Respondents to make unilateral changes, including the elimination of a benefit, provided the changes were made for all employees covered by the plans.

Respondents argue that persons who will be hired on or after January 1, 2014, are prospective employees, not current employees, and the IBEW does not represent prospective employees. Therefore, Respondents' decision to eliminate retiree medical benefits applies only to individuals who are outside the bargaining unit and it can only qualify as a mandatory subject of bargaining if it is determined that the decision vitally affects the terms and conditions of employees who are currently employed and part of the bargaining unit. Respondents contend the change has no effect on any bargaining unit employee, and even as to individuals hired on or after January 1, 2014, only when they retire which at the earliest is 2024.

Respondents argue that, even assuming the elimination of retiree medical coverage for future hires is a mandatory subject of bargaining, Respondents had the right to unilaterally make the change because the participation clause in the master collective-bargaining agreement, the reservation of rights clauses contained in the benefit plans, and the established past practice of providing the same benefits to all employees who participate in the AEP system benefit plans authorized it to do so. Respondents contend arguments that this change differed from prior changes because it was the complete elimination of benefits fail because the reservation of rights clause contained in the benefit plans reserves Respondents the right to terminate the benefit in whole or in part at any time and for any reason. Respondents contend this is an integral part of the medical plan the Unions agreed to through collective bargaining to have its employees participate in, and they cannot pick and choose which provisions of the plan applied to its members and which do not. Second, Respondents have in the past unilaterally eliminated other of its system wide benefits. In 2011, Respondents eliminated company paid retiree life insurance for all employees hired after January 1, 2011. It is contended this was not the loss of a de minimus benefit; rather it was a loss of the $30,000 coverage for all employees affected by it. It also occurred during the term of the master agreement and was in effect immediately prior to the current master agreement. Respondents contend if the Unions wanted to discontinue the practice of having its members participate in the AEP systemwide benefits which they knew were subject to the reservation of rights provisions contained in the benefit plan documents, they could have insisted on changing the employee benefits provision when they bargained for the current master agreement. Instead it was Respondents who prevailed in the collective-bargaining negotiations in keeping the article X participation clause language intact. Therefore, Respondents contend the complaint should be dismissed.

E. Analysis

It has been long held that a unilateral change to a mandatory subject of bargaining, absent a valid defense is violative of Section 8(a)(5) and (1) of the Act. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962); and *Bethlehem Steel Co. (Shipbuilding Div.)*, 136 NLRB 1500, 1503 (1962). It has been held that future retirement benefits of current active employees constitute a mandatory subject of bargaining. See *Allied Chemical &nd Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180 (1971); *Georgia Power Co.* 325 NLRB 420 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999), cert. denied 528 U.S. 1061 (1999); and *Southern Nuclear Operating Co.*, 348 NLRB 1344, 1350 (2006), enfd. in relevant part 524 F.3d 1350, 1356 (D.C. Cir. 2008).

Respondents argue that, since the elimination of the retiree medical insurance applies only to individuals who have not yet been hired, the change at issue pertains to a permissive subject of bargaining because it does not affect existing bargaining unit members. I disagree with Respondents' contention. In *Mississippi Power Co.*, 332 NLRB 530, 533 fn. 10 (2000), enfd. in part 284 F.3d 605 (5th Cir. 2002), the Board stated:

> Although the judge found that the Respondent violated the Act as alleged, he found that since the Locals were not the representative of anyone that retires after January 1, 2002, unless that person is currently employed, his ruling did not apply "to anyone not currently employed in the bargaining unit." Citing *Exxon Research & Engineering Co.*, 317 NLRB at 676

> fn. 3, the judge therefore found that "[e]mployees hired after Respondent's illegal OPRB changes are not included in the relevant bargaining unit." We disagree. 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.

In the current case, the applicable master collective-bargaining agreement has effective dates of March 12, 2012, to February 16, 2015. On November 27, 2012, Respondents announced three changes to the applicable retiree medical plan including the change at issue here that employees hired on or after January 1, 2014, will no longer be eligible for retiree medical coverage. I find that, absent a valid defense, Respondents had a mandatory bargaining obligation with the Unions before changing terms and conditions of employees who were to be hired after a certain date. Otherwise, Respondents would be allowed to divide the bargaining unit and undermine the Unions by making unilateral changes for employees who are hired within the contract term, or thereafter, without bargaining with the Unions. Aside from the fact, that these divisions could set employee against employee, carried to its logical extent, if Respondents have their way they could 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. Such action would render the term good-faith bargaining meaningless. Moreover, the parties here knew better as article I of the master agreement is entitled "Union Representation." It provides at section 8(c) 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 a Company and represented by a Local Union." (Emphasis addded.) Thus, the terms of the agreement are consonant with Board law as the agreement acknowledges future employees are covered by its terms.

Respondents citation of *Star Tribune*, 295 NLRB 543 (1989), does not require a different result. There, the Board concluded that "applicants are not bargaining unit 'employees' and that pre-employment drug and alcohol testing is not encompassed within the statutory duty to bargain about terms and conditions of employment of the employer's employees in an appropriate unit." The Board noted there is no economic relationship between the employer and an applicant, and the possibility that such a relationship may arise is speculative. Unlike preemployment tests for applicants, Respondents change in retiree medical benefits here effects the benefit package of employees only after they are hired and by definition are part of the bargaining unit. Since the change impacts on benefits of bargaining unit employees it directly impacts the bargaining unit. Thus, the "vitally affects" test raised by Respondents concerning the duty to bargain over nonbargaining unit changes and the impact they may have on the bargaining unit is not applicable here. See *Georgia Power Co.*, supra at 420 fn. 5.

In *NLRB v. Katz*, 369 U.S. 736, 745–747 (1962), the Court stated:

> The respondents' third unilateral action related to merit increases, which are also a subject of mandatory bargaining. *NLRB v. J. H. Allison & Co.*, 6 Cir., 165 F.2d 766. The matter of merit increases had been raised at three of the conferences during 1956 but no final understanding had been reached. In January 1957, the company, without notice to the union, granted merit increases to 20 employees out of the approximately 50 in the unit, the increases ranging between $2 and $10. [FN13] This action too must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of section 8(a)(5), unless the fact that the January raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews-in effect, were a mere continuation of the status quo-differentiates them from the wage increases and the changes in the sick-leave plan. We do not think it does. Whatever might be the case as to so-called 'merit raises' which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.

In *E. I. du Pont De Nemours & Co. v. NLRB*, 682 F.3d 65, 67–69 (D.C. Cir. 2012), the court stated:

> Under *Katz*, an employer unilaterally may implement changes "in line with [its] long-standing practice" because such changes amount to "a mere continuation of the status quo." 369 U.S. at 746, 82 S.Ct. 1107; *see Courier–Journal*, 342 N.L.R.B. 1093, 1094 (2004) ("a unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo—not a violation of Section (a)(5)"). The purpose of prohibiting unilateral changes is not advanced by freezing in place the terms of employment when doing so disrupts the established practice for making changes. For this reason, an employer may lawfully change the terms of employment pursuant to such an established practice. There are, however, limits to the scope of the unilateral changes an employer may lawfully make during negotiations. More specifically, the Act does not permit a unilateral change "informed by a large measure of discretion" because "[t]here simply is no way in such [a] case . . . to know whether or not there has been a substantial departure from past practice." *Katz*, 369 U.S. at 746, 82 S.Ct. 1107.
>
> . . . .
>
> We hold Du Pont, by making unilateral changes to Beneflex after the expiration of the CBAs, maintained the

> status quo expressed in the Company's past practice; those changes were therefore lawful under *Courier-Journal.* While the CBAs were in effect, Du Pont annually made unilateral changes to the package of benefits offered under Beneflex, including changes to the premiums the employees paid and to the benefits they received. Du Pont made the unilateral changes in dispute here after the CBAs had expired, but those changes were similar in scope to those it had made in prior years. Du Pont's discretion in making those changes was limited by the terms of the reservation of rights clause in the Beneflex plan documents, which permitted changes during—and only during—the annual enrollment period. Moreover, here as in *Courier-Journal,* the employer was obligated under its past practice to "treat the [union] employees exactly the same as [the non-union] employees," and so the employer's "discretion was limited" because it "did not have the freedom to grant [non-union] employees a benefit and deny same to [union] employees." 342 NLRB at 1094. Under the Board's precedent, therefore, Du Pont's making annual changes to Beneflex became a term and condition of employment the company could lawfully continue during the annual enrollment period, irrespective of whether negotiations for successor contracts were then on-going.

The court stated:

> Du Pont has made changes to Beneflex at the time of enrollment each year since at least 1996. Changes to the program have included increases in the premiums for medical, life, vision, and dental insurance, changes in coverage, and the addition and elimination of plan options. These changes to Beneflex applied to employees at all Du Pont facilities, to union and non-union employees alike. [Id at 66–67.]

In *FirstEnergy Generation Corp.,* 358 NLRB No. 96, slip op. at 1 (2012), the Board stated:

> For the reasons set forth in his decision, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by making unilateral changes to the retirement healthcare benefits of current employees. In adopting the judge's conclusion that the Respondent failed to establish a past practice of making unilateral changes such as the one at issue here, we rely on his finding that the Union objected to the last major change in future retiree benefits viz. the 2004 elimination of retiree healthcare benefits for new employees. We also rely on the judge's reasoning that, even assuming the Union acquiesced in the Respondent's annual minor programmatic changes, acquiescence alone does not establish a surrender of the right to bargain over future changes. See *Caterpillar, Inc.*, 355 NLRB 521, 523 (2010), enfd. mem. ___ F.3d ___, 2011 WL 2555757 (D.C. Cir. May 31, 2011). Finally, we rely on the judge's finding that the retirement benefit change at issue in this case is significantly different from those minor programmatic changes. See id. (even assuming the employer had a past practice of making minor changes to its prescription drug plan, the employer's significant change to that plan was a "material departure from that practice").[2]

As set forth by the judge in *FirstEnergy,* supra, JD slip op. at 10:

> The burden of proof to demonstrate a past practice sufficient to eliminate the duty to bargain a unilateral change rests on the *Respondent. Caterpillar, Inc.*, 355 NLRB [521] No. 91, slip op. 1 (2010); *Eugene Lovine, Inc.*, 328 NLRB 294, 294 fn. 2 (1999). The Respondent "must show that the practice occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis."

In *Caterpillar, Inc.*, 355 NLRB 521, 523 (2010), the Board stated:

> Moreover, even assuming that the past changes were sufficiently similar among themselves to constitute a "practice," the implementation of "generic first" represented a material departure from that past practice. The past changes were limited in scope, involving only certain drugs or families of drugs. "Generic first," by contrast, involved *all* brand-name drugs that have generic equivalents.[13] Moreover, and significantly, unlike "generic first," the past changes did not alter express terms of the Group Insurance Plans. All such changes concerned matters the Group Insurance Plans either did not address or, after April 28, 2005, expressly left to the Respondent's sole discretion. By contrast, the copay amounts for brand-name drugs were specified in the Group Insurance Plans.
>
> Finally, we reject the judge's finding that the unilateral implementation of "generic first" was lawful because it continued a past practice of making "administrative" changes. As defined by the Respondent, an "administrative" change is procedural, as opposed to a substantive modification in plan benefits. But there is no principle that exempts a "procedural" change from the duty to bargain, provided that the change is material, substantial, and significant (as "generic first" was, for reasons explained below).
>
> Further, making a series of disparate changes without bargaining does not establish a "past practice" excusing bargaining over future changes. Rather, it shows merely that, on several past occasions, the Union waived its right to bargain. It is well settled, however, 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."[14] Moreover, as stated above, however characterized, "administrative" changes that do not alter express contract terms are fundamentally unlike an "administrative" change that does.

In *Caterpillar Inc. v. NLRB,* 2011 WL 2555757, 2 (D.C. Cir. 2011), in enforcing the Board's order the court stated:

> The Board also reasonably concluded that Caterpillar's prior changes to its employees' prescription drug benefits did not establish a past practice such that its employees

> could have expected further changes like the "Generic First" program. At most, Caterpillar demonstrated that the union had waived its right to bargain over several prior changes to the prescription drug program. Board precedent is clear 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 N.L.R.B. 609, 609 (1987). The facts before the Board were easily distinguishable from precedent in which an employer's past practice occurred with such regularity and frequency that it became the status quo. See, e.g., *Post-Tribune Co.*, 337 NLRB at 1280; *Daily News of L.A.*, 315 N.L.R.B. 1236, 1236–37 (1994); *A-V Corp.*, 209 N.L.R.B. 451, 452 (1974).

In the instant case, I do not find that Respondents have established a past practice that occurred with such regularity that would allow Respondents to unilaterally eliminate retiree health benefits for employees hired after January 1, 2014. Respondents in support of their case provided a description of the bargaining history of Local 1392 and some of AEP's subsidiaries going back to the late 1970s. I do not find this bargaining history as particularly helpful. For in 2005, Local 1392 began bargaining with Respondents as part of a council composed of Local 1392 and nine other IBEW Locals to negotiate a master agreement with AEP and multiple subsidiaries, many of which had no bargaining history with Local 1392. The master agreement included employee benefits for all 10 locals and the Respondents. In the circumstances here, I cannot conclude Local 1392's individual bargaining proposals constitute evidence of some type of waiver binding on all the other locals, nor do I find that was the intent of the parties when they agreed to negotiate a new master agreement on behalf of multiple locals and multiple AEP subsidiaries, which had not previously bargained with Local 1392.

Moreover, I do not find Local 1392's bargaining history shows a waiver of a right to bargain even for Local 1392. Rather, it shows over the years prior to the master agreement, Local 1392 made some proposals concerning benefits which were rejected by the participating employers. Those employers did not take the position to Local 1392 that it did not have the right to bargain about these matters. Rather, they just refused to accept Local 1392's proposals which were eventually dropped. The failure to incorporate a statutory right into a collective-bargaining agreement does not constitute a waiver of that right. Moreover, the fact that Local 1392 bargained with these employers over benefits for multiple contracts reveals that neither party considered there to be such a waiver. Similarly, the parties entered their first master agreement in 2009, and admittedly there was bargaining over benefits leading up to that agreement. In fact, Respondents as per the Unions' request inserted a layoff allowance benefit in the master agreement. The fact that the benefit differed from a prior layoff plan, and that the new plan was given its own new section under the benefits article is not determinative. In this regard, the prior layoff plan was under the same benefits article which Respondents argue gives it sanctuary to make unilateral changes. Moving the new plan to a different section of the same benefits article does not signify that the Unions waived their right to bargain over benefits. In fact, to the contrary they had just successfully engaged in such bargaining.

More to the point article X, section 1 of the master agreement is the provision upon which Respondents rely as well as the history of changes that have been made to benefits under that provision. First, unlike the contractual provision in *Courier-Journal*, supra, the provision in the parties' master agreement does not specifically link the changes to the benefit plans to those of nonbargaining unit employees. Rather, Respondents contends in its brief that since the early 1980s it has regularly made unilateral changes in its systemwide benefit plans including its comprehensive medical plans. It states some of the changes enhanced the plans others were administrative and some reduced or eliminated benefits. The ones that reduced or eliminated benefits included; increased employee medical plan contribution rates; increased monthly contribution rates under medical, dental and vision plans; increased medical plan deductibles; changing company paid life insurance to a flat $30,000 for all employees retiring after April 1, 2011, and altogether eliminating it for all employees hired or rehired on or after January 1, 2011; increasing employee percentage for copayment of nonpreferred prescriptions; and instituting monthly spousal and domestic partner surcharges for AEP medical plan coverage, urgent care and emergency room visits. It must be said first that Respondents submitted no documentary evidence supporting changes to benefits prior to the year 2001, and there was an assertion by Respondents' counsel when Respondents' summary of benefit changes was only admitted into evidence going back to 2001, that this was all Respondents needed to establish their case-in-chief. Second, Respondents through the testimony of their own witness admitted that prior to the elimination of retiree health care at issue here Respondents had never previously eliminated a complete medical benefit for a group of employees or retirees during the term of an agreement.

Respondents argued that in 2011 they eliminated a $30,000 life insurance policy for retirees. I do not find this one-time event to be 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. In this regard, Respondents' 2012 enrollment guide for retirees and survivors under age 65 showed Respondents were offering retirees in that age group four medical plan options. The HMO option provided for no deductible for the plan participant, an annual medical annual out of pocket maximum for $2500 for the participant only and a $5000 maximum for their family. It provided no limit on preventive care, and $20 copays for routine office visits to name a few of the benefits listed. It did not list a maximum for employee or family coverage in the benefit summary. Dawson admitted that health insurance is far more expensive for Respondents per month for an individual than a $30,000 life insurance policy. Yet, Respondents were not only providing individual but family coverage for retirees' health insurance. I do not find the Unions failure to protest the one-time elimination of a $30,000 life insurance policy remotely related to their position in the current dispute over the elimination of retiree

health insurance for employees' hired after January 14, 2014. Even if I were to conclude it was related it was a one-time event and not sufficient to establish a past practice of the Union's acquiescence to the elimination of healthcare for a category of future retirees. Similarly, the Unions' acquiescence in routine annual changes in Respondents' benefit package where benefits were added, changed, and costs varied constitutes acquiescence in minor changes as opposed to the wholesale elimination of a major benefit such as the one in dispute here. Thus, I do not find that Respondents have established that its unilateral elimination of retiree health care for employees hired after January 1, 2014, was a continuation of the status quo. See *FirstEnergy Generation Corp.*, 358 NLRB No. 96 (2012); *Caterpillar, Inc.*, 355 NLRB 521, 523 (2010), enfd. mem. ___ F.3d ___, 2011 WL 2555757 (D.C. Cir. 2011); and *E. I. du Pont De Nemours & Co. v. NLRB*, 682 F.3d 65, 67–69 (D.C. Cir. 2012), where the court specifically noted that unilateral changes it found to be a continuation of past practice were similar in scope to those Du Pont had made in prior years. Here, I do not find Respondents elimination of retiree health care was similar in scope to its prior benefit changes.[7]

Next there is a dispute between the parties as to whether the master-collective bargaining agreement precluded or permitted Respondents' termination of this benefit. In *Georgia Power Co.*, 325 NLRB 420, 420–421 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999), the Board stated:

> Concerning the waiver issue, we note that waivers of statutory rights are not to be lightly inferred, but instead must be "clear and unmistakable."[6] Even when an employer relies on contract provisions in an attempt to show that a union has waived its right to bargain over an issue, either the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter.[7] Here, however, there is no relevant contract language.[8] The MOA does not refer to medical or life insurance benefits. And the "reservation of rights" language in the benefit plans, which reserves to the Respondent the right to amend or terminate the plans at any time, was never the subject of collective bargaining before the changes at issue were announced. In these circumstances, we cannot find that the Union clearly and unmistakably waived its right to bargain over the changes in post-retirement benefits for current employees.[9]

The Board made this finding although it imputed knowledge of the plans termination of rights language to the union, stating the written language of the plans had been in the union's possession, and the language had been included in the plans for many years. Id. at 421 fn. 9.

In *Amoco Chemical Co.*, 328 NLRB 1220 (1999), enf. denied sub nom. *BP Amoco Corp. v. NLRB*, 217 F.3d 869 (D.C. Cir. 2000), the relevant provision in the collective-bargaining agreement stated that "the following Employee Benefit Plans are generally set forth in the current Benefits Plan Booklets," and listed eight named plans including a savings, group life insurance, retirement, dental, and health benefit plan at issue in the case, the terms of which applied to both current and retired employees. In refusing to find the reservation of rights provisions contained in the relevant benefit plans were incorporated the collective-bargaining agreements, the Board stated:

> As in *Georgia Power*, we find that the reservation-of-rights language relied on by the Respondents does not meet the standard for a clear and unmistakable waiver of the Unions' right to bargain about the AMP. The local contracts do not specifically incorporate the AMP documents let alone the reservation-of-rights language from the AMP summary plan description. Indeed, only three of the five local contracts even mention the summary plan as a source for general description of the AMP's benefits. [FN5] Furthermore, there is no evidence that the parties have ever bargained about the reservation-of-rights language at the local or national level.[6] There is scant evidence that union officials were even aware of this language.
>
> Obviously, the AMP summary plan description is a primary reference for identifying the medical insurance benefits that the Respondent has contractually agreed to provide unit employees. The record here will not, however, support finding that the entirety of this non-negotiated corporate document was part of the parties' collective-bargaining agreement and so establishes the Unions' waiver of their statutory right to so bargain about the AMP benefits and, during the term of a contract, to insist on the Respondents' maintenance of current benefits unless the Unions consent to change them. Under the circumstances, we conclude that the Respondents' implementation of changes in the AMP benefits of active employees without the Unions' consent violated Section 8(a)(5) of the Act.

In *BP Amoco Corp. v. NLRB*, 217 F.3d 869, 873–875 (D.C. Cir. 2000), the court in refusing to enforce the Board's order took a different view. The court stated, that two of the agreements recite that, "that specified 'Employee Benefit Plans,' including the 'Amoco Medical Plan,' 'are generally set forth in the current Benefits Plan Booklet[s],' although 'it is understood that certain provisions in the Booklet have been superseded by negotiation between the parties.'[3] The Wood River, Illinois, and Yorktown, Virginia facilities' agreements provide: 'Benefit plans for the Company . . . will continue in force during the life of this Agreement with the understanding that these Plans may be bargained upon but will not be subject to arbitration.' In each case, the quoted language explicitly makes the plans a part of the collective-bargaining agreement, subject to specific, negotiated variations. The Board itself acknowledged as much when it stated 'the AMP summary plan description is a *primary*

[7] Most of the annual benefit changes upon which Respondents rely were announced in the fall to take effect January 1 of the upcoming year. Here, Respondents announced the elimination of retiree health care in November 2012, for employees hired or rehired after January 1, 2014. Thus, the timing of the announcement of this benefit change does not coincide with any past practice that employees could reasonably expect. Moreover, it lends itself to the conclusion that the announcement was timed to preserve an argument that the class of individuals affected were future employees and therefore this was a permissive subject of bargaining. An argument I have previously rejected.

reference for identifying the medical insurance benefits that the Respondent has *contractually* agreed to provide unit employees.'" The court went on to state that, "Because the agreements incorporated the AMP generally, they incorporated all of the plan's provisions not expressly superseded in the agreements, including the reservation of rights clause." The court stated, "In sum, the express incorporation of the AMP into the collective bargaining agreements made the plan's reservation of rights clause a part of each agreement and thereby authorized BP Amoco to unilaterally modify the AMP without the Union's consent."

In *Southern Nuclear Operating Co.,* 348 NLRB 1344, 1254 (2006), enfd. in part, vacated in part 524 F.3d 1350 (D.C. Cir. 2008), the Board approved the judge's finding that the parties did not incorporate benefit plans and their reservation of rights language to amend the applicable plans in their collective-bargaining agreement. There it was stated:

> When, as here, plan descriptions or summary plan descriptions, are the primary reference for identifying the medical or life insurance benefits that the employers have agreed to provide, those plans or summary plan descriptions are not incorporated into the collective-bargaining agreements absent specific agreement to that effect (*Amoco Chemical Co.*, 328 NLRB 1220 (1999)). I find there was no specific agreement to incorporate the plan or summary plan documents into the collective-bargaining agreement.
>
> Moreover, besides not agreeing to incorporate plans into their agreement Local 796 did not waive its right to bargain over changes in plans. Under applicable law, there must be "clear and unmistakable relinquishment of that right (to negotiate) (*Trojan Yacht*, 319 NLRB 741 (1995)).

In *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1359–1360 (D.C. Cir. 2008), the court again disagreed with the Board's analysis stating as follows:

> Second, the Companies assert that the collective-bargaining agreements incorporated the reservation-of-rights clauses by express reference. Here, the Companies are on firmer ground. In *BP Amoco Corp. v. NLRB*, we held that when a collective-bargaining agreement expressly incorporates a benefit plan, all the plan's clauses, including any reservation-of-rights clauses, are also incorporated into the agreement, "thereby authoriz[ing] [the employer] to unilaterally modify the [plan] without the Union's consent." 217 F.3d 869, 874 (D.C.Cir. 2000). In that case, we were faced with several agreements and were asked to decide whether they incorporated benefit plans by reference. Some of the agreements referred to "Employee Benefit Plans" and "Benefits Plan Booklets." Id. at 873.[8] Others referred to "[b]enefit plans for the Company." *Id.* at 873.[9] We concluded that "[i]n each case, the quoted language explicitly makes the plans a part of the collective bargaining agreement." Id. at 874. Because the plans contained reservation-of-rights clauses that allowed the employer to make unilateral changes, it was free to do so. Id.

With *BP Amoco* in mind, we consider the Companies' collective-bargaining agreements one by one:

APC: APC's collective-bargaining agreement identifies the health-care plans offered to its employees. Under *BP Amoco*, such direct references incorporate the plans. APC could unilaterally modify its health-care plans because they included a reservation-of-rights clause stating that "[t]he company has the right and may terminate or amend this Plan in whole or in part, including but not limited to any Benefit Option described herein."

[8] Specifically, they "recite[d] that specified Employee Benefit Plans, including the Amoco Medical Plan, are generally set forth in the current Benefits Plan Booklets." 217 F.3d at 873 (quotation marks omitted).

[9]. Specifically, they stated that "[b]enefit plans for the Company . . . will continue in force during the life of this Agreement with the understanding that these Plans may be bargained upon but will not be subject to arbitration." 217 F.3d at 873–74 (quotation marks omitted).

However, see *Bender v. Newell Window Furnishings, Inc,* 681 F3d 253, 264–265 (6th Cir. 2012), a case involving LMRA and ERISA claims, where the court held that a provision in collective-bargaining agreements stating that benefits pertaining to a retiree health insurance benefit program are set forth in a booklet and policy a copy of which was available to employees did not incorporate reservation of rights language from the summary plan description in the collective-bargaining agreements. The court noted that the collective-bargaining agreements referenced the book and policy but did not include any specific language of incorporation.

In *Omaha World-Herald*, 357 NLRB No. 156, slip op. at 2 fns. 5, 6 (2011), the Board majority quoted collective-bargaining agreement language that stated "all employees are eligible to participate in the retirement plan" which the parties conceded was the employer's unilaterally created pension plan. The Board majority stated the Board has previously held that similar contractual language providing that unit employees would participate in the company's benefits programs on the same basis as all other employees was too ambiguous, standing alone, to demonstrate a union's assent to an employer's right to make unilateral, companywide changes to benefits plans affecting represented employees, even when the plan documents contained a reservation of rights clause. The Board majority at fn. 5 cited the following case law in support of this assertion:

> [5] See, e.g., *Rockford Manor Care Facility*, 279 NLRB 1170, 1172–1173 (1986) (no waiver where agreement provided that unit employees "will participate in the [c]ompany's [benefits] programs on the same basis as other employee members of the group."); *Trojan Yacht*, 319 NLRB 741, 742–743 fn. 5 (1995) (no waiver where agreement provided that benefits "will be maintained in the same manner and to the same extent such plans are generally made available and administered on a corporate basis").

In *Omaha World-Herald,* supra, the Board reaffirmed its prior holdings in *Southern Nuclear Operating Co.*, 348 NLRB 1344, 1352 (2006), enfd. in part, vacated in part 524 F.3d 1350 (D.C. Cir. 2008); and it *Amoco Chemical Co.*, 328 NLRB 1220, 1222 fn. 6 (1999), enf. denied 217 F.3d 869 (D.C. Cir. 2000). In this

regard, in *Omaha World-Herald*, supra at 3 fns. 8, 9 it was stated:

> Moreover, the Board has previously held that a union's acquiescence in prior unilateral changes-even together with reservation of rights language similar to that in the instant case-was insufficient to establish a waiver. See, e.g., *Southern Nuclear Operating Co.*, 348 NLRB 1344, 1352 (2006), enfd. in part, vacated in part 524 F.3d 1350 (D.C. Cir. 2008); *Amoco Chemical Co.*, 328 NLRB 1220, 1222 fn. 6 (1999), enf. denied 217 F.3d 869 (D.C. Cir. 2000). . . .
>
> . . . .
>
> See, e.g., *Amoco*, supra (reservation of rights provision did not establish waiver where simply mentioned in collective-bargaining agreements as general source of information about plans; unlike this case there were no terms obligating employer to "discuss and explain changes" or explaining that disputes over the plan were excluded from grievance arbitration); *Southern Nuclear*, supra at 1356 (reservation of rights provision did not establish waiver where collective-bargaining agreements did not even mention plan at issue; recognizing, however, that language stating employer "shall provide a comprehensive group major medical insurance program-covering employees who comply with the eligibility and qualification requirements" "appears to constitute a waiver" with respect to that plan).

The Board in *Omaha World-Herald*, supra, went on to state that the Board has held that the mere exclusion of a subject from a contractual grievance/arbitration system does not constitute a clear and unmistakable waiver of the union's right to bargain over the subject. The Board stated as follows at slip op. at 2:

> [6] See, e.g., *Bonnell/Tredegar Industries*, 313 NLRB 789, 791 (1994), enfd. 46 F.3d 339 (4th Cir. 1995) (parties' "exclusion of certain benefit provisions from the grievance-arbitration procedure is open to any number of possible inferences, including the likelihood that the parties simply preferred to resolve disputes over these subjects in other forums").

Yet, in *Omaha World-Herald*, supra, slip op. at 2–3, the Board majority citing a combination of factors concluded that the union there had waived the right to bargain over certain changes to the pension plan in effect there. The Board explained the contractual reference to an existing plan, and the governing documents which contain a reservation-of-rights clause were not the only evidence of waiver. The Board stated:

> Although the Board has held that the mere exclusion of a subject from a contractual grievance/arbitration system does not constitute a clear and unmistakable waiver of a union's right to bargain concerning the subject,[6] the contract here goes further and explains that changes to the benefit plans are excluded from the grievance and arbitration procedure *because* the plans cover all employees, not simply represented ones. This explanation suggests that the Respondent was attempting to preserve its authority to make uniform changes in the plans as they applied to both represented and unrepresented employees.
>
> Third, the collective-bargaining agreement states that the Respondent "will advise the Union of proposed changes [to the pension plan] and meet to discuss and explain changes if requested." The judge found that this clause alone was insufficient to constitute a clear and unmistakable waiver. In combination with the language discussed above, however, the clause supports such a finding. It is surely significant that the parties chose the terms "discuss" and "explain" rather than "bargain over." Indeed, had the parties intended to convey a bargaining obligation with respect to changes to the pension plan, they likely would have used the term "bargain," as they did elsewhere in the agreement.[7] For that matter, if the Union had not agreed to waive its statutory right to bargain about changes to the plan, there was no need to include any language about a lesser contractual right.
>
> In our view, the foregoing factors establish waiver in this case and set it apart from other Board decisions in which no clear and unmistakable waiver was found. The contract, including article 28, was in effect when the change to the pension plan occurred (in contrast to the change to the 401(k) plan, discussed below). The parties agreed that employees would be covered by a unilaterally established pension plan covering all the Respondent's employees, both unit and nonunit. The agreement did not describe the pension plan, which could only be understood by reference to the plan documents and existing practice. The plan documents contained express reservation of rights language permitting the Respondent to unilaterally change the plan. The parties agreed that changes in the plan were excluded from the contractual grievance/arbitration system. The parties agreed to that exclusion on the express ground that the plan covered unit and nonunit employees. Finally, the parties agreed that the Respondent would advise the Union and, upon request, "meet and discuss" changes to the plan, rather than bargain over them. In combination, we conclude that these facts demonstrate that the Union clearly and unmistakably waived its right to bargain about changes to the pension plan during the contract's term.
>
> . . . .
>
> Corroborating our finding of waiver is the fact that the Union did not object to a similar, prior unilateral change by the Respondent during the term of the contract. Specifically, in 2005, the Respondent modified its pension plan by removing all employees under age 50 from the plan. The Union neither objected to the change nor requested bargaining. The Board has previously held that a union's acquiescence in an employer's prior unilateral changes, without more, generally does not constitute a waiver of the right to bargain over such changes for all time.[8] However, this prior uncontested unilateral change does suggest that past practice under article 28 has been consistent with a waiver of the right to bargain over modifications to the pension plan.

I find the instant case is distinguishable from *Omaha World-Herald*, supra, and that neither the contract language nor the

past practice here support a finding that the Unions have waived their right to bargain over the elimination of retiree health insurance benefits for a certain category of employees. More than that, I find, as urged by counsel for the Acting General Counsel, that the contract language supports a finding that those benefits were guaranteed for the life of the contract, and that by removing those benefits without the Unions' consent Respondents have unilaterally modified the contract in violation of Section 8(a)(5) of the Act.

The contract language at issue here provides that:

> Article X, section 1 provides:
>
> > Employees shall be permitted to participate in the American Electric Power System Comprehensive Dental Plan, Comprehensive Medical Plan [or alternate medical coverage such as the Health Maintenance Organization (HMO) or Preferred Provider Organization (PPO) should such be made available by the Company], Spending Accounts, Group Accidental Death and Dismemberment Insurance Plan, Group Life Insurance Plan, Dependent Life Insurance Plan, Dependent Care Plan, Long Term Care Plan, Long Term Disability Plan, Retirement Plan, Retirement Savings Plan and Sick Pay Plan.

By correspondence dated December 4 and 26, 2012, in response to the Unions' grievance over the change in retiree health benefits, Respondents took the position that retiree health insurance was covered under article X, section 1 under the term "Comprehensive Medical Plan." However, the cited article makes no reference to the underlying plan documents, and does not specifically incorporate those documents into the collective-bargaining agreement. Moreover, although Respondents drew testimony concerning the negotiation of the parties two master collective-bargaining agreements there was no claim that the reservation of rights language contained in the plan documents was ever discussed with the Unions, or that the Unions agreed to the inclusion of such language to become part of said master agreements. Thus, there was no evidence that a waiver to bargain over the changes in these benefits was discussed, explored, or otherwise specifically granted by the contract language. See *Georgia Power Co.*, 325 NLRB 420, 420–421 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999). The mere reference to the plan does not incorporate plan documents into the collective bargaining agreement. See *Bender v. Newell Window Furnishings, Inc.*, 681 F3d 253, 264–265 (6th Cir. 2012); *Omaha World-Herald*, 357 NLRB No. 156 (2011); *Southern Nuclear Operating Co.*, 348 NLRB 1344, 1254 (2006), enfd. in part, vacated in part 524 F.3d 1350 (D.C. Cir. 2008); *Amoco Chemical Co.*, 328 NLRB 1220 (1999), enf. denied sub nom. 217 F.3d 869 (D.C. Cir. 2000), *Georgia Power Co.*, 325 NLRB 420, 420-421 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999); and *Trojan Yacht*, 319 NLRB 741 (1995). Similarly, bare language excluding the benefit plans from the collective-bargaining grievance procedure does not serve to incorporate the reservation of rights language into the collective-bargaining agreement. See *Omaha World-Herald*, supra; and *Bonnell/Tredegar Industries*, 313 NLRB 789, 791 (1994), enfd. 46 F.3d 339 (4th Cir. 1995).

The current case is distinguishable from the factors that led the Board majority to find a waiver in *Omaha World-Herald*, supra. There the applicable collective-bargaining agreement went further than merely excluding the pension plan from the grievance procedure by stating that the benefit plans are excluded from the grievance and arbitration procedure because the plans cover all employees, not simply represented ones. No such language is included in the collective-bargaining agreement in the current case. Moreover, in *Omaha World-Herald* the collective-bargaining agreement only required the employer to advise the union of proposed changes and to meet and discuss them with the union if requested. The Board concluded that the usage of the term "meet and discuss" as opposed to bargain with the union signified that the union was aware, as per the collective-bargaining agreement, that there was no obligation to bargain. There is no such language qualifying the Unions' right to bargain over benefit plan changes in the parties' master agreement here. Finally, the Board majority noted in *Omaha World-Herald* there had been a recent significant change to the pension plan to which the union their did not object signifying the union there was aware it had waived its right to bargain. I do not find a similar bargaining history here, as Respondents can point to no recent change to employees' coverage for retiree health insurance similar to the elimination of the benefit for a whole category of employees. The Union's acquiescence in the prior elimination of a life insurance benefit for certain retirees involved a different benefit plan, and for a benefit much different in scope and cost. For the reasons previously stated, I do not find that it serves as evidence of waiver for the elimination of retiree health insurance.

Finally, I have concluded, as urged by counsel for the Acting General Counsel, that the master agreement, by its terms, ensures the eligibility of employees to participate in the retiree health insurance. The agreement defines employees as those hired or hereafter hired. It states employees shall be permitted to participate in the comprehensive medical plan which Respondents concede includes retiree health insurance. The agreement at article III, section 2 states it will supersede all prior agreements and understandings, oral or written, express or implied between the parties, shall govern the entire relationship and be the sole source of any rights or claims. It states the parties for the life of the agreement waive any rights to request to negotiate or to negotiate or to bargain with respect to any matters contained in this agreement. Since the agreement by its terms was complete and it made no specific reference to the incorporation of benefit plan reservation of rights language for the reasons set for above, and by the terms of the agreement itself I find the plan reservation language was excluded from the collective-bargaining agreement. I also find by the terms of the agreement employees were guaranteed participation in the retiree health insurance plan, and Respondents violated Section 8(a)(5), (1) and 8(d) of the Act by their unilateral action in terminating that benefit for a whole category of employees without the Unions' consent. In this regard, I conclude Respondent lacked a sound arguable basis for its interpretation of the contract and, accordingly, modified the terms of the contract in

violation of Section 8(d) of the Act. See *Walt Disney Co.*, 359 NLRB No. 73 (2013).[8]

CONCLUSIONS OF LAW

1. American Electric Power (AEP) 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 (collectively called Respondents) admit that they are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act; and that the International Brotherhood of Electrical Workers, System Council U-9 and Locals 329, 386, 696, 738, 876, 934, 978, 1002, 1392, and 1466, AFL–CIO (collectively the Unions) are labor organizations within the meaning of Section 2(5) of the Act.

2. The labor organizations named in paragraph 1 above represent bargaining unit employees respectively described in article I, section 1 of the parties' current master agreement with effective dates of March 12, 2012, to February 16, 2015, and in the "Union Representation" and "Unit Defined" articles and sections contained in the parties' local agreements.

3. By on or about November 27, 2012, failing and refusing to keep in effect all terms of the parties' master collective-bargaining agreement by eliminating retiree medical benefits for all employees hired after January 1, 2014, without the Union's consent, the Respondents violated Section 8(a)(5), (1) and 8(d) of the Act by modifying the parties' master collective-bargaining agreement.[9]

4. The above-unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. With respect to the Respondents' unlawful elimination of retiree medical benefits for all employees hired after January 1, 2014, I shall recommend that Respondents be ordered to restore the status quo ante by reinstating those benefits to employees hired after that date who are within bargaining units represented by the Unions and that Respondents continue in effect all terms and conditions of employment contained in the collective-bargaining agreements with the Unions covering its employees, absent consent by the Unions to modify those agreements. I shall also recommend that Respondents make all employees within the represented bargaining units whole for any loss of earnings and/or benefits suffered as a result of the Respondent's unlawful actions. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In addition, the decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012), shall be applied by Respondents in compensating affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and the filing of a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, it is hereby ordered that Respondents American Electric Power (AEP) 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, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating retirees' medical insurance for bargaining unit employees hired after January 1, 2014, without the consent of the Unions.

(b) Failing to continue in effect the terms and conditions of their March 12, 2012, to February 16, 2015 master collective-bargaining agreement with the Unions by such acts as eliminating retiree health insurance for employees hired after January 1, 2014, without the consent of the Unions.

[8] I find this case distinguishable from the court's analysis in *BP Amoco Corp. v. NLRB*, 217 F.3d 869, 873–875, 342 (D.C. Cir. 2000); and *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1359–1360 (D.C. Cir. 2008), because the collective-bargaining agreement guarantees employee participation in the benefit which the employer unilaterally eliminated; and because the collective-bargaining agreement excludes other agreements or understandings, which I have concluded includes the plan reservation of rights language; which is also excluded from the agreement under consistent Board precedent, which I am obliged to follow, and for which I agree. I have reached this result relying on both contractual interpretation and waiver analysis as set forth above. I find *E. I du Pont De Nemours v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012), cited by Respondents does not to require a different result. Du Pont dealt with a unilateral modification of health care benefits following the expiration of a collective-bargaining agreement. The court held the modifications were consistent with past practice in that they were similar in scope to changes Du Pont had made in the past, and that Du Pont's discretion was limited by the terms of the reservation of rights clause in the Beneflex plan documents which permitted changes only during the annual enrollment period. The court also noted in Du Pont that each CBA provided for employees to participate in Beneflex "subject to the terms and conditions" of the plan. Such incorporation language is not included in the parties' master agreement here, the change was not made during the annual enrollment period, and I have found that the nature of the change in terms of timing and scope was not supported by the parties' past practice.

[9] The complaint did not specifically list Sec. 8(d) of the Act, but the pleadings establish the Acting General Counsel was arguing an unlawful mid-term contract modification by Respondents' actions. See *Walt Disney Co.*, 359 NLRB No. 73 (2013).

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

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

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

(a) Restore retiree health insurance for bargaining unit employees represented by the Unions who are hired after January 1, 2014, and continue in effect all of the terms and conditions of employment contained in Respondents' 2012 to 2015 master collective-bargaining agreement with the Unions.

(b) Make whole, with interest, any employee hired on or after January 1, 2014, who loses benefits as a result of Respondents unlawful termination of retiree health benefits for the described employees in the manner set forth in the remedy section of the this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay and/or other compensation due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities owned and/or operated by American Electric Power (AEP) 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 (collective the Respondents) where bargaining unit members represented by the International Brotherhood of Electrical Workers, System Council U-9 and Locals 329, 386, 696, 738, 876, 934, 978, 1002, 1392, and 1466, AFL–CIO (collectively the Unions) are employed or visit as part of their employment, copies of the attached notices marked Appendix A through H, as required for each company listed in the notice.[11] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondents' authorized representative, shall be posted by each Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent(s) customarily communicate with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents, jointly or individually, have gone out of business or closed the facility involved in these proceedings, the company or companies as applicable shall duplicate and mail, at their own expense, a copy of the notice to all current former bargaining unit employees employed by said company or companies at any time since November 27, 2012.

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

Dated, Washington, D.C. July 31, 2013

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate retirees medical insurance for bargaining unit employees hired after January 1, 2014, who are represented by the International Brotherhood of Electrical Workers, System Council U-9 and/or any of the following IBEW Locals 329, 386, 696, 738, 876, 934, 978, 1002, 1392, and 1466, AFL–CIO (collectively the Unions), without the consent of the Unions.

WE WILL NOT fail to continue in effect the terms and conditions of the March 12, 2012, to February 16, 2015 master collective-bargaining agreement with the Unions by such acts as eliminating retiree health insurance for employees hired after January 1, 2014, without the consent of the Unions.

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

WE WILL rescind the elimination of retiree medical benefits announced on November 27, 2012, for IBEW represented employees hired after January 1, 2014, and notify the Unions and all IBEW bargaining unit employees in writing that we have done so.

WE WILL make whole, with interest, any IBEW bargaining unit employee hired on or after January 1, 2014, who loses benefits as a result of our termination of their retiree health benefits in the manner described in the Board's decision.

AMERICAN ELECTRIC POWER

[11] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate retirees medical insurance for bargaining unit employees hired after January 1, 2014, who are represented by the International Brotherhood of Electrical Workers, System Council U-9 and/or any of the following IBEW Locals 329, 386, 696, 738, 876, 934, 978, 1002, 1392, and 1466, AFL–CIO (collectively the Unions), without the consent of the Unions.

WE WILL NOT fail to continue in effect the terms and conditions of the March 12, 2012, to February 16, 2015 master collective-bargaining agreement with the Unions by such acts as eliminating retiree health insurance for employees hired after January 1, 2014, without the consent of the Union.

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

WE WILL rescind the elimination of retiree medical benefits announced on November 27, 2012, for IBEW represented employees hired after January 1, 2014, and notify the Unions and all IBEW bargaining unit employees in writing that we have done so.

WE WILL make whole, with interest, any IBEW bargaining unit employee hired on or after January 1, 2014, who loses benefits as a result of our termination of their retiree health benefits in the manner described in the Board's decision.

APPALACHIAN POWER CO.

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate retirees medical insurance for bargaining unit employees hired after January 1, 2014, who are represented by the International Brotherhood of Electrical Workers, System Council U-9 and/or any of the following IBEW Locals 329, 386, 696, 738, 876, 934, 978, 1002, 1392, and 1466, AFL–CIO (collectively the Unions), without the consent of the Unions.

WE WILL NOT fail to continue in effect the terms and conditions of the March 12, 2012, to February 16, 2015 master collective-bargaining agreement with the Unions by such acts as eliminating retiree health insurance for employees hired after January 1, 2014, without the consent of the Union.

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

WE WILL rescind the elimination of retiree medical benefits announced on November 27, 2012, for IBEW represented employees hired after January 1, 2014, and notify the Unions and all IBEW bargaining unit employees in writing that we have done so.

WE WILL make whole, with interest, any IBEW bargaining unit employee hired on or after January 1, 2014, who loses benefits as a result of our termination of their retiree health benefits in the manner described in the Board's decision.

INDIANA MICHIGAN POWER CO.

APPENDIX D

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate retirees medical insurance for bargaining unit employees hired after January 1, 2014, who are represented by the International Brotherhood of Electrical Workers, System Council U-9 and/or any of the following IBEW Locals 329, 386, 696, 738, 876, 934, 978, 1002, 1392, and 1466, AFL–CIO (collectively the Unions), without the consent of the Unions.

WE WILL NOT fail to continue in effect the terms and conditions of the March 12, 2012, to February 16, 2015 master collective-bargaining agreement with the Unions by such acts as eliminating retiree health insurance for employees hired after January 1, 2014, without the consent of the Union.

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

WE WILL rescind the elimination of retiree medical benefits announced on November 27, 2012, for IBEW represented employees hired after January 1, 2014, and notify the Unions and all IBEW bargaining unit employees in writing that we have done so.

WE WILL make whole, with interest, any IBEW bargaining unit employee hired on or after January 1, 2014, who loses benefits as a result of our termination of their retiree health benefits in the manner described in the Board's decision.

KENTUCKY POWER CO.

APPENDIX E

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate retirees medical insurance for bargaining unit employees hired after January 1, 2014, who are represented by the International Brotherhood of Electrical Workers, System Council U-9 and/or any of the following IBEW Locals 329, 386, 696, 738, 876, 934, 978, 1002, 1392, and 1466, AFL–CIO (collectively the Unions), without the consent of the Unions.

WE WILL NOT fail to continue in effect the terms and conditions of the March 12, 2012, to February 16, 2015 master collective-bargaining agreement with the Unions by such acts as eliminating retiree health insurance for employees hired after January 1, 2014, without the consent of the Union.

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

WE WILL rescind the elimination of retiree medical benefits announced on November 27, 2012, for IBEW represented employees hired after January 1, 2014, and notify the Unions and all IBEW bargaining unit employees in writing that we have done so.

WE WILL make whole, with interest, any IBEW bargaining unit employee hired on or after January 1, 2014, who loses benefits as a result of our termination of their retiree health benefits in the manner described in the Board's decision.

KINGSPORT POWER CO.

APPENDIX F

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate retirees medical insurance for bargaining unit employees hired after January 1, 2014, who are represented by the International Brotherhood of Electrical Workers, System Council U-9 and/or any of the following IBEW Locals 329, 386, 696, 738, 876, 934, 978, 1002, 1392, and 1466, AFL–CIO (collectively the Unions), without the consent of the Unions.

WE WILL NOT fail to continue in effect the terms and conditions of the March 12, 2012, to February 16, 2015 master collective-bargaining agreement with the Unions by such acts as eliminating retiree health insurance for employees hired after January 1, 2014, without the consent of the Union.

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

WE WILL rescind the elimination of retiree medical benefits announced on November 27, 2012, for IBEW represented employees hired after January 1, 2014, and notify the Unions and all IBEW bargaining unit employees in writing that we have done so.

WE WILL make whole, with interest, any IBEW bargaining unit employee hired on or after January 1, 2014, who loses benefits as a result of our termination of their retiree health benefits in the manner described in the Board's decision.

OHIO POWER CO.

APPENDIX G

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate retirees medical insurance for bargaining unit employees hired after January 1, 2014, who are represented by the International Brotherhood of Electrical Workers, System Council U-9 and/or any of the following IBEW Locals 329, 386, 696, 738, 876, 934, 978, 1002, 1392, and 1466, AFL–CIO (collectively the Unions), without the consent of the Unions.

WE WILL NOT fail to continue in effect the terms and conditions of the March 12, 2012, to February 16, 2015 master collective-bargaining agreement with the Unions by such acts as eliminating retiree health insurance for employees hired after January 1, 2014, without the consent of the Union.

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

WE WILL rescind the elimination of retiree medical benefits announced on November 27, 2012, for IBEW represented employees hired after January 1, 2014, and notify the Unions and all IBEW bargaining unit employees in writing that we have done so.

WE WILL make whole, with interest, any IBEW bargaining unit employee hired on or after January 1, 2014, who lose benefits as a result of our termination of their retiree health benefits in the manner described in the Board's decision.

PUBLIC SERVICE POWER CO. OF OKLAHOMA

APPENDIX H

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate retirees medical insurance for bargaining unit employees hired after January 1, 2014, who are represented by the International Brotherhood of Electrical Workers, System Council U-9 and/or any of the following IBEW Locals 329, 386, 696, 738, 876, 934, 978, 1002, 1392, and 1466, AFL–CIO (collectively the Unions), without the consent of the Unions.

WE WILL NOT fail to continue in effect the terms and conditions of the March 12, 2012, to February 16, 2015 master collective-bargaining agreement with the Unions by such acts as eliminating retiree health insurance for employees hired after January 1, 2014, without the consent of the Union.

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

WE WILL rescind the elimination of retiree medical benefits announced on November 27, 2012, for IBEW represented employees hired after January 1, 2014, and notify the Unions and all IBEW bargaining unit employees in writing that we have done so.

WE WILL make whole, with interest, any IBEW bargaining unit employee hired on or after January 1, 2014, who loses benefits as a result of our termination of their retiree health benefits in the manner described in the Board's decision.

SOUTHWESTERN ELECTRIC POWER CO.