No. 13-1010

In The Supreme Court of the United States

M&G POLYMERS USA, LLC; M&G POLYMERS USA, LLC COMPREHENSIVE MEDICAL BENEFITS PROGRAM FOR EMPLOYEES AND THEIR DEPENDENTS; THE M&G CATASTROPHIC MEDICAL PLAN; THE M&G MEDICAL NECESSITY BENEFITS PROGRAM OF HOSPITAL, SURGICAL, MEDICAL, AND PRESCRIPTION DRUG BENEFITS FOR EMPLOYEES AND THEIR DEPENDENTS; AND THE M&G MAJOR MEDICAL BENEFITS PLAN,

Petitioners,

v.

HOBERT FREEL TACKETT; WOODROW K. PYLES; UNITED STEEL, PAPER AND FORESTRY, RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION; AND HARLAN B. CONLEY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONERS 1

I. Respondents Cannot Salvage The Judgment Below By Recasting *Yard-Man* As "Ordinary Contract Interpretation" 4

II. Respondents Do Not Dispute That The Agreement Lacks Clear And Express Language Vesting Health-Care Benefits 9

III. The Confusion Sown By The Sixth Circuit's Approach Underscores The Need For A Uniform, Consistent Text-Based Standard 17

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Allis-Chalmers Corp. v. *Lueck*, 471 U.S. 202 (1985) 11, 12

Bidlack v. *Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) 5, 14

Chesapeake & Ohio Canal Co. v. *Hill*, 82 U.S. 94 (1872) 17, 18

Cole v. *ArvinMeritor*, 549 F.3d 1064 (6th Cir. 2008) 19

Consol. Rail Corp. v. *Ry. Labor Execs. Ass'n*, 491 U.S. 299 (1989) 13

IBEW Local 1395 v. *NLRB*, 797 F.2d 1027 (D.C. Cir. 1986) 12

Int'l Union, UAW v. *Skinner Engine Co.*, 188 F.3d 130 (3d Cir. 1999) 11

Lewis v. *Benedict Coal Corp.*, 361 U.S. 459 (1960) 7

Litton Fin. Printing Div. v. *NLRB*, 501 U.S. 190 (1991) ..... *passim*

Local 174, Teamsters v. *Lucas Flour Co.*, 369 U.S. 95 (1962) 22

NLRB v. *Am. Nat'l Ins. Co.*, 343 U.S. 395 (1952) 3

Nolde Bros., Inc. v. *Bakery Workers*, 430 U.S. 243 (1977) 14

Reese v. *CNH Am. LLC*, 574 F.3d 315 (6th Cir. 2009) 2, 5

TABLE OF AUTHORITIES – Continued

Page

Tarrant Reg'l Water Dist. v. *Herrmann*, 133 S. Ct. 2120 (2013).....23

UAW v. *Yard-Man*, *Inc.*, 716 F.2d 1476 (6th Cir. 1983).....*passim*

Yolton v. *El Paso Tenn. Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006).....19

STATUTES

29 U.S.C. § 157, National Labor Relations Act § 7.....12

29 U.S.C. § 185, Labor Management Relations Act § 301.....12

REPLY BRIEF FOR PETITIONERS

To effectuate the intent of parties to a collective bargaining agreement, and provide the uniformity needed in national labor law, any commitment to vest health-care benefits should be clear and express in the language of the agreement. That standard aligns with this Court's precedent, with national labor policy, and with common sense given the gravity of the contractual obligation at stake. At a minimum, this Court should insist on affirmative language in the agreement that can be reasonably construed as a promise of unalterable lifetime benefits. Silence is not enough. This Court should reject the Sixth Circuit's *Yard-Man* presumption of unalterable, lifetime health-care benefits (along with its various corollaries) and reverse the judgment below.

But now, respondents try to put as much distance as they can between *Yard-Man* and the judgment in this case. They do not even attempt to defend the Sixth Circuit precedent that carried the day for them below until the tail end of their brief—and even then their defense denies the obvious presumption applied by that court. Instead, respondents argue that *Yard-Man* merely involves "ordinary contract interpretation." That argument, however, does not pass the straight-face test, as *Yard-Man* itself expressly states that the duration of retiree health-care benefits is not "subject to th[e] stricture" of ordinary contract interpretation. *UAW* v. *Yard-Man*, *Inc.*, 716 F.2d 1476, 1481 n.2 (6th Cir. 1983). And that is putting it mildly. The Sixth Circuit has applied *Yard-Man* in

twenty-one published decisions and found enforceable promises of unalterable, lifetime health-care benefits in all but two of them. Br. of National Association of Manufacturers as *Amicus Curiae* 13-14 & n.9, 34. As Judge Sutton has observed, *Yard-Man* "must mean something or else there would be no point in having it." *Reese* v. *CNH Am. LLC*, 574 F.3d 315, 321 (6th Cir. 2009).[1]

This case provides a particularly clear lesson in what *Yard-Man* means. The district court initially determined that respondents' claims should be dismissed at the pleading stage because the language of the collective bargaining agreement cannot be read to promise a lifetime of unalterable health-care benefits. Pet. App. 142-45. Applying *Yard-Man*, however, the Sixth Circuit interpreted that same language, "standing alone, as indicating an intent to vest" and reversed the district court's dismissal for failure to state a claim. *Id.* at 19. In this case, then, *Yard-Man* meant everything—as respondents, who invoked *Yard-Man* at virtually every opportunity in the courts below, well know.[2]

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[1] It is no accident that respondents chose to bring this litigation in the Sixth Circuit, selecting only named retiree plaintiffs domiciled in Ohio (rather than, say, in West Virginia, where the plant and numerous other retirees are located).

[2] Respondents cited or discussed *Yard-Man* repeatedly throughout the proceedings below, e.g., Union Resp. to Motion to Dismiss 3, 4, 20, 23, 32; Retirees' Resp. to Motion to Dismiss 3, 4, 5; *Tackett I*: Retirees' Opening Br. 15, 16, 18, 19, 20, 22, 23; Union's Opening Br. 22, 24, 45, 50, 51, 52; Retirees' Reply Br. 6, 9, 10;

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Yard-Man is many things, but "ordinary contract interpretation" is not one of them. There is nothing ordinary about manufacturing ambiguity out of vague notions of "context" and then using that same context to "resolve" the purported ambiguity. Moreover, to the extent *Yard-Man* operates to impose a substantive term—i.e., a promise to provide unalterable lifetime health-care benefits—on the parties to a collective bargaining agreement, it directly contravenes national labor policy, which is concerned with process, not results. See Br. of Chamber of Commerce & Business Roundtable as *Amici Curiae* 10 (citing *NLRB* v. *Am. Nat'l Ins. Co.*, 343 U.S. 395 (1952)). And Congress quite deliberately chose *not* to apply the vesting rules it adopted for pension benefits to welfare benefits like health care. See, e.g., Br. of ERISA Industry Committee & American Benefits Council as *Amici Curiae* 12.

The lack of any meaningful defense of *Yard-Man* by respondents only confirms that it is indefensible and should be rejected in no uncertain terms. Because *Yard-Man*'s erroneous vesting presumption infected all proceedings below, the judgment should be reversed.

Union's Reply Br. 16, 21; Union Resp. to Motion for Summary Judgment 37, 39, 59, 62, 67; Retirees' Resp. to Motion for Summary Judgment 12, 46; *Tackett II*: Respondents' Opening Br. 38, 39, 40, 41, 50, 63, 67; Respondents' Reply in Support of Cross Appeal 10, 11, 12, 13, 14.

I. Respondents Cannot Salvage The Judgment Below By Recasting *Yard-Man* As "Ordinary Contract Interpretation"

Respondents make no serious effort to defend *Yard-Man* on its own terms. Instead, they take a "nothing to see here, folks" approach, insisting that *Yard-Man* is nothing more than "ordinary contract interpretation." See Resp. Br. 15-46.

In opposing *certiorari*, however, respondents at least acknowledged that "traditional contract-interpretation rules" are "refined by * * * nuanced Sixth Circuit jurisprudence." BIO 9. If *Yard-Man* were as innocuous as respondents suggest, there would be little point for the Sixth Circuit to deploy it each time it is faced with a case regarding retiree health-care benefits in collective bargaining agreements—and virtually every time to find a promise of unalterable, lifetime health-care benefits in agreements that say nothing of the sort.

In the Sixth Circuit, the "context" of retiree health-care benefits has subsumed the text of collective bargaining agreements—and that, in turn, has allowed courts to use extrinsic evidence both to create and resolve perceived "ambiguity"—i.e., silence as to the duration of retiree health-care benefits.

Presumably because the Sixth Circuit knows that it has staked out a position that goes well beyond ordinary contract interpretation, it has claimed to disavow any presumption in favor of a promise of unalterable, lifetime health-care benefits while at the

same time "inferring" that very thing. One example captures the contradictions:

> Although we do not apply a "legal presumption that benefits vest" and although we require plaintiffs to bear the burden of proving that vesting has occurred, we apply an "inference" that "it is unlikely that [welfare benefits] would be 'left to the contingencies of future negotiations,'" so long as we can find *either* "explicit contractual language *or* extrinsic evidence indicating" an intent to vest benefits.

Reese, 574 F.3d at 321 (alteration in original) (emphases added) (citation omitted). The Sixth Circuit's "inference" squarely conflicts with the fundamental principle of "ordinary contract interpretation," properly understood, that extrinsic evidence should only be used to resolve ambiguous contract language. See, e.g., *Bidlack* v. *Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) (en banc).

A. Try as they might, respondents cannot escape the reality that the *Yard-Man* presumption was dispositive in this case on the threshold legal issue whether the collective bargaining agreement contained a promise to provide unalterable health-care benefits for life. See Pet. App. 114. Indeed, the district court initially granted M&G's motion to dismiss respondents' claims in their entirety because that court determined (correctly) that as a matter of law, there is no language in the collective bargaining agreement evincing any such promise. Respondents are correct that after the Sixth Circuit reversed

that decision, the district court subsequently made credibility determinations in their favor as to *what* vested—but those determinations are utterly irrelevant to the question presented here concerning whether anything did actually vest. *Id.* at 64.

As the Sixth Circuit itself recognized, its prior holding in *Tackett I* established "a controlling interpretation of the [collective bargaining agreement] that prove[d] dispositive of at least the vesting issue, if not the issue of capped versus uncapped benefits." *Id.* at 61. The Sixth Circuit paid lip service to the notion that it did not decide the ultimate question, *id.* at 61-62, while at the same time referring to "an unqualified declaration" that "'the parties intended health-care benefits to vest.'" *Id.* at 62 (quoting *id*. at 114). The district court got the message and made factual findings on remand that aligned with its "conclusion that the Sixth Circuit answered the threshold vesting issue." *Id.* at 63. But the agreement is silent on that "threshold" issue—and typically, when an agreement expires, its provisions do not outlive it. *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 207 (1991). There is no getting around that *Yard-Man* dictated the conclusion that the benefits vested in this case as a matter of law—and the trial that followed on *what* actually vested has nothing to do with the threshold vesting issue before this Court.[3]

[3] Respondents rely (at 30-31) on the principle that retiree benefits are essentially deemed "deferred compensation," but that argument proves too much. It would render vesting automatic

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The trial repeatedly invoked by respondents is thus unconnected with the vesting question before this Court. The bench trial simply determined "*what* vested"—not whether anything vested as an initial matter. Pet. App. 64 (emphasis in original). The Sixth Circuit had already decided that issue based solely on its application of *Yard-Man* to the collective bargaining agreement at issue. The district court was only "called upon to explain whether what vested include[d] specific benefits." *Ibid.* The fact findings on which respondents adamantly rely are thus irrelevant to this Court's resolution of the case, as M&G's arguments for reversal focus on the threshold vesting issue.

Respondents argue nonetheless (at 13) that the *Tackett II* panel "corrected the district court's misimpression that *Tackett I* had finally determined the question of vesting," a claim that is true as far as it goes—which is not very far. While the *Tackett II* panel did mention "the possibility that the district court might determine on remand that the Plaintiffs did not have vested benefits," Pet. App. 13, the key takeaway for present purposes is the Sixth Circuit's

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simply by virtue of the fact that the benefit at issue is being afforded to a retiree—and no court, not even the Sixth Circuit, has gone so far (although the Sixth Circuit's approach essentially has the same practical effect). And contrary to respondents' assertion (at 31-32 n.12), this Court's decision in *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960), does not help them. *Lewis* predated ERISA and Congress' careful consideration (and rejection) of welfare-benefit vesting.

holding in *Tackett I*—in no uncertain terms—that under *Yard-Man*, the district court reversibly erred in concluding that contract language promising a "full company contribution towards" (indicating not all) the costs of health-care benefits is not, as a matter of law, a promise of unalterable, contribution-free health-care benefits. Thanks to *Yard-Man*, after that reversal, the writing was already on the wall—and the district court received the Sixth Circuit's message loud and clear on remand.

B. Having ridden *Yard-Man* for all it was worth in the courts below, respondents now cast it aside, claiming (at 17) that "the judgment below rests on traditional rules of interpretation—not on any presumption in favor of vesting" and that "the Sixth Circuit has not proceeded on the basis of any such presumption." But respondents have affirmatively invoked *Yard-Man* throughout the many years of this litigation. See *supra* note 2.

After the Sixth Circuit reversed the dismissal of respondents' claims, respondents argued in *Tackett II* (paraphrasing *Yard-Man* only slightly) that "retiree benefits are in a sense 'status' benefits which, as such, carry with them an inference * * * that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree." Second Br. (Resp. Opening Br.) at 39, *Tackett II*, 733 F.3d 589 (6th Cir. 2013) (Nos. 12-3329, 12-3407) (citing *Yard-Man*, 716 F.2d at 1482). Respondents went on to claim that, "[i]n light of the *Yard-Man* directives and the inference that retiree benefits are intended

to vest, the [d]istrict [c]ourt correctly concluded [respondents] established that lifetime health care benefits have vested." *Id.* at 40.

Respondents' attempt to distance themselves from a method of contract interpretation that expressly allows courts to resort to extrinsic "evidence" to support an initial "inference" of vesting based solely on context (never mind text) is wholly unpersuasive. It is undeniable that *Yard-Man* has been embedded in this case from *Tackett I* forward. As a result, if *Yard-Man* falls, the judgment below cannot stand. In that regard, it is telling that respondents have apparently decided the only way to save *Yard-Man* is to pass it off as something else. That ploy only underscores that *Yard-Man* is indefensible on its own terms, and the only real question is what the proper standard of construction should be going forward.

II. Respondents Do Not Dispute That The Agreement Lacks Clear And Express Language Vesting Health-Care Benefits

The only interpretive standard that honors this Court's precedent, respects traditional rules of contract interpretation, and furthers national labor policy is one that requires an intent to vest benefits be expressed with sufficient clarity in a collective bargaining agreement to trump the expiration clause of that agreement—a standard not satisfied by the agreement here. As already demonstrated by M&G

and its *amici*, this clear statement rule—which has been adopted by the Third and Fifth Circuits—is the optimal approach to construing silence in collective bargaining agreements regarding the duration of retiree health-care benefits. Pet. Br. 13-14; 25-29; Br. of ERISA Industry Committee & American Benefits Council as *Amici Curiae* 10-16; Br. of National Association of Manufacturers as *Amicus Curiae* 5-25, 33-36; Br. of Council on Labor Law Equality & Society for Human Resource Management as *Amici Curiae* 4-24; Br. of Chamber of Commerce & Business Roundtable as *Amici Curiae* 5-23; Br. of Whirlpool as *Amicus Curiae* 30-33. That is so for several reasons.

First and foremost, it ensures adherence to traditional rules of contract interpretation. Pet. Br. 25-29. Given the background rules indisputably in place here—primarily Congress' deliberate decision to refrain from mandating that welfare benefits (as opposed to pension benefits) be vested, and this Court's general rule that terms expire with the collective bargaining agreements that contain them—silence on such a crucial point should not be treated as an invitation to extend the benefit beyond the term of the agreement. See Br. of ERISA Industry Committee & American Benefits Council as *Amici Curiae* 10-16. Nor should mere silence be enough to open the floodgates of discovery into "extrinsic evidence" that might support plaintiffs' interpretation. A clear statement rule prevents courts, however well-meaning, from violating the cardinal labor-law principle that courts must not impose substantive terms on the

parties to a collective bargaining agreement. Br. of Chamber of Commerce & Business Roundtable as *Amici Curiae* 10.

Additionally, a clear statement rule furthers the goals of national labor law by encouraging the parties to address the subject (as they should under principles of normal contract interpretation if vesting were intended) at the bargaining table rather than in the courtroom. A promise of unalterable lifetime healthcare benefits, as the Third Circuit has noted, is a substantial concession not to be imposed lightly by inference or presumption. *Int'l Union, UAW* v. *Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999). Further, as this Court has explained, Congress' policy of "interpretive uniformity and predictability" requires courts to construe collective bargaining agreements under "uniform federal law"—so that the parties can be certain "as to what they were binding themselves to when they agreed to create a right to collect benefits under certain circumstances." *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 211 (1985).

As the history of *Yard-Man* discloses, without a clear statement rule—or at least some form of a text-based rule—the employer choosing to provide any benefits to retirees will be the party in need of language *negating* vesting to avoid having to prove a negative down the line. Br. of Chamber of Commerce & Business Roundtable as *Amici Curiae* 12-13. A clear statement rule thus prevents courts from giving substantive weight to the parties' silence on an issue.

Perhaps most important, a clear statement rule would best serve national labor law's goals of uniformity and predictability by drastically reducing the odds that different courts will construe the same contract language differently, as is now unfortunately the case. See, e.g., *Allis-Chalmers Corp.*, 471 U.S. at 211 (invoking § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to justify preemption of state contract and tort actions based upon "[t]he interests in interpretive uniformity and predictability" of collective bargaining agreements). And represented workers will know their rights with certainty before litigation and independent of the circuit in which they live.

Respondents do not dispute—and thus concede—that the contract language here could not satisfy a clear statement standard. Instead, they take issue with the standard itself—relying heavily upon Judge Silberman's opinion for the D.C. Circuit in *IBEW Local 1395* v. *NLRB*, 797 F.2d 1027 (D.C. Cir. 1986), to argue against requiring clear textual evidence of an employer's promise of unalterable health-care benefits in perpetuity. But that case involved whether a collective bargaining agreement waived a *statutory* right—the right to engage in sympathy strikes, as established by § 7 of the National Labor Relations Act, 29 U.S.C. § 157—with the requisite "unmistakable" clarity. *Id.* at 1029. While the right to engage in sympathy strikes is a statutory right,

there is no statutory right to lifetime retiree health benefits.[4]

A clear statement rule is fully consistent with this Court's decision in *Litton*, which holds that "if a collective-bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement* * * *" *Litton*, 501 U.S. at 207. Rather than seeing the essential point of *Litton*, respondents distort it to bolster their argument that continuing health-care benefit obligations do not need to be expressed in the terms of the agreement. This misses the point of *Litton* and misapplies its holding—at base, the case is about a *contractual* guarantee, and

[4] In a further effort to avoid this conclusion, respondents misrepresent (at 22) the holding in *Consolidated Rail Corp.* v. *Railway Labor Executives Ass'n*, 491 U.S. 299 (1989). That case concerned whether an employer should have flexibility to act pursuant to a management-rights clause that gives an employer discretion to act in some circumstances. The union argued in that case that the employer could only act in ways specifically delineated in the contract. *Id.* at 308. This Court rejected the union's position, reasoning that labor law permits the parties to bargain for flexible contract terms, and such terms would be undermined if courts required a "clear and patent" statement of every action the employer might want to take pursuant to a management-rights clause. *Ibid.* The flexibility accorded by the management-rights clause at issue in *Consolidated Rail* has no bearing on the vesting issue presented in this case. If anything, it is clarity and uniformity—not "flexibility"—that is needed here.

not a term that continues as a statutory matter after the agreement expires.[5]

Litton involved an arbitration clause written into a collective bargaining agreement, and the question was whether that clause still applied to require arbitration after the contract terminated. While this Court noted that some contractual commitments can survive the termination of collective bargaining agreements—not as a matter of contract but as a function of the statutory status quo—it reaffirmed the general rule that contract provisions do not extend beyond the life of the contract itself.

Significantly, *Litton* involved an arbitration agreement, not a negotiated wage or benefit. It would make little sense for a requirement of arbitrability to cease with the contract, given that one reason for having arbitration is to resolve disputes that arose before the contract terminated. See *Bidlack*, 993 F.2d at 607-08 (en banc) ("The utility of an arbitration clause would be greatly impaired if the duty to arbitrate disputes arising under the contract expired with the contract, since such disputes might easily remain pending on the date of expiration. * * * [T]here is no similar structural necessity for a collective bargaining agreement to include an undertaking by the employer to pay lifetime medical benefits to retired employees* * * *"). And even though it was implicit,

[5] Respondents over-read *Nolde Brothers, Inc.* v. *Bakery Workers*, 430 U.S. 243 (1977), for the same reasons.

the obligation was one that arose by the terms of the agreement itself—and the Court did not need to (and did not) look to extrinsic evidence or course of conduct to make a determination as to whether the provision applied. *Litton* is rooted in Congress' strong preference for arbitration and the common-sense recognition that disputes arising during the term of an agreement may not be fully and completely resolved while the agreement is in effect.

The guarantee of a health-care benefit, by contrast, has nothing to do with dispute resolution under the contract. As respondents note (at 22), "the purpose of an arbitration clause [is] to resolve disputes that arise under the contractual relationship." Retiree health-care benefits have no such purpose and—like the obligation to pay wages at specified levels and provide negotiated benefits—need not (and do not) survive the termination of the agreement under *Litton*.

In this case, unlike in *Litton*, a court would have to venture beyond the contract (to something such as *Yard-Man* "context") to justify vested benefits—a short trip, as it turns out, in the Sixth Circuit. Moreover, unlike arbitration, Congress has not expressed an affirmative desire for health-care benefits to continue beyond the term of a collective bargaining agreement; in fact, the available evidence suggests just the opposite. Pet. Br. 4-6, 22-23. In short, there is no logical equivalence between the arbitration clause in *Litton* and the health-care benefits at issue here. Absent clear textual evidence to the contrary,

contractual terms—including those regarding health-care benefits—follow the "ordinary course" and do not outlast the agreement that provides them. Respondents' accusation (at 23) that M&G has somehow "patently distorted" *Litton* is simply wrong.

In all events, ordinary contract interpretation does not treat silence as giving rise to substantive and perpetual obligations—and there is good reason for that. As set forth by M&G in its merits brief at 16-25, implying an obligation such as vested health-care benefits runs contrary to contract interpretation principles and sound policy concerns. Consequently, respondents do not even attempt a justification of *Yard-Man*'s policy rationale for placing extrinsic evidence on a level field with contract language and throwing in an inference or presumption that favors vested benefits. Those arguments lack persuasive force, even on their own terms (see *ibid.* at 18-22), and create an untenable situation for employers who are left trying to prove a negative. It is entirely consistent with traditional contract interpretation, with national labor law, and with ordinary common sense to construe silence regarding the duration of retiree health-care benefits to mean that the employer did *not*, as a matter of law, promise to provide such benefits in perpetuity.

III. The Confusion Sown By The Sixth Circuit's Approach Underscores The Need For A Uniform, Consistent Text-Based Standard

Particularly given the disarray and divergence in the lower courts, respondents' insistence that the Sixth Circuit is merely engaging in "ordinary contract interpretation" to find vested health-care benefits in virtually every collective bargaining agreement is simply not credible. Even if this Court declines to adopt a clear statement rule, it should confirm that the *text* of the collective bargaining agreement is still the best indication of the parties' intentions, as the Second and Seventh Circuits hold. Pet. Br. 30-33. A text-based approach that insists on language in an agreement that is, at a minimum, reasonably susceptible of a promise of vesting—and that requires ambiguity before extrinsic evidence can enter the picture—better comports with traditional contract interpretation, national labor law, and this Court's precedent than *Yard-Man* dressed up as "ordinary contract interpretation."

Though respondents are surely correct that intent is the touchstone of the analysis, even the case they cite (at 19) for that proposition, *Chesapeake & Ohio Canal Co.* v. *Hill*, 82 U.S. 94 (1872), makes clear that, in ascertaining intent, courts must "look carefully to the substance of the original agreement * * * in order that we may give it a fair and just construction." *Id.* at 99-100. This Court went on to say that courts should not presume or infer that parties intended to provide for certain things—intent flows

from the *text*. *Ibid.* That rule still holds force today and contractual text—no different than statutory text—must always control the inquiry. Absent an indication of vesting in the text of the agreement, none should be postulated.

The instant case highlights why such a rule is needed. Even though M&G would have prevailed in any circuit that analyzes collective bargaining agreements without a thumb on the scale in favor of vesting, the courts here were able to piece together an intent to vest from contradictory inferences and presumptions, self-serving testimony, and snippets of contractual language that, as the district court initially (and correctly) held, say absolutely nothing about the duration of retiree health-care benefits (much less promise such benefits in perpetuity). Thus the "inference" of vesting trumped not only text but also undisputed extrinsic evidence (including evidence the district court initially ruled unambiguously failed to support vesting, see Pet. App. 127-31).

A. To begin, respondents' repeated claims that it is somehow improper for the Court to consider the contrast between the absence of any durational language concerning retiree health-care benefits with the presence of such language in other parts of the agreement make little sense. For one thing, the question presented quite clearly asks whether courts, in construing collective bargaining agreements:

> [S]hould presume that silence concerning the duration of retiree health-care benefits

> means the parties intended those benefits to vest (and therefore continue indefinitely), as the Sixth Circuit holds; or [ ] require a clear statement that health-care benefits are intended to *survive the termination of the collective bargaining agreement*, as the Third Circuit holds; or [ ] require at least some language in the agreement that can reasonably support an interpretation that health-care benefits should *continue indefinitely*, as the Second and Seventh Circuits hold.

Pet. Br. at i (emphases added). The argument about various durational clauses is thus fairly included within the question presented.

Nor is it "waived" for not being raised below. The Sixth Circuit has squarely held—as part and parcel of its *Yard-Man* analysis—that courts must disregard durational language in collective bargaining agreements unless it specifically refers to retiree benefits. See, e.g., *Cole* v. *ArvinMeritor*, 549 F.3d 1064, 1071 (6th Cir. 2008) ("General durational provisions only refer to the length of the [collective bargaining agreements] and not the period of time contemplated for retiree benefits. Absent specific durational language referring to retiree benefits themselves, courts have held that the general durational language says nothing about those retiree benefits."); *Yolton* v. *El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 580-81 (6th Cir. 2006) (same); *Yard-Man*, 716 F.2d at 1482-83. This point was made in the petition for *certiorari*. Pet. 14. There was no point in arguing to the Sixth Circuit that where, as here, an agreement is silent on

the duration of retiree health-care benefits, courts should look elsewhere in the agreement for cues—including how the parties treated the duration of other benefits. Indeed, the Sixth Circuit's rejection of any such argument only illustrates how *Yard-Man* operates selectively to allow courts to pick and choose among contractual provisions to support vesting.

Respondents acknowledge (at 12), as they must, that M&G has always maintained that the contractual language concerning "full Company contribution towards" health-care benefits is insufficient to vest benefits as a matter of law. That language—along with retirees' eligibility for health-care benefits being based on their receipt of a pension and benefits being available for surviving spouses—is the only textual hook for vesting in this case. As the district court recognized at the outset—and as respondents do not seriously dispute—those terms have nothing to say about *duration* of the benefits. Pet. App. 142-43 (noting that "full Company contribution towards" health-care benefits does not vest those benefits); see also Br. of Chamber of Commerce & Business Roundtable as *Amici Curiae* 16 ("An agreement may address both [welfare and pension] benefits together, but that is simply because a retiree may become *eligible* for both benefits at the same point in time.").

Respondents' attempt at a textual argument is defeated by understanding the link between receiving a pension and being eligible for retiree health-care benefits. The link ensures that an employee receiving retiree health-care benefits is, in fact, retired and

has not merely qualified for retirement but continues to work. The contractual language designates who is eligible for the benefit, and says nothing about how long that benefit must last.[6]

Respondents' textual argument also ignores that the agreement provides health-care benefits to workers and retirees alike—and it is undisputed that active workers' health-care benefits are not vested. In this context, then, it makes no sense to think of health-care benefits as some sort of deferred compensation. Not only is that argument undermined by the lack of a vesting schedule (as can be found with the pension benefits, see, e.g., JA 376-77), it is refuted entirely by the inconsistency in the union's position that an active worker with 95 or more points could have his retiree health-care benefits negotiated away at any time, whereas a retiree is forever vested in the same benefits.

With no contract language reasonably susceptible to an interpretation creating a perpetual entitlement to health-care benefits, respondents try to create a distraction by pointing to the credit M&G received for assuming benefits for retirees. Resp. Br. 2, 43. But the price credit simply offset a liability that M&G had to book whether or not there was an

[6] For the same reasons, the language providing benefits to surviving spouses highlighted by respondents cannot logically be read to vest health-care benefits, either. It denotes who is eligible for the benefit, not whether the benefits are vested.

actuarial "true up" with the seller and whether or not the benefits were vested. See Financial Accounting Standard 106 (requiring companies to account for the full value of the benefits as a liability whether or not they are vested).

Respondents also insist (at 50-52) that the benefits vest because the agreement contains vesting language when referencing pension plans, but not health-care benefits, because ERISA requires the vesting of pension plans. That argument only proves M&G's point. The parties include vesting language for pension plans because they know vesting is required by statute and must be expressed in the terms of the contract. Pension vesting would never be left to the vagaries of extrinsic evidence and nebulous claims concerning the parties' intent. It would make little sense for an agreement to omit vesting language regarding a benefit not already statutorily guaranteed to vest—that thus remains subject to negotiation—if vesting were actually intended.

B. Most of all, a text-based approach is necessary to determine whether health-care benefits in a collective bargaining agreement have vested because "[t]he possibility that individual contract terms might have different meanings [in different circuits] would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962). While every circuit, including the Sixth, claims to use "ordinary contract interpretation" rules, the lower courts are "all over

the lot" when it comes to actually applying those rules. Respondents' attempt to paper over those differences is as unhelpful as it is unsuccessful.

Respondents have chosen this tactic, of course, because they cannot prevail under any standard that requires textual indication of vesting. See Pet. Br. 25-42. And this Court has recognized the commonsense principle that the weightier a commitment is, the more likely it is to be clearly indicated by the parties in their agreement—and, in all events, their agreement would not be silent on the point. See *Tarrant Reg'l Water Dist.* v. *Herrmann*, 133 S. Ct. 2120, 2133 (2013); see also Br. of ERISA Industry Committee & American Benefits Council as *Amici Curiae* 10-16 (contracting parties, like legislatures, do not "hide elephants in mouseholes").

Respondents' argument that the Sixth Circuit (and others) are merely engaged in "ordinary contract interpretation" only confirms that the problem with *Yard-Man* is not limited to its presumption or inference, but also extends to the various "rules of construction that have followed the *Yard-Man* inference." Br. of National Association of Manufacturers as *Amicus Curiae* 25. If anything, respondents' argument itself raises serious questions about whether any standard short of a clear statement rule or something very close to it can put an end to the mischief inherent in *Yard-Man*. In the absence of such a rule, disputes over retiree health-care benefits will continue to be settled in the courtroom, rather than at the bargaining table—sacrificing the uniformity and

predictability that national labor law demands. This Court should therefore reject in no uncertain terms *Yard-Man* with its imposition of extra-textual obligations based on a faulty policy rationale not even respondents seriously defend. Under any meaningfully text-based rule of construction, the agreements at issue did not vest lifetime, contribution-free health-care benefits and the Sixth Circuit's contrary judgment cannot stand.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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