UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re: PATRIOT COAL CORPORATION, *et al.*, Debtors.[1]	Chapter 11 Case No. 12-51502-659 (Jointly Administered)

OBJECTION TO DEBTORS' MOTION
TO REJECT COLLECTIVE BARGAINING AGREEMENTS AND
TO MODIFY RETIREE BENEFIT PURSUANT TO
SECTIONS 1113 AND 1114 OF THE BANKRUPTCY CODE

Energy West Mining Company ("Energy West"), through its undersigned attorneys, hereby submits this Objection To Debtors' Motion to Reject Collective Bargaining Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C. §§ 1113, 1114 of the Bankruptcy Code ("Motion"). In support of this Objection, Energy West hereby states the following:

PRELIMINARY STATEMENT

The Court should deny this Motion to the extent Debtors seek to cease contributing to (and withdraw from) the multiemployer pension plan known as the United Mine Workers of America ("UMWA") 1974 Pension Plan ("1974 Plan" or "Plan") because Debtors have failed to show that rejection of 1974 Plan obligations is necessary to their reorganization. If Debtors are permitted to evade their financial obligations to the 1974 Plan, the remaining contributing employers, including Energy West, will be left to absorb the cost of Debtors' obligations, creating a substantial financial burden on all of these employers. Moreover, the other employers who contribute to the 1974 Plan are Debtors' competitors who possess not only 1974 Plan

[1] The Debtors are the entities listed on Schedule 1 attached to the Motion to Reject Collective Bargaining Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C. §§ 1113, 1114 of the Bankruptcy Code

obligations but also other pension and health contribution obligations pursuant to applicable collective bargaining agreements. By foisting the additional financial responsibility of Debtors' 1974 Plan contribution obligations on the other contributing employers, some of these employers may be forced to file bankruptcy themselves, resulting in the potential failure of the 1974 Plan. Debtors should not be permitted to utilize Section 1113 to avoid their 1974 Plan obligations to the detriment of their competitors and other employers that contribute to the 1974 Plan. Other avenues exist through which Debtors may reorganize without harming their competitors or placing the 1974 Plan in jeopardy. Thus, the Court should deny the Motion.

BACKGROUND

A. The UMWA 1974 Pension Plan

The 1974 Plan is a multiemployer pension plan ("MEPP") that provides pension benefits to retired UMWA coal miners and their eligible dependents. Specifically, the Plan provides pensions to over 90,000 eligible mine workers and/or their spouses. The average monthly benefit for a regular retiree is $620. See Exhibit A at 23.

Pursuant to the current 2011 National Bituminous Coal Wage Agreement ("NWBCA") negotiated with the UMWA, as well as other individual agreements, Debtors and Energy West are among the thirty-five employers required to make contributions to the 1974 Plan based principally on hours worked by UMWA-represented employees. Debtors are the second largest contributor to the 1974 Plan, contributing $21 million in 2010, $24.3 million in 2011 and $20.8 million in 2012. See Exhibit B at 34.

The 1974 Plan already is in poor financial health. Not only is the Plan currently underfunded (i.e., the value of the Plan's assets is less than the actuarial value of the Plan's vested accrued benefits), but for the plan year beginning July 1, 2012, its financial status was classified as "seriously endangered."[2] Specifically, the Plan's funded percentage for the beginning of the current plan year is approximately 72% and furthermore, the Plan is projected to have a funding deficiency within the next six years.[3]

B. Withdrawal Liability

The Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") requires an employer that contributes to a MEPP pay its proportionate share of that MEPP's unfunded vested benefits[4] at the time of its withdrawal from the MEPP. Such termination payment is referred to as "withdrawal liability." The 1974 Plan calculates an employer's withdrawal liability based on the employer's share of contributions to the Plan during the previous five plan years of its participation.[5] For the most recent plan year ending June 30, 2012, the 1974 Plan's unfunded vested benefits were $5,107,362,000. See Exhibit A at 55. Debtors' proportionate share of these unfunded vested benefits (i.e., withdrawal liability) is approximately $959,000,000.

STANDING

[2] The Pension Plan Act of 2006 ("PPA") establishes "zones" that represents a plan's financial status including "endangered," "seriously endangered," "critical" or "neither critical nor endangered." The PPA requires a funded percentage of 80% be maintained for a plan, and if a plan is determined to have a funded percentage of less than 80% it is deemed to be "endangered." A plan is deemed to be "seriously endangered" if it is not in "critical" status, its funded percentage is less than 80% and it is projected to have a funding deficiency within six years. A plan is deemed to be "critical" when its funded percentage is less than 65% and either it is projected to have a funding deficiency within four years or it is projected that will not be able to pay vested benefits within seven years. See generally 26 U.S.C. § 432.

[3] See Exhibit A at 37. As of June 30, 2012, the total actuarial asset value was $4,658,185,000 and the total actuarial accrued liability was $6,438,715,000 (i.e., a funded percentage of 72.35%). Id.

[4] "Unfunded vested benefits" are defined as the difference between the benefits that are currently being paid to retirees and that will be paid in the future to covered employees who have already completed some specified period of service, and the current value of the plan's assets. See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 608-609 (1993) (citations omitted).

[5] Under this "rolling five method," withdrawal liability is calculated by determining the unfunded vested liabilities as of the end of the plan year preceding withdrawal which is multiplied by a single fraction (numerator is the withdrawing employer's contributions in the five plan years prior to the withdrawal and the denominator is the amount of contributions by all employers (which have not withdrawn) in the same period). See ERISA Section 4211(d) (requiring 1974 Plan to use the "rolling five method" to determine withdrawal liability).

Energy West has standing to be heard in the instant matter because it is both a "party in interest" within the meaning of Section 1109(b) of the Bankruptcy Code and an "interested party" pursuant to Section 1113(d)(1).

A. Standing under Section 1109(b)

Pursuant to Bankruptcy Code § 1109(b), a "party in interest" has the right to "appear and be heard" on "any issue in a case" arising under Chapter 11. See 11 U.S.C. § 1109(b). Although a "party in interest" is not defined by the Bankruptcy Code, courts generally have interpreted the phrase to mean a party with a financial stake in the outcome of the case. See, e.g., In re U.S. Fidelis, Inc., 481 B.R. 503, 515 (Bankr. E.D. Mo. 2012) (under § 1109(b), "A 'party in interest' is a person who holds a pecuniary interest that could be adversely affected by the outcome of the proceeding."); In re Stone Barn Manhattan LLC, 405 B.R. 68, 74 (Bankr. S.D.N.Y. 2009) (same). Furthermore, courts broadly interpret "any issue in a case" to allow a party to be heard on any issue arising in a contested matter or adversary proceeding. See Term Loan Holder Committee v. Ozer Group, L.L.C. (In re Caldor Corp.), 303 F.3d 161, 169 (2d Cir. 2002); see also Sarah R. Neuman Foundation, Inc. v. Garrity (In re Neuman), 124 B.R. 155, 160 (S.D.N.Y. 1991) (§ 1109(b) grants a right to intervene in adversary proceedings).

Energy West is a "party in interest" within the meaning of Section 1109(b). Debtors are the second largest contributor to the Plan. If Debtors are permitted to evade financial responsibility for even a portion of their 1974 Plan withdrawal liability, the Plan's contribution base will shrink, resulting in an ultimate increase in the remaining participating employers' contribution obligations. Moreover, Debtors' withdrawal will have a significant financial impact on the remaining employers' obligations because these employers will be forced to absorb and assume responsibility for Debtors' 1974 Plan obligations. Because Energy West, along with the other contributing employers, may be compelled to pay for Debtors' proportionate share of unfunded liability, Energy West has a pecuniary stake in the financial outcome of this issue. As such, Energy West is a "party in interest" and is afforded the right to appear and be heard pursuant to Section 1109(b).

B. Standing Under Section 1113(d)(1)

In addition to its right pursuant to Section 1109(b), Energy West also has standing to be heard on this matter under Section 1113(d)(1) of the Bankruptcy Code. Section 1113(d)(1) permits all "interested parties" to "appear and be heard" at a hearing of a debtor's motion to reject a collective bargaining agreement. See 11 U.S.C. § 1113(d)(1). Although not defined by the Bankruptcy Code, the Seventh Circuit in In re UAL Corp., held that an "interested party" under Section 1113(d)(1) is a "party to a collective bargaining agreement or a *guarantor of that contract*." 408 F.3d 847, 851 (7th Cir. 2005) (emphasis added).

As discussed above, when a debtor is permitted to withdraw from a MEPP without satisfying its obligation to pay its share of unfunded liability, the remaining contributing employers are left with the financial responsibility of the debtors' unpaid withdrawal liability. In effect, the remaining employers are the guarantors of the withdrawing debtors' obligations pursuant to the applicable collective bargaining agreement.[6]

If Debtors exit the 1974 Plan without assuming responsibility for their proportionate share of unfunded vested benefits, Energy West and the other contributing employers must take on Debtors' obligations to ensure continuation of the Plan. As such, Energy West is a guarantor

[6] Unlike the single employer pension plan ("SEPP") context in which the Pension Benefit Guaranty Corporation ("PBGC") is the guarantor of the SEPP if the employer withdraws without assuming responsibility for its obligations, in the MEPP context the remaining participating employers are responsible for unpaid obligations with the PBGC taking over only after the failure of the MEPP itself. This, along with the continuing contribution requirement, imposes a direct cost disadvantage for direct competitors of Debtors.

of the 1974 Plan and thus, has a right to appear and be heard under Section 1113(d)(1) on Debtors' Motion to reject their collective bargaining agreements.

OBJECTION

A. Debtors Should Not be Permitted to Cease Contributions to and Withdraw from the 1974 Plan Because Debtors Have Not Demonstrated Such Relief is Necessary to Their Reorganization and/or Treats Affected Parties Fairly and Equitably

1. Withdrawal from the 1974 Plan Is Not Necessary to Debtors' Reorganization

Before a Chapter 11 debtor may reject its collective bargaining agreement, it must satisfy several requirements, including demonstrating that its proposed rejections and modifications are "necessary to permit the reorganization." See 11 U.S.C. 1113(b)(1)(A); see generally United Food & Commercial Workers Union v. Family Snacks, Inc. (In re Family Snacks), 257 B.R. 884, 892 (B.A.P. 8th Cir. 2001) (discussing requirements for rejection of collective bargaining agreement as set forth in In re American Provision Co., 44 B.R. 907 (Bankr. D. Minn. 1984)). Debtors have failed to demonstrate that their cessation of payments to and withdrawal from the 1974 Plan is necessary to their reorganization.

In determining whether a debtor's proposal is "necessary," courts look to whether such proposal is "essential" to the debtor's reorganization. See Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America, 791 F.2d 1074, 1088-94 (3d Cir. 1986) (holding "necessary" and "essential" to be synonymous); see also In re Pierce Terminal Warehouse, Inc., 133 B.R. 639, 646-47 (Bankr. N.D. Iowa 1991); cf. Truck Drivers Local 807 v. Carey Transp., Inc., 816 F.2d 82, 90 (2d Cir. 1987) (interpreting necessary more broadly). Such finding is based on Congress' intent that the focus of "necessary" be on the short-term goal of preventing debtor's liquidation rather than the long-term goal of ensuring lasting reorganization. See Wheeling-Pittsburgh Steel Corp., 791 F.2d at 1089. The United States Bankruptcy Appellate Panel for the

Eighth Circuit has held that necessary means "necessary to accommodate confirmation of a Chapter 11 Plan." See In re Family Snacks, Inc., 257 B.R. at 893. Although the Eighth Circuit has not addressed the meaning of the term "necessary" in this context, the United States District Court for the District of Minnesota has utilized the more flexible definition, holding that "necessary" means a "successful reorganization, i.e., one from which the debtor emerges as an economically viable operation." See Assoc. of Flight Attendants-CWA, v. Mesaba Aviation, Inc., 350 B.R. 435, 449 (D. Minn. 2006) (citing In re Mile Hi Metal Sys., Inc., 899 F.2d 887, 893 (10th Cir.1990) (citation omitted)).

Debtors have not shown that eliminating their financial obligations to the 1974 Plan is essential or even necessary to their reorganization. Debtors merely list withdrawal from the 1974 Plan as one of the numerous obligations they wish to evade with minimal explanation as to its necessity. Indeed, numerous reasons support the position that withdrawal from the 1974 Plan is wholly *unnecessary*.

As an initial matter, Debtors have made and currently continue to make their required contributions to the 1974 Plan, even after filing bankruptcy. Debtors may not now claim that ceasing contributions to and withdrawing from the Plan is necessary when, as the present situation plainly demonstrates, they are financially capable of making such contributions without harming their current business operations. Debtors' 1113 Proposal further underscores their ability to fulfill their 1974 Plan contribution obligations. [7] In their 1113 Proposal, Debtors proposed payments to a retirement plan that they acknowledge would increase spending. See Debtors' Memorandum in Support of Motion, at p. 48. Debtors desire to swap one form of retirement income, the MEPP, for a 401(k) or similar plan. Debtors propose, in lieu of making

[7] Additionally, a decision in favor of the Debtors in their case against Peabody Holding Company, LLC and Peabody Energy Corporation filed with this court on March 14, 2013 will significantly decrease Debtors' total employee liabilities which would also eliminate the necessity to withdraw from the 1974 Plan.

1974 Plan contributions, they will make contributions equal to six (6) percent of gross hourly wages to a 401(k) or similar plan. In effect, the Debtors explicitly recognize that providing a retirement benefit is necessary to retaining a workforce.

If Debtors are financially capable of making the proposed 401(k) payments, they may very well be capable of making 1974 Plan contributions of $5.50 per hour. Debtors' current financial capabilities and their 1113 Proposal demonstrate that withdrawal from the 1974 Plan is not necessary to their reorganization.

2. Debtors' Request for Withdrawal Is Based on Assumptions and Uncertainties and thus, Is not "Necessary" to Reorganization

The majority of Debtors' arguments proffered in support of withdrawal assume that the Plan's contribution rates will remain status quo or increase. Because Debtors cannot predict with any accuracy the future financial health of the Plan and/or Plan contribution rates, Debtors' requested withdrawal is premature and thus, unnecessary to reorganization.

Debtors cite the possible 2017 increase in the 1974 Plan contribution obligations[8] as rationale for ceasing participation in the 1974 Plan. See Debtors' Memorandum in Support of Motion, at p. 41. A scheduled increase *four years* in the future is insufficient to show that an immediate withdrawal is warranted.

As evidenced by history, the coal industry is cyclical. Although coal prices currently may be at a low, the possibility exists that such prices may rise over the next four years as they have in the past. See Schwartz Decl. at 14 (chart showing up and down swing of U.S. Thermal coal prices over the past eight years). Debtors have no prediction methods that allow them to assert with any certainty that current coal prices will fall or even remain status quo in the future. Indeed, pursuant to PPA requirements, the 1974 Plan's funding status must be certified each

[8] Pursuant to the 1974 Plan funding improvement plan made in accordance with PPA requirements, each employers' contributions will increase in 2017.

year. If the Plan's funded status were to increase, it may alleviate the need for a funding improvement plan and the higher contribution rates. For example, there was no contribution requirement from 2002 to 2006 as the 1974 Plan was fully funded in or around 2000. See Exhibit C at 148-149.

In addition, Debtors presume that the Plan's current "seriously endangered" status also will result in increased Plan contributions. Such argument hinges on the assumption that the federal interest rate will remain constant or continue to decline. The financial health of the 1974 Plan inexorably is linked to the applicable federal interest rate and is a major factor in determining funded status, for both the PPA and the determination of withdrawal liability. See 29 U.S.C. Sections 1085(b)(3)(B)(i) and 1393(a)(1) (in essence, requiring plan actuaries to use interest rate assumptions that are reasonable and represent their "best estimate" of the plan's future experience)[9]; see also Board of Trustees, Michigan United Food and Commercial Workers Unions v. Eberhard Foods, Inc., 831 F.2d 1258, 1260 (6th Cir. 1987) ("A small adjustment in the interest rate assumption can lead to a major change in the withdrawal liability calculation."). Debtors have no means of accurately forecasting future federal interest rates. If interest rates rise, the funding level of the 1974 Plan will improve, resulting in the elimination of and/or lessening the likelihood of an increase in contributions as required by the PPA.

[9] For example, Section 1393 provides, in part,

> (a) Use by plan actuary in determining unfunded vested benefits of a plan for computing withdrawal liability of employer
>
> The corporation may prescribe by regulation actuarial assumptions which may be used by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part. Withdrawal liability under this part shall be determined by each plan on the basis of—
>
> (1) actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan . . .

29 U.S.C. § 1393(a)(1).

Finally, as cited in Debtors' Motion, future congressional action may remedy the 1974 Plan's underfunded status. See Debtors' Memorandum in Support of Motion, at pp. 56- 57, n.32. Just last month, the Coalfield Accountability and Retired Employee Act, S. 468, 113 Cong., 1st Sess. (2013); H.R. 980, 113 Cong., 1st Sess. (2013) ("CARE Act"), was introduced in Congress. This legislation, in part, would amend the Surface Mining Control and Reclamation Act and allow the transfer of additional federal funds to the 1974 Plan on an annual basis. If such legislation is passed, the potential for an increase in contributions may be reduced and/or eliminated.

3. Withdrawing from the 1974 Plan is Not Fair and Equitable

In addition to their failure to demonstrate necessity, Debtors fail to show that their proposal to withdraw from the 1974 Plan treats all parties "fairly and equitably" as required by Section 1113(b)(1). See 11 U.S.C. 1113(b)(1)(A); see also In re American Provision Co., 44 B.R. at 909. As explained previously, Debtors' withdrawal from and evasion of liability to the Plan will result in immediate and substantial financial harm to Debtors' competitors and other employers who contribute to the 1974 Plan because the contribution base will shrink and the remaining employers likely will be saddled with higher contribution rates as well as with Debtors' significant 1974 Plan obligations. Utilizing bankruptcy to financially damage competitors runs afoul of the notions of fairness and equality articulated in Section 1113. Additionally, the legality of imposing higher costs on direct competitors is untested.[10] As such, Debtors have not demonstrated their proposal is fair and equitable

Because Debtors fail to demonstrate withdrawal is necessary and/or equitable, the requested withdrawal should be denied. Debtors may achieve meaningful cost savings through business tactics other than withdrawing from the 1974 Plan and thus, eliminating the infliction of

[10] See supra at n. 6.

significant economic harm to the other Plan contributors as well as the risk of the failure of the 1974 Plan.

B. If Debtors Cease Making Contributions to and Withdraw from 1974 Plan, Withdrawal Liability Incurred After Debtors' Bankruptcy Filing Should Be Afforded Administrative Priority

If Debtors are permitted to eliminate their 1974 Plan contribution obligations by ceasing the payment of contributions to and withdrawing from the Plan, the portion of the withdrawal liability incurred post-petition is entitled to administrative priority under the Bankruptcy Code.

Section 507(a)(2) of the Bankruptcy Code provides that administrative expenses allowed under § 503(b) are entitled to priority over the claims of general unsecured creditors. See 11 U.S.C. § 507(a)(2). Section 503(b)(1)(A) defines administrative expenses as "the actual, necessary costs and expenses of preserving the estate including . . . wages, salaries, and commissions for services rendered after the commencement of the case [i.e. after the filing of the bankruptcy petition]." 11 U.S.C. § 503(b)(1)(A). In determining whether a claim is an "actual, necessary 'cost and expense' of preserving the estate" within the meaning of § 503(b)(1)(A), "courts generally consider whether (1) the expense arose from a transaction with the estate, and (2) whether it benefitted the estate in some demonstrable way." See Williams v. IMC Mortgage Co., 246 B.R. 591, 594 (B.A.P. 8th Cir. 1999); see also Sanchez v. Northwest Airlines Inc., 659 F.3d 671, 677 (8th Cir. 2011) (same). The primary intent behind granting administrative expense priority only to "actual, necessary" costs and expenses is to provide an incentive for creditors to continue or commence doing business with an insolvent entity. See IMC Mortgage Co., at 594. To be granted administrative status, a creditor must demonstrate that the expenses provided a tangible benefit to the bankruptcy estate. See id.

Courts have held that to the extent MEPP withdrawal liability is attributable to post-petition employment, the resulting claim is entitled to administrative expense status. See In re Marcal Paper Mills, Inc., 650 F.3d 311, 315 (3d Cir. 2011); see also Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc. (In re McFarlin's, Inc.), 789 F.2d 98, 101-04 (2d Cir. 1986) (suggesting post-petition withdrawal liability to a MEPP may be entitled to administrative expense status); see also In re Great Northeastern Lumber & Millwork Corp., 64 B.R. 426, 428 (Bankr. E.D. Pa. 1986); In re Cott Corp., 47 B.R. 487, 495 (Bankr. D. Conn. 1984).

The Third Circuit In re Marcal Paper Mills directly addressed whether MEPP withdrawal liability incurred by a debtor-employer that continued to employ workers during a bankruptcy case was entitled (in whole or in part) to administrative expense status. In re Marcal Paper Mills, Inc., 650 F.3d at 315. Because the work performed by the debtor-employer's employees conferred a benefit on the bankruptcy estate and pursuant to the collective bargaining agreements the debtor-employer was obligated to provide certain benefits in exchange for such post-petition work, the court held that that the portion of withdrawal liability relating to post-petition labor was entitled to administrative expense status. See In re Marcal Paper Mills, at 317.

The issue presented in the instant case is identical to that decided by the Third Circuit in In re Marcal Mills Paper – that is, whether any portion of withdrawal liability owed by Debtors to the 1974 Plan is a post-petition expense provided in exchange for services that are "actual" and "necessary" for the continued operations of Debtors. The answer is decidedly "yes."

The post-petition work being performed by the UWMA employees covered by the 2011 NWBCA is essential to keeping Debtors' business in operation and thus, confers a benefit to the bankruptcy estate. Moreover, pursuant to the 2011 NWBCA and the 1974 Plan, Debtors have promised to provide pension benefits in exchange for the work that is performed after they filed bankruptcy. The portion of the withdrawal liability that corresponds to this post-petition work is owed by Debtors in fulfillment of their promise to provide pension benefits in consideration for this necessary post-petition work. Thus, the requirements of §§ 503(b)(1)(A) & 507(a)(2) of the Bankruptcy Code are satisfied and the portion of the withdrawal liability attributable to post-petition is entitled to administrative expense status.

WHEREFORE, for the reasons set forth herein, Energy West respectfully requests that this Court 1) deny Debtors' Motion and 2) grant such other and further relief as the Court deems appropriate.

Dated: April 11, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed with the Clerk of Court this 11th day of April, 2013, and was served electronically by operation of the Court's CM/ECF system upon the parties receiving electronic service.

/s/ Bryan D. LeMoine______________

EXHIBIT A

December 2012

United Mine Workers of America
1974 Pension Plan

Actuarial Valuation Report as of July 1, 2012

MERCER

CONSULTING. OUTSOURCING. INVESTMENTS.

Contents

Highlights

Mercer has prepared this report exclusively for the Board of Trustees of the United Mine Workers of America ("UMWA") 1974 Pension Trust to:

1. Present Mercer's actuarial estimates of liabilities and expenses for the UMWA 1974 Pension Plan as of July 1, 2012;
2. Review plan experience for the year ended June 30, 2012;
3. Determine whether negotiated contributions fall within the acceptable range of plan contributions for the year beginning July 1, 2012;
4. Provide the plan's accountants with information concerning the funded status of the plan; and
5. Compare the assets with the value of vested benefits to determine withdrawal liability, if any.

The report is divided into two parts. **Section 1** describes the basis of the valuation. It summarizes the plan provisions, provides information relating to the plan participants, and describes the funding methods and actuarial assumptions used in determining liabilities and costs.

The following changes since the July 1, 2011, valuation are significant::

1) The National Bituminous Coal Wage Agreement of 2011 was ratified in June 2011; it is effective July 1, 2011, and expires December 31, 2016. It calls for contributions of $5.50 per hour worked (including hours worked by New Inexperienced Miners and Electing Miners) and $1.10 contribution per ton of "purchased coal." The only potential benefit change contained in this Agreement is a $1,500 increase in lump sum death benefits that is effective for eligible pensioner deaths on or after July 1, 2013. This benefit is expected to be first reflected in the 2013 funding valuation.

   The following changes have no effect on the current valuation results since they will be reflected in future demographic experience of the plan:

   - New Inexperienced Miners first hired on or after January 1, 2012 (2012 NIMs) will not earn any vesting, signatory, or credited service.
   - Miners who are active participants may opt out of the plan on or after January 1, 2012 (EMs). After the opt-out date, EMs will earn service credit for vesting and "any early retirement adjustments based on the type of pension benefit," but not signatory or credited service.
   - 2012 NIMs and EMs will be eligible for normal and minimum disability benefits and, if they meet the eligibility requirements, lump sum death benefits. These benefits will be determined as if the miner had not been a 2012 NIM or EM.

   There were 36 active EMs reported in the 2012 valuation data under a new separate status code.

2) The RPA '94 current liability interest rate was changed to 4.02% for 2012 from 4.48% for 2011 (the highest rate in the acceptable range for each year). In addition, the RPA '94 current liability mortality table was changed to the separate annuitant/nonannuitant mortality tables for males and females for the 2012 plan year as set forth in Regulations section 1.412(l)(7)-1 from the comparable 2011 plan year tables.

3) The total number of reported active participants increased by 3.5% from 10,427 in the prior year to 10,789. The total number of reported plan participants decreased by 1.1% from 213,843 in the prior year to 211,585.

4) There was a net actuarial loss from experience during the plan year ended June 30, 2012, of $223,191,000. The loss was primarily the result of less-than-expected investment income.

Highlights *(continued)*

Section 2 contains the results of the valuation. It includes the experience of the plan for the year ended June 30, 2012, the current annual costs, unfunded vested benefits for withdrawal liability purposes, and reporting and disclosure information. The range of contributions developed in Section 2.6, together with the corresponding items from preceding valuations, are shown below.

Comparison of Actual Contributions with Contribution Ranges and Plan Disbursements

	July 1, 2010	July 1, 2011	July 1, 2012
1) Actual Contributions for the Plan Year[1]	$122,940,000	$129,211,000	Not Available
2) Contribution Range from Section 2.6			
a) Maximum Tax-deductible Contribution	$8,056,736,000	$8,446,046,000	$9,201,389,000
b) Constant 30-Year Amortization of Unfunded Actuarial Accrued Liability[2]	137,263,000	157,456,000	176,241,000
c) ERISA Minimum Funding	0	0	0
Test Criteria; Excess (Shortfall):			
a) 10-Year Funding = (1)-(2a)	(7,933,796,000)	(8,316,835,000)	Not Available
b) 30-Year Funding = (1)-(2b)	(14,323,000)	(28,245,000)	Not Available
c) Minimum Funding = (1)-(2c)	122,940,000	129,211,000	Not Available

Withdrawal liability calculations require a determination of the plan's unfunded vested benefits. FASB Accounting Standards Codification 960 (formerly Statement of Financial Accounting Standards No. 35) requires the calculation of the actuarial present value of accumulated plan benefits. As shown in Section 2.7, the actuarial present value of accumulated plan benefits of $9,614,214,000 exceeds the net assets available for plan benefits by $5,411,969,000 as of June 30, 2012. The amount of unfunded vested benefits on June 30, 2012, was $5,107,362,000. The corresponding amount of unfunded vested benefits on June 30, 2011, was $4,371,242,000. The increase in unfunded vested benefits was primarily attributable to the net effects of the decrease in interest rates, a market value gain, and interest on the prior year's amount.

[1] *Actual contributions include $37,000 of withdrawal liability payments for the plan year beginning July 1, 2011.*
[2] *The amounts shown in the table assume that contributions and expenses are uniformly distributed over the plan year.*

Data and Plan Provisions

To prepare our report, Mercer used and relied on July 1, 2012, participant census data and June 30, 2012, draft unaudited financial statements, provided by Funds' Staff and summarized herein. The plan administrator is responsible for ensuring that such participant data provides an accurate description of all persons who are participants under the terms of the plan or otherwise entitled to benefits as of July 1, 2012, that is sufficiently comprehensive and accurate for these purposes. Although Mercer has reviewed the data in accordance with Actuarial Standards of Practice No. 23, Mercer has not verified or audited any of the data or information provided.

We also used and relied on the plan documents, including amendments through September 27, 2011, and interpretations of plan provisions, supplied by the plan sponsor as summarized herein. We have assumed for purposes of this valuation that copies of any official plan document, including all amendments and collective bargaining agreements, as well as any interpretations of any such document, have been provided to Mercer along with a written summary of any other substantive commitments.

The plan sponsor is solely responsible for the validity, accuracy, and comprehensiveness of this information. If any data or plan provisions supplied are not accurate and complete, the valuation results may differ significantly from the results that would be obtained with accurate and complete information; this may require a later revision of this report. Moreover, plan documents may be susceptible to different interpretations, each of which could be reasonable, and different interpretations could lead to different valuation results.

Important Notices

Mercer has prepared this report exclusively for the Board of Trustees of the UMWA 1974 Pension Trust; Mercer is not responsible for reliance upon this report by any party other than the plan sponsor, the plan administrator, and the Trustees. Subject to this limitation, the Trustees may direct that this report be provided to the auditors. The only purposes of this report are to provide the information described on page 1. This report may not be used for any other purpose; Mercer is not responsible for the consequences of any unauthorized use. This report is not an annual determination or certification of endangered or critical status under Internal Revenue Code Section 432. Decisions about benefit changes, granting new benefits, investment policy, funding policy, benefit security, and/or benefit-related issues should not be made on the basis of this valuation, but only after careful consideration of alternative economic, financial, demographic, and societal factors, including financial scenarios that assume future sustained investment losses.

A valuation is only a snapshot of a plan's estimated financial condition at a particular point in time; it does not predict the plan's future financial condition or its ability to pay benefits in the future, and it does not provide any guarantee of future financial soundness of the plan. Over time, a plan's total cost will depend on a number of factors, including the amount of benefits the plan pays, the number of people paid benefits, the period of time over which benefits are paid, plan expenses, and the amount earned on any assets invested to pay benefits. These amounts and other variables are uncertain and unknowable at the valuation date.

Because modeling all aspects of a situation is not possible or practical, we may use summary information, estimates, or simplifications of calculations to facilitate the modeling of future events in an efficient and cost-effective manner. We may also exclude factors or data that are immaterial in our judgment. Use of such simplifying techniques does not, in our judgment, affect the reasonableness of valuation results for the plan.

To prepare the valuation report, actuarial assumptions, as described herein, are used in a forward-looking financial and demographic model to select a single scenario from a wide range of possibilities; the results based on that single scenario are included in the valuation. The future is uncertain and the plan's actual experience will differ from those assumptions; these differences may be significant or material because these results are very sensitive to the assumptions made and, in some cases, to the interaction between the assumptions.

Important Notices *(continued)*

Different assumptions or scenarios within the range of possibilities may also be reasonable and results based on those assumptions would be different. As a result of the uncertainty inherent in a forward-looking projection over a very long period of time, no one projection is uniquely "correct" and many alternative projections of the future could also be regarded as reasonable. Two different actuaries could, quite reasonably, arrive at different results based on the same data and different views of the future. A "sensitivity analysis" shows the degree to which results would be different if you substitute alternative assumptions within the range of possibilities for those utilized in this report. We have not been engaged to perform such a sensitivity analysis and thus the results of such an analysis are not included in this report. Mercer is available to perform a sensitivity analysis upon request.

Actuarial assumptions may also be changed from one valuation to the next because of changes in mandated requirements, plan experience, changes in expectations about the future, and other factors. A change in assumptions is not an indication that prior assumptions were unreasonable when made.

Valuations do not affect the ultimate cost of the plan, only the timing of contributions into the plan or the timing of when future benefit costs are recognized. Plan funding occurs over time. Contributions not made this year, for whatever reason, including errors, may continue to be required and may be made in later years. If the contribution levels over a period of years are lower or higher than necessary, it is normal and expected practice for adjustments to be made to future contribution levels or benefit rates to take account of this with a view to funding the plan over time.

Data, computer coding, and mathematical errors are possible in the preparation of a valuation involving complex computer programming and thousands of calculations and data inputs. Errors in a valuation discovered after its preparation may be corrected by amendment to the valuation or in a subsequent year's valuation.

The Trustees are solely responsible for selecting the plan's investment policy, asset allocation, and individual investments. Mercer's actuaries have not provided any investment advice to the Trustees. The Bituminous Coal Operators' Association is responsible for selecting the plan's actuarial cost and asset valuation methods and the plan sponsor is responsible for funding policy. The policies and methods reflected in this report are those that have been so selected and are described in Section 1.3. Funds' Staff are responsible for reviewing and confirming that these policies and methods are accurate and are solely responsible for communicating to Mercer any changes required thereto. Section 1.3 also describes the assumptions that have been selected for funding purposes. Certain actuarial assumptions, including discount rates and mortality tables, are prescribed for current liability purposes by regulation or statute. By relying on this valuation report, the parties for whom we have prepared this report confirm that they have accepted the actuarial basis contained in this report.

The withdrawal liability and accounting information reported herein is based on the assumptions and methods as described on page 57. The actuarial assumptions and methods for accounting purposes were selected by the plan sponsor. Based on the information provided to us, we believe that the actuarial assumptions are reasonable for the accounting purposes described in this report.

The plan administrator should notify Mercer promptly after receipt of this report if any party for whom we have prepared this report disagrees with anything contained herein or is aware of any information that has not been communicated to Mercer or incorporated herein that would affect our valuation. This report will be deemed final and acceptable for the purposes described unless the plan administrator provides such notice to Mercer.

Important Notices *(continued)*

This report is based on our understanding of applicable law and regulations as of the valuation date, including the Pension Protection Act of 2006, the Worker, Retiree, and Employer Recovery Act of 2008, and the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010. The results of this valuation are subject to change based on future guidance, interpretations, or regulations. Mercer is not a law firm and cannot provide legal advice to the Funds. Funds' Staff should review any legal issues, including the impact of any legislation or regulations, with their legal counsel. Mercer is also not an accountant or auditor and is not responsible for the interpretation of, or compliance with, accounting standards; citations to, and descriptions of, accounting standards provided in this report are for reference purposes only.

Funded Status

Starting with the July 1, 2008, plan year, the plan's actuary is required to certify annually to the IRS and plan sponsor whether or not the plan is endangered or critical for the plan year, and whether or not a plan in a funding improvement or rehabilitation period is making scheduled progress under its plan. This certification is due by the 90th day of each plan year. The certification was made on September 26, 2012, for the current plan year, based on projected July 1, 2011, valuation results and the unaudited June 30, 2012, market value of assets.

Based on an estimated funding percentage of 72.6% and funding standard account projections, the plan was certified to be in seriously endangered status for the plan year beginning July 1, 2012. If the certification had been based on July 1, 2012, valuation results, the PPA '06 Liability (based on the Unit Credit Method and funding assumptions) would have been $6,438,715,000 and the PPA '06 Funded Percentage (computed using the actuarial value of assets) would have been 72.34%.

Professional Qualifications

We are available to answer any questions on the material in this report or to provide explanations or further details as appropriate. The undersigned credentialed actuaries meet the Qualification Standards of the American Academy of Actuaries to render the actuarial opinion contained in this report. We are not aware of any direct or material indirect financial interest or relationship, including investments or other services that could create a conflict of interest, that would impair the objectivity of our work.

Carol A. Gramer

Carol R. Gramer, FSA, EA, MAAA
Enrollment Number 11-03555

December 21, 2012
Date

Fran Kemp

Fran Kemp, EA, MAAA
Enrollment Number 11-02417

December 21, 2012
Date

Mercer
1166 Avenue of the Americas
New York, NY 10036-2708
212 345 7000

The information contained in this document (including any attachments) is not intended by Mercer to be used, and it cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code that may be imposed on the taxpayer.

Plan Participants

Distribution of Retirees and Surviving Spouses

Age	Number of Participants: Regular Retirees	Disabled Retirees	Surviving Spouses
54 and under	363	572	628
55-59	6,658	1,700	1,236
60-64	12,857	2,385	2,184
65-69	11,431	2,051	2,908
70-74	8,284	1,528	3,488
75-79	5,578	745	4,235
80-84	3,903	323	5,597
85 and over	4,403	115	10,490
Total	53,477	9,419	30,766

The average monthly benefit for regular retirees is $620.

The average monthly benefit for disabled retirees is $553.

The average monthly benefit for surviving spouses is $322.

Unfunded Actuarial Accrued Liability and Normal Cost at July 1, 2012

1) Actuarial Present Value of Accrued Benefits:	
a) Retirement Benefits	
Active Miners & Truck Drivers	$695,560,000
Terminated Vested Participants	414,634,000
Retired Participants	4,309,414,000
Spouses Receiving Benefits	757,825,000
b) Preretirement Spouse's Benefits	10,920,000
c) Disability Benefits	73,966,000
d) Termination Benefits	47,647,000
e) Lump Sum Death Benefits	128,749,000
Total Actuarial Accrued Liability	$6,438,715,000
2) Actuarial Value of Assets (see Section 2.1)	4,658,185,000
3) Unfunded Actuarial Accrued Liability	1,780,530,000
4) Normal Cost at July 1, 2012	$25,789,000

Withdrawal Liability and Accounting Information

Unfunded Vested Benefits, June 30, 2012

Withdrawal liability calculations require a determination of the plan's unfunded vested benefits as of the end of a plan year. The unfunded vested benefits as of June 30, 2012, are as follows:

1)	Actuarial Present Value of Vested Benefits[9] – PBGC Annuity Rate Interest Assumption (3.11% for 20 years and 3.36% thereafter)	$9,309,607,000
2)	Market Value of Assets	4,202,245,000
3)	Percentage Funded = (2)÷(1)	45.1388%
4)	Unfunded Vested Benefits = (1)-(2)	$5,107,362,000

[9] *Includes the PBGC expense charge as described in Appendix C to Part 4044 of the PBGC Regulations.*

EXHIBIT B

10-K 1 pcx1231201210k.htm 10-K

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 10-K

(Mark One)

☒ **ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**
For the Year Ended December 31, 2012

or

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**
For the transition period from to

Commission File Number: 001-33466

PATRIOT COAL CORPORATION

(Exact name of registrant as specified in its charter)

Delaware	**20-5622045**
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)
12312 Olive Boulevard, Suite 400 St. Louis, Missouri	**63141**
(Address of principal executive offices)	(Zip Code)

(314) 275-3600
(Registrant's telephone number, including area code)

Securities Registered Pursuant to Section 12(b) of the Act:
None.

Securities Registered Pursuant to Section 12(g) of the Act:
Common Stock, par value $0.01 per share
Preferred Share Purchase Rights

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act Yes ☐ No ☑

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act Yes ☐ No ☑

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☑ No ☐

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes ☑ No ☐

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer," and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer	☐	Accelerated filer	☑
Non-accelerated filer	☐	Smaller reporting company	☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act) Yes ☐ No ☑

Aggregate market value of the voting stock held by non-affiliates (shareholders who are not directors or executive officers) of the Registrant, calculated using the closing price on June 29, 2012: Common Stock, par value $0.01 per share, $111.6 million.

Number of shares outstanding of each of the Registrant's classes of Common Stock, as of February 15, 2013: Common Stock, par value $0.01 per share, 92,407,579 shares outstanding.

DOCUMENTS INCORPORATED BY REFERENCE

Part III of this Annual Report incorporates by reference certain information that the registrant intends to file in an amendment to this Form 10-K no later than 120 days after the close of the registrant's fiscal year ended December 31, 2012. Other documents incorporated by reference in this report are listed in the Exhibit Index of this Form 10-K.

costs. Under current projections for the health funds, these available resources are sufficient to cover all anticipated costs of orphan retirees. These amounts are in addition to any amounts that may be appropriated by the United States Congress (Congress) at its discretion. The legislation also revises the AML fees paid by coal producers based on coal production, effective in October 2007, with the imposition of such fees currently scheduled to expire in its entirety on September 30, 2021. See additional details about the AML trust fund in Mine Closure Costs below.

The 2006 Act specifically amended the federal laws establishing the Combined Fund, the 1992 Benefit Plan and the 1993 Benefit Plan. The 2006 Act provided new and additional funding to all three programs, subject to the limitations described below. The 2006 Act guaranteed full funding of all beneficiaries in the Combined Fund by supplementing the annual transfers of interest earned on the AML trust fund. The 2006 Act further provided federal funding for the annual orphan health costs under the 1992 Benefit Plan on a phased-in basis, reaching 100% in 2011. The coal producers that signed the 1988 labor agreement, including some of our subsidiaries, remain responsible for the costs of their beneficiaries of the 1992 Benefit Plan. The 2006 Act also included the 1993 Benefit Plan as one of the statutory funds and authorized the trustees of the 1993 Benefit Plan to determine the contribution rates through 2010 for pre-2007 beneficiaries. Our subsidiaries that have agreed to the 2011 NBCWA will pay $1.10 per hour worked to the 1993 Benefit Plan in 2013. New inexperienced miners hired after January 1, 2007 cannot receive benefits from the 1993 Benefit Plan unless they are disabled as the result of a mine accident. The 1993 Benefit Plan is now effectively closed to new miners.

Under the 2006 Act, these new and additional federal expenditures to the Combined Fund, 1992 Benefit Plan, 1993 Benefit Plan and certain AML payments to the states and Indian tribes are collectively limited by an aggregate annual cap of $490 million as described above. To the extent that (i) the annual funding of the programs exceeds this amount (plus the amount of interest from the AML trust fund paid with respect to the Combined Fund), and (ii) Congress does not allocate additional funds to cover the shortfall, contributing employers and affiliates, including some of our subsidiaries, would be responsible for the additional costs.

The actuarially-determined liability for these benefit plans was $39.3 million as of December 31, 2012, $5.0 million of which was a current liability. The actuarially-determined liability for these benefit plans was $40.8 million as of December 31, 2011, $5.4 million of which was a current liability. Expenses for the years ended December 31, 2012, 2011 and 2010 were $2.1 million, $2.1 million and $3.2 million, respectively. Cash payments to these funds were $5.0 million, $5.4 million and $6.0 million for 2012, 2011 and 2010, respectively. The benefit plans that qualify as multi-employer plans are expensed as payments are made and no liability was recorded other than amounts due and unpaid. Expense related to these funds was $4.0 million, $2.5 million and $10.0 million for the years ended December 31, 2012, 2011 and 2010, respectively.

Certain of our subsidiaries participate in a defined benefit multi-employer pension fund (the 1974 Plan) that was established as a result of collective bargaining with the UMWA pursuant to the 2007 NBCWA, as periodically negotiated and adjusted based on the 2011 NBCWA. The assets of the 1974 Plan are managed by the UMWA. The plan provides pension and disability pension benefits to qualifying represented employees upon retirement. The 2011 NBCWA requires funding at $5.50 per hour for certain UMWA workers. Our subsidiaries with UMWA-represented employees are required to contribute to the 1974 Plan. The 1974 Plan funding rate could change during the term of the 2011 NBCWA if deemed necessary to guarantee benefit payments. Expense related to this plan was $20.8 million, $24.3 million and $21.0 million for the years ended December 31, 2012, 2011 and 2010, respectively.

In relation to the bankruptcy process and pursuant to Section 1113 of the Bankruptcy Code, Patriot is seeking to renegotiate the terms of collective bargaining agreements between certain Patriot subsidiaries and the UMWA, which may affect our future participation in the 1974 Plan.

The 1974 Plan is considered to be in "Seriously Endangered Status" for the plan year beginning in July 2011 (the 2011 Plan Year). That status is the result of the 1974 Plan funded percentages being less than 80% and because the 1974 Plan is projected to have an accumulated deficiency within six years after the 2011 Plan Year. As a result, a funding improvement plan was adopted by the 1974 Plan as of May 25, 2012, which would require increased contributions to the 1974 Plan after a new UMWA collective bargaining agreement is negotiated in 2016. Under the funding improvement plan, the hourly contribution rate would increase in stages from a minimum of $12.50 in 2017 to a maximum potential rate of $26.50 as early as 2022.

New inexperienced miners hired after January 1, 2012 will not participate in the 1974 Plan. Instead, for each hour worked, the Company contributes $1.00 into the UMWA Cash Deferral Plan on the employee's behalf, increasing to $1.50 on January 1, 2014. Effective January 1, 2012, employers also pay $1.50 per hour to a new Retiree Bonus Account Trust (Trust) for the term of the 2011 NBCWA. This Trust will make a payment to pensioners in November of 2014, 2015 and

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EXHIBIT C

National Bituminous Coal Wage Agreement of 2002

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 2002

Article I—ENABLING CLAUSE

THIS AGREEMENT, made this 1st day of January, 2002 between the coal operators and associations signatory hereto, as parties of the first part (each coal operator which is a signatory hereto being called "Employer") and the International Union, United Mine Workers of America (hereinafter called "Union"), on behalf of each member thereof, as party of the second part, covers all of the bituminous coal mines described in Article IA, Section (f), owned or operated by said first parties. This Agreement carries forward and preserves the terms and conditions of all the various District agreements executed between the United Mine Workers of America and the various operators and coal associations subject to the terms and conditions of this Agreement and as amended, modified and supplemented by this Agreement as herein set out.

This Agreement shall be binding upon all signatories hereto, including those Employers which are members of signatory associations, and their successors and assigns. In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the shall not be construed to apply to Employees whose regular job duties include the relief of other Employees for short periods of time which do not exceed thirty (30) minutes for each occurrence during the basic workday. For such relief periods, however, the Employee providing relief shall be paid the higher rate.

Article XX—HEALTH AND RETIREMENT BENEFITS

Section (a) General Purpose

This Article makes provision for pension, health and other benefits for Employees covered by this Agreement, and for former Employees who were covered under the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 Fund"), and for the spouses and dependents of such Employees. The benefits to be provided are as set forth under separate plans and trusts referred to in Sections (b) and (c) of this Article.

A general description of the benefits to be provided appears immediately following this Article. The specific provisions of the plans will govern in the event of any inconsistencies between the general description and the plans.

Pursuant to the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), the health benefits (and in some cases the death benefits) provided to retirees who were age and service eligible as of February 1, 1993, 1978 or subsequent NBCWA; and is not eligible to receive benefits under the Coal Act.

The Union and Trustees shall assist and fully cooperate with the Employers in obtaining all necessary opinion letters, exemptions, or rulings from the Department of Labor, the Internal Revenue Service or other applicable federal agencies, in order to implement the provisions of this subsection so as to ensure compliance with all applicable federal laws and regulations and ensure the deductibility for income tax purposes of any and all contributions made by signatory Employers to the 1993 Benefit Trust and the individual health plans referred to in this Section.

Section (d) **Contributions by Employers**

(1) During the life of this Agreement, for the periods of time indicated below, each signatory Employer (including those engaged in the production of coal and those not engaged in the production of coal) shall contribute to the Trusts referred to in this Article the amounts specified below based on cents per hours worked by each of the Employer's Employees who perform classified work under this Agreement.

(i) Into the 1950 Pension Trust: for the period beginning on the Effective Date and ending when this Agreement is terminated, 0.0¢ per hour on each such hour worked;

(ii) Into the 1974 Pension Trust: for the period beginning on the Effective Date and ending when this

Agreement is terminated, 0.0¢ per hour on each such hour worked for any Employer, including related persons to such Employer within the meaning of Section 9701(c)(2) of the Internal Revenue Code, that initially entered into an agreement prior to January 1, 2002 to make contributions to the 1974 Pension Trust meeting the required standard of such Trust; and $0.75 per hour on each such hour worked for any Employer that became obligated to contribute for the first time on or after January 1, 2002.

(iii) Into the 1993 Benefit Trust: for the period beginning on the Effective Date and ending the day prior to the first anniversary of the Effective Date, 13¢ per hour on each such hour worked for any Employer, including related persons to such Employer within the meaning of Section 9701(c)(2) of the Internal Revenue Code, that initially entered into an agreement prior to January 1, 2002 to make contributions to the 1993 Benefit Trust meeting the required standard of such Trust; and 75¢ per hour on each such hour worked for any Employer that became obligated to contribute for the first time on or after January 1, 2002; and for the period beginning on the first anniversary of the Effective Date and ending when this Agreement is terminated, 50¢ per hour on each such hour worked for any Employer, including related persons to such Employer within the meaning of Section 9701(c)(2) of the Internal Revenue Code, that initially entered into an agreement prior to January 1, 2002 to make contributions to the 1993 Benefit Trust meeting the required standard of such Trust; and 75¢ per hour on each such hour worked for any Employer that became obligated to contribute for the first time on or after January 1, 2002; provided that the obligation of each signatory Employer to make contributions into the 1993 Benefit Trust shall be suspended at any time that the net assets available for future benefits equal or exceed $20 million, and shall not resume following any such suspension until such time as the net assets available for future benefits are less than $15 million. For purposes of this subdivision, "net assets available for future benefits" is the amount shown as such on the 1993 Benefit Plan monthly financial statement, under "Statements of Net Assets Available for Plan Benefits."

(iv) In addition to the contributions indicated above, during the life of the Agreement, each signatory Employer shall, for the periods of time indicated below, contribute to the Trusts established in this Article in the amounts shown below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal after production by another operator, procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made (amounts shown below include cents per hours worked contributions converted to tonnage equivalents).

(a) Into the 1950 Pension Trust: for the period beginning on the Effective Date and ending when this Agreement is terminated, 0.0¢ per ton on each such ton;

(b) Into the 1974 Pension Trust: for the period beginning on the Effective Date and ending when this Agreement is terminated, 0.0¢ per ton on each such ton for any Employer, including related persons to such Employer within the meaning of Section 9701(c)(2) of the Internal Revenue Code, that initially entered into an agreement prior to January 1, 2002 to make contributions to the 1974 Pension Trust meeting the required standard of such Trust; and 14.5¢ per ton on each such ton for any Employer that became obligated to contribute for the first time on or after January 1, 2002; and

(c) Into the 1993 Benefit Trust: for the period beginning on the Effective Date and ending the day prior to the first anniversary of the Effective Date, 2.5¢ per ton on each such ton for any Employer, including related persons to such Employer within the meaning of Section 9701(c)(2) of the Internal Revenue Code, that initially entered into an agreement prior to January 1, 2002 to make contributions to the 1993 Benefit Trust meeting the required standard of such Trust; and 14.5¢ per ton on each such ton for any Employer that became obligated to contribute for the first time on or after January 1, 2002; and for the period beginning on the first anniversary of the Effective Date and ending when this Agreement is terminated, 10¢ per ton on each ton for any Employer, including related persons to such Employer within the meaning of Section 9701(c)(2) of the Internal Revenue Code, that initially entered into an agreement prior to January 1, 2002 to make contributions to the 1993 Benefit Trust meeting the required standard of such Trust; and 14.5¢ per ton on each such ton for any Employer that became obligated to contribute for the first time on or after January 1, 2002; subject to the provision regarding suspension of the contribution obligation in (iii) above.

The parties hereto mutually agree that, if at any time during the term of this Agreement a court or tribunal of competent jurisdiction determines by a final decision that is not appealable that the provision appearing in paragraph (iv) just preceding is invalid or in violation of the National Labor Relations Act, 1947, as amended, or other Federal or state law, the parties shall, at the option of and upon demand by the Union, without affecting the integrity of any other provision of this Section or any other provision of the National Bituminous Coal Wage Agreement, meet and engage in good faith negotiations to agree upon a clause to be inserted into this Agreement in replacement of the provision found invalid or unlawful.

(v) In the event the BCOA ceases to exist, or in the event that more than 50% of the tonnage membership of BCOA on the Effective Date has withdrawn prior to the time when the BCOA is required or permitted to take action under this Article, then such action may be taken by a majority vote, based on tonnage, of Employers who were BCOA members on the Effective Date.

(vi) At any time during the term of this Wage Agreement, the Bituminous Coal Operators' Association may reallocate the contributions to be paid under the respective subdivisions (i) and (ii) in this Section, which reallocation will increase the cents per hour to be contributed into the 1950 Pension Trust and correspondingly will decrease the cents per hour to be contributed by the Employers into the 1974 Pension Trust, or which will decrease the cents per hour to be contributed into the 1950 Pension Trust and correspondingly will increase the cents per hour to be contributed by the Employers into the 1974 Pension Trust, provided that notice shall be given to the Union, and to the Trustees (who shall in turn notify all contributing Employers) of the cents per hour to be allocated to each such Trust at least 30 days prior to the date the contributions become due and owing to the respective Trusts. No reallocation of the contributions to be paid to the two Trusts shall be made which will increase the total combined contributions required by this Article to be made by the Employers to those two Trusts.

(vii) Hours of work for purposes of Employer contributions to the plans and trusts described in this Article shall include all hours worked, or fractions thereof, by Employees in a classified job covered by this Agreement. Hours actually worked for which a premium pay of any type is provided shall be treated for purposes of Employer contributions to the Trusts as though worked on a straight-time basis. Reporting pay for hours not actually worked shall not be included for the purpose of making Employer contributions to the Trust.

(2) The sole obligation under this Section of any Employer signatory hereto shall be to contribute the amounts specified in this Section.

(3) The obligation to make payments to the Trusts specified in this Article shall become effective on the dates specified in the respective Subdivisions (i) through (iv) of this Section, and the first payments are to be made on the 10th day of each month after such specified dates, and thereafter continuously on the 10th day of each succeeding calendar month.

(4) It shall be the duty of each of the Employers signatory hereto to keep current said payments due to the Trusts, and to furnish to the International Union, United Mine Workers of America and to the Trustees of those Trusts a monthly statement showing on a mine-by-mine basis the full amounts due hereunder and the tons of coal produced, procured or acquired for use or for sale and the hours worked with respect to which the amounts are payable. Payments to those Trusts shall be made by check payable, as appropriate, to:

"Trustees of the United Mine Workers of America 1950 Pension Trust"

"Trustees of the United Mine Workers of America 1974 Pension Trust"

"Trustees of the United Mine Workers of America 1993 Benefit Trust"

The Trustees are hereby authorized to require each signatory Employer to make payment of all contributions to the 1993 Benefit Trust, the 1950 Pension Trust and the 1974 Pension Trust by a single check made payable in such manner as may be specified by the Trustees.

(5) Payments shall be delivered or mailed to such location as designated by the Trustees of those Trusts.

(6) Failure of any Employer signatory hereto to make full and prompt payments to the Trusts specified in this Article in the manner and on the dates herein provided shall be deemed a violation of this Agreement. This obligation of each Employer signatory hereto, which is several and not joint, to so pay such sums shall be a direct and continuing obligation of said Employer during the life of this Agreement and it shall be deemed a violation of this Agreement, if any mine, preparation plant or other facility to which this Agreement is applicable shall be sold, leased, subleased, assigned, or otherwise disposed of for the purpose of avoiding any of the obligations hereunder.

(7) Each Employer agrees to give proper notice to the president of the appropriate local union by the 18th day of each month that the Employer has made the required payment to the Trusts for the previous month, as required by this Article, or is delinquent in such payment, such notice to set forth the amount paid to the Trusts, or the amount of the delinquency, the tonnage procured or acquired for use or for sale and the hours worked with respect to the mine or mines under the jurisdiction of such local union. Each Employer agrees to give notice to the appropriate president of the local union by the 18th day of each month that the Employer has made the appropriate payment to the insurance carrier for the Employer benefit plan established under (c)(3) above, or is delinquent in such payment.

(8) Title to all the monies paid into and/or due and owing to the Trusts specified in this Article shall be vested in and remain exclusively in the Trustees of those Trusts. It is the intention of the parties hereto that those Trusts shall constitute irrevocable trusts and that no benefits or money payable from those Trusts shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and that any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void.

(9) It is understood that the individual Employees of Employers agree, through their representative, the

United Mine Workers of America, to surrender any personal or individual right to or interest in monies paid or required to be paid to the Trusts pursuant to this Agreement.

(10) Any judgment obtained by the Trustees of the Trusts established pursuant to this Agreement for a default giving rise to damages accruing to more than one of the Trusts established hereunder shall be allocated by the Trustees among such Trusts in proportion to the amounts owing to each which gave rise to such judgment.

Section (e) **Responsibilities and Duties of Trustees**

(1) The 1950 Pension Trust, the 1974 Pension Trust, and the 1993 Benefit Trust shall each be administered by a Board of four Trustees, two of whom shall be appointed by the Employers and two of whom shall be appointed by the Union. Either party may, but shall not be required to, appoint an individual to serve as a Trustee on more than one Trust. One of the Trustees appointed by the Union shall be the Chairman. Each Board of Trustees shall perform its duties in accordance with the requirements, terms and conditions of each such Trust.

(2) It is the intent and purpose of the contracting parties that full cooperation shall be given by each of them to one another, to the Trustees provided for under this Article, and to all affected mine workers, to the eventual coordination and development of poli-