INTEREST OF THE NCCMP

The National Coordinating Committee for Multiemployer Plans ("NCCMP") is a nonprofit, tax-exempt organization that has actively participated in the development of employee benefits legislation and regulations promulgated to implement the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and other laws affecting multiemployer plans. Currently, more than 240 multiemployer plans and related entities, including 184 defined benefit pension plans, are affiliated with the NCCMP. These affiliated plans represent a majority of the participants in multiemployer plans throughout the nation and are representative of the multiemployer plan community generally. The NCCMP has frequently participated as *amicus curiae* in the United States Supreme Court and the federal courts of appeal.

One of the issues raised in this proceeding is of vital significance to virtually all of NCCMP's affiliates, to wit, the contention that the Defendant Plan's application of its "pro-rated level of benefits rule," also referred to as a "separation provision," violates the benefit accrual requirements set forth in Section 204(b)(1) of ERISA, 29 U.S.C. § 1054(b)(1).

Certain dicta in the lower court's analysis could be misread to suggest—incorrectly—that application of separation provisions, like the one found in the Defendant Plan, to limit the availability of retroactive benefit improvements to active employees can violate ERISA's 133-1/3 percent benefit accrual rule.[1] In a separate, even more disturbing, ruling, another district court incorrectly applied 133-1/3 percent rule to invalidate a plan's application of its separation provisions. *See Melvin v. UA Local 13 Pension Plan*, 204 F. Supp. 2d 564 (W.D.N.Y. 2002). Both *Melvin* and the Plaintiff in this case misconstrue ERISA's backloading provisions in a manner that could have serious and harmful consequences for the great majority of multiemployer defined benefit plans.

As we discuss below, separation provisions are commonplace in multiemployer defined benefit plans and provide important and entirely legitimate protections against unanticipated financial liabilities. The dicta below—if not properly understood—and the *Melvin* decision seemingly challenge the very existence of such provisions. Indeed, Plaintiff herein actually requests the Court to remand the case to the district court with directions to the Defendant Trustees to direct "reformation" of the Plan[2] in order to conform to Plaintiff's incorrect interpretation of ERISA's benefit accrual requirements.

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[1] *See* ERISA Section 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B). The actual finding of the district court was that the Defendant Plan did not unlawfully "backload" Plaintiff's benefit accruals by virtue of a separate backloading formula set forth in ERISA Section 204(b)(1)(D), 29 U.S.C. § 1054(b)(1)(D).

[2] Defendant correctly points out that Plaintiff has waived the right to assert this request on appeal.

This misreading of ERISA's backloading provisions, if perpetuated, could have a devastating effect on hundreds of multiemployer defined benefit pension plans. Use of the 133-1/3 percent rule to invalidate legitimate separation rules is not supported by the Act, its legislative history, the preponderance of case law or the relevant guidance promulgated by the Internal Revenue Service. The NCCMP hopes that the Court will see fit to disavow any suggestion that the Plan herein does not satisfy ERISA's benefit accrual requirements, even for post-ERISA participation.

The NCCMP requests, in effect, that this Court affirm the decision below, but that it specifically clarify that the Plan's application of its separation rule satisfied ERISA's accrual requirements irrespective of whether the original participation had been pre-ERISA under Section 204(b)(1)(D) or post-ERISA under Section 204(b)(1)(B). As this Court has recently recognized, it is "axiomatic" that an appellate court may affirm the judgment below for reasons different than those relied on by the district court. *See Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.2d 456, 466 (2d Cir. 2001).

ARGUMENT

I. **Introduction**

The Defendant Plan correctly characterizes this case as a "routine denial of benefits case." (Appellee's Brief at 1.) The Plaintiff worked in covered employment from 1953 through 1973, and again from 1980 through 1996. Plaintiff contends that his pension benefit should be calculated without regard to the fact that he incurred a six-year separation from covered employment between 1974 and 1979.

Under a perfectly legitimate "separation" provision of the Plan, adopted in 1984, Plaintiff's six-year separation from employment means that his ultimate pension amount is to be determined on a "pro rata basis." [3] (A 145.) The amount of pension based on service before his separation is determined by the benefit rate

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[3] Article V, Section 7 of the 1994 Plan states:

> An Employee shall be deemed to have separated from employment on the last day in which he receives an Hour of Service which is followed by a Plan Year in which he receives fewer than 500 Hours of Service. If such Employee subsequently returns to employment his pension amount will be determined on a pro rata basis. The amount of pension based on Benefit Service earned before his separation from employment shall be determined under the terms of the Plan on his first separation from employment. If after his return as an Employee he earns three or more years of Vesting Service, the amount of pension based on Benefit Service earned after his separation from employment shall be determined under the terms of the Plan on his subsequent separation from employment. If after his return as an Employee he earns less than three years of Vesting Service the amount of pension based on Benefit Service earned after his separation from employment shall be determined under the terms of the Plan on his first separation from employment. The final benefit amount will be the sum of the two amounts, however, in no event will more than 40 years of Benefit Service be used in the determination of the amount of pension.

(A 145-46.) A similar provision is set forth in Article IV, Section 6 of the 1984 Plan. (A 192.)

of the plan in effect and applicable to that time. The amount of pension based on service after the separation is determined under the benefit rate of the plan in effect on his subsequent separation.

Separation rules of this kind are very common in multiemployer defined benefit pension plans.[4] Such plans are funded by employer contributions paid into the plan generally on a monthly basis.[5] Contribution amounts are typically based on the collectively-bargained rates in effect at the time the contributions are made. All contributions are pooled and become assets of the plan available for the payment of benefits and administrative costs of maintaining the plan. *See generally Central States S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985).

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[4] *See, e.g.,* the provisions enforced in *Lewis v. Plumbers & Pipefitters Nat'l Pension Fund*, 91 F.3d 144 (6th Cir. 1996) (unpublished decision), reported in full, No. 95-5635, 1996 U.S. App. LEXIS 19115 (6th Cir. Ky. July 9, 1996); *Brean v. Board of Trustees for the Chicago Dist. Council of Carpenters Pension Fund*, 27 F. Supp. 2d 1086 (N.D. Ill. 1998), *aff'd*, 202 F.3d 272 (7th Cir. 1999) (unpublished decision); *Vail v. Plumbers, Pipe Fitters & Apprentices Local 112 Pension Fund*, 129 F. Supp. 2d 176 (N.D.N.Y. 2001); and *Paoli v. Meyers*, No. 99 Civ. 4394 (JSM), 2001 U.S. Dist. LEXIS 13188 (S.D.N.Y. 2001).

[5] The importance of adequate employer contributions to the financial solvency of multiemployer plans was expressly recognized in Congress's adoption of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208. That Act amended ERISA so as to impose a *statutory* obligation on employers to make contributions. MPPAA § 306, codified at 29 U.S.C. § 1145.

Plaintiff stresses that, over time, the rate at which participants' benefits are calculated typically increases. The flip side of that coin is that collectively-bargained employer contribution rates typically increase as well. Thus, a participant who works a sufficient number of hours to vest in his pension, then separates from covered employment for several years and later returns to covered employment, likely worked in his initial period of employment under a collective bargaining agreement with a distinctly lower employer contribution rate than that in effect during his later period of covered employment. Accordingly, that period of service produced a relatively lower amount of contributions available to finance the pensions of all participants.

When determining the viability of a benefit increase, a plan's trustees—with the assistance of actuaries—must make determinations and projections based, *inter alia*, on existing fund assets, projected future contribution levels and projected liabilities based on the terms of the plan and any amendments thereto. Separation provisions like that contained in the plan of benefits of Defendant herein are an important mechanism by which plans can protect themselves against pension liabilities that are unanticipated and/or not supported by adequate employer contributions. Separation provisions, once adopted, also become part of the package of assumptions on which actuarial projections are based.

Plaintiff herein separated from covered employment in 1974, when the Defendant Plan's benefit rate was $5 per month for each year of service. (A 329.) Plaintiff returned to covered employment in 1980 and worked until his retirement in 1996, at which time a $50 per month benefit rate was in effect. Applying its separation rule, the Defendant Plan calculated Plaintiff's pension by applying a $50 rate to his service following his separation and a $20 rate to the service earned before his separation. The $20 rate was the rate in effect in 1984, at the time the separation provision was adopted. (A 331.)

In analyzing Plaintiff's "backloading" argument, it is important to understand that multiemployer defined benefit plans, like the plan at issue herein, are subject to Title II of ERISA, (codified as amendments to the Internal Revenue Code ("Code")) which duplicates those portions of Title I of ERISA (codified at Title 29 of the U.S.C.) setting forth ERISA's provisions on vesting, accrual and funding, including ERISA's "backloading" rules.[6] To obtain the tax benefits afforded "tax qualified" pension plans, the sponsors of multiemployer pension plans from time to time must apply for favorable determination letters from the IRS, which reviews such applications on a plan-by-plan basis. To receive a favorable determination, a plan must comply with the requirements imposed by

[6] Under Reorganization Plan No. 4 of 1978, §101, 43 Fed. Reg. 47713, the IRS was given authority over ERISA's funding, participation, benefit accrual and vesting provisions.

Code Sections 401 *et seq.*, including the benefit accrual requirements set forth in Code Section 411(b) and the regulations promulgated thereunder.

Separation provisions are nothing new to multiemployer defined benefit plans, nor are they new to the IRS, which periodically reviews such plans. ERISA's Section 204[7] benefit accrual requirements have been in effect since 1974. Yet it is only very recently, over a quarter century since the passage of the statute, that the Plaintiff herein and the plaintiff in the *Melvin* case have attempted to assert the novel argument that separation rules cannot be enforced because they allegedly violate the 133-1/3 percent rule, a rule already by definition applied by the IRS in the course of issuing periodic determination letters.

ERISA's vesting and accrual provisions are "complicated and densely worded." *See McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 153 F. Supp. 2d 268, 280 (S.D.N.Y. 2001). Plaintiff herein seeks to take advantage of the technical and "reticulated"[8] nature of the statutory language in inviting the Court to gloss over certain vital distinctions and meanings in the statutory text. As we will demonstrate below, a correct application of the statute would uphold, not undo, these longstanding separation provisions, which have

[7] Section 411(b) of the Code.

[8] *See Nachman Corp v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980).

been sanctioned by the Internal Revenue Service and are designed to protect and preserve pension fund assets for the benefit of all participants.

II. The Drafters of ERISA Recognized that Pension Plans Needed the Flexibility to Formulate Benefit Levels Commensurate With the Plans' Ultimate Ability to Fund and Pay All Promised Benefits.

No one questions the general proposition that a fundamental purpose of the statute was to ensure that a participant who has fulfilled the requirements for vesting will ultimately receive that vested benefit. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510-512 (1981). Nonetheless, Congress also recognized the need to avoid undue interference with a plan's determination of the actual content of such benefits. As the Supreme Court has noted, it is clear from the language of the statute that "the private parties, not the Government, control the level of benefits. . . ." *See id.* at 510-512. *See also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) (while it wanted to protect contractually defined benefits, "Congress was also concerned lest the cost of federal standards discourage the growth of private pension plans.").

In ERISA, Congress established certain minimum periods of time within which participants must be deemed to have vested in a pension benefit. ERISA Section 203, 29 U.S.C. § 1053, Internal Revenue Code ("Code") Section 411(a), 26 U.S.C. § 411(a). Recognizing the possibility that some plans might attempt to avoid some of the effects of the minimum vesting rules, Congress simultaneously adopted the so-called "backloading" rules, which were designed to prevent employers from effectively circumventing ERISA's minimum vesting rules by having the bulk of an employee's pension benefit only accrue when he was on the verge of retirement. However, as we will discuss below, Congress carefully crafted the backloading rules so they would not interfere with either a plan's ability to make periodic increases to the benefit levels of participants or with other legitimate and established plan rules.

III. The Plan Satisfies ERISA's Benefit Accrual Requirements.

A. Under the Plain Language of the Statute, Relevant Regulations and Administrative Rulings, the Defendant Plan Satisfies the 133-1/3 Percent Rule.

The prorated level of benefits rule herein is a fairly typical one, used by multiemployer defined benefit plans to limit generous retroactive benefit improvements to a participant's "uninterrupted" or "continuous" service prior to the effective date of a retroactive benefit improvement. Notwithstanding the Defendant Trustees' adoption of numerous benefit improvements over time, the Plan's benefit formula and accrual schedule ensure that every active employee participating in the Plan will always accrue benefits in any plan year at the same rate as all other employees, regardless of his or her years of service.[9] For this reason, the Defendant Plan satisfies ERISA's benefit accrual requirements.

To satisfy ERISA's benefit accrual requirements for periods of participation after the effective date of ERISA, the Plan must satisfy one of three benefit accrual tests set forth in Section 204(b)(1). Notwithstanding the dicta below, the Defendant Plan *does* satisfy the requirements in the 133-1/3 percent test set forth in ERISA Section 204(b)(1)(B). That section provides:

> (B) A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133-1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph—
>
> (i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;
>
> (ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

[9] The benefit formula for most defined benefit plans is set forth as a "unit benefit." A unit benefit typically is expressed as a "flat dollar" amount (for example, a monthly benefit equal to $50 multiplied by a participant's total years of service) or as a percentage of average annual compensation (for example, a monthly benefit equal to 3% of a participant's high 5-year average earnings multiplied by years of service divided by 12 months). The Defendant Plan is a flat-dollar unit benefit plan. (A 143.)

> (iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and
>
> (iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

29 U.S.C. § 1054(b)(1)(B).

First of all, there is no dispute that over time all of the Defendant Plan's benefit increases have been solely the result of periodic and discretionary *amendments* which increase the flat dollar unit benefit for the current plan year for *all active participants* during that plan year regardless of their years of service.

The Defendant Plan's benefit accrual formula, accordingly, clearly satisfies the 133-1/3 percent test. Section 204(b)(1)(B) expressly provides that the 133-1/3 percent rule tests a plan's compliance with ERISA's benefit accrual requirements in that *particular plan year*. Article 5, Section 2(a) of the 1994 Plan provides that, effective July 1, 1994, an employee's benefit at Normal Retirement Age is a monthly benefit equal to $45 multiplied by the employee's years of Benefit Service (up to a maximum of 40 years). Thus, in 1994, the *annual rate of accrual* for *all* employees, regardless of years of service, was $45 per year of service. This formula does not create distinctions based on a participant's years of service (up to a maximum of forty).[10] Accordingly, in the applicable plan year (1994), each participant—including Plaintiff—accrued benefits at the same rate as any individual who was or could have been a participant in that plan year, thus satisfying the rule.

To further clarify the 133-1/3 percent rule, Congress included subparagraphs (i) and (ii). These provisions relate to benefit improvements adopted by amendment (subparagraph (i)) or benefit improvements set forth in the plan document, without amendment, which will apply in later *plan years* (subparagraph (ii)). Because the Defendant Plan adopts benefit improvements through amendments, subparagraph (i) would apply so that a Plan amendment that increases the Plan's flat dollar unit benefit for the current year would be "treated as in effect for all other plan years." By contrast, subparagraph (ii), would apply in instances where the plan itself contains a benefit improvement schedule for future plan years.[11] As will be discussed in more detail below, these subparagraphs

[10] Because participants cease to accrue benefits after 40 years of service, the formula under the Plan is not completely uniform. However, ERISA permits pension plans to limit years of service for purposes of benefit accrual. Moreover, a decrease in the accrual rate based on years of service will satisfy ERISA's backloading rules. *See also* Code Section 411(b)(1)(H)(ii) (a plan will not be deemed to discriminate based on age "solely because the plan imposes (without regard to age) a limitation on the number of years of service or years . . . taken into account for purposes of determining benefit accrual under the plan.").

[11] For example, if a plan's monthly benefit formula stated that for all participants in 2002, the accrual rate will be $50 multiplied by years of benefit

simply reinforce the conclusion that provisions of the kind at issue here are in full accord with ERISA's benefit accrual requirements.

Plaintiff contends that the Plan's separation provision causes the Plan to violate the 133-1/3 percent rule because it may result in a participant having the portion of his benefit for years of service after a separation determined under a flat dollar benefit rate that exceeds the portion for years of service prior to such separation by more than 33-1/3 percent. Plaintiff attempts to rephrase subparagraph (ii) so as to suggest that it "permits an increase in future accrual rates without comparing current and future rates of accrual, *provided the old and new rates do not coexist in the same plan year.*" (Appellant's Brief at 23.) This facile paraphrase suggests, incorrectly, that Section 204(b)(1) embodies some special benefit accrual rule that prohibits the Plan's application of a prorated level of benefits rule. Not only the statute, but the legislative history, relevant IRS regulations and other administrative rulings are all to the contrary.

On several occasions Congress commented on the relationship between benefit improvements and the 133-1/3 percent rule. The Committee Report for

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service and that, effective 2003, the accrual rate will be $75 multiplied by years of benefit service. This provision satisfies subparagraph (ii) because the change in accrual rate in 2003 does not apply to any individual who is or could be a participant in 2002, but who ceased to be in 2003.

H. R. 12855, an earlier version of ERISA where subparagraphs (i) and (ii) of the 133-1/3 percent rule first appear in their final form, provides that—

> A plan will not fail to meet the back loading requirements merely because a plan amendment (or scheduled benefit increase) increases the rate of benefit accrual for the current year or for future years under the plan*, without providing past service credits*. For example, if a plan provides a 1 percent rate of accrual for all participants for 1976, and a 2 percent rate of accrual for all participants for years after 1976, this would satisfy the test (subject only to the antidiscrimination requirements of the tax law) even though 2 percent is more than one and one-third times 1 percent.

H. R. Rep. No. 93-807, at 61 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4727 (1974) (emphasis added). Subsequent legislative history echoes the Committee's prior report on the matter of plan amendments:

> In applying these rules, a plan amendment in effect for the current year is to be treated as though it were in effect for all plan years. (For example, if a plan provides a one percent rate of accrual for all participants in 1976, and is amended to provide a 2 percent rate of accrual for all participants in 1977, the plan will meet this test, even though 2 is more than 1 1/3 times 1).

H. Conf. Rep. No. 93-1280, at 274 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5055 (1974). The legislative history indicates that Congress understood that plan amendments often increase accrual rates from one year to the next and, as a result of such amendments, participants could have their rate of benefit accrual for earlier periods of service calculated at a lower rate than the rate applicable for subsequent years. More importantly, Congress sought to avoid having the impact of such benefit increases taken into account under the 133-1/3 percent test, when it included subparagraphs (i) and (ii) in the final version of Section 204.

The Plaintiff cites to the example provided in Treas. Reg. § 1.411(b)-1(b)(2)(ii)(B) to support his contention that "co-existing accrual rates" will cause a Plan to violate the 133-1/3 percent schedule:

> (B) Change in accrual rate. Any change in an accrual rate which change does not apply to any individual who is or could be a participant in the plan year is disregarded. Thus, for example, if for its plan year beginning January 1, 1980, a defined benefit plan provides an accrued benefit in plan year 1980 of 2 percent of a participant's average compensation for his highest 3 years of compensation for each year of service and provides that in plan year 1981 the accrued benefit will be 3 percent of such average compensation, the plan will not be treated as failing to satisfy the requirements of this subparagraph for plan year 1980 because in plan year 1980 the change in the accrual rate does not apply to any individual who is or could be a participant in plan year 1980. However, if, for example, a defined benefit provided for an accrued benefit of 1 percent of a participant's average compensation for his highest 3 years of compensation for each of the first 10 years of service and 1.5 percent of such average compensation for each year of service thereafter, the plan will be treated as failing to satisfy the requirements of this subparagraph for the plan year even though no participant is actually accruing at the 1.5 percent rate, because an individual who could be a participant and who had over 10 years of service would accrue at the 1.5 percent rate, which rate exceeds 133-1/3 percent of the 1 percent rate.

(Appellant's Brief at 23-24.)

This provision does not support Plaintiff's contentions regarding "co-existing accrual rates." Rather, it illustrates the purpose of ERISA Section 204(b)(1)(B)(ii) (Code Section 411(b)(1)(B)(ii)) by comparing a plan that provides for one benefit rate in one year (1980) and a higher rate in a subsequent year (1981) with a plan provision applicable *for all plan years* that sets forth two different accrual rates based solely on a participant's years of service (1% for first 10 years of service and 1.5% for each year of service thereafter). While this example does not address the treatment of plan amendments, it is illustrative of the practice ERISA's backloading provisions were intended to prevent; namely, benefit accrual formulas that provide higher accrual rates for those participants with greater years of service.[12]

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[12] Treas. Reg. § 1.411(b)-1(b)(2)(F) is illustrative of the regulatory framework designed to prevent plan sponsors from getting around the backloading rules through the subtle means of manipulating the "base" used for computing benefits:

> (F) Computation of benefit. A plan shall not satisfy the requirements of this subparagraph if the base for the computation of retirement benefits changes *solely by reason of an increase in the number of years of participation*. Thus, for example, a plan will not satisfy the requirements of this subparagraph if it provides a benefit, commending at normal retirement age, of the sum of (1) 1 percent of average compensation for a participant's *first 3 years* of participation multiplied by his first 10 years of participation (or, if less than 10 his total years of participation) and (2) 1 percent of average compensation for a *participant's 3 highest years* of participation multiplied by each year of participation subsequent to the 10th year.

(Emphasis added.) *See Carollo v. Cement & Concrete Workers Dist. Council Pension Plan*, 964 F. Supp. 677 (E.D.N.Y. 1997), holding that Section 1.411(b)-1(b)(2)(ii)(F) was violated where plan provided that participants with 25 years of service would have benefits calculated on an average of highest five years base while participant with fewer than 25 years had benefits calculated on a career average base.

Further guidance regarding the 133-1/3 percent rule is set forth in an IRS publication released prior to that agency's issuance of regulations promulgated under Section 411 of the Code. In that announcement, the IRS provided a number of examples to help explain how ERISA's "backloading" rules applied to amendments increasing benefit accrual rates:

> Q. A qualified plan subject to the minimum vesting requirements of section 411 of the Code providing a benefit of 1% of compensation per year of service is amended to provide a benefit of 2% of compensation for all future years of service. Does the plan fail to meet the 133-1/3 rule?
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> A. No. For any given year, section 411(b)(1)(B) requires that the accrual rate for *that year and years after that year* is to be compared with the accrual rate in a subsequent year in order to determine whether the accrual rate in a subsequent year exceeds 133-1/3% of the accrual rate in a previous year. Section 411(b)(1)(B) does not consider the accrual rates for years previous to the years in which qualification is being tested. In the instant case, in testing the plan's qualification in the year the amendment first becomes effective the previous 1% accrual would be ignored.

IRS Announcement 75-110 (Oct. 28, 1975). This provision underscores the analysis set forth in the legislative history regarding the purpose of the 133-1/3 percent rule's "amendment" clause.[13] It also demonstrates the phantom nature of Plaintiff's "coexisting rates" argument.[14]

[13] Although this guidance came in the form of an IRS announcement, rather than in new regulations or a revenue ruling, it is a reasonable interpretation of Code Section 411(b)(1)(B)(i), consistent with the legislative history and in no way contrary to subsequent IRS regulations. It is therefore entitled to certain degree of deference. *See Christensen v. Harris County*, 529 U.S. 576, 590-91 (2000) (Scalia

B. A Plan's Ability to Adopt Separation Rules
Is Necessary to Protect and Preserve
<u>Plan Assets for the Benefit of Participants.</u>

As discussed above, in enacting ERISA, Congress sought to ensure that if an employee is promised a defined pension benefit upon retirement—and has fulfilled whatever conditions are required to obtain a vested benefit—he actually receives it, while, at the same time, leaving to plan sponsors the right to control the level of benefits provided under a pension plan. The Plaintiff's strained interpretation of the 133-1/3 percent rule, however, unduly interferes with the plan sponsor's discretionary authority to amend a plan to provide benefit improvements that may favor active employees over inactive participants.

J. concurring) (listing cases whether Court accorded deference to authoritative agency guidance in various forms).

[14] In general, neither the IRS nor Congress used flat dollar unit benefit plans in their explanatory examples of backloading. Plans that use a flat dollar unit benefit accrual rate, like the Defendant Plan, are far easier to test for compliance with ERISA Section 204(b)(1) than plans that use a percentage of compensation unit benefit rate or other hybrid accrual formulae. *See, e.g., DeVito v. Pension Plan of Local I.B.T. Pension Fund*, 975 F. Supp. 258, 268 (S.D.N.Y. 1997) (benefit formula found to be backloaded was "the greater of (1) [(1/12) x (.45 x (Final Earnings)) x (years of participation/20)] – [Pensioner's Social Security Benefit]; or (2) $2.00 x (the Participant's full years of Credited Service up to a maximum of 20 years)"). By contrast, a flat dollar unit benefit plan with a backloading problem will be apparent. For example, a plan that provides that all participants will have their monthly benefit calculated at $10 per year of service during their first 15 years of service and calculated at $15 per year of service thereafter will not satisfy the 133-1/3 percent rule.

The right of plan sponsors to design benefit improvements so that current employer contributions are directed primarily towards active employees is of special importance in the multiemployer context.[15] Multiemployer defined benefit plans are funded by employer contributions set at rates established through collective bargaining between the union and the employer. The contributions one employer makes to a multiemployer defined benefit plan will help fund the plan's accumulated liabilities, including the benefits of other employers' active employees, inactive employees and retirees, as well as the benefits of that employer's active employees. The prospect of having the vast portion of its contributions used for the purpose of funding the benefits of another employer's inactive employees—as opposed to having its contributions primarily fund the benefits of its active employees—will tend to discourage an employer's participation in a multiemployer defined benefit plan, contrary to Congress's intent

[15] Although all active employees under the Plan accrue benefits at the same rate for all current years, participants who incur a separation during their employment history will receive a smaller benefit than participants who do not incur a separation over the same period. Nonetheless, Congress, when enacting ERISA, was careful to leave such matters within the discretion of the plan sponsor. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 445 (1999) (explaining that "ERISA's fiduciary requirement simply is not implicated" where plan sponsors make decisions regarding the form and structure of a plan including who is entitled to get benefits and in what amounts, or how such benefits are calculated); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983) ("ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits").

and desire to foster and encourage the continuation and effective functioning of such plans.[16]

Provisions addressing separation in participation also serve as a valuable tool for multiemployer plan sponsors in their efforts to regulate funding requirements. An employer sponsoring a single employer defined benefit plan has complete control over how its plan will be funded and will generally seek to fund the plan within the range prescribed in Sections 412 and 404(a)(1) of the Internal Revenue Code.[17] By contrast, multiemployer defined benefit plans are funded through contributions made by numerous employers who are required to pay rates fixed in accordance with collective bargaining agreements with durations of several years or more. Thus, multiemployer plan sponsors do not control, but merely anticipate, the amount of contributions coming into the fund from year to year. For multiemployer plan sponsors considering benefit improvements, provisions like the Defendant Plan's prorated level of benefits rule help eliminate some of the uncertainty related to funding such improvements.[18]

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[16] *See* MPPAA § 3, Pub. L. No. 96-364, 94 Stat. 1209 (1980) (codified at 29 U.S.C. § 1001a(3)) (Congress declared that "the continued well being and security of millions of employees, retirees and their dependents are directly affected by multiemployer plans. . . .").

[17] Code Section 412 sets forth ERISA's minimum funding requirements while Section 404(a)(1) sets forth maximum deduction limits.

[18] Consider the example of a participant who works 20 years in covered employment from 1970 through 1990 and leaves covered employment at a time

There is no authority to suggest that Congress sought to curtail a defined benefit plan sponsor's authority to limit benefit improvements to current periods of active employment. Yet that is precisely the practice that Plaintiff challenges in this case by arguing that a plan violates ERISA's benefit accrual requirements if it limits the scope of retroactive benefit improvement to the uninterrupted past service of active participants.

Notwithstanding Plaintiff's argument, the legislative history of these requirements indicates that the accrual rules were a logical extension of ERISA's minimum vesting standards:

> It is necessary to provide a statutory definition of an "accrued benefit" because, unless this is a defined amount, vesting of an "accrued benefit" in whatever form is specified by the plan has little, if any, meaning. . . . Many plans provide for a faster rate of benefit accrual in the employee's later years; thus, an employee might accrue a benefit equal to 1.5 percent of compensation for each year of service until age 55, and 2 percent per year thereafter. This technique is known as "back loading". . . [I]t is obviously necessary to put some limits on this device; *otherwise a plan which wishes to evade the vesting requirements could provide for de minimis accruals until an employee's last years of employment, at which point very large accruals would be provided.*

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when the benefit rate under the plan was $25. The benefit rate under the plan later increases to $40. In 2002, the trustees of the plan would like to increase the benefit rate to $45. While the inactive participant may or may not return to employment covered by the plan, without a provision similar to the prorated level of benefits rule, the trustees, in funding the benefit increase, must account for the possibility that the inactive participant may return to covered employment and, as a result, see his unit benefit increase to $45 for current service and service *prior* to his separation, notwithstanding the rate and amount of contributions that were generated by that prior service.

H. R. Rep. No. 93-779, at 59-60 (1974) (emphasis added). Plan provisions such as the pro-rated level of benefits rule do not in any way undercut the purpose of ERISA's vesting provisions.[19]

Plaintiff's argument also fails to account for the prosaic yet unavoidable fact that as time moves on employees get older and accumulate more service. That is why, in setting out the 133-1/3 rule, Congress focused on "*a particular plan year*" or "*current year*." Under the Defendant Plan's flat dollar benefit rate, all employees during *a particular plan year* will generally accrue benefits at a uniform rate under the Plan. Thus, in any *current ye*ar, the 19-year-old active employee with two years of service accrues benefits at the same rate as the 64-year-old active employee with twenty-five years of service.

Plaintiff's analysis also ignores the fact that the decision by plan trustees to amend benefit rates often corresponds to factors that have *no correlation* with an employee's years of service. For example, in the case of multiemployer defined benefit plans, benefit rates, to a large extent, are the product of contribution rates established through collective bargaining. Depending on each party's priorities

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[19] The Plaintiff could not in good faith contend that the nonforfeitable benefit he accrued as of 1984 was *de minimis* when compared to the benefits all other active participants had accrued at that time. Indeed, the flat dollar benefit rate applicable to Plaintiff's service in 1984 ($20) was the exact rate that would have been used to calculate the accrued benefit of any participant who left covered employment and retired in 1984.

and bargaining leverage, the amount an employer will contribute to a defined benefit pension plan will change from one collective bargaining agreement to the next and, during the period of an agreement, often from year to year. Moreover, depending on whether actual investment performance of plan assets outperform a plan's actuarial assumptions, plan sponsors may offer frequent and generous benefit improvements. However, if a plan's actual investments underperform the plan's actuarial assumed rate of investment return, benefit improvements may cease, or even be reduced prospectively.[20] *See* ERISA Section 204(h), 29 U.S.C. § 1054(h), (describing the notice requirements for pension plan amendments that provide for a significant reduction in the rate of future benefit accruals).[21]

Benefit increases adopted by plan sponsors through amendments may be retroactive or prospective. Retroactive benefit improvements apply with respect to service that has already been performed, that is, they will affect a participant's past service under the plan as well as the participant's future service. Prospective

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[20] During the 1990s, actual investment performance of many defined benefit plans outperformed actuarial rate of investment return. As a result, many plan sponsors adopted numerous and generous benefit improvements. It is notable that Plaintiff does not discuss the fact that his theory regarding a "living accrued benefit" would not be applicable in the event the Trustees were required to *reduce* the rate of accrued benefits prospectively.

[21] To counteract the impact of inflation on meaningful pension benefits, a flat dollar unit benefit plan is more likely to be amended to increase accrual rates than are percentage-of-compensation unit benefit plans, because benefits under

benefit improvements only apply with respect to benefit credits earned on and after the amendment's effective date. If a benefit increase is applied both retroactively and prospectively, it will be more expensive than merely applying the benefit increase prospectively. In any event, because the liability was not incurred at the time the participants were earning the service credit, a retroactive benefit increase must be funded by the contributions participants generate through their work in the future and the pension fund's future investment returns.

One effect of Plaintiff's position is that—if adopted—it would prohibit prospective benefit improvements under ERISA unless such benefit improvements are so small that, cumulatively, they are never more than 133-1/3 percent of the benefit rate applicable in any earlier year. Under Plaintiff's "co-existing accrual rates" analysis, every prospective benefit improvement must be compared with all previous benefit rates in effect in all previous years. Thus, for example, a plan which set a benefit rate of $10 per month per year of service upon its inception would have to cease to implement prospective benefit improvements once the

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percentage-of-compensation plans will increase without any adjustment to the benefit formula simply as a result of inflation's impact on employee compensation.

aggregated prospective benefit improvements totaled $3.33. Obviously, Congress did not intend to accomplish such an absurd result.[22]

CONCLUSION

Multiemployer defined benefit pension plans are the mainstay of retirement protection for millions of employees in numerous industries. Congress and the Internal Revenue Service have crafted a set of intricate rules carefully designed to protect participants while ensuring that plan trustees have the needed flexibility to establish reasonable plans of benefits and to preserve and protect the corpus of the trust. The unfortunate dicta in the decision below—if misread to support Plaintiff's argument—could serve to displace that intricate balance and discourage plans from enacting benefit improvements. This Court could do a great service in this proceeding by clarifying the correct application of the 133-1/3 percent rule.

For the foregoing reasons, the NCCMP urges that the Court affirm the ruling below on the backloading issue, on the ground that the Defendant Plan has complied not only with Section 204(b)(1)(D) of ERISA, but with Section 204(b)(1)(B) of ERISA as well.

[22] *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.").

Respectfully submitted,

Dated: October 25, 2002 By: ______________________________

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