

**Georgia Power Company and International Brotherhood of Electrical Workers Local 84, AFL-CIO-CLC. Case 10-CA-28441**

March 10, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On February 14, 1997, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply 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,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

The Union represents a bargaining unit of certain of the Respondent's employees. For many years, the Respondent's currently working and retired employees have been covered by medical and life insurance programs. The parties have bargained over those benefits as applied to currently working unit employees; however, the relevant collective-bargaining agreement (styled memorandum of agreement, or MOA) did not include or refer to those benefits. The parties have never negotiated over benefits for current retirees or over future retirement benefits for active unit employees. Indeed, the Respondent has refused the Union's earlier attempts to bargain over retiree benefits and has frequently made unilateral changes in those benefits, with the apparent acquiescence of the Union.

On April 21, 1995, the Respondent announced that it would limit the company-paid portion of the pre-

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge inaccurately stated that unit and nonunit employees have received the same medical coverage since 1991. In fact, as the judge later noted, although the two groups of employees have been covered under the same plan during that period, they received somewhat different benefits. Further, contrary to statements in the judge's decision that might suggest otherwise, the Respondent only bargained with the Union over benefits as applied to current employees. Those minor mischaracterizations do not affect the overall accuracy or validity of the judge's decision.

<sup>2</sup> We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB No. 14 (Nov. 7, 1997).

miums for medical and life insurance coverage of employees who retire after January 1, 2002, with certain exceptions not material here. The limitations would not affect current retirees. It is undisputed that the Respondent took this action unilaterally and without affording the Union an opportunity to bargain over the announced changes.

The judge found that the Respondent's actions violated Section 8(a)(5) and (1) of the Act. In so doing, he found that the future retirement benefits of currently active unit employees were mandatory bargaining subjects and that the Union had not waived its right to bargain over the changes.

We agree with the judge on both counts. We note initially that the Board in *Midwest Power Systems, Inc.*<sup>3</sup> recently reaffirmed its long-held view that future retirement benefits of currently active unit employees are mandatory bargaining subjects, and that unilateral changes in those benefits violate Section 8(a)(5).<sup>4</sup> Here, as in *Midwest Power Systems*, the prospectively announced changes in retirement benefits will affect currently active unit employees who will retire on or after the announced implementation date, and therefore were mandatory bargaining subjects. The Respondent's arguments to the contrary in this case are thus without merit.<sup>5</sup>

Concerning the waiver issue, we note that waivers of statutory rights are not to be lightly inferred, but instead must be "clear and unmistakable."<sup>6</sup> 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 un-

<sup>3</sup> 323 NLRB 404 (1997), remanded on other grounds (mem.) *Midwest Power Systems, Inc. v. NLRB*, No. 97-1251 (D.C. Cir. 1998).

<sup>4</sup> The Board noted that although the Supreme Court in *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), held that an employer is not required to bargain over benefits for already retired employees, the Court also stated that "the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining." *Id.* at 180.

<sup>5</sup> The Respondent also contends that, in any event, the changes in future retirees' benefits do not "vitaly affect" active unit employees, and therefore that it was not required to bargain over those changes. The Board rejected that same argument in *Midwest Power Systems*, finding the "vitaly affects" doctrine inapplicable to the situation of current employees with a direct interest in their future retirement benefits. 323 NLRB 404.

The Respondent further argues that the number of employees who may eventually be affected by the unilateral changes in retiree benefits is too small to support a finding that the changes were substantial and material. We also reject this argument. As the Board noted in *Torrington Co.*, 305 NLRB 938 (1991), if a change involves the terms and conditions of employment of unit employees, it is a mandatory bargaining subject even if only a relatively few employees are affected. *Id.* at 939 fn. 7.

<sup>6</sup> *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

mistakably waived its interest in the matter.<sup>7</sup> Here, however, there is no relevant contract language.<sup>8</sup> 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.<sup>9</sup>

<sup>7</sup> *Trojan Yacht*, 319 NLRB 741, 742 (1995); *Angelus Block Co.*, 250 NLRB 868, 877 (1980).

<sup>8</sup> The Respondent does argue that the judge failed to give any weight to the MOA’s management-rights clause. In this the judge plainly did not err. The management-rights clause states that:

The right to hire, discipline, and/or discharge employees for reasonable or sufficient cause, and the full right of management of the properties is reserved to and shall be vested exclusively *with the Management of the Company*. Such rights shall include, but not be limited to, the right of *Management* to determine at any and all times how many men it will employ or retain, together with the right to exercise full control and discipline in the interest of proper service, operation, and efficient and economical conduct of its business, subject to the other provisions of this Agreement. The foregoing rights shall be subject to arbitration under the provisions of Article XIII only to the extent that they are modified or limited by other specific provisions of this Agreement. (Emphasis in the original.)

General language of this sort is insufficient to establish a waiver of the Union’s right to bargain over the changes in question. See *Metropolitan Edison*, 460 U.S. at 708.

<sup>9</sup> In reaching this conclusion, we do not rely on Union Business Manager Doyle Howard’s apparent subjective unawareness of the “reservation of rights” language. The written plans were in the Union’s possession, and the language had been included in the plans for years.

The Respondent relies on numerous court decisions holding that, under ERISA, the language of benefit plans is controlling. See, e.g., *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560 (7th Cir. 1995); *UPIU v. Jefferson Smurfit Corp.*, 961 F.2d 1384 (8th Cir. 1992). Those decisions are inapposite, because they concerned alleged violations of ERISA, alleged contract violations, and other matters. They did not involve alleged violations of Sec. 8(a)(5) of the Act, over which the Board has primary jurisdiction. See *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 552–553 (1988).

That the Union did not protest or demand to bargain over previous unilateral changes in retirement benefits does not require a different result. The Board has consistently held that a union that acquiesces in an employer’s unilateral changes in terms and conditions of employment does not irrevocably waive its right to bargain over such changes in the future. *Midwest Power Systems*, slip op. at 4. Nor does the Union’s failure to grieve or otherwise protest the Respondent’s earlier refusals to bargain over retirement benefits establish that the Union has waived its bargaining rights. See *Air Vac Industries*, 282 NLRB 703 (1987). Thus, even if the actions acquiesced in by the Union could be construed as applying to current unit employees rather than retirees, the Union still did not waive its right to bargain over the changes at issue here.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Georgia Power Company, Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

“(c) Within 14 days after service by the Region, post at copies of the attached notice marked “Appendix.”<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 21, 1995.”

MEMBER HURTGEN, dissenting in part and concurring in part.

I agree with my colleagues only in certain respects. The plan documents gave Respondent the right to “alter, amend or terminate” the plan for any reason. This language, as amplified by Union acquiescence in prior changes, clearly waived the Union’s right to bargain about the change announced on April 21. However, the plan, and its waiver, were not incorporated into any contract. Thus, the Union was free to withdraw the waiver at any time. On April 21, and again on May 9, the Union requested bargaining about the change. In my view, the effect of these requests was to make it clear that the waiver was being withdrawn. Accordingly, Respondent was obligated to bargain about the Union’s request that the April 21 change be rescinded.<sup>1</sup>

In sum, Respondent was privileged to make the change of April 21, but was not privileged to refuse to bargain on and after April 21 about rescinding that change.

<sup>1</sup> The change would not become effective until 2002.

*Katherine Chahrouri, Esq.*, for the General Counsel.  
*Laura Kriteaman, Esq.* and *Bentina Chisolm, Esq.*, of Atlanta, Georgia, for the Respondent.  
*J. Michael Walls, Esq.*, of Atlanta, Georgia, for the Charging Party.

## DECISION

WILLIAM N. CATES, Administrative Law Judge. This hearing was on November 18, 1996,<sup>1</sup> in Atlanta, Georgia. The charge was filed on May 5, 1995. The complaint issued on August 10, 1995.

## I. JURISDICTION

The Respondent is a Georgia corporation with its principal place of business in Atlanta, Georgia, where it is engaged in the business of generating and distributing power utility services. During the past year, a representative period, it purchased and received at its Atlanta, Georgia facilities goods valued in excess of \$50,000 directly from suppliers located outside the State of Georgia. Respondent admitted and I find that at all times material it has been an employer engaged in commerce as defined in the National Labor Relations Act (the Act).

The parties stipulated that Respondent is a wholly owned subsidiary of the Southern Company. Other wholly owned subsidiaries of the Southern Company include Mississippi Power Company, Alabama Power Company, Savannah, Gulf Power, and SEL.

## II. LABOR ORGANIZATIONS

Respondent admitted that International Brotherhood of Electrical Workers Local 84, AFL-CIO-CLC (Union, IBEW or Local) is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

It is alleged that Respondent unilaterally changed working conditions for employees represented by the Union.

Business Manager and Financial Secretary of the Union Doyle Howard testified that the Union has had a collective-bargaining relationship with Respondent since back in the 1920's. The Union currently represents a unit of some 5000 employees.

This litigation deals with retirement benefits that are called OPRB (Other Post-Retirement Benefits).

Respondent admitted that on or about April 21, 1995, it announced changes to retirement benefits without bargaining with the Union; that it was at material times party to a collective-bargaining agreement with the Union; and that the Union is the exclusive collective-bargaining representative of its employees in an appropriate bargaining unit described at article II, section 2 of that agreement (Memorandum of Agreement).

Respondent's April 21, 1995, announcement made to its managers is as follows:

I'd like to inform you of several changes we're making in retiree life and medical benefits that will affect many future retirees. The changes will be communicated to all employees in the next issue of The Citizen Weekly, which will be mailed Monday, April 24. I've attached an advance copy of those articles. Please review this information thoroughly so that you'll be fa-

<sup>1</sup>The hearing originally opened on February 2, 1996, before Administrative Law Judge Albert A. Metz. At that time the hearing was postponed pending settlement negotiations.

miliar with the changes in case you receive questions from employees. Although covered more completely in the attachments, there are several points that need to be emphasized:

**The major changes**

A maximum ceiling is being established for the company-paid portion of the cost of coverage—often referred to as premiums - for retiree life and medical coverage. (Specific limits have been approved and are included in the attached.) The level of company contributions will be tied to length of service (Specific levels for each year of service have not been approved and will be communicated later.)

**Transition period for the changes**

The changes do not impact those in the following groups:

Current retirees;

Any employee who has at least 30 years of accredited service (as defined in the pension plan) on or before January 1, 2002; or

Employees age 55 or over as of January 1, 2002, with 15 years of accredited service.

The changes apply to all other employees not covered in the groups above. Generally, this includes those who become retirement eligible after January 1, 2002.

**Reasons for the changes**

To adjust for changes in accounting rules, which have led to an increase in accounting costs for these benefits of about \$70 million annually for the Southern Company.

To support the company's cost-competitive goals. It's important to keep in mind that, even with these changes, the company is maintaining a competitive and generous retiree benefits package. At a time when many companies are dramatically reducing or simply eliminating retiree medical and life insurance benefits altogether, we are adopting a solution that both clarifies our commitment to retiree benefits and continues to provide our retirees access to these benefits. As we continue to review our benefits practices, changes to these and other benefits plans may be necessary in the future.

The Respondent called the principal of compensation of benefits of The Southern Company, David Settle. Settle testified that the driving force behind Respondent's April 21, 1995 changes in OPRB was a change in Federal Accounting Standard 106. Effective with FAS 106 companies must account for retirement cost as a liability while the employee is in active service. Formerly that liability could be shown during retirement rather than while the employee was in active service. FAS 106 does not apply to pension plans but it applies to welfare benefits that would include life and medical insurance. Settle agreed that the new FAS 106 requirements applied to current employees regarding future retirement rather than to current retirees.

The parties are not in dispute regarding a matter mentioned by Respondent in its opening argument. Respondent commented, in part, regarding the parties relationship regarding other post retirement benefits (OPRB):

Retiree benefits have been offered by the company for decades, as have benefits to active, covered (unit)

and non-covered employees. Up to 1978, all employees and retirees were covered under one medical plan.

In 1978, the plan offered was the Provident Plan. In 1978-79, the medical plan split, with the Union employees voting to take coverage under Blue Cross/Blue Shield; and the non-covered (non-unit) employees and retirees remaining with the Provident Plan . . . .

Unit and nonunit employees have again received the same medical insurance coverage since the 1991 collective-bargaining agreement. Business Manager Howard testified that although unit employees rejected going under the same plan with nonunit employees in 1989, they joined in the same plan 2 years later.

Lynn Martin, who was employed in Respondent's compensation benefits department, testified regarding the different plans. Martin testified that she was involved in negotiations with the Union from 1991. She testified that at times since 1978 the benefits plans for active and retired employees have not always been the same. In 1989 Respondent adopted the "Provident Plan" in-house that covered active nonunit employees and retirees. In 1989 unit employees were covered by Blue Cross/Blue Shield. The Union terminated its Blue Cross/Blue Shield coverage in 1991 and agreed to join other employees and retirees in the Provident Plan. However, differences in coverage have remained for unit and nonunit employees. For example unit employees were not initially covered for prescription drugs in 1991. From 1991 through January 1, 1993, separate lists were maintained for 100-percent outpatient surgeries. During 1992 there was a different premium structure for family coverage between nonunit and retirees and unit employees. Currently unit employees are covered under a life insurance policy issued by Provident Life and Accident Insurance. Nonunit and retirees whether formerly unit or nonunit employees, are covered by a Metropolitan Life Insurance policy.

In 1996 there was a change in pension plans. Respondent's witness David Settle testified that nonunit employees may now retire at age 50 with 10 years' service. The Union declined to accept that change in eligibility for unit employees.

Respondent contends: (1) that the Union has waived bargaining over the OPRB by historically permitting Respondent to make changes without bargaining; and (2) that the Union specifically waived bargaining through a clause contained in the benefits package.

(1) Have the parties historically bargained about retirement benefits

Respondent contended that since 1978 it has made changes to medical benefits provided to retirees and nonunit employees without bargaining with the Union and without receiving requests or demands to bargain over those changes.

Doyle Howard agreed that unit employees had a different insurance plan from 1979 to 1991. Nonunit employees and retirees had the same plan. During that period the Respondent made changes to the nonunit employees and retirees' insurance without negotiating with the Union.

Lynn Martin testified that Respondent has never negotiated with the Union over future retirement benefits for active unit employees. She recalled that Respondent has made changes to retirees' benefits and that those changes have not been ne-

gotiated with the Union. The Union has never negotiated retirees' benefits.

Rueben Pierce Head, who retired from Respondent in 1984, confirmed that Respondent and the Union did not negotiate over retirees' benefits. Head was Respondent's chief negotiator between 1975 and 1986. He recalled that the Union made inquiries during those years about present retired employees. Head did not object to those discussions but he never agreed those were negotiable matters. During 1980 the Union requested information including retiree information. Head's response to the Union dated August 18, 1980, included a comment that the retiree information concerned a nonnegotiable item. However, Head noted that he was supplying the Union with the summary plan description for retired employees.

Gene Ussery was Respondent's manager of labor relations from May 1992 until October 1995. Ussery testified that Respondent did not negotiate with the Union over benefits for nonunit employees and retirees. He testified that to his knowledge negotiations did not involve future retirees' benefits. Before April 1995, the Union did not seek to negotiate with Respondent for the medical benefits that active unit employees would have if those employees retired from Respondent. He recalled that Doyle Howard used to joke that he was negotiating on behalf of Ussery on occasions when Respondent offered to extend whatever had been negotiated with the Union to nonunit employees and retirees.

Business Manager Howard testified that medical and life insurance benefits are included in the total compensation package that the Union negotiated with Respondent and that total compensation package includes medical insurance for current employees who later retire. Howard testified that to his knowledge Respondent never attempted to change its practice of paying full medical insurance premiums for employees who later retired, until April 21, 1995.

According to Howard, although medical and life insurance benefits have been negotiated for unit employees those benefits have never been mentioned in the collective-bargaining agreement. Occasionally negotiations for medical and life insurance benefits occurred during regular contract negotiations. On other occasions those negotiations were held separately from the regular contract negotiations.

It is the parties' practice to negotiate only proposed changes. The parties do not negotiate over contract items when the particular items are not included in a proposed change.

During the most recent negotiations Respondent proposed changes regarding medical and life insurance. There was no agreement and that matter was postponed. Doyle Howard testified that an example of Respondent and the Union negotiating changes in medical insurance occurred in 1991 when the parties negotiated an agreement to include coverage for prescription drugs. Before that time drugs had not been included in health insurance for unit employees. Howard recalled that change covered both current unit employees and unit employees who would later retire. Benefit changes were also negotiated in 1993.

The General Counsel introduced documents to support its contention that the parties have negotiated medical and life insurance benefits.

In a document entitled "Company Package Proposal Submitted to the Union Committee, December 1, 1977," Re-

spondent proposed to modify the insurance program to provide additional life and medical coverage. That document also includes a proposal to revise the pension plan to:

Revise Pension Plan to include all full-time Union representatives, who are employees of the Company, on a leave of absence provided the entire cost is borne by Local Union #84 as sole bargaining representative, as submitted to the Union on August 5, 1977.

Doyle Howard identified Respondent's description of the settlement for a 3-year contract. That document, "Resume of Georgia Power Company-I.B.E.W. Negotiations with Respect to Working Conditions and Rates of Wages," is dated August 24, 1987. It contained a provision whereby the Respondent agreed to contribute more toward medical insurance premiums on increases in those premiums expected in October 1987 and 1988. It outlines the insurance program under "Summary of Economic Proposals."

In a 1989 resume of negotiations signed by Respondent's manager of labor relations, there is an indication that Respondent asked the Union Committee if it had decided to rebid the insurance coverages of covered (unit) employees. That document shows there were design changes agreed to by the Union including improved control of psychiatric and substance abuse treatment and chiropractic treatment plus the deletion of the mandatory second opinion for proposed surgeries. Howard testified that the insurance agreement applied to current employees and to insurance benefits that the employees would receive upon retirement.

In a memorandum of understanding signed by the Union and Respondent on April 26, 1990, there is a provision providing for life insurance equal to three times the employees annual salary. That provision includes a program for the payment of life premiums from Company and employee reserves. Following that provision is the following paragraph:

After the Company and the employee reserves are utilized as set forth above the parties agree to negotiate issues of funding and continuation of coverage, including but not limited to, the amount of coverage, setting new experience rated rates and what percentage of that rate will be paid by the Company and by the employees, respectively.

In a package proposal presented to the Union by Respondent on January 14, 1991, in the context of contract negotiations, Respondent proposed several modifications to the medical insurance program. That proposal also provided that Respondent was agreeable to make the changes in the medical insurance plan retroactive to January 1, 1991, if the contract was approved. Under Respondent's January 1991 proposal both noncovered and covered (unit) employees would receive the same medical insurance. Howard testified that the parties agreed to insurance changes that applied to current employees and current employees who later retired.

On November 12, 1992, Respondent wrote the Union and included 5500 copies of their summary of proposed benefit changes for January 1, 1993. Those copies were submitted in order to permit the Union to mail them to its unit employees for a vote on the proposals. The proposals had been negotiated between the Union and the Respondent. According to Doyle Howard the parties agreed during negotiations that

those proposed changes applied to current employees and to current employees who might later retire.

On February 2, 1992, the Union and Respondent signed a memorandum of understanding, medical benefits in which Respondent agreed to amend the schedule of benefits to provide unit employees 100-percent surgical coverage in accord with a schedule.

On April 5, 1994, Respondent wrote the Union and included 4600 copies of the summary of medical plan options effective June 1, 1994 for mailing to unit employees. The summary had been agreed to by the Union and Respondent subject to vote by the unit employees.

On May 12, 1995, the Union and Respondent signed an agreement to provide specific coverage for treatment of varicose veins. Howard testified that represented an agreement to reinstate the varicose veins coverage. On that same date the parties signed an agreement for reimbursement for non network physicians.

#### Findings

The record showed that Respondent and the Union have negotiated on numerous occasions regarding welfare benefits for unit employees. The record also shows that Respondent frequently considered retirees and nonunit employees separate from unit employees for the purpose of welfare considerations. Before 1991 nonunit employees and retirees were covered under a different medical insurance plan from the unit employees. During the period before 1991 Respondent made changes to the plan for nonunit employees and retirees without bargaining with the Union. On occasion the Union requested negotiations regarding retiree benefits and frequently Respondent refused to engage in those negotiations on the claim that retiree benefits were not negotiable.

In making my findings herein I credit the testimony of Doyle Howard that shows that Respondent frequently told the Union that negotiated benefits would be applied to retirees. I make that credibility determination on the basis of Howard's demeanor and the full record. The testimony of Gene Ussery, Respondent manager of labor relations until October 1995, supports my findings by showing that Respondent did offer to extend some unit employees' benefits to retirees.

The record including especially the testimony of Reuben Pierce Head shows that Respondent frequently discussed and provided the Union with information regarding retirees' benefits. I am also convinced and credit the testimony showing that Respondent frequently told the Union that retirees' benefits were not negotiable. I make that decision on the basis of the full record.

I credit the testimony of Lynn Martin that Respondent has never negotiated with the Union over future retirement benefits for active unit employees. Martin testified that at times since 1978 the benefits plans for active and retired employees have not always been the same. In 1989 Respondent adopted the "Provident Plan" in-house that covered active nonunit employees and retirees. In 1989 unit employees were covered by Blue Cross/Blue Shield. The Union terminated its Blue Cross/Blue Shield coverage in 1991. However, differences in coverage have remained for unit and nonunit employees. For example unit employees were not initially covered for prescription drugs in 1991. From 1991 through January 1, 1993, separate lists were maintained for 100 percent

outpatient surgeries. During 1992 there was a different premium structure for family coverage between nonunit and retirees and unit employees. Currently unit employees are covered under a life insurance policy issued by Provident Life and Accident Insurance. Nonunit and retirees whether formerly unit or nonunit employees, are covered by a Metropolitan Life Insurance policy.

I also credit Doyle Howard's testimony that Respondent never advised the Union of its intention to change its practice of paying full medical insurance premiums for employees who later retired until April 21, 1995.

An employer has a duty to bargain over terms and conditions of employment for bargaining unit employees. However, an employer has no duty to bargain regarding current retirees. Respondent contends that the instant matter involves bargaining over benefits for retirees and that it did not make changes in terms and conditions of employment of present members of the bargaining unit. See for example *Murphey Diesel Co.*, 184 NLRB 757, 763 (1979); *Civil Service Employees Assn.*, 311 NLRB 6, 7 (1993). Respondent argued that courts have refused to hold that decisions that are merely tangential to the rights of present members of the bargaining unit constitute mandatory subjects of bargaining. See for example *Pittsburgh Plate Glass Co. v. NLRB*, 404 U.S. 157 (1971); *Keystone Steel & Wire v. NLRB*, 41 F.3d 746 (D.C. Cir. 1994); *Torrington Co.*, 305 NLRB 938 (1991).

There is a clear difference between bargaining over future retirement benefits for active employees and benefits for current retirees. Here the discussion involves employees that will not retire before 2002. As shown above the changes mentioned in Respondent's OPRB Update affect the premiums to be paid by employees that retire after January 1, 2002, and were not grandfathered into the previous plan. Those employees grandfathered into the current (previous) plan include those that retire on or before January 1, 2002, those that are 55 with 15 years' service on January 1, 2002, and those with 30 years service before January 1, 2002.

Obviously current retirees, having retired before January 1, 2002, fall within the above exceptions and are not affected by the OPRB changes. As shown above David Settle testified that FAS 106 apply to current employees regarding future retirement rather than to current retirees.

The OPRB changes involve bargaining unit employees. They do not involve retirees and as such do not involve non-mandatory subjects of bargaining. Moreover, since the unit employees are not retirees or other nonstatutory employees, the "vitally affects" test is not applicable. *Pittsburgh Glass*, supra.

Even though the OPRBs are not included in the parties contract, Respondent has an obligation to bargain in good faith before instituting the changes. *St. Vincent Hospital*, 320 NLRB 42 (1995).

(2) Does the language of the plan documents permit Respondent's action

Lynn Martin testified that there are reservation of rights clauses in plan documents for unit, nonunit, and retirees. According to Martin, Doyle Howard did object to that language during a September 1995 negotiation meeting.

The reservation of rights reads as follows:

AMENDMENT AND TERMINATION OF PLAN

*Amendment of Plan.* The Vice President of Human Resources of the Company shall have the right at any time by instrument of writing, duly executed, to modify, alter or amend, in whole or in part, the Plan, provided that any Covered Expense that has been incurred and has become payable as a Benefit but is unpaid shall not be affected by such amendment.

*Termination of Plan.* The Vice President of Human Resources of the Company shall have the right at any time by instrument of writing, duly executed, to terminate the Plan provided, however, that notice of such termination shall be furnished to Covered Employees.

As shown above the Union did not agree to the plan until 1991. The above language was included in the plan before that date. Moreover, as shown above, the Union never agreed to the same plan held by nonunit and retirees. As shown by Lynn Martin's testimony the Union terminated its Blue Cross/Blue Shield coverage in 1991 and agreed to join other employees and retirees in the Provident Plan. However, differences in coverage have remained for unit and nonunit employees.

Gene Ussery agreed that Doyle Howard objected to the reservation of rights language around September or October 1995. According to Ussery he sensed that Howard had been unaware of that language before that time. Ussery responded that the reservation of rights language had been in the plan for many years and that he was surprised that Howard did not know of that language.

Findings

I credit the testimony of Lynn Martin showing that the Plan contained reservation of rights language similar to the above-quoted language, since at least 1989.

As shown above Gene Ussery agreed that Doyle Howard objected to the reservation of rights language around September or October 1995. According to Ussery he sensed that Howard had been unaware of that language before that time.

Respondent's witnesses Martin, Ussery, and Rueben Pierce Head could not recall a time when Respondent and the Union negotiated over the insurance plan reservation of rights language.

The fact that the current collective-bargaining agreement does not include the OPRB benefits and the inclusion of a reservation of rights clause in insurance plans without negotiation, does not constitute waiver of the Union's right to bargain. The evidence failed to show that the Union ever "consciously yielded" or "clearly and unmistakably waived" its interest in future retirement benefits. *T.T.P. Corp.*, 190 NLRB 240 (1971). In fact, as shown above, the parties did not negotiate over the reservation of rights language until the Union objected to the language in 1995.

Language in the plan, without negotiations, does not provide a legitimate basis for Respondent to make a unilateral change in OPRB. *Trojan Yacht*, 319 NLRB 741 (1995).

The Respondent pointed out that its representatives frequently told the Union that it did not negotiate over retirees' health and life insurance benefits. However, the Respondent and the Union did negotiate over health and life benefits and oftentimes those benefits were extended to retirees.

I find that this matter must be distinguished from *Electrical Workers IBEW v. Northeast Utilities*, C.A. No. 92-30086-F, cited by the Respondent. In that action to enforce a collective-bargaining agreement the Court found that the collective-bargaining agreement did not contain a provision requiring the employer to maintain health coverage. Here the situation is similar to that in *Trojan Yacht*, supra. In *Trojan Yacht* where there were applicable collective-bargaining provisions, the Board held that in "order to establish a waiver of the statutory right to bargain over mandatory subjects of bargaining, . . . there must be clear and unmistakable relinquishment of that right." *Trojan Yacht*, 319 NLRB at 744.

Here unlike *Trojan Yacht*, there was no applicable collective-bargaining provisions. Therefore, the instant situation makes for an even stronger case for the General Counsel than *Trojan Yacht*.

Here credible evidence received through Respondent's witness Lynn Martin showed that the plan adopted by the Union in 1991 was not the exact same plan applicable to nonunit employees and retirees.

Moreover the testimony of Gene Ussery proved there was never a clear and unmistakable relinquishment of the right to bargain over future retirees OPRB. Ussery agreed that Doyle Howard objected to the reservation of rights language around September or October 1995. According to Ussery he sensed that Howard had been unaware of that language before that time.

Neither the parties' memorandum of agreement nor any other agreement between the parties, included terms that are "incisive, direct, and specific in their assault on the existence of any negotiating responsibility during the term of the contract, and their desire to commit unresolved issues to management prerogatives as they existed on entry of the agreement." *Rockford Manor Care Facility*, 279 NLRB 1170, 1174 (1986).

The record failed to establish there was a clear and unmistakable relinquishment of the right to bargain over OPRB changes. *Trojan Yacht*, 319 NLRB 741 (1995). The record proved that the Union did not waive its right to bargain over OPRB changes.

(3) Retirees are not entitled to receive a particular level of benefits

(4) OPRB Benefits are not vested

The Respondent argued that the Union has no right to maintain a particular level of benefits and that OPRB benefits are not vested, in light of ERISA. The Board has not held nor does the General Counsel seek in the instant matter, maintenance of a particular level of benefits. Nor is there a contention that OPRB benefits are vested. Instead the Board has held that an employer must offer bargaining before unilaterally changing benefits that affect unit employees. The Board found in *Trojan Yacht*, supra, that the employer must offer bargaining before deciding upon a precise change.

(5) The changes are not substantial and material

(6) The changes do not vitally affect benefits of active employees

The Respondent cited *Civil Service Employees Assn.*, 311 NLRB 6 (1993), in arguing that the changes here are not ma-

terial, substantial and significant. However, *Civil Service* must be distinguished. There the Board found there had been no actual unilateral change since the unilateral requirement that employees carry beepers did not materially change the practice of having employees call in and for it to call places listed on the itinerary. Here there was a clear unilateral change.

Respondent argued that the Board is bound by the "vitally affects" doctrine citing among others *Pittsburgh Plate Glass Co. v. NLRB*, 404 U.S. 157 (1991). However, the Court in *Pittsburgh Plate & Glass* noted,

be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining. 404 U.S. at 157, 180.

The Board has held:

Changes in retirement benefits that affect current employees are a mandatory subject of collective bargaining, and a unilateral modification of such benefits, during the term of an agreement is in derogation of the bargaining obligation and constitutes and unfair labor practice. *Titmus Optical Co.*, 205 NLRB 974, 981 (1973).

The Board has continued to find that future retirement benefits constitute a mandatory subject of bargaining. *Britt Metal Processing*, 322 NLRB 421 (1996); *K & R Co.*, 320 NLRB No. 140 ( Mar. 29 1996). In view of the current state of Board decisions I find I cannot rule for Respondent in its contentions that the unilateral changes are not substantial and material or that they do not vitally affect benefits of active employees.

#### Conclusions

The record is not in dispute that the Union requested bargaining over OPRB changes announced by Respondent on April 21, 1995. Respondent rejected the Union's request on and after April 21, 1995. I find that Respondent has continued to refuse to bargain over its OPRB changes.

There is no dispute but that Respondent had a bargaining obligation with the Union. At issue is whether that obligation extended to the instant issue, i.e., the OPRB changes. In determining that issue I must question whether the alleged unilateral changes involve a mandatory subject of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1957); *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

The Board and courts, have held that pension plan benefits for future retirees is a mandatory subject of bargaining. *T.T.P. Corp.*, 190 NLRB 240 (1971); *Pittsburgh Plate Glass Co. v. NLRB*, supra. As noted, for example, in *United Hospital Medical Center*, 317 NLRB 1279 (1995) "(h)ealth and life benefit plans are a mandatory subject of collective bargaining. They may not be altered or eliminated without bargaining to mutual agreement or to a good faith impasse on such action. *NLRB v. Katz*." In as much as health and life benefit plans are mandatory subjects of bargaining and in as much as the Board and courts have concluded that pension benefit plans for future retirees are mandatory subjects of bargaining, I am persuaded that health and life insurance coverage in retirement is a matter relating to wages, hours,

and other terms and conditions of employment such as to constitute a mandatory subject of bargaining.

Respondent argues that the distinction of importance is one involving employees and retirees. However, there is another distinct group involved in the instant dispute. In its April 21, 1995 notice Respondent discussed benefits for some employees that would first become eligible to retire on and after January 1, 2002. Obviously that group does not involve current retirees. That group would potentially involve some current unit employees. It is not possible to determine at this time which unit employees other than those in the excluded or grandfathered group, will fall within those affected by Respondent's April 21 notice. Nevertheless, it is apparent that retirement benefits are important conditions of employment for all unit employees that may first qualify for retirement after January 1, 2002.

I find that Respondent's April 21, 1995, announcement affects current unit employees. Only current employees and those that may be hired in the future may be affected by Respondent's OPRB changes. No current retirees may be affected as shown in Respondent's announcement. Those April 21 OPRB changes involve terms and conditions of employment of current unit employees.

By announcing its planned OPRB changes, announcing that the changes would be implemented and refusing to bargain regarding current unit employees' future retirement welfare benefits after the Union's request, Respondent failed to fulfill its bargaining obligation and thus violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Georgia Power Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers Local 84, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, by unilaterally changing its other post retirement benefits (OPRB) for unit employees without bargaining with the Union as representative of the employees in the bargaining unit described at article II, section 2 of their collective-bargaining agreement, has engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

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

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent has illegally changed other post retirement benefits (OPRB) for bargaining unit employees without bargaining with the Union as representative, Respondent is ordered to restore OPRB to pre-April 21, 1995 status and upon request bargain in good faith with the Union regarding OPRB.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

ORDER

The Respondent, Georgia Power Company, Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making unilateral changes in bargaining unit employees' OPRB without providing notice of the proposed changes and adequate opportunity for the Union to bargain about those changes.

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

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

(a) On request, bargain collectively with International Brotherhood of Electrical Workers Local 84, AFL-CIO-CLC as exclusive representative of the employees in the appropriate bargaining unit described in article II, section 2 of their collective-bargaining agreement (memorandum of agreement) and, if an understanding is reached, embody that understanding in a signed contract.

(b) Restore OPRB to the pre-April 21, 1995, level.

(c) Within 14 days after service by the Region, post at its facilities in Atlanta, Georgia, copies of the attached notice.<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 10, 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.

(d) Within 21 days after service by the Region, file with the Regional Director, Region 10, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>2</sup>If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>3</sup>If 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."

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 change terms and conditions of employment including other post retirement benefits (OPRB) for employees in bargaining units represented by International Brotherhood of Electrical Workers Local 84, AFL-CIO-CLC, or any other labor organization.

WE WILL, on request of the Union, bargain collectively regarding other post retirement benefits (OPRB) as they may

affect bargaining unit employees, with International Brotherhood of Electrical Workers Local 84, AFL-CIO-CLC, as the exclusive representative of the employees in the appropriate bargaining unit described at article II, section 2 of our memorandum of agreement.

WE WILL, within 14 days of this Order, restore other post retirement benefits (OPRB) for bargaining unit employees to the pre-April 21, 1995 level.

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

GEORGIA POWER COMPANY