IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
JOHNSTOWN DIVISION

ANTHONY J. ZANGHI, KENNETH J. SOWERS, DOMINIC MCCUCH, JAMES HOHMAN, DARRELL SHETLER on behalf of themselves and others similarly situated, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC, Plaintiffs, v. FREIGHTCAR AMERICA, INC., JOHNSTOWN AMERICA CORPORATION, and JOHNSTOWN AMERICA CORPORATION USWA HEALTH & WELFARE PLAN, Defendants.	**Civil Action No.: _____** **COMPLAINT FOR VIOLATION OF LABOR CONTRACTS AND ERISA PLAN** Class Action Jury Trial Demanded Electronically Filed

INTRODUCTION

1. Plaintiffs Anthony J. Zanghi, Kenneth J. Sowers, Dominic McCuch, James Hohman, and Darrell Shetler ("Class Representatives"), on behalf of themselves and all other persons in the proposed class described in this Complaint, by their attorneys, and Plaintiff United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC ("USW"), by its attorneys, bring this action against Defendants FreightCar America, Inc. ("FreightCar" or "FCA"), and Johnstown America Corporation USWA Health & Welfare Plan (the "Plan"), and aver as follows:

2. Pursuant to Rule 23 of the Federal Rules of Civil Procedure ("FRCP"), Plaintiff Class Representatives bring this class action lawsuit on behalf of themselves and a similarly situated group of retirees, all of whom were represented in collective bargaining by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC ("USW"), as well as on behalf of their spouses and surviving spouses. The class ("Class") consists of all persons who, as of November 30, 2012, were receiving or were eligible to receive retiree medical and/or life insurance benefits as a result of the settlement of United Steelworkers of America, AFL-CIO-CLC, Geraldine Deemer, and Darrell Shetler v. Johnstown America Corporation, et al., No. 02-CV-806 (W.D.Pa.); United Steelworkers of America, AFL-CIO-CLC, Reggie Britt, et al. v. Johnstown America Corporation, et al., No. 03-CV-1298 (W.D.Pa.); or Sowers v. FreightCar America. Inc. et al., No. 07-CV-201 (W.D.Pa.).

3. The USW was the collective bargaining representative of workers in the Johnstown, Pennsylvania area who produced railroad freight cars at a facility in Johnstown ("Johnstown Facility"). The Johnstown Facility was owned by Bethlehem Steel Corporation ("Bethlehem") from 1923 to 1991. In 1991, Johnstown America Industries, Inc. purchased the facility from Bethlehem.

4. In 1999, Johnstown America Industries, Inc. renamed itself Transportation Technologies Industries, Inc. ("TTII"). At the same time that it changed its name to TTII, Johnstown America Industries, Inc., sold its railcar business to a newly formed company, Johnstown America Corporation ("JAC"). In 2004, JAC became known to the public as FreightCar America, Inc. ("FreightCar"), a Defendant here. The entity JAC is now a FreightCar subsidiary. In this Complaint, TTI, Defendant JAC, Defendant FreightCar, and any other related

entities that have owned and/or operated the Johnstown Facility since 1991 will jointly be referred to as the "Defendant Corporate Entities," which may refer to one, two, or all three of these entities.

5. The Johnstown Facility workers included the Class Representatives. The Class members that the Class Representatives seek to represent consist of similarly situated former workers now drawing their pensions (hereinafter "Retirees"), as well as spouses and surviving spouses of these Retirees (hereinafter and collectively, "Spouses"). Retirees and Spouses are, collectively, the "Class Members."

6. Over decades of service at the Johnstown Facility, Retirees earned rights to receive retiree health and life insurance benefits. Rights to these benefits were created through collective bargaining between the successive employers and the USW. In negotiating the labor agreements, the parties agreed that the employer's obligation was to provide these benefits as long as the retiree remained retired, "notwithstanding the expiration of this agreement, except as the company and union may agree otherwise." The USW never "agreed otherwise": It *never* agreed to convert these important retirement benefits into benefits that were "gratuitous" or terminable at the employer's whim.

7. One of the Defendant Entities -- JAC -- nonetheless announced in February and March 2002 that it planned to unilaterally eliminate the retiree health and life insurance benefits of approximately 250 Retirees and Spouses. The Defendant Corporate Entities thereafter announced its intention to eliminate these benefits for other groups of Retirees and their Spouses.

8. To protect these benefits, Retirees and the USW filed and litigated three lawsuits, challenging the Companies' position that the benefits were unilaterally terminable.

9. The most recent of these lawsuits was Sowers v. FreightCar America. Inc., Civil Action No. 3:07cv201KRG (W.D. Pa., Johnstown Division, Gibson, J.) ("Sowers/Hayden Lawsuit"), reported at Hayden v. Freightcar Am., Inc., 2007 U.S. Dist. LEXIS 61337 (W.D.Pa. 2007), later proceedings, 2008 WL 400696, 2008 U.S. Dist. LEXIS 9913, 43 Employee Benefits Cas. (BNA) 1489 (W.D. Pa., Feb. 11, 2008). The plaintiffs in the Sowers/Hayden Lawsuit included the instant Class Representatives, Anthony J. Zanghi and Kenneth J. Sowers. The global agreement settling the Sowers/Hayden Lawsuit ("Sowers Settlement Agreement"), which also settled additional disputes between the parties, is attached hereto as Exhibit 1.

10. The earlier lawsuits challenging the Defendant Corporate Entities' position that the benefits were unilaterally terminable were entitled United Steelworkers of America, AFL-CIO-CLC, Geraldine Deemer, and Darrell Shetler v. Johnstown America Corporation, et al., Case No. 02-CV-806 (hereinafter "Deemer Lawsuit"), and United Steelworkers of America, AFL-CIO-CLC, Reggie Britt, et al., v. Johnstown America Corporation, et al., Case No. 03-CV-1298 (hereinafter "Britt Lawsuit").

11. As to retiree health benefits, the Deemer and Britt Lawsuits were settled in 2005 with an agreement that the Defendant Corporate Entities would pay a specified contribution for all Retirees and Spouses through November 2012. See Deemer/Britt Settlement Agreement (Exhibit 2 hereto). The settling parties agreed that if the Defendant Corporate Entities ceased making these specified contributions thereafter, Plaintiffs could then refile their lawsuits. The settling parties also agreed that in any re-filed lawsuits, the parties would "retain their legal positions that they asserted in the Britt and Deemer litigations," so that the "Plaintiffs [could] continue to assert both that alteration of benefits is unlawful and that obligations under collectively bargained agreements require the continuation of the negotiated level of benefits

provided under the 1997 collective bargaining agreement (e.g., no deductibles, contributions, etc.)." Deemer/Britt Settlement Agreement § 16(f).

12. In 2008, the parties settled the Sowers/Hayden Lawsuit with an agreement providing, *inter alia*, that the 202 Retirees whose rights were at issue in that case, including Plaintiffs Zanghi and Sower, and their Spouses would "continue to be eligible for retiree healthcare coverage … *under applicable terms and conditions of the court settlements in the Deemer and Britt cases*. [FreightCar] and the Union reserve their respective legal positions on the issue of whether [FreightCar has] the right to make future changes to retiree healthcare after expiration of the time periods … in the court settlements in the Deemer and Britt cases." (Emphasis added).

13. FreightCar subsequently informed counsel for the USW and for the Deemer, Britt and Sowers/Hayden classes that it would cease making the contributions for Retirees and Spouses described in the Sowers/Hayden, Deemer and Britt settlements.

14. As Plaintiffs allege in Count I, since the rights of Retirees and Spouses (collectively, "Class Members") to retiree health benefits were created through agreements between a labor organization and an employer, violation of those agreements is actionable in this Court under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a).

15. Class Representatives bring Count II pursuant to § 502(a)(1)(B) and (a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B) and (a)(3). In this Count, Class Representatives seek a declaration that the Defendant Corporate Entities have no right to unilaterally terminate their retiree health and life insurance benefits.

JURISDICTION AND VENUE

16. As both Counts raise federal questions, this Court has jurisdiction over them under 29 U.S.C § 1331. The Court also has jurisdiction over Count I under § 301 of the LMRA, 29 U.S.C. § 185, and over Count II under § 502(e)(1) and (f) of ERISA, 29 U.S.C. § 1132 (e)(1) and (f). Venue in this judicial district is proper under § 301 of LMRA, 29 U.S.C. § 185, and § 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

17. Also as to venue, on August 17, 2007, immediately after the Sowers/Hayden Lawsuit was filed, Judge McVerry of this District issued an order stating that it appeared "that the instant cause of action unquestionably arose in Johnstown, Cambria County, Pennsylvania, and involves employer/employee rights and relationships exclusive to Defendant's facility and employees in Johnstown. Pursuant to Local Rule 3.1(2), 'where . . . the cause of action arose . . . in . . . Cambria . . . County, the clerk shall give such complaint, petition or other pleading a Johnstown number and it shall be placed upon the Johnstown calendar.' Accordingly, the Court finds and rules that pursuant to Local Rule 3.1 this case is hereby transferred to the United States District Court for the Western District of Pennsylvania, Johnstown Division."

PARTIES

18. Defendant FreightCar is a Delaware corporation with principal executive offices in Chicago, Illinois. FreightCar is engaged in the business of manufacturing freight cars for the railroad industry.

19. Defendant JAC is a predecessor of FreightCar and now a subsidiary of FreightCar.

20. The Defendant Corporate Entities operated the Johnstown Facility from approximately 1991 until it closed it in 2008. Each of the Defendant Corporate Entities is or was

qualified to do business in Pennsylvania and has conducted or is conducting business within this District.

21. At all pertinent times, the Defendant Corporate Entities are or have been the "employer" of the Retirees within the meaning of ERISA, 29 U.S.C. § 1002(5).

22. The Defendant Corporate Entities also are or were a "sponsor," "fiduciary," and "plan administrator" of "employee benefit plans" providing retiree health and retiree life insurance benefits, which are considered "employee welfare benefits" as that term is used or defined in ERISA, 29 U.S.C. § 1002(1). The employee benefit plan in question is the Johnstown America Corporation USWA Health & Welfare Plan ("Plan"). The Plan is sued as a party needed for just adjudication under Rule 19 of the FRCP, and well as a party responsible for providing benefits.

23. Each of the Defendant Corporate Entities is or was an employer engaged in commerce, and the Defendant Corporate Entities are now or were the "plan sponsor" and a fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21). The Defendant Corporate Entities are sued in their capacities as the Plan's sponsor and fiduciary, as well as the responsible employer under the labor contracts.

24. Plaintiffs are informed and believe and thereupon allege that, at all times mentioned, each of the Defendants was the agent, co-venturer, partner, or in some manner agent or principal, or both, of the other Defendant[s], and in doing the things alleged was acting within the course and scope of such agency.

25. Named Plaintiff and Class Representative Anthony J. Zanghi is an adult resident of Johnstown, Pennsylvania in Cambria County. Between 1988 and 2007, Plaintiff Zanghi worked at the Johnstown Facility, where he was a member of the bargaining unit represented by

the USW. Zanghi, a plaintiff in the Sowers/Hayden Lawsuit, is or has been a Plan "participant" (within the meaning of ERISA, 29 U.S.C. § 1002(7)). Under the terms of a collectively bargained agreement between his employer and the USW applicable at the time of his retirement, Plaintiff Zanghi and his spouse are entitled to retiree health care benefits as set forth in this Complaint.

26. Named Plaintiff and Class Representative Kenneth J. Sowers, is an adult resident of Benedict, Pennsylvania in Cambria County. Between 1988 and 2007, Plaintiff Sowers worked at the Johnstown Facility where he was a member of the bargaining unit represented by the USW. Plaintiff Sowers, a plaintiff in the Sowers/Hayden Lawsuit, is or has been a Plan "participant" (within the meaning of ERISA, 29 U.S.C. § 1002(7)). Under the terms of a collectively bargained agreement between his employer and the USW applicable at the time of his retirement, Plaintiff Sowers and his spouse are entitled to retiree health care benefits as set forth in this Complaint.

27. Plaintiff Named Plaintiff and Class Representative Dominic McCuch is an adult resident of Windber, Pennsylvania in Cambria County. Between 1974 and 2002, Plaintiff McCuch worked at the Johnstown Facility where he was a member of the bargaining unit represented by the USW. Plaintiff McCuch, a plaintiff in the Britt Lawsuit, is or has been a Plan "participant" (within the meaning of ERISA, 29 U.S.C. § 1002(7)). Under the terms of a collectively bargained agreement between his employer and the USW applicable at the time of his retirement, Plaintiff McCuch and his spouse are entitled to retiree health care benefits as set forth in this Complaint.

28. Named Plaintiff and Class Representative James Hohman is an adult resident of Johnstown, Pennsylvania in Cambria County. Between 1971 and 2002, Plaintiff Hohman

worked at the Johnstown Facility where he was a member of the bargaining unit represented by the USW. Plaintiff Hohman, a plaintiff in the Britt Lawsuit, is or has been a Plan "participant" (within the meaning of ERISA, 29 U.S.C. § 1002(7)). Under the terms of a collectively bargained agreement between his employer and the USW applicable at the time of his retirement, Plaintiff Hohman and his spouse are entitled to retiree health care benefits as set forth in this Complaint.

29. Named Plaintiff and Class Representative Darrell Shetler, is an adult resident of New Florence, Pennsylvania in Westmoreland County. Between 1966 and 2001, Plaintiff Shetler worked at the Johnstown Facility where he was a member of the bargaining unit represented by the USW. Plaintiff Shetler, a plaintiff in the Deemer Lawsuit, is or has been a Plan "participant" (within the meaning of ERISA, 29 U.S.C. § 1002(7)). Under the terms of a collectively bargained agreement between his employer and the USW applicable at the time of his retirement, Plaintiff Shetler and his spouse are entitled to retiree health care benefits as set forth in this Complaint.

30. Plaintiff USW is a labor organization with its headquarters in Pittsburgh, Pennsylvania. Plaintiff USW was known for many years as the United Steelworkers of America, AFL-CIO/CLC, before it changed its name in 2005 to United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC. For many years, the USW negotiated collective bargaining agreements with Bethlehem and later with the Defendant Corporate Entities relating to, *inter alia*, retiree health and life insurance benefits for hourly employees working at the Johnstown Facility.

STATEMENT OF FACTS

31. The Johnstown Facility was a fabricating/assembly plant that manufactured and assembled various types of freight cars for the railroad industry. Production at the Johnstown Facility ceased in 2008.

32. In its February 11, 2008 Opinion in the Sowers/Hayden Lawsuit, issued before the closing of the Johnstown Facility in late 2008, this Court accurately described the background of the Johnstown Facility and the corporate history of the Defendant Corporate Entities as follows:

> 9. FCA is the leading manufacturer of aluminum-bodied rail cars in North America, based on the number of cars delivered.
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> 10. FCA specializes in the production of coal-carrying rail cars, and manufactured an estimated 81% of the coal-carrying rail cars delivered in the North American market over the three years ended December 31, 2006. FCA specializes in aluminum cars because of the added efficiency of aluminum cars in terms of weight capacity for the transportation of coal.
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> 13. The current FCA has its beginnings in 1901, and was owned and operated by Bethlehem Steel Corporation from 1923 to 1991, as the Bethlehem Steel FreightCar Division. In 1991, FCA's predecessor purchased the Bethlehem Steel FreightCar Division from Bethlehem Steel and became publicly owned in 1994. The business was subsequently sold to certain members of management, and the Company became known as JAC Holdings International, Inc. In December 2004, the Company changed its name to FreightCar America, Inc., to better reflect its business of manufacturing rail cars.
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> 14. FCA's manufacturing facilities are located in Danville, Illinois, Johnstown, Pennsylvania, and Roanoke, Virginia.
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> 15. As of December 31, 2006, FCA had 1,429 employees, of whom 841 were members of unions, representing approximately 59% of the total labor force.

2008 U.S. Dist. LEXIS 9913, at ** 73-75 (citations omitted).

33. For decades, hourly production and maintenance workers at the Johnstown Facility have been represented by the USW.

34. For many years while Retirees worked at the Johnstown Facility, retiree health benefits for Retirees and Spouses were described in and provided through successive collectively bargained agreements. Retirees' former employers negotiated these labor agreements with the USW when Retirees were still active employees at the facility.

35. For example, one of the original plaintiffs in the Deemer Lawsuit, Geraldine Deemer, now deceased, was the widow of James E. Deemer. Mr. Deemer worked at the Johnstown Facility for more approximately 42 years, and retired from JAC in 1997. Since Mr. Deemer's death in 2000 and until her own death in 2008, Mrs. Deemer continued to receive Surviving Spouse's benefits under the pension plans applicable to unionized employees at the facility. Similarly, Plaintiff Shetler worked at the Johnstown Facility for approximately 33 years, and retired in 2001. Mr. Deemer and Plaintiff Shetler both began receiving retiree medical and life insurance benefits when they retired. Because Mr. Deemer's widow Geraldine Deemer received a Surviving Spouse's benefit under the pension plan, she was eligible for and continued to receive retiree medical benefits upon her husband's death and until her own death in 2008.

36. For many years while Class Representatives worked at the Johnstown Facility, retiree medical and life insurance benefits were described in and provided through negotiated plan booklets. June 28, 2002 Affidavit of Andrew Palm ("Palm Aff.") (Exhibit 3 hereto) ¶ 6, and Exhibit A thereto, which is the 1990 version of the booklet — the Bethlehem "PROGRAM OF HOSPITAL-MEDICAL BENEFITS" (or "Bethlehem PHMB").

37. Nowhere does the Bethlehem PHMB reserve for the employer a *unilateral* right to reduce or terminate benefits. Indeed, negotiated provisions contained within the booklet expressly mandate that benefits are to last for life, irrespective of whether there is still a labor

agreement in effect, unless the company and union agree otherwise. Thus, the 1990 Bethlehem PHMB states:

> Any pensioner or individual receiving a Surviving Spouse's benefit who become covered by the [PHMB] *shall not have such coverage terminated or reduced … so long as the individual remains retired from the Company or receives a Surviving Spouse's benefit, notwithstanding the expiration of this agreement, except as the company and union may agree otherwise*.

Palm Aff. (Exhibit 3), Exhibit A, p. 57, ¶ 7 ("Continuation of Coverage") (emphasis added). See also, id. ¶ 6 (similar language for life insurance).

38. This language means that the retiree welfare benefits in question were "vested" *in the sense that they could not be unilaterally terminated or reduced by the employer* and that they were to remain unchanged throughout retirement – *unless the Union and company agreed otherwise*.

39. In 1991, Bethlehem sold its Freight Car Division to JAC. Then USW Director Andrew Palm participated in the labor negotiations in connection with the sale. Palm Aff. ¶¶ 4-5.

40. As attested by Mr. Palm, the following occurred in connection with the 1991 negotiations:

> When we were negotiating for the Union's first contract with JAC in 1991, we considered it crucial that JAC agree to the same retiree medical benefits as Bethlehem Steel was providing at that time. One feature of retiree medical benefits for Bethlehem Steel retirees (and generally for all basic steel retirees) is that they are to continue throughout retirement and beyond contract expiration (unless the Union affirmatively agrees otherwise). The reason we considered it crucial in 1991 to have JAC agree on this issue was because we had a lot of people in our bargaining unit who had worked many years and would be retiring during the next ten years. Many were even eligible for immediate retirement from Bethlehem in 1991. We thought it would be totally unfair and inappropriate if these people lost their lifetime retiree medical benefits by virtue of the sale. We stated repeatedly to JAC negotiators that this issue was a deal breaker, in that we

> needed to have these retiree medical benefits or there would be no agreement. In the end, we achieved our goal.

September 9, 2002 Supplemental Declaration of Andrew Palm filed with Plaintiffs' Motion for Summary Judgment ("Supp. Palm Decl.") (Exhibit 4 hereto) ¶ 3.

41. More specifically as to "achievement of this goal," JAC entered into an October 18, 1991 agreement with the Union entitled "Johnstown America Corporation – Mirroring of Employee Benefit Plans" (hereinafter "Mirroring Agreement"). Palm Aff. ¶ 9, and Exhibit B thereto. In the Mirroring Agreement, JAC promised to "*create* mirror bargaining unit employee benefit plans *identical in all material respects* to the Bethlehem plans they replace." Palm Aff., Exhibit B p. 1 (emphasis added). The Mirroring Agreement mandated establishment of "mirror" plans for *all* benefit plans (with the exception of Bethlehem's "Employee Investment Program" (id.), which is not involved in this lawsuit) "effective immediately" after closing of the sale.

42. Retiree medical and life insurance benefits are considered "welfare benefits." Retiree welfare benefits are among those covered by the Mirroring Agreement, as a subsequent paragraph in the Agreement makes clear. This provision requires establishment of an identical program, and essentially provides that claims arising out of injuries or illnesses occurring before the sale would be Bethlehem's responsibility while JAC's plan would cover future injuries and illnesses:

> *Johnstown America Corporation bargaining unit welfare benefit plans will mirror existing Bethlehem plans* and *shall be effective immediately after closing* [of the sale]. The obligation to pay benefits to employees *or former employees* of Bethlehem/FCD under Johnstown America Corporation bargaining unit welfare benefit plans which arise from or are based on events which occurred prior to closing [of the sale] (whether or not claims for such benefits are submitted prior to closing) shall remain the responsibility of Bethlehem, whether or not the claiming employees are employed by Johnstown America Corporation. *Johnstown America shall be responsible for all benefits payable to its employees or its retirees which arise or are based on events which occurred after closing.* For purposes of this agreement, the term "events" means the items that are the subject

> matter of the claim (*i.e.*, medical services, etc.), but not the condition or injury leading to the filing of the claim.

Palm Aff., Exhibit B, p. 2 (emphasis added).

43. The Mirroring Agreement also specifies that past service with Bethlehem is to count for purposes of determining benefit entitlements under the new plans. Palm Aff., Exhibit B, p. 1.

44. After signing the Mirroring Agreement, JAC discharged the obligation it imposed to "create" welfare benefit programs, including retiree medical and life insurance benefits to retiring employees, which "*mirrored*" Bethlehem's welfare programs in "*all material respects*." Thus, and as JAC admitted in the Deemer litigation, from 1991 until 1997, *it was bound* by specific language in the Bethlehem PHMB appearing under the heading "Continuation of Coverage," which, again, provides that retiree benefits survived the expiration of the CBA – unless the company and union were to "agree otherwise." In other words, JAC *admitted* in the Deemer litigation that the Bethlehem "Continuation of Coverage" provision described its contractual obligation and was part of the controlling Plan document.

45. JAC made a similar admission *even after 1997* -- even though it later claimed in briefs submitted in the Deemer litigation that the USW had agreed to convert the retiree benefits to *gratuitous* benefits during the 1997 negotiations. In a letter from JAC's President dated June 3, ***1999*** (Palm Aff., Exhibit C) which addressed a change in the corporate entity owning the facility, JAC provided union employees "with information about how your benefits will be handled following the acquisition, particularly … retiree health care and life insurance programs." As to these programs, this 1999 letter goes on to state

> *You will be eligible for the same retiree health and life insurance coverage through Johnstown America Corporation as you were through Bethlehem Steel and the current plan*. Again all your service will count towards eligibility for these retiree coverages.

Palm Aff., Exhibit C (emphasis added).

46. At no time during the initial 1991 labor negotiations or during any subsequent round of bargaining before 2002 did JAC ever suggest to the Union that retiree welfare benefits were terminable simply because the current labor agreement expired. See, e.g., Palm Aff. ¶ 13; and Supp. Palm Decl. (Exhibit 4) ¶ 2.

47. Even though JAC fulfilled its obligation under the Mirroring Agreement to "*create*" welfare plans which mirrored Bethlehem's and provided such mirrored benefits for many years, it never actually prepared a separate, written plan which tracked the language of the PHMB. Thus, when the USW asked for the actual plan documents covering welfare benefits (including benefits for retirees) in 2002, JAC admitted that: "Plan documents do not exist for the welfare plans i.e., health care, and sickness and accident plans, etc." Palm Aff., Exhibit D. In accordance with the Mirroring Agreement, however, the terms set forth in the Bethlehem PHMB became the terms of the retiree medical and life insurance Plan of JAC. See, e.g., Palm Aff. ¶ 14.

48. By letters dated February 1 and March 6, 2002 — at a time when the affected Class Representatives and other Class Members were already retired and their rights to retiree medical and life insurance benefits were already earned — *JAC announced that effective May, 2002 it would cease paying for any retiree medical and life insurance coverage for approximately 250 persons*. Palm Aff., Exhibits E and F. The terminated group encompassed all Retirees (and their Spouses), including the named Plaintiff Shetler, who retired after the 1991 sale and who were at least 43 years old at the time of sale (and their surviving spouses). See Palm Aff., Exhibit E, p. 1.

49. On April 26, 2002, Plaintiffs in the Deemer Lawsuit filed their complaint in the United States District Court for the Western District of Pennsylvania. The complaint alleged that retiree medical and life insurance benefits for the named individual Deemer Plaintiffs and a class of approximately 250 individuals were meant to last throughout retirement.

50. The Deemer Plaintiffs moved for summary judgment and a permanent injunction mandating that the defendants reinstate benefits for the Deemer class. The defendants cross-filed for summary judgment.

51. Prior to the summary judgment briefing in the Deemer litigation in 2002, the only excuse JAC ever offered for terminating benefits was that Bethlehem was operating under Chapter 11 of the U.S. Bankruptcy Code and has "stopped reimbursing JAC for the cost of your post-retirement benefit premiums." See, e.g., Palm Aff. ¶ 16, and Exhibit E, p. 1. JAC explained that, at the time of the 1991 sale, "Bethlehem agreed to reimburse JAC for the cost of your post-retirement health insurance and life insurance," and that Bethlehem had now reneged on this agreement. Id.

52. While JAC may have had a claim against Bethlehem for breach of the alleged 1991 reimbursement agreement, Bethlehem's conduct provides no basis for JAC to abandon its obligation to provide retiree benefits "so long as the individual remains retired from the Company or receives a Surviving Spouse's benefit, notwithstanding the expiration of [the labor] agreement" – unless the company and Union "agree otherwise." Neither the Union nor the retirees were parties to that alleged reimbursement agreement (Palm Aff. ¶ 17), and nothing in the agreements between JAC and the Union condition JAC's obligation on its continued receipt of reimbursements from Bethlehem. See also Judge Cindrich's July 14, 2003 Memorandum Opinion in the Deemer Litigation ("5/14/2003 Mem. Op.") (Exhibit 5 hereto), p. 2 n.2.

53. JAC's defense in its cross-motion turned on two arguments. First, JAC noted that in the 1997 negotiations, the parties had removed a 1991 Side Letter (#22) which had called for JAC to "create" welfare plans identical to Bethlehem's, and they also added a "integration" clause or "zipper" clause in that year. Based on these facts, JAC asserted that the Continuation of Coverage language (and the obligation to "mirror" the Bethlehem PHMB) were "expressly abrogated in 1997 in collective bargaining between JAC and the Union…" See JAC's August 9, 2002 summary judgment brief ("JAC Sum Jud. Brief") (Exhibit 6 hereto) p. 1; Report and Recommendation dated February 24, 2003 ("2/24/2003 R&R") (Exhibit 7 hereto), pp. 12-13. Second, JAC relied on a clause in a "JAC Guide" – a summary of benefits -- stating that changes that could be made "subject to the collective bargaining agreement." JAC Sum. Jud. Brief, p. 8.

54. In the 2/24/2003 R&R, Magistrate Judge Robert C. Mitchell recommended granting Defendants' summary judgment motion, and denying the Deemer Plaintiffs' Motions. The Deemer Plaintiffs filed objections to the R&R. By decision of July 14, 2003 (Exhibit 5 hereto), District Judge Robert J. Cindrich rejected the R&R, and ordered that the case should proceed to trial.

55. Judge Cindrich did so after evaluating the evidence submitted by the Deemer plaintiffs, which included the following:

56. First, the Deemer plaintiffs relied upon the aforementioned letter from JAC's President sent to Plaintiff-Participants in 1999 which had assured that retirees were still entitled to the "same retiree health … insurance coverage … as you were [receiving] through Bethlehem Steel," Palm Aff. Exh. C (emphasis added), and, of course, an essential feature of this Bethlehem coverage was the Continuation of Coverage clause. Therefore, JAC's President was admitting in 1999 that the clause was still effective.

57. Second, the Deemer plaintiffs relied upon evidence showing that the subject of the duration of retiree health benefits never even came up in the 1997 negotiations. Supp. Palm Decl. (Exhibit 4) ¶ 2. Thus, in 1991 JAC had bound itself to provide retirees and spouses medical benefits throughout retirement "except as the company and union may agree otherwise," and the union never agreed otherwise in 1997 or at any other time. The absence of any discussion showed that the 1997 removal of Side Letter #22 and "zipper" clause were nothing more than housekeeping items, and do not begin to approach the degree of specificity that would be needed to abrogate important rights to lifetime coverage.

58. Third, the Deemer plaintiffs noted that the JAC Guide clause stating that changes that could be made "subject to the collective bargaining agreement" could not support the defendants' position since it had been in existence since 1993 and was widely distributed. The Guide stated at several points that it was just a summary, and the Guide alludes to an "actual" plan document that contains all the details (i.e., the Bethlehem PHMB). E.g., September 9, 2002 Affidavit of Raymond J. Jastrzab (Exhibit 8 hereto) ¶ 2, and Exhibit A thereto, the Employee Guide, at pp. 2, 3, 6. Accordingly, the 1993 JAC Guide (being just a summary) was meant to summarize the Bethlehem PHMB and necessarily had the same meaning as that document and its Continuation of Coverage clause, which -- again -- even JAC admits controlled between 1991 and 1997. Unless this were the case, the exact same JAC Guide would have to have an entirely different meaning before 1997 than it did after 1997.

59. Read together, the JAC Guide and the Continuation of Coverage clause did in fact have the same meaning: The Guide's reference to changes that could be made "subject to collective bargaining" (Jastrzab Aff. (Exhibit 9) Exh. A, p. 11)) was simply another way of saying that no changes could be made "except as the company and union may agree otherwise."

Thus, the 1997 labor agreement's reference to the Guide simply incorporated JAC's assurance that retiree benefits were summarized in an "official" document (i.e., the Bethlehem PHMB), and that benefits could be changed only subject to collective bargaining (i.e., only if the company and Union agree).

60. Based on this evidence, Judge Cindrich first noted:

> [The Bethlehem PHMB] that Johnstown America agreed to mirror mandated that pensioners 'shall not have such coverage terminated or reduced … so long as the individual remains retired from the Company … notwithstanding the expiration of this agreement, except as the company and union may agree otherwise.'" We agree with the several courts that have construed this exact language that it creates vested retirement benefits. Indeed, defendants do not argue that plaintiffs' rights were not vested.

7/14/2003 Mem. Op. (Exhibit 5), p. 2.

61. Judge Cindrich then reasoned that the case turned on whether the USW had "agreed otherwise" in the 1997 negotiations (as the Company was contending), and whether the Company had proven such a 1997 agreement. Referencing the evidence, Judge Cindrich then concluded:

> It is defendant's burden, in overcoming the Union's vested right to retiree benefits, to show that the union and the company "agreed otherwise." There is substantial evidence in the record to support plaintiffs' position that no such agreement was reached.
>
> It appears to be undisputed that Johnstown America continued to adhere to the Bethlehem PHMB until early 2002, long after the Mirroring Agreement was supposedly rejected under defendants' theory. The Union presents a plausible explanation for why Side Letter 22 was not incorporated into the 1997 CBA, i.e., that it had fulfilled its purpose of creating a retiree benefit plan that mirrored Bethlehem's plan. Thus, both sides could be technically truthful in saying that Side Letter 22 was discussed in the negotiations and that "retiree benefits" were not discussed in those negotiations. The term "subject to collective bargaining," as used In the JAC Employee Guide, is not irreconcilable with the term "as the company and union may otherwise agree," which was used in the Bethlehem PHMB. The Union points out that the JAC Employee Guide was drafted in 1993, when the Bethlehem PHMB was indisputably in effect and was not changed after the 1997 negotiations. The Union also points to text in the JAC Employee Guide stating that it was merely a summary document, thus creating a strong inference that the "actual plan document" referred to in the JAC Employee Guide remained the Bethlehem PHMB. In resolving a motion for summary judgment, the Magistrate Judge should have drawn the

> inference in the light most favorable to the non-moving party. Accordingly, we conclude that the Magistrate Judge erred by granting defendants' motion for summary judgment.
>
> ***
>
> The court will hold an evidentiary hearing …. Each side may present evidence in support of its contractual interpretation by way of documents and/or witnesses.

7/14/2003 Mem. Op., pp. 3-4.

62. Subsequently, the parties in Deemer conducted months of discovery, which included many depositions and the production of thousands of pages of documents. The parties also participated in mediation proceedings in late March 2004, and then resumed negotiations during the period from September through November 2004.

63. In the meantime, the Britt plaintiffs filed their complaint on August 29, 2003. As they alleged, they also had worked at the Johnstown Facility where the Deemer plaintiffs worked. The Britt plaintiffs further alleged that they had earned rights to receive certain pension supplements *as well as the same retiree medical and life insurance benefits that were at issue in Deemer*, and that the defendants had abridged these rights by refusing to pay these benefits. Like the Deemer plaintiffs, they alleged that the defendants' refusal to pay benefits was actionable under Section 301 of the LMRA, and ERISA.

64. The negotiations that took place from September through November 2004 ultimately resulted in the Deemer/Britt Settlement Agreement (Exhibit 2), which the Court approved on May 4, 2005.

65. As to retiree medical benefits, the Deemer/Britt Settlement Agreement put a plan in place for both the Deemer and Britt classes, with Defendant JAC (which changed its name to FreightCar around the time of settlement) making $700 monthly contributions for households with a class member not eligible for Medicare and $450 monthly contributions for households with a class member eligible for Medicare. The contributions were to last at least through

November 2012, and if the Defendant Corporate Entities were to cease making contributions at that point, Retirees and Spouses could then file their lawsuits again. Deemer/Britt Settlement Agreement § 16(f).

66. As alleged above, the Deemer/Britt Settlement Agreement provided that in the re-filed lawsuits, the parties would "retain their legal positions that they asserted in the Britt and Deemer litigations," so that the "Plaintiffs [could] continue to assert both that alteration of benefits is unlawful and that obligations under collectively bargained agreements require the continuation of the negotiated level of benefits provided under the 1997 collective bargaining agreement (e.g., no deductibles, contributions, etc.)." Id.

67. Retiree life insurance was addressed in a separate provision, which stated: "Defendant JAC will reinstate the retiree life insurance program and will provide future benefits consistent with that Program." Id. § 16(i).

68. Thereafter, in 2007, the Defendant Corporate Entities announced the closing of the Johnstown Facility and the Sowers/Hayden plaintiffs filed the Sowers/Hayden Lawsuit. The Court in that case later ruled that substantial evidence showed that the purpose behind the closing was to leave many senior employees just short of attaining the years of age and service necessary to qualify for shutdown pensions *and the retiree health and life insurance benefits that accompanied such pensions*. See 2008 U.S. Dist. LEXIS 9913 (W.D. Pa. Feb. 11, 2008).

69. This Court issued an opinion granting the plaintiffs an injunction. Id. While the case was on appeal, the parties reached a settlement under which the affected class members -- 202 persons not in the Britt and Deemer classes -- were allowed to accrue sufficient additional service to qualify them for pensions and retiree health and life insurance benefits.

70. These 202 additional persons were in essence added to the Deemer and Britt classes since they were granted the same rights as the class members in those cases to sue beyond November 2012 should the Defendant Corporate Entities not continue retiree health contributions for them. Thus, the Sowers/Hayden Settlement Agreement (Exhibit 1) provides:

> Current retirees and employees who retire under the terms of the Sowers/Hayden Litigation Settlement Agreement will continue to be eligible for retiree healthcare coverage under applicable terms and conditions of the CBA and under applicable terms and conditions of the court settlements in the Deemer and Britt cases. The Companies and the Union reserve their respective legal positions on the issue of whether the Companies have the right to make future changes to retiree healthcare after expiration of the time periods established in Appendix 5 of the CBA and in the court settlements in the Deemer and Britt cases.

Sowers/Hayden Settlement Agreement ¶ 7, p. 5.

71. FreightCar subsequently announced that, effective October 1, 2013, it would cease making the contributions for Retirees and Spouses described in the Sowers/Hayden, Deemer and Britt settlements. Accordingly, the hundreds of Retirees and Spouses covered by all three lawsuits possess the right to reassert their claims "that alteration of benefits is unlawful and that obligations under collectively bargained agreements require the continuation of the negotiated level of benefits provided under the 1997 collective bargaining agreement (e.g., no deductibles, contributions, etc.)."

CLASS ACTION ALLEGATIONS

72. Class Representatives bring this class action on behalf of themselves and a Class of similarly situated persons, defined as follows:

> All persons who, as of November 30, 2012, were receiving or were eligible to receive retiree medical and/or life insurance benefits as a result of the settlement of United Steelworkers of America, AFL-CIO-CLC, Geraldine Deemer, and Darrell Shetler v. Johnstown America Corporation, et al., No. 02-CV-806 (W.D.Pa.); United Steelworkers of America, AFL-CIO-CLC, Reggie Britt, et al. v. Johnstown America Corporation, et al., No. 03-CV-1298 (W.D.Pa.); or Sowers v. FreightCar America. Inc. et al., No. 07-CV-201 (W.D. Pa.).

73. The exact number of Class Members is not presently known, but, on information and belief, it exceeds 800. Accordingly, joinder of individual Class Members in this action is impracticable.

74. The retiree health care benefits to which Class Members are entitled pursuant to the collectively bargained agreements are similar, and all benefits were meant to last, unaltered, throughout retirement except for specific changes that were authorized (*e.g.*, if the USW "agreed otherwise," or coverage stops when a dependent student child reached age 25).

75. There are common questions of law and fact in this action that relate to and affect Class Members, as set forth below in Counts I and II of this Complaint.

76. The relief sought is common to all Class Members, as set forth below in the "Relief Requested" section of this Complaint.

77. The claims of the Class Representatives are typical of the claims of the Class Members they seek to represent insofar as they all assert, *inter alia*, that:

(a) Defendants are obligated under LMRA § 301 and ERISA to provide retiree health and life insurance benefits throughout retirement without unilateral reduction, as set forth in collectively bargained agreements negotiated between the USW and the Defendant Corporate Entities and its successors;

(b) Defendants cannot unilaterally terminate or reduce those benefits in violation of collectively bargained terms.

78. There is no conflict between any Class Representative and other Class Members with respect to this action.

79. The Class Representatives are able to, and will, fairly and adequately protect the interests of the Class Members. The attorneys for the Class Representatives are experienced and

capable in the field of labor law and employee benefits law, and retiree health benefits in particular, and have successfully litigated numerous class actions of a similar nature.

80. The action is properly maintained as a class action under FRCP Rule 23(b)(2), in that Defendants have acted on grounds generally applicable to the Class by unilaterally terminating retiree health care and life insurance benefits they are obligated to provide to Class Members, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the Class as a whole.

81. The action is also maintainable as a class action under FRCP 23(b)(1)(A). Because of the uniform standards of conduct imposed by ERISA, the prosecution of separate actions by individual members of the Class would create a risk of inconsistent adjudications that would establish incompatible standards of conduct for Defendants.

COUNT I

Violation of Labor Agreements Actionable Under Section 301 of the LMRA (Against all Defendants)

82. Paragraphs 1 through 81 are re-alleged and incorporated by reference.

83. As noted, in the years before their retirements and at the time they retired, Class Members' retiree health and life insurance benefits were the subject of labor agreements between the Defendant Corporate Entities and the USW. Under those labor agreements, Class Members and eligible dependents had rights to receive specified retiree benefits that are not subject to unilateral reduction or termination during retirement. Defendants' reduction of and announcement of reduction of retiree benefits infringes upon those rights.

84. Accordingly, Defendants' reduction of retiree benefits violates collectively bargained obligations owed to Class Members, and is actionable under Section 301 of the LMRA, 29 U.S.C. § 185(a).

COUNT II

Violation of Employee Welfare Benefit Plan Actionable Under ERISA § 502(a)(1)(B) (Against all Defendants)

85. Paragraphs 1 through 84 are re-alleged and incorporated herein by reference.

86. By taking the actions described above, Defendants violated the rights of Class Representatives and other Class Members. Specifically, under the Plan's governing documents (including collectively bargained agreements), Class Representatives and the Class as a whole have rights to retiree health and life insurance benefits that are not subject to unilateral reduction or termination during retirement. Accordingly, Defendants' unilateral reduction of and announcement of unilateral reduction of benefits infringes upon and is in derogation of those rights.

87. Defendants' repudiation of the terms of the employee welfare benefit plan is actionable in this Court under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), which allows a participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Additionally, a participant suing under this provision is entitled to interest on any retroactive amounts awarded.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Certify this action as a class action, appoint Plaintiffs Anthony J. Zanghi, Kenneth J. Sowers, Dominic McCuch, James Hohman, and Darrell Shetler as Class Representatives, and appoint Feinstein Doyle Payne & Kravec, LLC, and its undersigned attorneys as counsel for the Class.

B. Declare that the retiree health and life insurance benefits as set forth in the applicable collectively bargained agreements between the Defendant Corporate Entities and the USW, and in the Plan, may not be unilaterally modified or terminated by Defendants.

C. Preliminarily and permanently enjoin Defendants from modifying or terminating the benefits they are obligated to provide to the Class Members under the terms of the applicable collectively bargained agreements and the Plan.

D. Award Class Representatives and Class Members such benefits, pursuant to the terms of applicable collective bargaining agreements and the Plan, and/or monetary damages (plus interest), as necessary to restore them to the position in which they would and should have been in but for Defendants' contractual and statutory violations.

E. Award Plaintiffs reasonable attorneys' fees and costs incurred in this action.

F. Award Class Members pre-judgment and post-judgment interest on any retroactive amounts awarded.

G. Grant such further relief as may be deemed necessary and proper.

JURY DEMAND

Plaintiffs request a jury trial of all issues so triable.

Respectfully submitted,

/s/ William T. Payne

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Dated: July 9, 2013