

Trojan Yacht, Division of Bertram-Trojan, Inc. and Industrial Union of Marine and Shipbuilding Workers of America, District Lodge 4, Local Lodge 86 and Industrial Union of Marine and Shipbuilding Workers of America, District Lodge 4, Local Lodge 88. Cases 4-CA-19851-1 and 4-CA-19851-2

November 24, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND
TRUESDALE

On January 13, 1993, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed cross-exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

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 and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the terms of the Respondent's pension plan authorized the Respondent to make unilateral modifications to the plan and that the Respondent did not thereby violate Section 8(a)(5) and (1) of the Act. Accordingly, the judge recommended dismissal of the complaint, and our dissenting colleague would affirm that recommendation. We disagree.

Shipbuilders Locals 88 and 86 represent employees at the Respondent's Lancaster, Pennsylvania and Elkton, Maryland plants, respectively. In 1971, the Locals formed a single bargaining unit. At that time, the Respondent's predecessor, Whittaker Corporation, provided employees with a pension plan. The parties' most recent collective-bargaining agreement, effective June 7, 1989, to June 6, 1992, provides in article X, section 2, that the Bertram-Trojan, Inc. Employees' Pension and Savings Plan (the Plan), which covers both unit and nonunit employees:

will be maintained in the same manner and to the same extent such plans are generally made available and administered on a corporate basis.

Section 14.01 of the Plan states that

[w]hile the Plan is intended as a permanent program, the Board of Directors shall have the right at any time to declare the Plan terminated, or to provide for a partial termination of the Plan.

Section 13.02 authorizes prospective or retroactive amendments to the Plan to make it

conform to any provisions of ERISA, the Internal Revenue Code provisions dealing with employees' trusts, or any regulation under either of such statutes.

The "Management Rights" provision of the contract states that the Respondent "reserves and retains all of its rights to manage the business," and the "Waiver" provision reads as follows:¹

The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any and all proper subjects of collective bargaining, and that all such subjects have been discussed and negotiated upon, and the agreements contained in this Agreement were arrived at after the free exercise of such rights and opportunities. Therefore, the Company and the Union, for the term of this Agreement voluntarily and without qualification, waive the right and agree that neither party shall be obligated to bargain collectively with respect to any term or condition of employment, or any other matter not related specifically to the administration of the express terms of this Agreement, even though such other matter might not have actually been raised during the negotiation thereof, it being the stated intention of the parties to have their entire collective bargaining relationship for the duration of this Agreement set forth in its provisions.

In order to protect the Plan's tax-exempt status under the 1986 amendments to the Internal Revenue Code, it was necessary, as a stop-gap measure, for the Respondent to adopt before March 31, 1989, one of four model amendments proposed by the Internal Revenue Service (IRS), and later to make a substantive amendment to the Plan. Some time after March 31, 1989, probably mid to late 1990, the Respondent adopted IRS Model Amendment 3, which provided for a cessation of benefit accruals.² During negotiation of the 1989-1992 bargaining agreement, the Respondent made no reference to its need to amend the Plan. Thereafter, the Respondent sent each participant in the Plan and the officers of the Unions a letter dated December 20, 1990, announcing that the Plan had been amended to freeze benefit accruals effective January 1, 1989. The Unions received the letters on or after December 22, 1990, and filed the instant charges on June 12, 1991. The charges were served June 21, 1991.³

¹ The Respondent refers to the waiver provision in its exceptions and brief as a zipper clause.

² No final amendment was later adopted because the Respondent filed a voluntary petition in bankruptcy on March 26, 1992.

³ For the reasons he stated, we adopt the judge's finding that the complaint is not barred by Sec. 10(b) of the Act. The judge found

Continued

1. The judge rejected the Respondent's contentions that the amendment was compelled by law and that the management-rights and zipper clauses of the parties' contract retained for the Respondent the right to amend the Plan. We adopt these findings and find that the cases cited by the Respondent are distinguishable. In *Rockford Manor Care Facility*, 279 NLRB 1170 (1986), for example, the zipper clause invoked to justify midterm adjustments in a contractually provided health care program specifically addressed the issue of midterm bargaining, stating that "employees covered by this Agreement are entitled only to those . . . wages, hours, or working conditions which are specifically covered by this Agreement. . . . [and those] not covered by this Agreement may be changed, altered, continued, or discontinued without consultation with the Union." The zipper clause also stated that "[e]ach [party] voluntarily and unqualifiedly waives the right to bargain collectively with respect to any subject or matter not specifically referred to in this Agreement." 279 NLRB at 1173. In *Columbus Electric Co.*, 270 NLRB 686 (1984), enfd. sub nom. *Electrical Workers IBEW Local 1466 v. NLRB*, 795 F.2d 150 (D.C. Cir. 1986), the Board, with court approval, dismissed allegations that an employer violated Section 8(a)(5) and (1) by discontinuing a Christmas bonus never referred to in the parties' contracts. The contract contained comprehensive provisions on other types of compensation, provided that the contract would govern the parties' "entire relationship," and stated that the contract would be the "sole source of any and all rights or claims which may be asserted in arbitration hereunder or otherwise." 270 NLRB at 687. Similarly, in *TCI of New York*, 301 NLRB 822 (1991), the employer unilaterally instituted a bonus program during the term of a contract that contained a "Scope of Bargaining" clause—recently opposed in bargaining but ultimately accepted by the union—that expressly provided that the agreement's terms would supersede "all prior agreements, understandings and past practices, oral or written, express or implied," including, it was found, the bonus program. This scope-of-bargaining clause also stated that the agreement "fully and completely incorporates all . . . understandings and agreements" between the parties. 301 NLRB at 823 (emphasis deleted).

In contrast to the above cases, the contract provisions relied on by the Respondent here contain no terms which are "incisive, direct, and specific in their assault on the existence of any negotiating responsibility

that letters that the Respondent sent to retirees outside the 10(b) period did not constitute notice to the Unions that the Plan had been amended. Those letters made no reference to an amendment to the Plan, and, contrary to the Respondent's claim, the record does not support a finding that the retirees discussed an amendment with union officials after they had received the letters.

ity during the term of the contract, and in their desire to commit unresolved issues to management prerogatives as they existed on entry of the agreement." *Rockford Manor Care Facility*, supra, 279 NLRB at 1174.

2. The judge found that the terms of the Plan authorized the amendment. In response to the contention of the General Counsel that the Unions had not waived their right to bargain over the change, the judge stated that the case was one of contract interpretation rather than waiver. According to the judge, it is not necessary that the Unions have clearly and unmistakably waived their right to bargain over the amendment, as required under the standard set forth in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), because that standard is more appropriately brought to bear to resolve issues concerning matters on which a collective-bargaining agreement is silent. The General Counsel and the Charging Party except. We find merit in their exceptions.

Contrary to the judge, the *Metropolitan Edison* standard is not limited to matters on which a collective-bargaining agreement is silent. In order to establish waiver of the statutory right to bargain over mandatory subjects of bargaining, such as those raised here, there must be clear and unmistakable relinquishment of that right. *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995). To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter.⁴

Applying the *Metropolitan Edison* standard, we find that the language of article X, section 2, of the collective-bargaining agreement neither authorizes a cessation in pension benefit accruals nor waives the Unions' interest in bargaining over these matters. In fact, in *Rockford Manor Care Facility*, supra at 1172–1173, the Board found that a like contract provision—providing in that case for unit employee "participat[ion] in the Company's health and life insurance programs on the same basis as other [i.e., nonunit] employee members of the group"—was ambiguous. The Board found that the provision did not manifest union assent to changes affecting unit employees whenever the employer changed the terms of nonunit employees' health and life insurance plans. Likewise, assent by the Unions to the cessation of benefit accruals cannot be inferred here.⁵ Accordingly, we

⁴ *Angelus Block Co.*, 250 NLRB 868, 877 (1980).

⁵ *Mary Thompson Hospital*, 296 NLRB 1245 (1989), to which the judge compared the terms of the pension plan in the instant case, is distinguishable. There, a provision of the collective-bargaining agreement specifically incorporated the entire benefit plan into the body of the agreement. There is no similar language of incorporation in the collective-bargaining agreement in this case. Thus, the plan language relied on by the Respondent regarding full or partial termi-

find no waiver of the Unions' bargaining rights in this respect. We conclude that, although the Respondent may ultimately have had the right to conform the Plan to the Internal Revenue Code to protect its tax exemptions, it had no contractual right to choose unilaterally among several alternatives to achieve that end, without first providing the Unions with notice and an opportunity to bargain about this subject.

Accordingly, we do not agree with our colleague's reading of the above-quoted language from article X, section 2, of the collective-bargaining agreement. More precisely, we do not agree with him that the general contractual language in question—i.e., that the pension plan will be “maintained in the same *manner* and to the same *extent* such plans are *generally made available and administered* on a corporate basis” (emphasis added)—means (in language which our colleague finds could not be more plain) that the pension provisions for unit employees are *required by the collective-bargaining agreement to be the mirror image* of those for nonunit employees. The language in question simply does not convey to us the absolutely plain meaning that it conveys to our colleague. Thus, we do not agree with his resultant finding, based on his view of the above language, that whenever the Respondent decides to change pension provisions for nonunit employees, it is clearly and unmistakably permitted—indeed, compelled—by the collective-bargaining agreement automatically and unilaterally to make identical changes in pension benefits for unit employees. In our view, contrary to our colleague's, the contractual language in question cannot reasonably be read to have granted the Respondent any such right, much less imposed on it any such obligation.

The Respondent argues that its unilateral implementation of a freeze on benefit accruals did not violate the Act because those changes were required by law. As the judge found in rejecting this argument, however, the Internal Revenue Service afforded some latitude to companies with pension plans whose vesting schedules and social security offsets were like the Re-

nation of the Plan and making the Plan conform to the Internal Revenue Code and ERISA is not in the collective-bargaining agreement, whereas in *Mary Thompson Hospital*, the plan language was fully incorporated into the collective-bargaining agreement. Moreover, even assuming for the sake of argument that sec. 14.01 of the Plan had been incorporated into the contract, we would not find that the Plan's authorization for the Respondent to “declare the Plan terminated, or to provide for a partial termination of the Plan” sanctioned the unilateral termination of benefit accruals under the *Metropolitan Edison* standard.

Inasmuch as the Respondent points principally to the language in the Plan, rather than in the collective-bargaining agreement, to justify its unilateral decision, it cannot fairly rely on cases such as *NCR Corp.*, 271 NLRB 1212 (1984), which involved an employer's “substantial right of contractual privilege” in the face of competing, equally plausible interpretations of a collective-bargaining agreement's provisions, to assert that this case is solely one of contract interpretation, and thus inappropriate for resolution by the Board.

spondent's, in amending their plans to comport with the revised tax statute. Thus, we agree with the judge that the Respondent had some choices over which the parties could have bargained. Specifically, the Respondent could have adopted any of four model amendments. For instance, the compensation level to be taken into account under the Plan could have been limited to \$200,000, or benefit accruals could have been terminated for highly compensated employees only. The Respondent unilaterally elected the model amendment that froze benefit accruals, a result that was not required to protect the Plan's tax-exempt status, and thus failed to provide the Unions with notice and an opportunity to bargain over benefit accrual, a mandatory bargaining subject. The Respondent thereby violated Section 8(a)(5) and (1) of the Act.⁶

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for purposes of collective bargaining:

All production and maintenance employees of the Respondent's existing plants in Lancaster, Pennsylvania and Elkton, Maryland, including material handlers, stockroom and shipping personnel, interplant truck drivers and janitors, but excluding office clericals, hourly and salaried engineering and developmental personnel, inspectors, foremen, guards, supervisory personnel as defined in the Act and all other employees of the Respondent.

4. At all times material the Unions have been the exclusive collective-bargaining representatives of the employees in the unit described above.

5. The Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally selecting and implementing IRS Model Amendment 3 (cessation of benefit accruals) over other proposed model amendments to its pension plan to comport with U.S. Internal Revenue Code requirements for tax-exempt status without providing the Unions with notice and an opportunity to bargain over these decisions and their effects.

6. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in and is engaging in certain unfair labor practices within

⁶See *Keystone Consolidated Industries*, 309 NLRB 294, 297–298 (1992), remanded 41 F.3d 746 (D.C. Cir. 1994).

the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent unlawfully implemented changes in its pension plan, we shall order the Respondent to rescind its unlawful unilateral modification of the pension plan and to bargain with the Unions over the precise manner by which it modifies its pension plan to comport with Internal Revenue Code requirements for tax-exempt status for the Plan. We shall also order the Respondent to make whole all employees for any losses they may have suffered as a result of the Respondent's unlawful unilateral modification of the pension plan, with such payments to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), and with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Trojan Yacht, Division of Bertram-Trojan, Inc., Lancaster, Pennsylvania, and Elkton, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally selecting and implementing IRS Model Amendment 3 (cessation of benefit accruals) over other proposed model amendments to its pension plan to comport with Internal Revenue Code requirements for tax-exempt status without providing the Unions with notice and an opportunity to bargain over this decision and its effects.

(b) 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) Rescind its unlawful unilateral modification of the pension plan.

(b) Make whole all employees for any losses they may have suffered as a result of the Respondent's unlawful unilateral modification of the pension plan, with such payments to be computed in the manner set forth in the remedy section of this decision.

(c) On request, bargain collectively with the Industrial Union of Marine and Shipbuilding Workers of America, District Lodge 4, Local Lodges 86 and 88, as the collective-bargaining representatives of the employees in the appropriate bargaining unit described below over the decision on how to modify its pension plan to comport with Internal Revenue Code requirements for tax-exempt status and the effects of that decision. The appropriate unit is:

All production and maintenance employees of the Respondent's existing plants in Lancaster, Penn-

sylvania and Elkton, Maryland, including material handlers, stockroom and shipping personnel, inter-plant truck drivers and janitors, but excluding office clericals, hourly and salaried engineering and developmental personnel, inspectors, foremen, guards, supervisory personnel as defined in the Act and all other employees of the Respondent.

(d) Post at its Lancaster, Pennsylvania, and Elkton, Maryland facilities and mail to retirees covered by the Bertram-Trojan, Inc. Employees' Pension and Savings Plan copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER COHEN, dissenting.

I find that the Respondent did not violate Section 8(a)(5) by changing its pension plan to conform to IRS requirements. I would therefore dismiss the complaint.

The pension plan is corporatewide, and thus covers both nonunit and unit employees. The plan itself is not in the collective-bargaining agreement. The contract, however, refers to the plan. Article X, section 2, of the contract provides that the plan

will be maintained in the same manner and to the same extent such plans are generally made available and administered on a corporate basis.

The contract could not be more plain. The pension provisions for the unit employees are to be the mirror image of those applying to the nonunit employees. Unquestionably, the Respondent's changes in the pension plan were lawful with respect to nonunit employees. Accordingly, under article X, section 2, these changes then applied automatically to unit employees. Clearly, there can be no violation in the Respondent's adherence to its collective-bargaining agreement.

Applying the majority's "waiver" test, the contract is unambiguous. It clearly and unmistakably permits—indeed compels—the Respondent to apply the same pension plan to unit and nonunit employees alike.¹

⁷If this Order is enforced by a judgment of a 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."

¹As there is no violation under the majority's "waiver" standard, the same result obtains a fortiori under the "contract coverage"

Thus, the Respondent's adherence to the contract did not violate Section 8(a)(5) and (1) of the Act.²

APPENDIX

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally select and implement a plan for bringing our pension plan into conformity with U.S. Internal Revenue Code requirements without providing the Unions with notice and an opportunity to bargain about these decisions and their effects.

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

WE WILL rescind our unlawful unilateral modification of the pension plan.

WE WILL make whole all employees for any losses they may have suffered as a result of our unlawful unilateral modification of the pension plan, with interest.

WE WILL, on request, bargain collectively with the Industrial Union of Marine and Shipbuilding Workers of America, District Lodge 4, Local Lodges 86 and 88 as the exclusive representatives of the employees in the appropriate bargaining unit, described below, over the decision on how to modify our pension plan to comport with Internal Revenue Code requirements for tax-exempt status and the effects of that decision:

standards set forth by the District of Columbia Circuit. *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993). See my dissent in *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995).

²*Rockford Manor Care Facility*, 279 NLRB 1170 (1986), contains language that is arguably at odds with my position. It suggests that, under a similar clause, an employer's change as to nonunit employees does not give the employer the right to unilaterally apply the change to unit employees. See *Rockford*, supra at 1173. The language, however, is essentially dicta. The actual decision in *Rockford* was that there was no violation, based on other clauses in the contract. The contract contained a zipper clause, a clause that gave the company the right to act unilaterally with respect to matters not expressly governed by the contract. In addition, I note that one member of the panel disagreed with the dicta; she took a position similar to my own.

All production and maintenance employees of the our existing plants in Lancaster, Pennsylvania and Elkton, Maryland, including material handlers, stockroom and shipping personnel, inter-plant truck drivers and janitors, but excluding office clericals, hourly and salaried engineering and developmental personnel, inspectors, foremen, guards, supervisory personnel as defined in the Act and all of our other employees.

TROJAN YACHT, DIVISION OF BERTRAM-TROJAN, INC.

Bruce G. Conley, Esq., for the General Counsel.
William J. Payne and *John B. Nason III, Esqs.*, of Philadelphia, Pennsylvania, for the Respondent.
Joshua P. Rubinsky, Esq., of Philadelphia, Pennsylvania, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. These consolidated cases were tried before me on various dates between June 17 and September 21, 1992, on the General Counsel's complaint which alleged, in general, that the Respondent had made a unilateral, midterm modification of its collective-bargaining agreement with the Charging Parties in violation of the Section 8(a)(5) of the National Labor Relations Act (the Act).

The Respondent generally denied that it engaged in any unlawful activity, and affirmatively contends that the complaint here is barred by Section 10(b) of the Act.

On the entire record of this matter, including briefs and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent was a Delaware corporation with offices and plants located in various States including Pennsylvania and Maryland and was engaged in the manufacture of fiberglass pleasure yachts. In the course and conduct of its business, the Respondent annually shipped directly to points outside Pennsylvania goods, products, and materials valued in excess of \$50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Each Charging Party (collectively referred to as the Union) is admitted by the Respondent to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts in General*

At issue is the Respondent's alleged unilateral midterm modification of the collective-bargaining agreement by ceas-

ing benefit accruals for all participants in its pension plan. The Respondent contends that specific language of the pension plan, as well as the collective-bargaining agreement, gave it the right to amend the Plan and cease accrual of benefits. The General Counsel and the Union disagree, arguing that Section 8(d) of the Act prohibited the Respondent from making any midterm change to the pension plan without the express consent of the Union.

The material facts are not really in dispute. Since 1969, employees of the Respondent's Elkton, Maryland plant have been represented by Local 86; and, since 1971, the employees at the plants in Lancaster and Kinzer, Pennsylvania, have been represented by Local 88. In 1971, the two Locals formed a single bargaining unit and have entered into a series of collective-bargaining agreements with the Respondent and its predecessor, the most recent of which was negotiated in 1989 and was effective June 7, 1989, through June 6, 1992.

In 1971, the Respondent's predecessor, Whittaker Corporation, started a pension plan which covered all employees—union and nonunion alike. While there were discussions about the pension plan during contract negotiations, the Union agreed its members would be covered by the Plan as applicable to all employees.

The language of the pension plan, and reference to it in the collective-bargaining agreement has changed somewhat over the years. The contract language material here first appeared in the 1980–1983 agreement. And the Plan in effect at the time material here was the Bertram-Trojan, Inc. Employees' Pension and Savings Plan effective March 1, 1985.

Article X, section 2, of the collective-bargaining agreement states that the Bertram-Trojan, Inc. Employees' Pension and Savings Plan

will be maintained in the same manner and to the same extent such plans are generally made available and administered on a corporate basis.

Section 14.01 of the Plan states:

While the Plan is intended as a permanent program, the Board of Directors shall have the right at any time to declare the Plan terminated, or to provide for a partial termination of the Plan.

In addition, section 13.02 of the Plan allows for prospective or retroactive amendments to the Plan

to make the Plan conform to any provision of ERISA, the Internal Revenue Code provisions dealing with employees' trusts, or any regulation under either of such statutes.

In brief, adoption of some amendment to the Plan was necessitated by changes in the Internal Revenue Code of 1986. In lieu of immediate compliance with the amended Code, IRS Advance Notice 88-131 gave pension plan sponsors the option of four model amendments as a stopgap. The IRS required one of these model amendments to be adopted by March 31, 1989, in order to protect the tax exempt status of the Plan. Subsequently, then, the Respondent could make a substantive amendment to the Plan in accordance with the Internal Revenue Code. And this, according to a memo in

evidence, was to take place at a board of directors meeting in June 1990. No additional amendment, however, was ever adopted, because, according to the Respondent's witnesses, it filed a voluntary petition in bankruptcy on March 26, 1992. By its letters to employees dated December 20, 1990, however, it appears the Respondent intended this amendment to be permanent.

This case is about the adoption of model amendment three (cessation of benefit accruals) which, according to witnesses for the Respondent, occurred at the board of directors meeting on February 28, 1989. Other evidence of record, however, suggests adoption of the amendment took place much later, which would imply that the February date was put on it to comply with the March 31, 1989 deadline though the deadline was subsequently extended to December 31, 1990. If this case required a specific finding that the amendment in question was adopted by the Respondent on February 28, 1989, I would be hard pressed to make it.

According to their testimony, none of the Respondent's managers involved in the Plan's administration knew of the amendment prior to late 1990. IRS Form 5500 submitted by the Respondent to the IRS for 1989 (dated October 15, 1990) shows the most recent amendment to the Plan to have been November 6, 1987. There is no indication of an amendment in 1989. And testimony of the Respondent's corporate counsel and president as to the Board meeting is not convincing.¹

During negotiations with the Union in June 1989, the Respondent made no reference to the amendment. Nor did the Respondent furnish a copy of the amendment, notwithstanding the Union's request for material concerning the Plan, which reasonably included any amendments. The Respondent did produce other material.

Finally, amendment 1 was unilaterally implemented on November 6, 1987, and the employees were notified by memo of January 4, 1988, just 2 months later—not almost 2 years, as the Respondent contends with the amendment here. No reason appears, nor was one suggested by the Respondent, why adoption of the amendment was kept from the Union during negotiations and for nearly 2 years.

From all the above, it appears that the amendment was adopted sometime after the March 31, 1989 deadline, probably in mid to late 1990. But precisely when the amendment was adopted is not material here. What is material is that the Respondent did amend the plan to cease accrual of benefits for all participants. The propriety of what the board of directors did is not here for decision. The issue here is whether the Respondent violated Section 8(a)(5) in adopting the amendment, assuming regularity of the Board's action.

On or about December 20, 1990, the pension plan committee mailed to each plan participant a memorandum announcing that the Plan had been amended, the effect of which was to freeze benefit accruals as of January 1, 1989. Copies of this memorandum were received by employees and officers of the Union within a few days of December 20, 1990.

There had been no previous notice to the Union of this amendment. Specifically, during negotiations for a new collective-bargaining agreement in 1989, the Respondent did not tell the Union that such an amendment had been, or would be, passed by its board of directors.

¹ From p. 349 to p. 357 of the transcript, "Mr. Rubinsky" should read "Mr. Payne."

B. Analysis and Concluding Findings

1. The 10(b) defense

The Respondent contends that the Union had notice of the plan amendment “probably prior to the formal December, 1990 notice.” This is based on letters from Nieves R. Cardenal (senior manager, employee benefits) to John E. Riggs of May 15, 1990, Billy Tribble of July 5, 1990, Elmer G. Sensenig Jr. of October 1, 1990, and Wayne L. Warner of October 22, 1990, wherein it was stated, “Your benefits in the attached have been calculated through 12/31/88. Your entitlement to benefits based on years after 12/31/88, if any, will not be determined until the plan is amended to comply with the new laws. At that time, if you are entitled to any additional benefits, you will be so informed.”

Counsel argues that this notice to retirees was notice to the Union that the Plan had been amended. Therefore, the charges, having been filed on June 12, and served on June 21, 1991, were more than 6 months beyond notice to the Union of the Respondent’s act which was alleged to constitute an unfair labor practice.

I reject this argument. There is nothing in these letters which suggests that the Respondent had in fact amended the Plan. Indeed, at the time the letters were written, Cardenal did not herself know of the amendment, though some future amendment is referred to in the letter. In any event, the Union was not notified and there is nothing in this record to suggest that a letter to a retiree would be known to officials of the Union.

If in fact the Plan was amended when testified to by witnesses for the Respondent, that fact was kept from the Union. The amendment was said to have occurred on February 28, 1989. Subsequently there were negotiations between the Respondent and the Union. The Plan was discussed, but nothing was said about the amendment. I conclude that whenever made, the Union was uninformed of the amendment until the general notice to employees by letter dated December 20, 1990, of which the Union had notice no earlier than December 22.

According to the evidence of record, the memorandum, though dated December 20, was not actually mailed until December 21. It could not have been delivered until after December 21 and therefore was not notice to the Union before December 22, which was within the 6-month period set forth in Section 10(b). See *MacDonald’s Industrial Products*, 281 NLRB 577 (1986), and *St. John Medical Center*, 252 NLRB 514 (1980).

2. The Respondent’s unilateral modification of the collective-bargaining agreement

Unquestionably, a pension plan is a term or condition of employment and a mandatory subject of bargaining. Such is therefore a matter not subject to unilateral modification during the term of a collective-bargaining agreement unless the company has retained the specific authority to do so.

The Respondent does not deny it unilaterally changed the Plan. The Respondent contends it had the right to do so by virtue of (a) the management-rights clause of the contract, (b) the zipper clause of the contract, and/or (c) express language of the pension plan.

The Respondent also argues that the specific amendment here was required by law, hence there was nothing to negotiate. The IRS, however, gave the Respondent its choice of four permissible amendments. Which to adopt was clearly something about which it could have negotiated with the Union. I, therefore, do not accept this argument as a basis for dismissing the complaint.

The General Counsel and the Union couch the issue in terms of waiver—whether the Union waived its 8(d) right that the Respondent could not make a midterm change in the Plan. They argue, as the Supreme Court has held, that waiver of a statutory right “must be clear and unmistakable,” and will not be inferred from general contract language. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). And they argue that neither language in the collective-bargaining agreement nor the bargaining history of the Plan supports a conclusion that the Union clearly and unmistakably waived its right to have the Plan apply unchanged during the course of the agreement.

While waiver may be a way of viewing this matter, I am more inclined to consider this a case of contract interpretation. This is not a case where the collective-bargaining agreement is silent. The parties agreed to language by which the bargaining unit employees would be covered under by the Plan. Therefore, the “clear and unmistakable” standard is irrelevant. See *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992); *Electrical Workers IBEW Local 47 v. NLRB*, 927 F.2d 635, 641 (D.C. Cir. 1991).

Thus, I conclude that neither the management-rights nor the zipper clause is particularly germane. There is nothing in the management-rights clause which would suggest that the Respondent retained the right to alter the pension plan, or any other item of compensation. The zipper clause states, in effect, that the parties bargained on all mandatory subjects and the contract represents their total agreement. This means that midterm neither party could demand bargaining on a subject not covered in the contract claiming that the parties had not previously bargained about it. It does not mean, however, that absent specific authority to do so, either party could unilaterally change a term of the agreement.

What is germane is language in the collective-bargaining agreement concerning the pension plan, and the language of the Plan. Specific wording in the Plan allows the Respondent to terminate it at will and to amend it to conform to the Internal Revenue Code. Therefore, the issue is whether an amendment necessitated by the Internal Revenue Code could be unilaterally adopted as to those employees who are also covered under the collective-bargaining agreement.

From the outset of their bargaining relationship, the Respondent and the Union have discussed the pension plan. During each period of negotiations for a renewal collective-bargaining agreement, particularly including that of 1989, the Plan was considered. Typically the Union made certain demands concerning the Plan which the Respondent rejected on grounds that the Plan covered all of its 1200 to 1300 or so employees, whereas the Union represented only 300.

Further, the Plan was changed midterm in 1980. The Union decided not to grieve this fact after being advised that the amendment added to benefits. And a new Plan was instituted in 1985.

In any event, during contract renewal bargaining, terms of the Plan were always subject to negotiation. That the Union

always accepted the Respondent's adamant position does not somehow mean that specific provisions of the Plan and the collective-bargaining agreement are not binding on the Union.

The language which incorporates the pension plan into the collective-bargaining agreement, as of 1989, states the Plan

will be maintained in the same manner and to the same extent such plans are generally made available and administered on a corporate basis.²

And specific provisions in the Plan, set forth above, clearly retained to the Respondent the power to alter it in circumstances such as here (a change in the Internal Revenue Code), or terminate it.

The General Counsel and the Union rely on *T.T.P. Corp.*, 190 NLRB 240 (1971), wherein the Board held that similar language did not permit an employer to change a unilaterally implemented pension plan, since the existence of the plan was a condition of employment and there was no reference to it in the collective-bargaining agreement. In finding a violation in *T.T.P. Corp.*, supra, it was noted that the collective-bargaining agreement had no management-rights or zipper clause.³

More recently, however, in *Mary Thompson Hospital*, 296 NLRB 1245 (1989), the Board concluded that pension plan language similar to that here permitted unilateral midterm modification, where the collective-bargaining agreement specifically incorporated the pension plan language.

²In *Rockford Manor Care Facility*, 279 NLRB 1170 (1986), similar language in the collective-bargaining agreement, along with a management-rights and a zipper clause, allowed the respondent to institute unilaterally a different health plan during the term of a collective-bargaining agreement.

³Compare *TCI of New York*, 301 NLRB 822 (1991) (Member Cracraft dissenting) where bargaining history in addition to a zipper clause was sufficient to allow a unilateral midterm change in a condition of employment on which the collective-bargaining agreement was silent.

The facts here are between *T.T.P.*, supra, where there was no mention of the plan in the collective-bargaining agreement, and *Mary Thompson*, supra, where the plan was incorporated in the collective-bargaining agreement by reference. Here, the parties specifically agreed that the companywide Plan would apply to bargaining unit employees; however, there is no specific language stating that the terms of the Plan were in the collective-bargaining agreement.

Nevertheless, I conclude this case is much closer to *Mary Thompson*, supra, and to *T.T.P.*, supra. The language making the Plan applicable to bargaining unit employees is: "The above plans will be maintained in the same manner and to the same extent such plans are generally made available and administered on a corporate basis." This can only mean that bargaining unit employees will benefit from the Plan to the same extent as all other employees.

If the benefit clauses apply, necessarily so do the proviso clauses, unless they are specifically modified by language in the collective-bargaining agreement. The only such modification agreed to by the parties relates to the minimum benefit, which in the agreement is set at \$10.50 per month per year of benefit service.

The provision allowing the Respondent to alter, or terminate, the Plan at any time was obviously known to the Union's negotiators. Clearly, the parties could have negotiated a limitation on this. So far as I can tell from this record, the Union never sought to limit that power as to bargaining unit employees. During several sets of negotiations, the Union always agreed to the Respondent's proposal that the pension plan would apply as written on a corporatewide basis.

I conclude that the specific terms of the pension plan, to which the Union was bound as a signatory to the collective-bargaining agreement, allowed the Respondent to make unilateral midterm modifications. Therefore, the Respondent did not violate Section 8(a)(5) in adopting amendment 2.

[Recommended Order for dismissal omitted from publication.]