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MODIFICATION OF PENSION FUND CONTRIBUTIONS DURING THE TERM OF A COLLECTIVE AGREEMENT: THE 1987 EMPLOYMENT AND ECONOMIC SECURITY PACT

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I. INTRODUCTION

On February 20, 1987, the chief executives of the United Mine Workers of America (UMWA) and of one of the nation's leading coal producers came together for a remarkable meeting in Charleston, West Virginia. Before a handful of reporters, Richard L. Trumka of the UMWA and S.O. "Bud" Ogden of the Island Creek Corp. announced a historic labor agreement. That agreement, known as the 1987 Employment and Economic Security Pact, or "EESP," granted unprecedented job security protections to bargaining units represented by the UMWA. In exchange, Island Creek received a significant reduction in the rate of required contributions to the industry's 1950 Pension Fund and a promise by the Union not to strike the company during negotiations for a 1988 industry-wide agreement.

The announcement of this agreement by two longtime adversaries in collective bargaining was remarkable in a number of respects. First, it appeared to reverse a previously deteriorating relationship between the Union and Island Creek and to signal a spirit of labor-management cooperation in the strife-ridden coal industry. Second, it represented a significant departure from the traditional pattern of

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multiemployer bargaining between the Union and the Bituminous Coal Operators Association (BCOA).¹

In addition, the UMWA-Island Creek EESP was a bold attempt by each side to address the consequences of a decline in the coal industry that has left both the Union and the organized producers reeling from sagging demand, overcapacity, and competition from nonunion coal and cheap oil.² The Union was willing to agree to reduced contributions to the 1950 Pension Fund, which covers mine workers who retired before 1976, because that fund was closed to new employees and was due by May 1987 to reach "full funding." It would thus be able to meet all of its currently negotiated benefit obligations out of current fund assets and income.³ Island Creek hoped that the resulting cost savings would allow it to compete more effectively in the coal and energy industry.

For its part, the Union was able to obtain significant commitments to job security for current and future Island Creek employees without sacrificing the benefits of any active mineworkers or jeopardizing the Fund's ability to meet its obligations to retirees.⁴ In addition, the agreement with Island Creek was to provide the Union with leverage and with a blueprint for its negotiations with other employers for a successor agreement to the 1984 National Bituminous Coal Wage Agreement (NBCWA).⁵

As such, it was clear that the agreement announced in Charleston would be the focus of much attention as the rest of the industry approached collective bargaining for a successor agreement to the

1. For a historical review of collective bargaining in the mining industry, see C. PERRY, *Collective Bargaining and the Decline of the United Mine Workers* (1984).

2. See *id.* at 7-24; McClure, *Energy Independence Through Increased Utilization of American Coal: Goal of the 98th Congress*, 86 W. VA. L. REV. 687, 687-89 (1984); *Weaker U.M.W.'s Hard Task*, N.Y. Times, Aug. 10, 1987, at D1, col. 3.

3. See *infra* notes 21-29 and accompanying text.

4. See *infra* notes 30-37 and accompanying text.

5. *UMW and Coal Producers Begin Talks; Job Security is Likely To Be Major Issue*, Wall St. J., Nov. 12, 1987, at 6, col. 2. Indeed, following the announcement of the UMWA-Island Creek EESP, the Union signed similar or identical agreements with a number of other coal operators. And in February, 1988, the UMWA and BCOA approved a successor agreement to the 1984 NBCWA that is similar in significant respects to the UMWA-Island Creek EESP. See *Mine Workers, Coal Producers Reach Tentative Pact Enhancing Job Security*, Wall St. J. Feb. 1, 1988, at 12, col. 1.

1984 NBCWA. Indeed, the Island Creek-UMWA EESP almost immediately became the center of a complex economic and legal battle within the industry. On one front of that battle, members of the BCOA, whose contracts required substantially higher pension contributions to the 1950 Pension Fund, announced that they would cease paying their contractual rate and pay only at the rate contained in the new Island Creek agreement.⁶ That announcement spawned lawsuits by the Union, the trustees of the UMWA Health and Retirement Funds, and the BCOA itself over the operators' obligation to continue contributions at the rate contained in their current contracts.⁷ At the same time, however, the fund trustees brought an action against Island Creek, the Union, and other operators that had signed EESP agreements seeking to void those agreements and to compel contributions by those employers at the higher rate contained in the 1984 NBCWA.⁸

Thus far, the fund trustees' efforts to undermine the vitality of the 1987 EESP agreements have been successfully resisted by the Union and by the companies that signed them. The success of these unprecedented agreements rests on a straightforward and funda-

6. *BCOA Members Will Stop 1950 Pension Fund Payments*, The Register/Herald, Apr. 7, 1987, at 1, col. 2.

7. On May 4, 1987, the Bituminous Coal Operations Association [hereinafter BCOA] brought an action against trustees of the 1950 Pension Fund in federal district court for the District of Columbia, seeking a declaratory judgment concerning the obligations of signatories to the 1984 National Bituminous Coal Wage Agreement [hereinafter NBCWA] to make contributions at the rate set in that agreement after the date on which the 1950 Fund was expected to reach "full funding." Bituminous Coal Operators' Ass'n, Inc. v. Connors, No. 87-1205 (D.D.C. filed May 4, 1987).

At the same time, the fund trustees brought a separate action against the BCOA and individual signatories to the 1984 NBCWA seeking a declaration, *inter alia*, that the operators were obligated under Section 515 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1145 (1982), to continue making contributions at the higher NBCWA rate for the life of that agreement. Connors v. Bituminous Coal Operators' Ass'n Inc., No. 87-1206 (D.D.C. filed May 4, 1987). Thereafter, on May 7, 1987, the Union filed its own lawsuit against both the BCOA and certain individual signatories to the 1984 NBCWA. UMWA v. Bituminous Coal Operators' Ass'n, Inc., No. 87-1238 (D.D.C. filed May 7, 1987).

These three cases were subsequently consolidated. On July 7, 1987, the Court granted the trustees' motion for summary judgment against the defendant signatories to the 1984 NBCWA, concluding that these companies were obligated to make contributions under the NBCWA for the life of that agreement.

8. Connors v. Island Creek Corp. No. 87-1210 (D.D.C. filed May 4, 1987). The Union and the employer signatories have filed joint motions to dismiss, and a decision on those motions is

mental legal principle. Although an employer has a binding obligation to make pension contributions at the rate specified in a current collective bargaining agreement, a union and employer remain absolutely free to terminate or modify their agreement during its term in a way that changes the rate of pension contributions required of the employer. This principle obtains even in cases where the modifications are made over the objection of the trustees administering the fund. Although fund trustees have broad authority to *administer* the fund and may reject employer contributions that adversely affect the fund's actuarial condition, in no event may they override a collectively bargained decision and *require* contributions at a rate not agreed to by the bargaining parties themselves.⁹

This article examines the vitality of this legal principle in the context of the 1987 EESP agreements. Part I of the article briefly describes the economic conditions in the industry that led the Union and employers such as Island Creek to deviate from the traditional system of multiemployer bargaining. Part II outlines the issues relating to the 1950 Pension Fund that made the Union willing to offer reduced contributions in exchange for job security protection. Part III describes the terms of the EESP agreement itself. Part IV then examines the legal issues in the litigation that ensued over these agreements. The article concludes that the legal principles underlying the EESP agreement are sound - they allow the parties to collective bargaining to react to often-dramatic industrial changes and to adequately protect the rights of pension beneficiaries and of fund trustees.

II. THE DECLINE OF MULTI-EMPLOYER BARGAINING THROUGH THE BCOA

The BCOA was formed in 1950 for the purpose of negotiating the National Bituminous Coal Wage Agreement with the UMWA. For more than 20 years following its formation, the BCOA was virtually an industry-wide multiemployer association whose members accounted for nearly the entire coal production capacity in the United

States.¹⁰ Despite the inexorable rise of non-BCOA and nonunion mining operations over the next 20 years, primarily in the western United States, the share of coal produced under agreement between the Union and BCOA operators remained as high as 70 percent by 1970.¹¹ Moreover, when the BCOA signed the 1981 NBCWA, it did so on behalf of some 145 coal companies, still the lion's share of the industry.¹²

When the Union and the BCOA opened negotiations for a 1988 agreement on November 12, 1987, however, the membership of the BCOA had dwindled to only 14 companies.¹³ The percentage of coal produced by BCOA employers had dropped to only about 40 percent.¹⁴ That precipitous decline has been accompanied by an equally dramatic drop in the UMWA's dues-paying membership from 144,000 in 1980 to only about 73,000 today.¹⁵

The relatively recent disintegration of the traditional multiemployer bargaining structure in the mining industry is attributable to several factors. The penetration of both foreign coal and nonunion coal into the domestic market has led to severe price competition among producers. In addition, excess capacity and a lower-than-anticipated growth in demand for coal have increased the economic pressure on the organized sector of the industry.¹⁶ These developments have undermined the value to union producers of the uniform labor costs that bargaining through the BCOA traditionally has offered.¹⁷

Moreover, there is a perception by many operators and by the UMWA itself that the BCOA is increasingly dominated by a few large producers whose long-term interests pose a serious threat to

10. C. PERRY, *supra* note 1, at 113.

11. *Id.*

12. 1981 NBCWA at 172-75.

13. *Mine Worker Negotiations Open Today*, Washington Post, Nov. 12, 1987, at A10, col. 1; WALL ST. J., *supra* note 5, at 6, col. 2.

14. C. PERRY, *supra* note 1, at 113.

15. N.Y. Times, *supra* note 2, at D1, col. 3.

16. See, e.g. Boyens, *Development of Foreign Coal By American Corporations*, 87 W. VA. L. REV. 567, 567-68 (1985); McClure, *supra* note 2, at 688; McAteer, *Coal Resource Development Toward a Rational Policy*, 86 W. VA. L. REV. 735, 735-37 (1984); WALL ST. J., *supra* note 5, at 6, col. 2.

17. See N.Y. Times, *supra* note 2, at D1, col. 3.

the Union and are adverse to, or at least not necessarily consistent with, those of the many smaller producers that traditionally have been part of the organization.¹⁸ In particular, the Union has been the victim in recent years of a significant contraction in available jobs as productivity within the industry continues to outstrip demand.¹⁹ The Union thus perceives as its central challenge in collective bargaining to achieve job security guarantees, a goal strongly opposed by the large producers that dominate the BCOA.²⁰ In sum, as the unionized coal companies have been subjected to increased price competition from abroad and from nonunion operators, and as the Union seeks to stem the tide toward increasing nonunion production, the pressure has grown upon them to seek collective bargaining solutions outside of the traditional BCOA structure.

III. FULL FUNDING OF THE 1950 PENSION FUND

Notwithstanding the relatively rapid withdrawal of coal operators from the BCOA after 1981, the national contract negotiated by that organization continued to set the standard for the unionized sector of the industry throughout the 1980s. For the most part, the employers that dropped out of the BCOA during that period, including Island Creek, simply signed "me too" agreements with the Union that were identical or nearly identical in all major respects to the current NBCWA.²¹ Thus, although by 1984 Island Creek and a substantial number of other coal operators were under separate contracts with the UMWA, those contracts, absent modification, committed the companies to the terms in the NBCWA for the duration of that agreement, until January 31, 1988.

The 1984 NBCWA set a rate of employer contributions to the 1950 Pension Plan of \$1.11 per ton.²² Beginning in 1986 and early

18. See N.Y. Times, *supra* note 2, at D1, col. 3; C. PERRY, *supra* note 1, at 113-33, 268.

19. Current estimates are that domestic demand for coal will have grown by 36.5 percent between 1984 and 1995, while productivity will have increased 43 percent. Under this scenario, the total number of jobs available to the Union will contract by 4.7 percent. N.Y. Times, *supra* note 2, at D1, col. 3.

20. *Id.*

21. See C. PERRY, *supra* note 1, at 113; Washington Post, *supra* note 13, at A10, col. 1.

22. 1984 NBCWA at 114.

1987, however, the Union found itself willing for the first time to strike bargains with certain employers by granting relief from the uniform pension contribution requirements established in the NBCWA. That willingness was based on the projection that by May 1987 the 1950 Pension Fund would be “fully funded”—*i.e.*, would be able to meet all of its currently negotiated benefit obligations out of current Fund assets and income, with no further contributions required.²³

The anticipated occurrence of full funding in the 1950 Pension Fund stood in marked contrast to the shaky funding status that historically has plagued the industry’s health and retirement funds. The UMWA and BCOA first established the industry funds in bargaining for the 1950 collective bargaining agreement. At that time, the pension and health benefits of all current and retired miners were paid out of a single fund, and the fund trustees determined the level of benefits to be paid on a year-to-year basis depending on the flow of contributions into the fund.²⁴

The existence of a single pension fund covering retired, current, and future miners, however, created great difficulties. The fund historically carried enormous unfunded liabilities. As a result, both UMWA and BCOA negotiators had been held hostage by the pension rolls of that fund and were forced to strike a difficult balance between funding pension benefits on the one hand, and wages and other terms of employment for current employees on the other.²⁵

In 1974, “because of their concerns about compliance with minimum funding standards”²⁶ imposed under ERISA and the actuarial condition of the single 1950 fund, the Union and the BCOA agreed to restructure the fund. Specifically, they replaced the single 1950 fund with two separate pension funds—the 1950 Pension Fund and the 1974 Pension Fund—and with two similarly denominated health

23. *Full Funding Imminent For UMWA 1950 Pension Trust*, UMWA News Release, Feb. 16, 1987.

24. See *UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562, 565 (1982).

25. This problem is discussed in a 1979 memorandum from Harry Huge, former chairman of the Board of Trustees of the UMWA Health and Retirement Funds, to the President’s Commission on Coal [hereinafter Huge Memorandum].

26. *Robinson*, 455 U.S. at 566.

funds.²⁷ Under this arrangement, all miners who retired prior to January 1, 1976 received pensions from the 1950 Fund; those who retired thereafter received pensions from the 1974 Fund.²⁸ In addition, the parties agreed that the amount of benefits, the eligibility requirements, and the level of contributions would be specified in their collective bargaining agreements.²⁹

The effect of the 1974 restructuring was, in effect, to create a closed 1950 Pension Fund, and to seal off liabilities to long-retired workers and permit those liabilities to be paid out of future employer contributions without creating additional liabilities through the participation in the fund of current or future employees. The 1950 Fund thereby became a problem with boundaries, and the obligations to pensioners in that Fund could be contained and met over time. By the time of full funding in May 1987, the UMWA was thus presented with bargaining flexibility it had not previously enjoyed. Full funding created the conditions necessary for the Union to achieve job security guarantees for current and future employees by trading a reduction in pension contributions for retired employees, without substantially sacrificing the interests of those employees or compromising their rights to promised benefits.

IV. THE TERMS OF THE 1987 EESP AGREEMENT

In the agreement between the UMWA and Island Creek that was announced in February 1987, the parties agreed that their 1984 contract "shall be amended to change the termination date of . . . January 31, 1988 to . . . the date of full funding of the UMWA 1950 Pension Trust."³⁰ The agreement further provided that, upon the termination of the 1984 Agreement, the parties would enter into a new collective bargaining agreement effective immediately, to be known as the EESP.³¹

27. *Id.*

28. *Id.*

29. *Id.*

30. 1987 Employment and Economic Security Pact between Island Creek Corp. and the United Mine Workers [hereinafter 1987 EESP].

31. *Id.*

Specifically, the 1987 EESP provided that, “[h]aving terminated the 1984 Agreement and thereby the Employer’s obligation to continue contributions into the 1950 Pension Trust post full-funding, the parties agree that . . . beginning the effective date of the 1987 EESP,”³² Island Creek would reduce its contributions to the 1950 Pension Fund from \$1.11 to \$0.25. The effect of that agreement was thus to release Island Creek from the previously agreed-upon rate of \$1.11 contained in the terminated Island Creek “me too” agreement.

In return, the Union received significant promises of job security for UMWA bargaining unit members. The EESP provided that available jobs at “any new or nonsignatory mining operations (including newly commenced or newly acquired)”³³ shall be offered first to laid-off bargaining unit employees under guidelines established in the 1984 NBCWA; if no laid-off employees are available, then active bargaining unit employees within the UMWA district and contiguous districts shall have transfer rights.³⁴

The EESP agreement provided further that lessees or licensees mining Island Creek coal properties shall make all offers of employment to laid-off bargaining unit employees; shall maintain the wages and other standards in the Island Creek-UMWA contract; and shall themselves be permitted, but not required, to become parties to the EESP agreement with the Union.³⁵ In addition to these job security provisions, the agreement contained a number of other provisions designed to improve the company’s productivity and cost competitiveness in the industry, and to facilitate and enhance the future collective bargaining relationship between Island Creek and the UMWA.³⁶

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Specifically, the EESP agreements signed by Island Creek and other operators contain provisions dealing with the procedure for determining whether the Union has obtained a majority showing of interest at any currently nonunion facilities, including provisions for employer neutrality in UMWA organizing efforts at these facilities; provisions calling for development of “education and communication” programs on the job in order to avoid labor-management confrontations; and provisions under which the signatory employers would agree to support the Union’s efforts to restore a centrally

Finally, the 1987 EESP provided for an expiration date of January 31, 1988, to coincide with the expiration of the 1984 NBCWA, and provided further that Island Creek and other signatories would agree to be bound by the industry-wide successor agreement to the NBCWA.³⁷ In the event a successor agreement could not be reached upon expiration of the 1984 NBCWA, the signatory employers agreed with the Union to extend the effective date of the EESP, on condition that the employers would make retroactive payment of any wage and benefit increases called for by the successor agreement.³⁸ In return for these commitments, the Union agreed that, in the event of a strike against the BCOA or any individual employer over bargaining for a successor NBCWA, the Union would not strike the EESP signatories.³⁹

V. THE LEGAL CHALLENGE TO THE 1987 EESP

Without question, the 1987 EESP was a major step for the UMWA, Island Creek, and the other signatory employers. As Island Creek and the UMWA stated in announcing their agreement, “[t]he increased job opportunities and economic security represented by the EESP go far beyond those contained in any collective-bargaining agreement in the industry, and can serve as a model for future contracts.”⁴⁰ Moreover, by providing Island Creek and the other EESP signatories with a significant cost advantage in the form of reduced pension contributions, and with a no-strike pledge unavailable to NBCWA signatories, the Union had achieved significant leverage in its efforts to win job security protections in bargaining over a successor national agreement.⁴¹

As one might have expected, however, both the BCOA and the trustees of the 1950 Pension Fund were unhappy with an agreement

administered health services card program in future collective bargaining negotiations. See 1987 EESP; Highlights of the Letter of Intent between the United Mine Workers of America and Island Creek Corp., Feb. 20, 1987 [hereinafter *Highlights of Letter of Intent*].

37. 1987 EESP.

38. *Id.*

39. *Id.*

40. *Highlights of Letter of Intent*, *supra* note 36.

41. See *supra* note 5.

that reduced the rate of pension contributions for some employers below that required of signatories to the NBCWA. In the *Connors* litigation, which challenged the 1987 EESP in federal court,⁴² the Fund trustees made two distinct arguments in opposition to the rights of the collective bargaining parties to change the rate of contributions midterm.

First, the trustees argued, based on common-law contract principles, that because the parties did not, in their original 1984 contracts, "reserve the power to modify the [agreement] insofar as it provide[s] for contributions of \$1.11 per ton,"⁴³ the Union and employers were without power to terminate or modify that agreement during its term. In support of that claim they further argued that, absent a reservation of an authority to modify in the parties' original agreement, the trustees had enforceable rights as third-party beneficiaries to continuing contributions at the \$1.11 rate for the full length of the original agreement.⁴⁴ Second, the trustees argued that the EESP's provision for reduced contributions was void because it was inconsistent with language in the Fund documents allegedly requiring contributions at the rate set in the current NBCWA.⁴⁵

It is important to note that the fund trustees have *not* made a claim that the EESP agreements in any way impermissibly affect the rights of retirees to earned benefits protected under ERISA.⁴⁶ Indeed, because the Fund is fully funded, there is no harm to the Fund's ability to pay all the benefits that have been promised to each and every retiree remaining in the Fund. In addition, there has been no claim that the collective bargaining parties have failed to have a meeting of the minds as to pension contributions in the 1987 EESP. Rather, it is readily apparent that both the Union and the signatory employers believe it is in their mutual interests to trade

42. See *supra* note 7.

43. *Island Creek Corp.*, Plaintiffs' Amended Complaint ¶ 15.

44. *Id.*

45. *Id.* at ¶¶ 16-20.

46. The Employee Retirement Income and Security Act of 1974 (ERISA), 29 U.S.C. § 1001-1045 (1974) protects the rights of pension fund participants to accrued and vested benefits earned as a result of credited service with employers participating in the Fund. As a general matter, however, ERISA does not circumscribe the rights of parties in collective bargaining to establish the rate of fund contributions to pay for benefits.

lower pension fund contributions for job security provisions sought by the Union. Thus, the trustees' objection to the EESP agreements, notwithstanding the agreement of the parties to the contrary, is essentially that the trustees are *themselves* entitled to contributions at the \$1.11 rate, at least through the expiration of the parties' original collective bargaining agreement. With those observations in mind, the trustees' precise arguments may be examined.

A. *The Third-Party Beneficiary or "Vested Rights" Theory*

The Supreme Court has made clear that the trustees of a jointly established employee benefit trust fund under Section 302 of the Labor Management Relations Act (LMRA)⁴⁷ "do not bargain . . . to set the terms of the employer-employee contract."⁴⁸ They therefore "can[not] require employer contributions not required by the original collectively bargained contract."⁴⁹ Rather, as a general matter "the [collective bargaining agreement] fixes the employer's contribution to the fund,"⁵⁰ and the rights and responsibilities of plan trustees are confined to administering the plan *in accordance* with the terms negotiated by the parties.⁵¹

Moreover, it is equally well established that collective bargaining parties, having once agreed on terms in a contract, are free "by joint action to modify, amend, and supplement their original collective bargaining agreement."⁵² This well-settled legal principle derives from federal labor policy mandating that unions and employers be free by mutual consent to respond to the changing realities of industrial life and to circumstances unforeseen at the time of their

47. 29 U.S.C. § 186 (1982).

48. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 336 (1981); *accord* *Professional Adm'rs Ltd. v. Kopper-Glo Fuel, Inc.*, 819 F.2d 639, 643 (6th Cir. 1987); *Central States, Southeast & Southwest Pension Fund v. Chicago-St. Louis Transport Co.*, 535 F. Supp. 476, 480 (N.D. Ill. 1982), *aff'd mem.*, 720 F.2d 681 (7th Cir. 1983).

49. *Amax Coal*, 453 U.S. at 336.

50. *Id.*

51. *Id.*; *Morse v. New York State Teamsters Conference Pension & Retirement Fund*, 580 F. Supp. 180, 187-88 (W.D.N.Y. 1983), *aff'd sub nom. Building Trades Employers Ass'n v. New York State Teamsters Conference Pension & Retirement Fund*, 761 F.2d 115 (2d Cir. 1985).

52. *Humphrey v. Moore*, 375 U.S. 335, 363 (1964) (Goldberg, J., concurring).

original agreement.⁵³ Thus, federal labor law protects with equal force not only the freedom of collective bargaining parties to negotiate terms in an initial contract or upon the scheduled expiration of a contract, but also the freedom to terminate or modify an agreement during its term.

Contrary to the position taken by the trustees in the litigation over the EESP, common-law principles governing the rights of "third-party beneficiaries" are not sufficient to overcome these principles, founded on federal law, protecting the freedom of parties in collective bargaining to alter their agreement during its term. As the Supreme Court long ago held, "[a] collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts."⁵⁴ Indeed, in other contexts the Supreme Court has specifically rejected the notion that common law rules governing third-party beneficiary contracts are applicable to labor agreements governed by federal law.⁵⁵ As noted above, the Court has forcefully stated that parties to a collective agreement generally are free to modify their contracts to affect prospectively the rights or benefits of employees or other third parties governed by those agreements.⁵⁶

Courts that have applied these principles have thus upheld the rights of parties to modify pension contribution rates and other non-

53. *Id.*; accord *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476, 489 (7th Cir.), cert. denied sub nom. *United Order of Am. Bricklayers & Stone Masons v. Waters*, 400 U.S. 911 (1970).

54. *Transportation-Communication Employees Union v. Union Pac. R.R. Co.*, 385 U.S. 157, 160-61 (1966).

55. See *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 371 n.11 (1984); *Lewis v. Benedict Coal Co.*, 361 U.S. 459, 468-69 (1960).

56. *Humphrey*, 375 U.S. at 353.

In addition, the common law of contracts itself, as set forth in the RESTATEMENT (SECOND) OF CONTRACTS, § 311(2)(1981), make clear that "the promisor and promisee retain power to discharge or modify the duty [to a third-party beneficiary] by subsequent agreement" in the absence of a specific restriction on the power to modify in the original agreement. *Id.* Thus, even the common law rule would not preclude midterm modification of the rate of pension contributions in a collective bargaining agreement.

Of course, the decisions of a labor organization in collective bargaining are always subject to the duty of fair representation under federal law. See, e.g., *Vaca v. Sipes*, 386 U.S. 171 (1967). Employees are thus protected against bargaining decisions that are arbitrary, capricious, or in bad

vested pension obligations during the term of an agreement.⁵⁷ In so doing, these courts have rejected the notion that collectively bargained commitments to contribute to a pension plan create rights in either fund trustees or beneficiaries that “vest” for all time and that cannot be modified prospectively. In *Kraftco*,⁵⁸ for example, the union and the employer, after signing a collective bargaining agreement which set the employer’s rate of contribution to an employee pension fund, entered into a letter agreement “limiting a preexisting valid obligation to pay money.”⁵⁹ The Sixth Circuit, sitting *en banc*, held that this letter agreement was effective, over the objection of the fund trustees, to “modify[] the collective bargaining agreement”⁶⁰ mid-term and reduce the amount of employer contributions to the pension fund.⁶¹

Similarly, in *Battle v. Clark Equip. Co.*,⁶² beneficiaries of an employee benefit plan brought suit alleging that the employer’s failure to comply with the terms of the collective bargaining agreement constituted a breach of that agreement.⁶³ The Court, finding that the union and the employer entered into an agreement to modify the employer’s obligation under the “Supplemental Unemployment Plan (SUB plan) contained in . . . the Collective Bargaining Agreement,”⁶⁴ held that the employer’s action “did not violate the collective bargaining agreement *as amended*.”⁶⁵

The Ninth Circuit reached the same result in *Turner v. International Brotherhood of Teamsters, Local No. 302*.⁶⁶ A retiree

57. See, e.g., *Central States Southeast & Southwest Areas Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098, 1107-14 (6th Cir. 1986) (en banc), cert. denied, 107 S.Ct. 1291 (1987); see also *Battle v. Clark Equip. Co.*, 579 F.2d 1338, 1347 (7th Cir. 1978), overruled on other grounds, 679 F.2d 685 (7th Cir. 1982); *Local No. 1316, IBEW v. Superior Contractors and Associates*, 608 F. Supp. 1246, 1240 (N.D. Ga. 1985); *Sutton v. Weirton Steel Div. of Nat’l Steel Corp.*, 567 F. Supp. 1184, 1192 (N.D. W. Va.), aff’d, 724 F.2d 406 (4th Cir. 1983), cert. denied, 467 U.S. 1205 (1984); *Chicago-St. Louis Transp. Co.*, 535 F. Supp. at 480-81.

58. *Kraftco, Inc.*, 799 F.2d at 1109.

59. *Id.*

60. *Id.* at 1114.

61. *Id.*

62. *Battle*, 579 F.2d at 1338.

63. *Id.* at 1342.

64. *Id.* at 1341.

65. *Id.* at 1346 (emphasis added).

66. *Turner v. Local No. 302, International Brotherhood of Teamsters*, 604 F.2d 1219 (9th Cir. 1979).

claimed that the rights given him through a collective bargaining agreement were “vested” and that “the unions and employers could not . . . extinguish vested rights without the consent of the retirees.”⁶⁷ The retiree argued further that by amending the collective bargaining agreement “before it expired”, such amendment “was a breach of contract.”⁶⁸

The Ninth Circuit flatly rejected this argument. First, it found that “the amendment was made by all of the parties to the agreement.”⁶⁹ It then noted:

Of necessity . . . collective bargaining agreements must be flexible and subject to change. As the Court said in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 80 S.Ct. 1347, 1351, 4 L.Ed.2d 1409 (1960), a collective bargaining agreement ‘is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate’. It is frequently necessary to modify a contract to meet changing conditions.⁷⁰

Therefore, finding “nothing in the language of the . . . collective bargaining agreement which would prevent amendment by the unions and employers,”⁷¹ the Court concluded as follows:

[T]he amendment to the 1974 collective bargaining agreement by the appellee unions and employers did not constitute a breach of the contract. The health and welfare benefits were not vested property rights but were instead contractual rights subject to amendment by the parties to the agreement.⁷²

These principles apply with equal force to protect the rights of the parties to the 1987 EESP to modify the rate of contributions to the 1950 Pension Fund.

67. *Id.* at 1224.

68. *Id.* at 1225.

69. *Id.*

70. *Id.* at 1226.

71. *Id.*

72. *Id.* (emphasis added); see, e.g., *Superior Contractors*, 608 F. Supp. at 1250; *Sutton*, 567 F. Supp. at 1192 (union and employer can agree to modify prospective pension benefits consistent with the requirements of ERISA).

In reaching its decision in *Turner*, the Ninth Circuit specifically rejected the further argument that modification is proper only if the original contract expressly provides for such modification. See, e.g., *Ekas v. Carling Nat'l Breweries, Inc.*, 602 F.2d 664, 666-67 (4th Cir. 1979), cert. denied, 444 U.S. 1017 (1980); *Superior Contractors*, 608 F. Supp. at 1250; *Sutton*, 567 F. Supp. at 1192.

B. *The Purported Inconsistency With Plan Documents*

The second argument offered by the trustees in opposition to the 1987 EESP relies on language in the pension plan documents suggesting that contributions to the 1950 Pension Fund must be made only at the rate set in the current NBCWA or in a "me too" agreement incorporating that contract. Specifically, Article VI.B(8) of the 1950 Pension Plan provides:

Contributions . . . shall be paid solely by the Employers in accordance with Article XX of the National Bituminous Coal Wage Agreement . . . and any successor agreements to that specific agreement.⁷³

In addition, Article VI.B(21) provides that:

Any employer who . . . was or is required to make . . . contributions to the 1950 Pension Plan . . . is obligated and required to comply with the terms and conditions of the 1950 Pension Plan . . . including but not limited to, making contributions required under . . . the National Bituminous Coal Wage Agreement. . . .⁷⁴

The 1984 NBCWA itself "incorporates" the 1950 Pension Plan by reference, although without specific reference to the above-quoted language.⁷⁵ In addition, the 1984 UMWA-Island Creek contract, as well as the "me too" contracts of other signatories to the 1987 EESP, tracked the language of the 1984 NBCWA and thus also incorporated the 1950 Pension Plan documents.⁷⁶ On the basis of these provisions, the trustees argued to the district court that the UMWA and the various EESP employers were bound to the \$1.11 contribution rate in the 1984 NBCWA for the life of that agreement, regardless of their current desires to modify their individual 1984 contracts mid-term.⁷⁷

73. United Mine Workers UMWA 1950 Pension Plan, art. VI.B(8).

74. United Mine Workers UMWA 1950 Pension Plan, art. VI.B(21). The employer representatives on the Fund Board of Trustees were successful in having these provisions inserted into the plan documents in 1978. At that time the BCOA feared that the withdrawal of individual operators from the 1950 Pension Fund would increase the amount of unfunded liability to the remaining employers, and it therefore sought to lock in all employers at a uniform vote of contributions. See Huge Memorandum, *supra* note 25.

With the full funding of the 1950 Pension Fund, unfunded liability is no longer a concern. Nonetheless, the trustees relied on the inserted language in their efforts to nullify the EESP.

75. 1984 NBCWA at 109-10.

76. 1984 Island Creek-UMWA Agreement, art. XX(d)(1).

77. See *supra* note 7.

There are several difficulties with this argument. First, the mere fact that the individual 1984 contracts, as “me too” agreements, tracked the language of the 1984 NBCWA could not preclude the individual parties from subsequently terminating or modifying those “me too” agreements. The individual employers were not signatories to the 1984 NBCWA and were thus not bound to it. Rather, they had merely adopted that agreement as the model for their own individual agreements, and having done so were free to modify their agreements with the Union as they saw fit.

Similarly, the fact that the parties’ 1984 agreements incorporated language drawn from the 1950 Pension Plan documents could not have precluded the parties from terminating those 1984 agreements, “unincorporating” that language, and establishing a new contribution rate. The exercise of the authority to terminate or modify terms of an agreement drawn initially from outside the parties’ agreement is no different than it is in cases where the parties terminate or modify terms which they initially supplied without such incorporation by reference. The parties themselves put in those terms, and they can take them out. In either case, the parties act pursuant to the well-established freedom “by joint action to modify, amend, and supplement their original collective bargaining agreement.”⁷⁸

Thus, any conflict between the Plan documents governing the trustees’ administration of the Plan and the current EESP agreements cannot nullify the collective agreements or entitle the trustees to enforce contributions at the superseded \$1.11 rate. Rather, in the event trustees of a pension plan determine that contributions fail to comply with the actuarial requirements of the plan—either as those requirements may be embodied in plan documents or otherwise—the trustees’ *sole* remedy is to *reject* the contributions and terminate the employer’s participation in the plan.⁷⁹ In no event may they rely on language in plan documents to enforce a rate of contributions not agreed to by the collective bargaining parties themselves, for such an outcome “would be intolerable in contract terms.”⁸⁰

78. *Humphrey*, 375 U.S. at 353.

79. *Chicago-St. Louis Transp. Co.*, 535 F. Supp. at 480-81.

80. *Id.* at 480.

Courts applying these principles have uniformly rejected trustee attempts to enforce contribution obligations embodied in plan documents where those obligations are inconsistent with a collective bargaining agreement. In *Central States Southeast & Southwest Areas Pension Fund v. Chicago-St. Louis Transport Co.*,⁸¹ for example, the court granted judgment in favor of the collective bargaining parties, and against plan trustees, on an attempt by the trustees to compel contributions that is identical to the trustees' claims in the *Connors* litigation.⁸² The court stated:

Contribution rates are set by collective bargaining, just as they were here. Trustees of the fund receiving the contributions may set regulations as to how their fund is run, but they have no delegated authority to change the previously-negotiated rates. . . .⁸³

The Court therefore rejected the trustees' attempt "to require [the employer] to pay contributions at a rate above that required by the [collective bargaining agreement]."⁸⁴ It concluded that "[p]laintiffs' remedy is and always has been to refuse to take [the employer's] money."⁸⁵

Similarly, in *Central Hardware Co. v. Central States, Southeast & Southwest Areas Pension Fund*,⁸⁶ the Eighth Circuit, while upholding the authority of trustees to *reject* nonconforming contributions where they have an actuarial basis for doing so, stated that its "holding is in no way meant to imply that [trustees] ha[ve] the authority to alter, reject, or rewrite the terms of the collective bargaining agreement between [the employer] and the Union."⁸⁷ This approach has been followed by every other court that has considered the question.⁸⁸

81. *Id.* at 476.

82. *Id.* at 481.

83. *Id.* at 480.

84. *Id.* at 481.

85. *Id.*

86. *Central Hardware Co. v. Central States, Southeast & Southwest Areas Pension Fund*, 770 F.2d 106 (8th Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986).

87. *Central Hardware*, 770 F.2d at 111.

88. *See, e.g., Morse*, 580 F. Supp. at 187-88; *Talarico v. United Furniture Workers Pension Fund*, 479 F. Supp. 1072, 1082 (D. Neb. 1979); *West Coast Stationary Eng'rs Welfare Fund v. City of Kennewick*, 59 Wash. App. 466, 694 P.2d 170 (1985).

The trustees of the 1950 Pension Plan have chosen not to reject the participation in the Fund of the employers signatory to the 1987 EESP. Although they have the legal authority to do so in cases where an employer's contributions do not conform to the actuarial requirements of a pension fund, it would not be a sensible option in this context, where the fund is closed to new participants and thus even the reduced contributions enhance the Fund's asset base without carrying with them any additional liability. Having made the decision not to reject the participation of the EESP employers, the trustees should have no further authority concerning the rate of contributions that are to be paid into the Fund.

VI. CONCLUSION

The legal rule underlying the 1987 EESP is a sensible and fair one. Under the applicable principles, trustees of a collectively bargained pension fund are always free to protect the actuarial condition of the fund by rejecting an employer's participation where its contributions are inadequate to fund benefits that have been guaranteed to fund participants. However, unions and employers remain free to set the rate of prospective employer contributions, and to change the rate as they see fit in response to changed industrial conditions. The rule thus ensures the flexibility necessary for effective collective bargaining, and adequately protects the assets of the fund and the interests of fund participants.

The UMWA, Island Creek Corp. and the other employers signatory to a 1987 EESP reached a creative agreement with no actuarial harm to the pension fund. In the process, the parties achieved a number of mutually beneficial solutions to important and seemingly intractable problems. It is precisely in order that unions and employers be permitted to address problems in such a manner that the law must protect the parties' freedom to modify their collective agreements as they see fit.

