

**In the Matter of Arbitration Between**

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**Employer Trustees of the Graphic  
Communications International Union  
Local 1-B Health & Welfare Fund**

**OPINION AND AWARD**

**and**

**FMCS Case No. 071013-50354-7**

**Union Trustees of the Graphic  
Communications International Union  
Local 1-B Health and Welfare Fund**

**A. Ray McCoy  
Arbitrator  
October 28, 2008**

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Appearances

**For the Employer Trustees**

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## **JURISDICTION**

The parties are trustees of the Graphic Communications Local 1B Health and Welfare Fund “A” (hereinafter “The Fund”) originally established in approximately 1953 by agreement between the Printing Industry of Minnesota Inc. and the Graphic Communications International Union Local 1B. The Agreement and Declaration of Trust (hereinafter “Declaration of Trust”) for the Fund contains the following:

### **Section 4.6- Arbitration.**

In the event that the Trustees deadlock on any question of the administration of the Fund, the Trustees shall, upon written application of the Trustees appointed by the Union or the Trustees appointed by the PIM, submit such dispute to an impartial umpire in accordance with the American Arbitration Association’s Impartial Umpire Rules for Arbitration of Impasses Between Trustees of Joint Employee Benefit Trust Funds. The decision of said umpire shall be final, binding and conclusive upon the Trustees and all persons concerned. (Er. Tr. Ex 2, Hereinafter referred to as “Declaration of Trust” at p.2)

The parties agreed, as discussed more fully below, that a deadlock occurred and that the matter was properly before the arbitrator for resolution. The parties notified the arbitrator of his selection by letter dated February 7, 2008. The parties selected June 4 and 5 for the hearing of this matter. The hearing was held at the Federal Mediation and Conciliation Services office in Minneapolis, Minnesota. At the end of the day on June 5, the parties agreed that additional time was needed to complete the hearing. The parties selected June 16 to complete the hearing. The parties agreed to submit post-hearing briefs postmarked July 11, 2008. The arbitrator received the briefs postmarked as agreed. The record in this matter was closed on July 14, 2008. The parties had a full and fair opportunity to present their respective cases including examination of witnesses and the introduction of documents.

## **HISTORY**

In 1991, the parties submitted a deadlocked issue to Arbitrator J.C. Fogelberg. Arbitrator Fogelberg described the issue in that arbitration as follows: “What is the appropriate level for monthly contributions by retirees for their health and welfare benefits under the Plan?” Arbitrator Fogelberg held, among other things that “As of March 1, 1993, all retirees will be

expected to pay **the full cost of the coverage.**” (Emphasis added.) (In the Matter of Arbitration between the Printing Industry of Minnesota Benefits and the Graphic Communications International Union, Local 1B, St. Paul, Minnesota, December 19, 1991, p. 2, 17, Hereinafter “Fogelberg award” or “1991 award”)

Fourteen (14) years after Arbitrator Fogelberg’s award, the Employer Trustees filed an action to enforce that award in federal district court. The Employer trustees filed suit in September 2005. Judge Doty remanded the case to state court and ordered the trustees to select an impartial umpire to resolve the deadlock. In doing so, Judge Doty said:

“The Employer Trustees request this court to order the Union Trustees to comply with the terms of the 1991 arbitration award. However, neither party disputes the enforceability of the award. Furthermore, the parties do not dispute that the award requires that all post-March 1993 retirees pay the actual cost of their retirement benefits. The principal dispute in this case, and the cause of the Board’s deadlock, is the manner in which the costs of coverage are to be calculated in light of the advent of SOP 92-6.” (Union Ex. 52 at p. 6-7)

Judge Doty went on to say that the court had jurisdiction for the limited purpose of appointing an impartial umpire to resolve the deadlock if the trustees could not agree upon an impartial umpire to do so and gave the parties the opportunity to select an impartial umpire. The parties failed to do so and Judge Doty remanded the cases to state district court. On June 29, 2006, Judge John T. Finley, Second Judicial District, granted the Employer Trustees’ motion to enforce Arbitrator Fogelberg’s 1991 award. Judge Finley said:

“In the Union and Management Trustee Agreement, it was agreed that the retirees would pay the actual premium costs of their health and welfare benefits program . . . The only issue is how one determines the actual costs of the coverage. The Plaintiffs (Employer Trustees) say that the actuarial of the retiree group should determine the full cost of the actual costs of the coverage and the union (Union Trustees) says COBRA costs or it should be arbitrated.”(Union Ex. 53)

The Union and Employer Trustees could not agree on whether the impartial umpire had to be an actuary and asked Judge Finley for clarification. Judge Finley issued an order dated August 30, 2006 reaffirming his earlier order and adding that the umpire need not be an actuary.

“The court believes that resolution of this conflict between the parties can best be resolved by the parties’ designees bringing in a third-party neutral. As stated earlier, the third party neutral could be an actuary, but it is not necessary that the person be an actuary. The court wants a person who can impartially settle the dispute between the parties based upon his or her ability to evaluate each party’s position and understand how each has calculated the actual costs of the insurance premium.” (Judge Finley Order, C1-05-8563, p. 2, August 30, 2005)

## **ISSUE**

The Employer Trustees ask the arbitrator to:

“...enforce the continuing obligation created by a 1991 arbitration decision requiring the subject health and welfare fund to charge those participants retiring after March 1, 1993, the full cost of their coverage provided by the fund - thereby eliminating the retiree subsidy for those retirees. This arbitration also seeks to break a deadlock which occurred when the Employer Trustees moved to set the Fund’s 2008 rates; rates which charged the post-March 1, 1993, retirees the full cost of their coverage.” (Employer Trustees Pre-Arbitration Statement, at p. 1 & 11)

The Union trustees frame the issue as follows:

“Whether retirees have been appropriately charged for their health coverage since the date of an Arbitration Award issued by Jay Fogelberg in 1991.” (Union Trustees Post-Hearing Brief at p. 1) The Union also described the issue in its opening statement as whether the rates should be calculated using the COBRA formula as the parties have since Arbitrator Fogelberg’s award.

## **STATEMENT OF THE FACTS**

In the early 1980's the Fund was performing well enough for the Trustees to unanimously agree to provide free health coverage to retirees 65 and older. During the mid-1980's the Trustees unanimously agreed to provide free health insurance for early retirees as well. By the late 1980's the Fund was in grave financial trouble. The Trustees were required to reduce benefits in order to save the Fund. In January of 1990, the Trustees passed a resolution that required all retirees to pay the actual cost of the health care benefit.<sup>1</sup> The Union and Employer Trustees could not

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<sup>1</sup>The trustees reduced the agreement to writing and included the relevant portions in the minutes of their January 27, 1990 meeting to writing and signed it. The relevant portion of the agreement reads: “Effective January 1, 1991, all retirees will be required to pay the actual cost of the health care benefits. The Fund actuary will be instructed to provide the Trustees with the

agree on the “actual cost” of the retiree health care benefit and deadlocked. Pursuant to the Declaration of Trust, all deadlocks are to be resolved by way of arbitration. The parties selected Arbitrator Jay Fogelberg to hear the matter in 1991. Arbitrator Fogelberg ruled that as of March 1, 1993, “all retirees must pay the full cost of coverage.” Arbitrator Fogelberg did not define “full cost” and did not identify a specific method for calculating the “full cost” of retiree health insurance premiums.<sup>2</sup>

Subsequent to the Fogelberg award, the actuary for the Fund established rates by dividing the cost of covering all participants in the health and welfare plan, both active and retired, by the total number of participants. The Union Trustees, led by former Fund Administrator, Joyce Hurley, were adamant that the rate to be paid retirees should be calculated on the basis of the entire group rather than separating out active employees from retired participants. If the trustees

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actual cost of this coverage on or before November 1, 1990, so that the retirees can be given at least one month’s notification regarding the cost of the coverage. Thereafter, the cost of coverage for retirees will be adjusted on January 1 of each year, based upon the actuary’s determination of the actual cost of providing benefits.”(See Er. Tr. Ex. 7 at p.3 & Er. Tr. Ex. 45 p.2) Arbitrator Fogelberg acknowledged the importance of the 1990 resolution requiring retirees to begin paying the actual cost of the premiums saying: “To now hold that the clear intent of the parties can somehow be significantly altered by the Neutral to the point of completely ignoring the resolution that was unanimously passed, would undermine the efforts of the parties to save the Plan in the first place.” (1991 Award at p. 14)

<sup>2</sup> Although the parties did request clarification from Fogelberg on an issue regarding the pre-1993 retiree group, they did not request clarification as to what method should be used to set the rate or to determine the “full-cost” of coverage.

had calculated the rate for retirees considering the retirees as a group separate and distinct from active employee participants, the amount of the premium paid by retirees would have been higher.

By combining actives and retirees in calculating the rate, the cost to retirees was less than full cost. By definition, the method of calculating rates that the Union Trustees insisted upon included a subsidy for post March 1, 1993 retirees. The Trustees approved rates based on the calculation that combined active and retiree participants beginning in approximately 1994 and continuing through 2006.

In 2001, the Trustees received word of a new accounting standard that required the separation of retirees from actives in order to determine the real cost of providing health insurance to retirees. The new accounting standard was issued by the American Institute of Certified Public Accountants Statement of Position 92-6 ("SOP 92-6")<sup>3</sup> The Fund retained an

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<sup>3</sup> In fact, discussion of this new accounting principal was evident in the early 1990's. Because of various debates at both the national and local level as well as within the actuarial and accounting profession, the Department of Labor did not begin enforcing the standard until the end of the 1990's. See e.g. AICPA's Comment to the Department of Labor's Non-enforcement Decision regarding SOP 92-6 dated May 12, 1997. AICPA expressed concern that trustees of multiemployer health and welfare plans needed to be more transparent regarding obligations for future benefits expected to be paid to or on behalf of retired or active participants after retirement. AICPA went on to tell the DOL that without measuring the benefit obligations, plan administrators had no basis for assessing future cash flow needs and taking appropriate actions to control the growth of the plan's health and welfare benefit costs. AICPA described the historical method of accounting for these obligations as the "pay as you go" method and said that it did not properly reflect the true ultimate obligation of the current promise and could have dire

actuary to assist with meeting the requirements of SOP 92-6. That actuary, Duane Hanf, attended a board meeting in 2003 and informed the trustees that the Fund was increasingly subsidizing post- March 1, 1993 retirees.

The new information led to a new round of discussions regarding whether the calculation of premiums to be paid by post-March 1, 1993 retirees needed to be changed. The Fund's actuary, Abby Countryman, issued a memorandum in February 2005 informing the Trustees that she believed each active participant was subsidizing the retirees to the tune of \$187.00 per month. (Er. Tr. Ex. 30) On May 26, 2005, the Employer Trustees presented a proposal which they believed represented the full-cost of coverage that post March 1, 1993 retirees were required to pay. The proposal was tabled to give the Union Trustees time to evaluate it. On June 24, 2005, the Trustees met again and the Employer Trustees submitted the same proposal for consideration and a vote. It was rejected by the Union Trustees leading to a deadlock. The Union Trustees calculated the subsidy to be only \$87.93 per active participant. (Union Post-Hearing Br. p. 11) Following the deadlock, Union and Employer Trustees engaged in a series of informal meetings (steak and whiskey meetings) in an effort to reach agreement on the critical issue of the retiree subsidy. The parties agreed that progress was being made in those discussions.

However, before those discussions were reduced to an agreement, the largest Fund employer, Banta was purchased by R.R. Donnelley in 2007. R.R. Donnelley added a new wrinkle to the discussions by threatening withdrawal from the Fund if the retiree subsidy was not eliminated. Other employers have threatened to follow suit if R.R. Donnelley withdraws from the Fund. The number of active employee participants in the Fund was approximately 640 in fiscal 2007. That number has decreased since that time. The number of retiree participants in the Fund in fiscal 2007 was approximately 208. The early retirees are receiving the greatest subsidy. The early retirees have higher health costs than active members and do not yet qualify for medicare. At a board meeting of the Fund on November 21, 2007, the Employer Trustees made a motion to change the method of calculating retiree rates. The Union Trustees rejected

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consequences if the plan does not estimate its true obligations.

that proposal leading to a deadlock. The Employer Trustees introduced a second motion that raised the rates by 12.4%. The Union Trustees reluctantly agreed in order to avoid not having any increases follow as a result of the deadlock. (Union Brief at p. 15)

Both the 2005 and 2007 deadlocks happened because the Union and Employer Trustees could not agree on a formula for determining the full cost of coverage for post 1993 retirees. Both deadlocks raise the same issue for determination-whether the subsidy for post-March 1, 1993 retirees should be eliminated.

## **STATEMENT OF POSITIONS**

### Union Trustees' Position

The Union Trustees argue that the issue to be decided is whether the retirees have been appropriately charged for their health coverage following Arbitrator Fogelberg's 1991 award. The Union Trustees frame the issue in this manner in order to emphasize the fact that the Trustees of the Fund have consistently set the rate for retirees since Arbitrator Fogelberg's award and have done so on a unanimous vote each time. The Union Trustees argue that the Fund has charged retirees in a manner consistent with Arbitrator Fogelberg's award. Moreover, the Union Trustees believe that the controlling factor in this case is the Fund Trustees unanimous response to Arbitrator Fogelberg's award. The Union Trustees argue that Arbitrator Fogelberg did not explain how he envisioned the "actual cost" or "full cost" because he knew that those terms could be calculated in different ways. The Fund Trustees settled on what is called the "Coleman" formula based upon COBRA as satisfying Arbitrator Fogelberg's definition of "actual" or "full" cost. The Union Trustees believe that the essential element of the Coleman formula is that the retiree rate is calculated on the basis of both the active employee participants and retiree participants in the Fund. The Union Trustees acknowledge that if retiree rates were calculated separately from active participants that their rates would be higher than they are and higher than the rates of active participants. The Union Trustees stress the reasonableness of the Coleman approach in light of the fact that retirees were, prior to the application of the Coleman formula, paying nothing for their health care.

The Union Trustees stress that all of the Fund Trustees were satisfied with the Coleman formula, unanimously instructed Coleman to calculate the rate based on both actives and retirees and continued this practice for more than a decade. The Union Trustees point out that year after year the retiree rate was set on the basis of a combined calculation of participants using COBRA as a base. The Employer Trustees did not object or register a dissent in all those years as noted by the lack of the same in the minutes. The Union Trustees maintain that the lack of opposition to the Coleman formula by the Employer Trustees constitutes an agreement to use that approach in setting the retiree rates and an acceptance that doing so met the demands of Arbitrator Fogelberg's 1991 award.

Moreover the Union Trustees argue that the Employer Trustees cannot sit idly by, declining or refusing to enforce their interpretation and years later complain that their interpretation is not being followed. The Union Trustees contend that the Employer Trustees are simply attempting to win for the employers what those employers failed to secure during collective bargaining. Banta Long Prairie and McKay Mitchell Envelope executed contracts with Local 1B after the 2005 deadlock. The Union Trustees also argue that it is unreasonable to impose a doubling of health premiums on retirees living on fixed incomes.

Union Trustees point out that this is especially true after agreeing to the Coleman process for establishing retiree health premiums for so many years. Finally, the Union Trustees argue that Arbitrator Fogelberg's award does not require the adoption of the Employer Trustees' position that would lead to a doubling of health premiums for retirees. Furthermore, they argue that even if Arbitrator Fogelberg did indeed require that the retiree subsidy be eliminated entirely the unanimous decision of the Fund Trustees to use the Coleman formula, without dissent between 1994 and 2005 demands enforcement as the agreement of the parties with regard to this issue. The doctrine of laches should apply, according to the Union Trustees because the Employer Trustees have not been diligent in asserting a known right and that they have been prejudiced by that delay. The Union Trustees believe that the most compelling evidence that the Employer Trustees are disingenuous in asserting an interest in enforcing Arbitrator Fogelberg's award is the fact that R.R. Donnelley said that even without that award it believed that the retiree subsidy should be eliminated.

Finally, the Union Trustees emphasize that the Fund Trustees have always been and continue to be free to alter the method by which retiree rates are set regardless of Arbitrator Fogelberg's award. In doing so, the Union Trustees point out that they recognize the legitimate concerns raised by the Employer Trustees regarding the retiree subsidy but feel that the steps already taken and those that would have resulted from the informal discussions (steak and whiskey meetings) would have also produced results that would have secured the Fund well into the future.

#### Employer Trustees Position

The Employer Trustees seek to enforce what they describe as the "continuing obligation" created by Arbitrator Fogelberg's 1991 award requiring Fund participants retiring after March 1, 1993 to pay the full-cost of their health insurance premiums. The Employer Trustees maintain that the Fund has failed to charge the full-cost and instead has created a subsidy, primarily for participants retiring after March 1, 1993 and early retirees in particular. It is the goal of the Employer Trustees to eliminate the subsidy. The Employer Trustees estimate that early retirees currently pay about one-half of the actual cost of their benefits. The Employer Trustees stress that the Fund is facing a trend characterized by a decreasing number of active participants, a growing number of retirees and escalating health care cost. To make clear the challenge facing the Fund, the Employer Trustees highlight the fact that the two largest Employers in the Fund have threatened to pull out at their earliest opportunity if the subsidy is not eliminated. The Employer Trustees maintain that while they approved rates for retirees each year based on what has been referred to as the Coleman formula or COBRA rate, the full-cost of retiree coverage was not known until the actuary separated out the actives from the retirees in analyzing cost.

According to the Employer Trustees it was not until the Fund was forced to implement the new accounting standard, SOP 92-6 that a true picture emerged as regards the full-cost of retiree benefits. The Employer Trustees claim that the Union Trustees will violate their fiduciary duty if they refuse to take steps to preserve the Fund's long-term viability and continue to allow the retiree subsidy to grow. They argue that if the subsidy is not eliminated the Fund's collapse is a certainty. They further argue that Arbitrator Fogelberg's award is a final, binding and

conclusive ruling that the Trustees are obligated to implement. Refusal to comply with that decision is a breach of fiduciary duty. The Employer Trustees emphasize that there is no evidence to support the argument that they ever intended to abandon the purpose of the 1990 agreement and Arbitrator Fogelberg's award both of which were designed to require post March 1, 1993 retirees to pay the full-cost of their health insurance premiums. The Employer Trustees claim that there is a substantial sum charged the active members to pay for the difference between the full cost of the early retiree benefits and the sum that the early retirees are actually paying. The Employer Trustees believe that the early retirees are paying one-half of the actual cost for their benefits. It is the early retiree group that is draining the Fund.

The Employer Trustees note that the individual employers are paying most of the active employee's health benefit costs pursuant to the various collective bargaining agreements. Therefore, the subsidy is actually increasing the burden on the employers of the Fund. The Employer Trustees believe that the trend is toward a shrinking base of active employees and increasing number of early retirees. They are concerned that if the largest employers leave the Fund as they have threatened to do if the subsidy is not eliminated, that the Fund will be bankrupt.

The current ratio is three active employees per one retiree. If the two largest employers leave the Fund, the Employer Trustees estimate the number of active employees to drop to 86 and the number of retirees to rise to approximately 200. The Employer Trustees said the first deadlock on the issue of rates leading up to this arbitration took place on June 24, 2005. It was at that meeting that the Employer Trustees brought a motion to eliminate the subsidy for early retirees. The proposal was unanimously rejected by the Union Trustees creating a deadlock. The Employer Trustees point out that they are not advantaged by pushing the rate issue to a deadlock because when a deadlock occurs the rates remain unchanged until the issue is resolved.

The Employer Trustees estimate that by 2007 the subsidy for early retirees was approximately \$350.00. If the early retiree had a spouse under the age of 65 then the subsidy was estimated to be approximately \$700.00 per month. The Employer Trustees argue that the Union Trustees have a fiduciary duty to keep the Fund viable. By allowing the subsidy to grow and remain unchecked they are putting the Fund in jeopardy.

## OPINION

### Issue and Role of the Arbitrator

At the outset, it is necessary to clarify the issue to be resolved as well as the role of the arbitrator in this matter. Jurisdiction rests with the arbitrator when the Trustees deadlock on “any” question of the administration of the Fund. The Trustees deadlocked in 2005 and 2007 on the question of retiree rates. More to the point, the deadlocks resulted from the Employer Trustees desire to stop subsidizing retirees and the Union Trustee’s refusal to put an end to the subsidy. Given that the arbitrator is required to break the deadlock, the issue might best be stated as whether the retiree subsidy should be continued. The Employer Trustee’s correctly describe the issue, at least in part, as whether the continuing obligation created by the Fogelberg award requiring post-March 1, 1993 retirees to pay the full cost of their health coverage should be enforced. Judge Finley decided as much when he said: “The Plaintiff’s motion to Enforce the 1991 Arbitration Award is GRANTED.” (Union Ex. 53) Judge Finley’s order means that Arbitrator Fogelberg’s language enforcing the Trustees’ 1990 agreement stands. This arbitrator, therefore, must abide by that ruling and the Fogelberg award which instructed the Fund to require post-March 1, 1993 retirees to pay the “full” or “actual” cost of their health coverage.

The issue as framed by the Union Trustees must be considered in light of the ultimate question, whether the retiree subsidy should be eliminated. Whether retirees have been appropriately charged for their health coverage since the date of the Fogelberg award, cannot be the focus. Rather, the focus is on how the rate for retirees is to be calculated going forward. Even if the issue as framed by the Union Trustees was answered in the affirmative, the deadlocks would remain. Judge Doty said: “The only issue is how one determines the actual costs of the coverage.” Both sides agree that Arbitrator Fogelberg did not provide a calculation method. Judge Finley agreed and said the neutral should resolve the matter by evaluating how each side calculated the cost of retiree coverage. Whether the “Coleman”/ “COBRA” method should be deemed “full cost” or whether the Employer Trustees’ proposals designed to eliminate the retiree subsidy represent “full cost” is another way of stating the issue to be decided in order to break

the deadlock.

Before getting to that question, it is important to clarify the arbitrator's role in this matter. The Employer Trustees placed great emphasis on the notion that the arbitrator sits as a tie-breaking trustee in this case with all of the *fiduciary responsibilities* of a regular trustee. The Employer Trustees cite International Union, United Auto., Aerospace, and Agricultural Implement Workers of America and its Locals 656 and 985 v. Greyhound Lines, Inc., 701 F. 2d 1181, 1187 (6<sup>th</sup> Cir. 1983) for the proposition that the actions of the arbitrator breaking a deadlock regarding benefit levels seem to come within the purview of a fiduciary as defined by ERISA, subject to arbitral immunity. However, a careful read of that case shows that the court never reached a decision as to whether the arbitrator serving to break a deadlock is in fact acting as a fiduciary. The court said: ***“Because of our disposition of the arbitral immunity issue, however, we need not decide whether an arbitrator is a fiduciary.*** (Id. at p.1187)

More to the point, the court cited Department of Labor Advisory Opinions which actually provide a different view. ***“. . .the Department advised that an arbitrator is not a fiduciary when he resolves an issue concerning the employer's monthly contribution to the fund and has the authority to decide on a contribution rate.”*** (Id at 1187 n. 9) The Department of Labor reasoned that the arbitrator did not perform any of the functions described in § 3(21)(A) of ERISA. The arbitrator has no authority to manage or dispose of plan assets, to render investment advice or to assist in the administration of the plan. Based on the arbitrator's read of the case, it is unnecessary to describe the arbitrator's role as that of a fiduciary. In fact, the arbitrator believes that to do so would create the possibility that the key to the arbitrator's role - “neutrality” or “impartiality” might be compromised by concerns over whether the decision breaches the fiduciary duty owed the Fund. To force fiduciary obligations upon arbitrators can have the effect of hampering an objective analysis of the issue(s) to be decided. Moreover, the Trustees have settled upon a set of guiding principles for arbitrators serving to resolve their impasses and included the same in the Declaration of Trust.<sup>4</sup> Furthermore, the Declaration of Trust defines

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<sup>4</sup> The Declaration of Trust requires the arbitrator to abide by the American Arbitration Association's Impartial Umpire Rules for Arbitration of Impasses Between Trustees of Joint Employee Benefit Trust Funds. It is important to note that Arbitrator Fogelberg described his role as follows: “As a neutral third party selected to hear this dispute, I am called upon, per the

“fiduciary” and that definition does not include arbitrators selected to resolve Trustee deadlocks. (See Er. Tr. Ex. 2, Article I, Section 1.11- 1.12, p. 3- 4)

### The Deadlocks

As noted above, the Trustees deadlocked twice on the issue of setting retiree rates. The first deadlock occurred in 2005. At the June 24, 2005 Trustee meeting, the Employer Trustees put forth a proposal designed to erase the subsidy by January 1, 2008. The Employer Trustee’s proposal acknowledged that fully implementing Arbitrator Fogelberg’s award would represent a shock to the retirees. The proposal capped the retiree subsidy at \$100.00 per month per active participant for 2006. The proposal then called for cutting that subsidy in half in 2007 and eliminating the subsidy in the following year. In 2007, following continued discussion regarding the problem of the subsidy, the Employer Trustees again put forth a proposal. This time, their proposal called for the immediate elimination of the retiree subsidy. In March 2003, the subsidy was estimated to be 17.2% of the monthly premium. In 2005, the subsidy was estimated to be 25.5% of the monthly premium. The Segal Group projected that in 2007 each early retiree would receive a subsidy of \$477.56 per month.

While the Union Trustees take exception to Employer Trustees description of the amount of the subsidy, they do not deny that the retirees are being subsidized by the active participants and that employers are burdened with higher contributions to the Fund as a result. The Union Trustees also do not disagree that the trends presented to the Trustees by the actuary show the number of active employees declining and the retiree subsidy increasing.

Since the active employee participants are subsidizing early retirees, as the ratio of actives to retirees continues to decline, the size of the subsidy required from the remaining active participants will continue to increase. As the Employer Trustees pointed out, a real threat exists to the viability of the Fund if the largest employers decide to pull out rather than continue to

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Fund’s Declaration of Trust, to serve in a “trustee-like” capacity for the limited purpose of breaking the deadlock that has arisen in the administration of the Fund, Ader vs. Hughes, 570 Fed. 2d 303(10th Cir. 1978). Arbitrator Fogelberg did not view his role as that of a “fiduciary.”

subsidize the retirees. The continued decline in active participants as well as the real possibility that the largest employers might leave the Fund represents a real threat to the survival of the Fund. The financial status of the Fund at the time of the hearing in this matter is summarized in the actuary's 2007 Health Benefits Report states:

“. . .total Fund income in fiscal 2007 decreased by \$417,500 to \$6,420,500. At the same time, total expenses increased by 389,700 to \$6,842,500 . . . Overall, the Fund experienced an operating loss of about \$422,000 (including the Medicare Part D subsidy reimbursement) for the year. Additionally, the Fund had an unrealized gain on the value of its investments of \$44,044, making the net result for the year a decrease in assets and reserves of just under \$378,000.” (Er. Ex. 39, Section 2, p. 1)

The Report also listed among its key findings a projected loss in 2008 of \$1,075,900. The Report said the ratio of retired to active participants “continues to be a concern.” The Report states that the average number of retirees in 2007 was 208 and the average number of actives was 640, or a 3 to1 actives per retiree ratio. The Report projects the actual cost of coverage as of January 1, 2008 to be \$827.31 per month. The Fund has a reserve policy that allows it to reduce the actual cost by applying any surplus toward to the contribution rate. The actuary anticipated a surplus that would allow the Trustees to reduce the projected contribution requirement from \$827.31 to \$774.74. The retirees, however, were projected to pay only \$515.96 in 2008 according to the Fund's actuary. This means that the projected subsidy for retirees less than 65 years of age was \$477.56 at the time of the hearing in this matter. Therefore, each active participant subsidized the early retirees to the tune of \$87.93 per month. Given the amount of the subsidy it is clear that the Employer's are contributing a significant amount to support the post March 1, 1993 retirees.

Given the clarity of the actuary's report and the fact that SOP 92-6 has now clarified the actual cost of retiree health coverage, it is impossible to imagine that the Union Trustees can maintain that this subsidy should remain in place simply because it has been voted upon and approved by the Trustees since 1994. The fact remains that the Coleman calculation of rates is simply contrary to the requirements of the Fogelberg award and the 1990 agreement.

The true picture imposes upon the Trustees an obligation to act both to comply with prior agreements designed to maintain the Fund's viability and to respect the Declaration of Trust. The Declaration of Trust imposes a requirement upon the Trustees to honor the Fogelberg award which this arbitrator reads to mean that the post-March 1, 1993 retirees should have never

received a subsidy and cannot continue to receive one.

The arbitrator finds that the Fund failed to comply with the plain meaning of Arbitrator Fogelberg's award and continued to subsidize those retiring after March 1, 1993. The arbitrator further finds that doing so contradicts the 1990 agreement designed to protect the solvency of the Fund. Finally, the arbitrator finds that the threat of withdrawal by the largest Employers of the Fund to be a real one. While, the arbitrator recognizes that there is no mechanism forcing those employers to remain in the Fund, the removal of the subsidy should reduce their desire to abandon the Fund. Those same employers might gain confidence in the Fund knowing that prior agreements will be honored.

The arbitrator is mindful that the Union Trustees described the employers' interest in enforcing Arbitrator Fogelberg's award as "disingenuous." The Union Trustees said that R.R. Donnelley wanted the subsidy eliminated even if the Fogelberg award did not exist. The arbitrator finds R.R. Donnelley's position on that point to be reasonable. The Fund was set up to provide health benefits to active employees, not retirees. The collective bargaining agreements between Local 1B and MacKay Mitchell as well as 1B and the former Banta Publications demonstrate as much. The Banta agreement reads:

"The Company agrees to contribute to the Graphic Communications Local 1-B Health and Welfare Fund "A" Medical (under joint administration) for each employee on the payroll or employees on temporary layoff not exceeding one (1) calendar month and employees who are sick or incapacitated not to exceed three (3) succeeding calendar months from the date of disability." (Er. Tr. Ex. 38, p. 21)

The Banta collective bargaining agreement also defines "employee" as "regular full-time employees who are on the payroll at least one (1) of the first five (5) working days of the calendar month." (Id.) (See also Agreement Between Graphic Communications Conference International Brotherhood of Teamsters Local 1B, Twin Cities and MacKay Envelope Company, LLC, Effective January 1, 2007 through December 31, 2009, Er. Tr. Ex. 37 at p. 19) The generosity of the employers during the early 1980's, when the Fund had large enough surpluses to offer retirees free health coverage, should not be ignored. The wealth was shared. When the surpluses dried up so did the Fund's ability to provide a discount, subsidy and certainly no-cost health coverage to retirees. It should be understood then that given the financial challenges

facing the Fund it makes sense to revert to the original intent - to provide subsidized coverage to active employee participants. The retirees benefitted not just through the early 80's but until the present day. Under the Coleman formula they have continued to receive a subsidy that should have ended in 1990 but certainly following the ruling by Arbitrator Fogelberg.

The Union Trustees suggest that Arbitrator Fogelberg knew there were numerous ways to calculate “full” or “actual” cost. The arbitrator disagrees. First, there appears to be nothing in Fogelberg’s award that suggests that “full cost” means anything other than the plain and ordinary meaning attributed to those words by us all in everyday usage. We all know the meaning of discounts. We do not need actuarial training to understand that full-cost is something very different from the discounted price. Moreover, it is clear that Arbitrator Fogelberg used the term “full” or “actual” cost to mean that the burden of paying for coverage should fall to the retirees and not to the active employees, the Employers or the Fund. This is clear from Arbitrator Fogelberg’s emphasis on the Trustees 1990 agreement. He understood that the purpose of that agreement was to bring the Fund back to solid financial ground. It would go against the exact words used by Arbitrator Fogelberg to argue that he understood the term “full-cost” to include significant subsidies to retirees or any method of calculating rates that required active participants, the employers or the Fund to pick up a portion of the true cost. **“To now hold that the clear intent of the parties can somehow be significantly altered by the Neutral to the point of completely ignoring the resolution that was unanimously passed, would undermine the efforts of the parties to save the Plan in the first place. (Fogelberg award, p. 14)**

Arbitrator Fogelberg decision was designed to enforce the Trustees 1990 agreement. That agreement also used the full cost to mean unsubsidized cost. **“Effective January 1, 1991, all retirees will be required to pay the actual cost of the health care benefits. The Fund actuary will be instructed to provide the Trustees with the actual cost of this coverage on or before November 1, 1990, so that the retirees can be given at least one month’s notification regarding the cost of the coverage.” (Er. Tr. Ex. 45)** There is nothing in the document that suggests otherwise and when placed in the context of the financial crisis facing the Fund at that time, the phrase “actual cost” is not subject to a different interpretation than what the words convey.

It is unfortunate that steps were not taken to ease the impact on the retirees before the

first deadlock in 2005. The arbitrator is mindful of the testimony of those retirees who will struggle to manage any increase in their rates. However, it is also true that all post-March 1, 1993 retirees received a windfall. They should have been paying full price at least since 1994. Had the Trustees managed to implement the Fogelberg award as intended, the hardship of the increased cost would have been managed by most retirees by now. In any event, it is time for the subsidy to come to an end. What has been referred to as the “Coleman” or “COBRA” cannot be used again.

#### The “Coleman”/“COBRA” Formula

Testimony at the hearing in this matter as well as a review of the record revealed that what has come to be known as the “Coleman” or “COBRA” formula for setting rates to be charged active and retirees each year was a product of excellent advocacy on behalf of retirees by the Union Trustees led by Joyce Hurley. What is clear is that Joyce Hurley instructed the actuary to calculate the rates for each year based on a composite of all Fund participants.

As the Union Trustees described the formula:

“...the essential element of the Coleman formula is that retiree rates were calculated on the basis of the entire group - - both actives and retirees. Obviously, if retiree rates were set considering only retirees, the rates would be higher than when retirees are combined with actives. Under Coleman’s methodology, a retiree and spouse would pay essentially the same amount as any active employee placed upon COBRA.” (Union Trustees Post-Hearing Brief at p. 4-5)

This was not the approach recommended by the actuary. The minutes of the November 16, 1994, Subcommittee Meeting to establish recommendations regarding the rates reflect as much.

“The actuary explained that if Segal were recommending formulas for determining rates they would probably be different from the Fund’s formulas for computing these various rates and they would most likely produce higher rates. After some discussion, the Subcommittee advised the actuary that he should use the Fund’s formula for figuring out the rates and should use 5.8% for medical inflation. For the purpose of computing the rates, all medical costs should be added together, divided by the total number of active participants plus retirees to get the cost per participant per month. (Do not separate out the retiree expenses.) This will then be trended up.” (Er. Tr. Ex 52)

It was clear that the recommendations did not reflect “full cost” or “actual cost” as

Arbitrator Fogelberg instructed. “Legal counsel and the actuary pointed out that the rate included \$18.22 per month for *retiree subsidy*.” (Emphasis added. Id. At p. 2) Based on the testimony at the hearing in this matter, it seems apparent that there was a great deal of tension and discord at the Fund meetings especially during the period that Joyce Hurley was involved. Trustee Fisk testified that Joyce Hurley defended the retirees very well and that some meetings were very uncomfortable for all of the Trustees. He specifically pointed out that Joyce Hurley and David Baumgardner “argued a bit.” As Trustee Fisk testified, the Union Trustees were adamant that the retirees are included with active participants to set the rate. He said, “Larry Olson, former Union Trustee and Secretary/Fund Administrator, would have never resigned if that issue was still alive . . .” Although, Arbitrator Fogelberg’s award was clear on its face, the Union trustees, led by Joyce Hurley, did an excellent job of continuing to represent the retirees, their former union members. The instruction to the actuary to compute the cost based on the composite group of active and retiree participants was the first step. Pushing that instruction through meant that a subsidy would be created and that post-March 1, 1993 retirees would not pay full cost. Trustee Fisk testified that he recognized that part of the premium charged to active participants could be considered a subsidy and that retirees were not paying the full cost of coverage. Even more surprisingly, Trustee Fisk acknowledged during cross-examination that retirees were being charged 50% of the rate rather than the full COBRA rate.

Neither the Union nor Employer Trustees disputed the fact that Joyce Hurley was the most vocal and adamant when it came to protecting the retirees. In terms of what the arbitrator was able to deduce from the testimony the level of acrimony and discord over this issue was significant enough to quash any real discourse on the subject without risking impasse and frozen rates pending the outcome of yet another arbitration. Trustee Fisk testified: “Joyce Hurley’s thing was that we don’t separate out retirees. She made it clear that if the issue had come up through a formal resolution we would have deadlocked on the issue.” The Trustees began using a formula that carried with it a built in subsidy for retirees which was bound to grow and did grow. It was inevitable that the day would come when the subsidy could not be continued.

This history is summarized to show that the prospect of changing that formula rest with the willingness of the Employer Trustees to argue to impasse each year and have the rates remain

at the previous year's level until the deadlock was resolved through arbitration. Obviously doing so would have created an even more adversarial and unproductive atmosphere in which to administer a Fund faced with significant challenges. Both Union and Employer Trustees acknowledged that everyone was tired of the acrimony and tension at the meetings and wanted to move toward a more productive relationship characterized by both sides continuing to advocate for their respective members and positions but also to advocate for the financial health and continued survival of the Fund. It is also clear that it took a change in leadership on both sides to begin that process.

It is clear from the testimony of Trustee Fisk that the Union Trustees were not oblivious to the need to change both the tenor of discussions at the Fund meetings but also the need to take specific actions designed to improve the financial long-term viability of the Fund. Fisk testified that the Union Trustees saw themselves giving up a great deal as a result of compromises reached during the steak and whiskey discussions. However, it is clear that the Union Trustees did not intend to budge on their belief that the Coleman formula represented "full-cost." The arbitrator is hopeful that the foundation laid as a result of those informal talks will serve to bring the Trustees back to the table to find ways to move forward in a manner consistent with the plan documents and this award which now becomes apart of those documents the Trustees are bound to respect.

### **Award**

The Trustees are hereby ordered to cease use of any and all methods of calculating the rates to be paid by post-March 1, 1993 retirees that include a subsidy. Post-March 1, 1993 retirees must pay the full or actual cost of their coverage effective immediately and subject only to the Fund's notice requirements for informing participants of rate changes. Effective immediately, the "Coleman" or "COBRA" formula that has been used since 1994 is declared invalid in light of Arbitrator Fogelberg's award and the analysis of the evidence presented in this case and shall not be used. The Fund's actuary shall calculate the rates to be charged post-March 1, 1993 retirees as a group separate and apart from active participants and in accord with relevant

accounting principles and practices applied to calculating rates for participants of plans such as this one. The actuary's calculation of the rates must include the basic assumption that for post-March 1, 1993 retirees, the intent of the Fund is that they shall pay the full (unsubsidized) cost of coverage. The arbitrator shall retain jurisdiction to respond to any questions regarding the intent of this award.

Respectfully submitted,

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A. Ray McCoy  
Arbitrator

Date: October 28, 2008