
OPINION OF TRUSTEES

Complainant: Pensioner
Respondent: Employer
ROD Case No.: 11-0143

Trustees: Michael H. Holland, Marty D. Hudson, and Joseph R. Reschini

The Trustees have reviewed the facts and circumstances of this dispute concerning the provision of benefits under the terms of the Employer Benefit Plan (“EBP”).

Background Facts

The Complainant states that the Respondent sent a letter on May 6, 2016, to the non-Coal Act retirees for whom it is the Plan Administrator, reflecting its intention to modify their health benefits upon the termination of the 2011 NBCWA on December 31, 2016. The Complainant states that unilateral changes or modifications may not be made to the benefits provided in the EBP.

The Respondent filed four responses to the complaint.¹ Its first response states that the instant ROD does not present any issues for the Trustees to resolve, as any changes that the Respondent may be contemplating would not be effective until after the expiration of the 2011 wage agreement (December 31, 2016), and that the Trustees have no authority under the ROD process to resolve disputes arising after the expiration of the wage agreement.

In its second response, the Respondent’s legal counsel reasserts the position that the Trustees do not have jurisdiction, because jurisdiction over this matter rests with the federal court.² In addition, counsel for the Respondent raises the issue of Trustee neutrality. This response does not address the ROD’s allegation that the Respondent intends to unilaterally change or modify the benefits provided by its EBP.

The third response notes Respondent’s continued objection to the Trustee’s adjudication of the instant ROD and states that it is responding only under protest.³ Counsel for the Respondent poses general objections to the ROD, in that it alleges that the outcome of

¹ The Employer’s first response is a 2-page letter dated 12/27/17. Three subsequent responses were submitted from counsel for the Employer dated 3/6/17, 3/17/17, and 4/21/17.

² This response is a 7-page letter dated 3/6/17, containing 34 pages of exhibits.

³ This response is a 14-page letter dated 3/17/17, containing 363 pages of exhibits.

the ROD determination is preordained and that the ROD process denies the Respondent due process under the law.⁴ The Respondent asserts that the Trustees are not impartial arbiters, the timing of the filing of the ROD was an attempt by the Complainant to affect the outcome of a civil lawsuit, and that the ROD process does not provide a neutral or fair forum. Further, Respondent asserts that it is not a violation of the NBCWA for it to communicate with retirees about potential changes to its EBP. The Respondent specifically takes issue with the directive in the ROD that states that “[it] must notify its retirees that it cannot make any changes in their benefits without the agreement of the UMW.” Respondent sets forth its position that retirees are not vested in the benefits and level of benefits guaranteed during the term of the agreement and that in any event, the Respondent has not made any changes to its EBP.

Finally, the Respondent provides information as to how it intends to change the method of delivering benefits to non-Coal Act retirees through a Health Reimbursement Account (“HRA”). The Respondent alleges that the new method of delivering benefits that is being considered maintains the same levels of coverage as provided for under the 2011 NBCWA. Respondent also states that its research indicates that there would be no change in the health benefit coverage levels and that it would be more cost-effective to provide Medicare-eligible retirees with an HRA, with which health insurance may be purchased, rather than continuing to provide health coverage under the EBP.

The Respondent’s final response reiterates its prior objections to both the ROD process and to the Trustees’ jurisdiction as well its allegations that the retirees are not vested in the benefits outlined in the 2011 NBCWA.⁵ It also alleges that the Trustees would be in violation of ERISA if they were to attempt to resolve a dispute between the Union and the Respondent.⁶ This response also contains the Respondent’s continued desire to present its case to the Trustees in person.⁷

⁴ Respondent cites the presence of two union trustees on the ROD panel and the fact that the union is involved in litigation with the Respondent on this issue to support its allegation that the ROD outcome is preordained. The ROD panel has always consisted of an even number of trustees appointed by both the Union and the BCOA to ensure that no bias for union or labor dictates the outcome of any decision. The Respondent has operated under this procedure for over two decades and can cite no instance where it has raised a legitimate claim of bias against any ROD panel. Clearly, there is no basis for the claim here, and it will not be further addressed.

⁵ This response is a 4-page letter dated 4/21/17, containing 28 pages of exhibits.

⁶ It should be noted that this ROD was one filed by the Union on behalf of an employee, as is normally done. Thus, the Respondent’s argument that this is a ROD between the Union and the Respondent is on its face incorrect. Further, the administration of the ROD process is not funded out of the 1993 Plan assets but from assets of the ROD Trust. The ROD process satisfies certain ERISA appeals requirements. Any alleged violations of ERISA with regards to the Trustees adjudication of this ROD is unfounded.

⁷ In person meetings are not part of the ROD process.

Dispute

Whether the Respondent can make unilateral changes to its EBP after the expiration of the NBCWA?

Whether the Respondent's proposed changes to its EBP provide the required level of benefits?

Positions of the Parties

Position of the Complainant: The Respondent can only make changes to its EBP, either during the term of the wage agreement or after its expiration, upon the agreement of the UMWA. The Respondent's proposed changes to the way health care coverage is provided does not guarantee the same level of benefits as provided in the EBP and may not be instituted absent an agreement with the Union.

Position of the Respondent: The Trustees are not authorized to resolve disputes after the expiration of the 2011 NBCWA. The ROD process does not provide a fair and neutral forum for adjudicating this ROD. The Respondent's proposed changes for the non-Coal Act Medicare-eligible retirees will provide the same or better health benefits coverage than is presently provided under the provisions of the EBP.

Pertinent Provisions

A. Jurisdiction

Article XX(e)(5) of the 2011 NBCWA:

Disputes arising under this Agreement with regard to the Employer benefit plan established in (c)(3) above shall be referred to the Trustees.

Article XX "General Description of the Health and Retirement Benefits," Section 10 "Health Care, Explanatory Note on Employer Provided Health Plans" of the 2011 NBCWA:

The Trustees of the UMWA Health and Retirement Funds shall resolve any disputes, as provided in Section (e)(5), including excessive fee disputes, to assure consistent application of the health plan provisions in the Employer Benefit Plans and of the managed care programs authorized by this Agreement.

Article III.A.(10)(b) of the model EBP states in pertinent part:

ARTICLE III. BENEFITS

A. Health Benefits

(10) General Provisions

(b) Administration

The Plan Administrator is authorized to promulgate rules and regulations to implement and administer the Plan, and such rules and regulations shall be binding upon all persons dealing with the Beneficiaries claiming benefits under this Plan. The Trustees of the UMWA Health and Retirement Funds will resolve any disputes, including excessive fee disputes, to assure consistent application of the Plan provisions under the 2011 Wage Agreement. The Trustees shall develop procedures for the resolution of such disputes. In the event the Trustees decide such dispute, such decision of the Trustees shall be final and binding on the parties.

B. Changes to Health Benefits Provided for Under the EBP

Article V Amendment and Termination of the model EBP states:

B. Post-termination Amendments. Subject to section C, following termination of the 2011 Wage Agreement, this Plan may be modified, amended, or terminated by BCOA and the UMWA, or by BCOA or the Employer as permitted by law.

C. Special Rule for Certain Pensioners. The Employer will provide, for life, only the benefits of its own eligible Pensioners who retired between February 1, 1993 and December 31, 2016. The benefits and benefit levels provided by the Employer under this Plan are established for the term of the 2011 Wage Agreement only, and may be jointly amended or modified in any manner at any time after the expiration or termination of the 2011 Wage Agreement.

Discussion

A. Jurisdiction

Article XX of the 2011 NBCWA, as cited above, and the model EBP, provide for the resolution of disputes during the term of the wage agreement. This is to ensure the consistent application of the plan provisions. The Respondent acts as the Plan Administrator for certain subsidiary companies that were signatory to the 2011 NBCWA that expired on December 31, 2016, as well as were signatory to numerous prior NBCWAs. This ROD was filed on November 1, 2016 after Respondent notified the wage agreement beneficiaries of its intent to modify their EBP. Therefore, the Trustees have jurisdiction to adjudicate this ROD as it was filed during the term of the 2011 NBCWA. This is consistent with the Trustees' prior opinion in ROD 88-711, wherein the Trustees asserted ROD jurisdiction after the expiration of an NBCWA. (In ROD 88-711, an employer locked out its employees following the expiration of the 1988 NBCWA and refused to provide continued health coverage to both its laid-off and locked-out employees.)

The 2011 NBCWA and the model EBP state that after the expiration of the wage agreement, the benefits or benefit levels may be jointly amended or modified by the UMWA and the Employer. This language recognizes the future ability of the parties to change the level of benefits after the expiration of the wage agreement upon agreement. The Claimant asserts that as of November 1, 2016, the Respondent was seeking to make unilateral changes to its health benefit plan after the expiration the 2011 wage agreement. The Respondent asserts that while it has contemplated making changes to the method by which it delivers benefits, to date it has not made any changes.⁸ The 2011 NBCWA is clear that modifications are permissible only to the extent to which such modifications have been made jointly by the UMWA and the employer.

Consequently, post expiration changes to an employer's NBCWA retiree health plan are subject to ROD jurisdiction since disputes about the level or provision of benefits that are plainly required after contract expiration may arise.⁹ Just as the obligation to provide lifetime retiree health benefits survives the termination of the NBCWA, the Trustees' jurisdiction to resolve disputes arising from that lifetime obligation also necessarily survives the termination of the NBCWA.

⁸ It should be noted that the Respondent did not change it EPB as anticipated because in March 2017 the U.S. District Court for the Southern District of West Virginia enjoined the Respondent from making any changes to its health benefits. *See generally, International Union, United Mine Workers of America v. Consol Energy, et al.*, U.S. District Court for the Southern District of West Virginia, 1:16-12506; Docket #50.

⁹ The Respondent's argument that the Trustees do not have jurisdiction to decide this ROD is moot. In *International Union, UMWA v. Consol Energy*, the Court granted the Plaintiffs' preliminary injunction thus permitting the Trustees to adjudicate this ROD. *Id.* "A decision on the merits from any forum other than the ROD process would undermine the bargained-for benefit of that process . . ." *Id.* at page 21.

B. Changes to Health Benefits Provided for Under the EBP

Article XX of the 2011 NBCWA permits changes or modifications to the level of benefits after the expiration of the agreement that are made jointly.¹⁰ Accordingly, the model EBP sets forth in Article V.B. that, subject to the requirements of Article C, after the expiration of the 2011 NBCWA changes to the plan may be made by “BCOA and the UMWA, or by the BCOA or the Employer as permitted by law.” Article V.C. of the model EBP reiterates that any changes to the EBP, specifically “benefits and benefit levels,” may be made jointly after the expiration of the 2011 NBCWA. In this instance, the Respondent has proposed to implement changes to the method of delivering health benefits after the expiration of the 2011 NBCWA, and no agreement with the Union has been reached.¹¹

The proposed new method of delivering the health benefits is an HRA. The HRA was described in detail in Exhibit 11 to the Respondent’s March 17, 2017, letter. Specifically, the Respondent would terminate its current health plan for the non-Coal Act Medicare-eligible retirees and instead create an HRA for each retiree. The Respondent would then annually place a pre-determined amount of money in each retiree’s HRA to utilize to purchase a health care plan. The retiree would be responsible for researching, choosing and enrolling in a Medicare health plan. The money in the HRA, would then be used by the retiree to pay for the Medicare health plan. The money could also be used for reimbursing the retiree for out of pocket medical expenses. The retiree would have to apply for such reimbursements to be made from the HRA. This burden would be placed on an older population that is poorly equipped to research and make these complicated decisions. In addition, providing a company that has no real stake in the results of the decision to assist if sought out, is clearly not a cure for this problem.

¹⁰ Article XX “General Description of the Health and Retirement Benefits,” section (c) of the 2011 NBCWA states:

The benefits and benefit levels provided by an Employer under its Employer Plan are established for the term of this Agreement only, and may be jointly amended or modified in any manner at any time after the expiration or termination of this Agreement.

¹¹ The Respondent’s argument that retirees are not vested in the benefits and level of benefits guaranteed during the term of the agreement was also rejected by the Court in *International Union, UMWA v. Consol Energy, Id.* at pp. 17-18. The Court stated that:

Defendant may be estopped from claiming Plaintiffs’ vested right to benefits and access to the ROD process terminate upon expiration. Judicial constructions accorded labor contract terms carry over to subsequent labor contracts, unless the parties choose to alter the same. Importantly, this court already has interpreted the language contained in the NBCWA and Employer Plan as creating a vested lifetime right to the Employer Plan benefits; and post-expiration access to the ROD process did not change in subsequent negotiations with Defendant CONSOL Energy. In fact, “the type of benefits at issue here are vested benefits, the right to which extends beyond the termination of the contract.” (*Internal citations omitted.*)

No such burden is placed on these beneficiaries by the current EBP.¹² Further, the retiree would have no choice to stay in the Respondent's current EBP.¹³ This change could result in retirees losing health benefit coverage if they are unable to enroll in a health plan. The Respondent will set up accounts for each retiree regardless of whether the retiree enrolls in a health plan. However, to utilize the money placed in an account, the onus is on the retiree to enroll in a plan or to apply to be reimbursed out of the HRA. The retiree may only utilize the money in the HRA for qualifying medical expenses. Although Respondent has indicated that it has contracted with RightOpt to assist retirees in this process, the Respondent cannot be certain that all retirees will avail themselves of this resource and will enroll at all.¹⁴ It is possible that some retirees will not enroll at all in a plan, in a mistaken effort to preserve their limited HRA allocation, due to a lack of understanding of the process. Further, Respondent's impact study indicates that retirees with more extensive health care needs (sicker retirees) are going to be more disadvantaged by the plan options as their health care needs increase. Also, provided by the Respondent as Exhibit 12, to the same letter, was an excerpt of testimony from the February 1, 2017, Motion Hearing held before U.S. District Court Judge David A. Faber, in the matter *International Union, United Mine Workers of America v. Consol Energy, et al.*¹⁵ This testimony claims that retirees will be able to obtain health coverage at the same level as provided in the EBP and most will be able to do so for less than the proposed amount the Respondent would provide through its contribution to an HRA. The Respondent's proposed HRA sets forth three funding levels for the HRA based on the retiree's age. There is no mechanism proposed for cost of living adjustments or considerations made for inflation. While it is possible that some beneficiaries will not experience much change, and some may benefit, some beneficiaries will suffer substantial hardship. The Respondent has acknowledged as much. For example, according to the Respondent's own submission at least 4% of the Respondent's population, a group that routinely uses approximately 17 prescriptions and at least 2 specialty drugs, will nearly unanimously find their cost rise above what was paid in their EPB. No beneficiary should be placed in a position where his or her benefits are less than or more expensive than beneficiaries that have the same ostensible coverage. Further, age is not necessarily an indicator of one's health status, so funding of the HRA on the basis of the retiree's age is necessarily flawed.

Respondent's proposal removes the right of the beneficiary to appeal to the Trustees, who presently have the authority to issue binding decisions. Since each plan purchased by a retiree would have its own appeal process not bound to any determination by the Trustees, retirees would be vulnerable to losses resulting from denied claims or additional expenses that are not consistent with the historical interpretation of the Employer Plan. Eliminating the ROD process would remove the Trustees' ability to assure retirees that required levels of benefits are being maintained by the Respondent.

¹² 2/1/17 testimony, p 133, ll. 1-6.

¹³ *Id.* at p.135, ll. 4-6.

¹⁴ Access to RightOpt is available via a telephone or internet, but contact must be initiated by the retiree. RightOpt has not been contracted to contact the retirees.

¹⁵ The entire transcript of the 2/1/17 Motion Hearing has also been reviewed and relied upon by the Trustees in deciding this ROD.

The Respondent's proposal also claims that HMO's and Medi-gap Plans will fill the gap between the amount paid by Medicare for covered charges and the balance. If Medicare denies a charge and the HMO also denies a charge, there is no recourse for the beneficiary to obtain prescription medications except as an out of pocket expense.

The Respondent proposed to establish one Catastrophic HRA in the amount of \$500,000.00 for the entire retiree population to pay for non-covered costs incurred by retirees for prescription drugs. The claim that sufficient funds would be put aside to cover the cost of catastrophic drug claims cannot be verified, since there is no way to determine what that cost may be in the future. Based on research performed by the Respondent's agent, twice the anticipated amount will be set aside to cover catastrophic drug claims, with reassessments performed, but with no schedule of the reassessment stated. There is no provision, should the catastrophic drug claims grow to exceed the amount put aside, that additional funds would be available since there is no rollover of savings from this funding from year to year. When a catastrophic claim is incurred it will be paid out of pocket, followed by an application for reimbursement. In some cases, the out of pocket cost alone might be prohibitive to obtaining the drug. For some retirees, this out of pocket limit may be reached in terms of a few hundred dollars, not to mention the ultra-expensive drugs such as the Hepatitis C treatment regimen that costs approximately \$80,000 per year. In contrast, under the EBP, the costs of these drugs would be covered. Thus, the retiree would not be receiving the same level of benefits as provided under the EBP.

The Respondent submitted a comparison of the 2016 EBP cost against the cost of several group plans offered in the areas in which the beneficiaries live, showing a savings for beneficiaries through the purchase of most health insurance plans, but the savings is based on assumptions and averages of current premiums and cost sharing for the population. Furthermore, although the proposal claims to provide funds above what would be needed to purchase coverage through an HMO and Medi-Gap plan, there are no provisions for an increase in the HRA should HMO premiums exceed the money now being offered for the HRA.

Opinion of the Trustees

Pursuant to Article XX of the 2011 NBCWA and Article III.A.(10)(b) of the model EBP, the Trustees have the authority to adjudicate this ROD as it concerns a dispute regarding the Respondent's obligation with regard to the provision and levels of retiree health benefits arising during or after the term of the 2011 NBCWA. The Trustees recognize that the Respondent may make modifications or changes to the retiree health benefit plan for which it is the Plan Administrator, after the expiration of its wage agreement. However, the Respondent is not permitted to make these changes unilaterally. In accordance with the 2011 NBCWA and the model EBP, any modification or changes must be made only upon mutual agreement of the Respondent and the UMWA.

The Trustees acknowledge that the Respondent has not yet made any changes to its EBP. The proposed changes that the Respondent has described in its submissions will not provide the level of health benefits as mandated in the 2011 NBCWA or the model EBP.