No. 15-2382

**IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

JACK REESE; FRANCES ELAINE PIDDE; JAMES CICHANOFSKY; ROGER MILLER; GEORGE NOWLIN,

ON BEHALF OF THEMSELVES AND A SIMILARLY SITUATED CLASS,

*Plaintiffs-Appellees*,

v.

CNH INDUSTRIAL N.V., AND CNH INDUSTRIAL AMERICA LLC,

*Defendants-Appellants,*

On Appeal from the United States District Court for the Eastern District of Michigan, No. 2:04-cv-70592

# CNH'S OPPOSITION TO PLAINTIFFS' PETITION FOR REHEARING EN BANC

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## TABLE OF CONTENTS

REASONS TO DENY PLAINTIFFS' PETITION ..... 2

I. The *Reese I* Reasonableness Ruling Represents The Law Of The Case, And The Panel Cannot Overrule It. ..... 2

II. This Question Does Not Warrant En Banc Consideration. ..... 5

III. Sound Policy Supports Allowing Reasonable Changes To Welfare Benefits. ..... 7

CONCLUSION ..... 10

# TABLE OF AUTHORITIES

## Cases

*M & G Polymers USA, LLC v. Tackett*,
135 S.Ct. 926 (2015) .......... 1, 2, 6, 8

*McKenzie v. BellSouth Telecommc'ns, Inc.*,
219 F.3d 508 (6th Cir. 2000) .......... 4

*Moore v. Metro. Life Ins. Co.*,
856 F.2d 488 (2d Cir. 1988) .......... 9

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

*Reese v. CNH Am. LLC*,
694 F.3d 681 (6th Cir. 2012) .......... passim

*Reese v. CNH Indus. N.V.*,
854 F.3d 877 (6th Cir. 2017) .......... 1, 5, 10

*Rutherford v. Columbia Gas*,
575 F.3d 616 (6th Cir. 2009) .......... 2

*Shimman v. Int'l Union of Operating Eng'rs*,
744 F.2d 1226 (6th Cir. 1984) .......... 5

*United Steel v. Kelsey-Hayes Co.*,
750 F.3d 546 (6th Cir. 2014),
*vacated on other grounds*, 795 F.3d 525 (6th Cir. 2015) .......... 6

*Zino v. Whirlpool Corp.*,
2013 WL 4544518 (N.D. Ohio Aug. 27, 2013) .......... 7

## Statutes

29 U.S.C. § 185 .......... 6

## Rules

Fed. R. App. P. 35 .......... 5

**Legislative Material**

H.R. Rep. No. 93-807 (1974) .......... 8

**Other Authorities**

CBO,
Technological Change and the Growth of Health Care Spending,
http://bit.ly/2uJi46u (Jan. 2008) .......... 9

This Court has held and twice reaffirmed that even if the collective bargaining agreement (CBA) at issue here vests retiree healthcare benefits, *this CBA* permits CNH to make reasonable unilateral changes to those benefits. *Reese v. CNH Am. LLC*, 574 F.3d 315, 327 (6th Cir. 2009) (*Reese I*); *Reese v. CNH Am. LLC*, 694 F.3d 681, 685 (6th Cir. 2012) (*Reese II*); *Reese v. CNH Indus. N.V.*, 854 F.3d 877, 884 (6th Cir. 2017) (*Reese III*). Plaintiffs now ask the Court to set aside that holding. But the *panel* cannot do so due to the law-of-the-case doctrine. Specifically, the ruling is consistent with *M & G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926 (2015), and no other exception to the law-of-the-case doctrine applies here.

Nor is the question fit for the en banc court. Plaintiffs forwent two prior opportunities to seek en banc review, the ruling at issue is not exceptionally important because it is based on the language of this unique CBA, and the ruling presents no split in the Court's precedents. Even if the Court were to review the ruling en banc, the ruling should be confirmed because it heeds the unique and evolving nature of health benefits.

## REASONS TO DENY PLAINTIFFS' PETITION

### I. The *Reese I* Reasonableness Ruling Represents The Law Of The Case, And The Panel Cannot Overrule It.

As Plaintiffs acknowledge, Pet. at 15-17, the law-of-the-case doctrine bars the panel from revising its earlier holding unless an "extraordinary circumstance" justifies it. *See Reese II*, 694 F.3d at 686; *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009). Plaintiffs ignore this Court's ruling in *Reese II*, however, that their failure to "invoke[] an exception to the law-of-the-case doctrine presents a conclusive impediment" to reconsideration of the reasonableness ruling. *Reese II*, 694 F.3d at 686. It is now too late.

Nevertheless, Plaintiffs belatedly assert two such circumstances. First, they contend that the ruling is inconsistent with the Supreme Court's instruction in *Tackett* to construe CBAs using ordinary contract principles. But *Reese I* anticipated *Tackett* by heeding Congress's mandate for "just this sort of flexibility" for health plans. 574 F.3d at 326; *see Tackett*, 135 S.Ct. at 933 (Congress intended that welfare plans not be so complex and expensive to deter employers from offering them).

Moreover, both *Reese I* and *Reese II* did apply ordinary contract principles to justify the reasonableness ruling. *Reese I* pointed out that

the 1998 CBA itself "reset the rules" for all employees who had retired "under earlier CBAs," not just for those retiring under the 1998 CBA. 574 F.3d at 324. The 1998 CBA moved existing retirees to a managed care plan, which "downgraded" coverage for at least some retirees. *Id.* at 325. *Reese I* also cited the "Cost of Healthcare Coverage" letter agreement, which promised no premium increases only for the life of the CBA, but not beyond. *Id.* And *Reese II*, 694 F.3d at 684, referred to the changes made under the "National and State Health Initiatives" letter agreement, which allows CNH to modify the Plaintiffs' benefits to conform to changes in government programs. R.439-3:16701. CNH relied on that letter to move retirees into the Medicare Prescription Drug program. R.423-4. These provisions, the Court properly concluded, confirmed the parties' intent to allow CNH to make reasonable changes to the benefits.

Second, Plaintiffs contend the law-of-the-case doctrine does not apply because "substantially new facts" were introduced after *Reese I*. Pet. 16–17. The district court, they say, rejected this Court's ruling that managed care was a reduction in benefits, and instead "*found* that the parties had bilaterally *improved* the benefits," Pet. 16 (emphasis

added). But on summary judgment the district court does not sit as a fact-finder, and on *de novo* review this Court squarely rejected the district court's conclusion about managed care. *Reese II*, 694 F.3d at 684 (the 1998 CBA "imposed managed care … which represented a reduction in" choices and coverage). Only this Court's view matters. *McKenzie v. BellSouth Telecommc'ns, Inc.*, 219 F.3d 508, 513 (6th Cir. 2000) (limiting law of the case to "the mandate of *the reviewing court's* opinion.") (emphasis added).

Plaintiffs then claim (incorrectly) that CNH's proposed plan itself is "new evidence" justifying a law-of-the-case exception. Pet. 16.[1] But the reasonable changes ruling *invited* the changes. It would be nonsensical to say that, by doing what the Court said, CNH placed the ruling in doubt. No exception to the law-of-the-case doctrine applies.

If any portion of the *Reese III* reasonableness ruling were due to be reconsidered, it would be the decision to remand the case for a third time. Doc.54 at 8 n.1. Five years ago the *Reese* panel commented that

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[1] Contrary to Plaintiffs' assertion that the proposed plan was introduced only after the *Reese II* remand, *Reese II* correctly stated that, on the *first* remand, "CNH moved for approval of its proposed modifications to the benefits, introducing evidence … that the changes were reasonable." *Reese II*, 694 F.3d at 684.

"[t]his long-running dispute needs to come to an end;" prolonging it is "particularly unfair" to CNH, which must continue to pay the benefits with no possibility of recoupment. *Reese II*, 694 F.3d at 685. The record is now complete. Plaintiffs have had *two chances* to submit *evidence* contesting the reasonableness of the changes, but advanced only legal arguments that this panel has twice rejected. *See id.* at 684-85; *Reese III*, 854 F.3d at 884-87. A third remand is unnecessary and unfair.

## II. This Question Does Not Warrant En Banc Consideration.

Although the en banc court is not bound by law of the case, *see Shimman v. Int'l Union of Operating Eng'rs*, 744 F.2d 1226, 1229 n.3 (6th Cir. 1984) (en banc), it should neither review nor overrule the three rulings allowing reasonable changes. *See* Fed. R. App. P. 35(a)(1)–(2). Twice before, after *Reese I* and *Reese II*, Plaintiffs opted not to seek en banc review of the reasonableness ruling. Nothing has changed.

***First***, there is no split in the Court's law. The question Plaintiffs ask the Court to reconsider is narrow: Did *these* parties agree *in the 1998 CBA* to permit reasonable changes to retirees' healthcare benefits? As shown (Part I above), the Court's answer is fact-bound: it relied on the interpretation of *this CBA*, a question unlikely to control other

cases. And the Court has recognized that the reasonable changes ruling is "entirely consistent with other Sixth Circuit retiree benefits cases." *United Steel v. Kelsey-Hayes Co.*, 750 F.3d 546, 554 (6th Cir. 2014), *vacated on other grounds*, 795 F.3d 525 (6th Cir. 2015).

Further, as shown (Part I above), the Court stuck to ordinary contract principles. *See Tackett*, 135 S.Ct. at 933. The Court "focus[ed] on the written terms of the plan," *id.*, to "ascertain the intentions of *the parties*," *id.* at 935; *see generally Reese I*, 574 F.3d at 324–26.

The central premise of Plaintiffs' argument is that a change in vested benefits violates the Labor Management Relations Act (LMRA). *See* Pet. 8–9. But a change in benefits would give rise to an LMRA cause of action *only if* the change *violated the CBA*. *See* 29 U.S.C. § 185(a) (Section 301 of the LMRA provides for "[s]uits for violation of" CBAs). Here, because the Court held that the CBA permitted changes, the changes by definition do not breach the CBA and thus do not violate the LMRA.

***Second***, interpretation of a single CBA affecting the plaintiff class of retirees is not a question of exceptional importance. As one court described it, *Reese* "is not a case of general application" because it relied

on "compelling evidence that the parties did not perceive the relevant CBAs as establishing fixed, unalterable benefits." *See Zino v. Whirlpool Corp.*, 2013 WL 4544518 at *27 (N.D. Ohio Aug. 27, 2013).

## III. Sound Policy Supports Allowing Reasonable Changes To Welfare Benefits.

Although en banc review is inappropriate, it would (if granted), merely serve to confirm the panel's ruling based on the language of this particular CBA. *See* Part I above.

If the en banc Court ventured further, and considered whether a more general rule allowing reasonable changes is appropriate, it would find the panel's reasoning compelling. The very nature of health care justifies allowing reasonable changes as a matter of sound policy and even "common sense." *Reese I*, 574 F.3d at 327.

As *Reese I* recognized, comparing health benefits to pension benefits "is not a perfect analogy," 574 F.3d at 324, and *Reese II* observed that "healthcare benefits cannot readily be monetized at retirement or for that matter practically fixed," 694 F.3d at 683. *Tackett* confirmed that Congress dealt with welfare benefits differently than pension benefits, and that employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare

plans." 135 S.Ct. at 933 (citation omitted). Congress concluded that flexibility is important for "ancillary benefits, such as medical insurance or life insurance," and that requiring "vesting of these ancillary benefits would seriously complicate the administration and increase the cost of [pension and retirement] plans whose primary function is to provide retirement income." H.R. Rep. No. 93-807 (1974), *quoted in Reese I*, 574 F.3d at 326–27.

These concerns not only counsel against inferring that healthcare plans are vested, but also recognize that even vested plans *must* change. Because healthcare rapidly changes, "vesting in the context of healthcare benefits provides an evolving, not a fixed benefit." *Reese II*, 694 F.3d at 683. "[C]ommon experience suggests that health-care plans invariably change over time, if not from year to year." *Reese I*, 574 F.3d at 324. They are "subject to fluctuating and unpredictable variables," because "medical insurance must take account of inflation, changes in medical practice and technology, and increases in the costs of treatment independent of inflation." *Id*. at 326 (quoting *Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988)). Change is inevitable; the question is whether the law inflexibly requires only constant,

increasingly expensive improvements to the coverage, with the resulting economic damage already seen to manufacturers in this Circuit,[2] or whether the reasonableness standards set forth by the panel better reflect modern expectations of health care.

The record evidence amply proves this point. In 2008, the Congressional Budget Office concluded that "roughly half" of the increase in healthcare costs is due to "technological advances" in medical procedures and equipment. *See* CBO, Technological Change and the Growth of Health Care Spending, http://bit.ly/2uJi46u (Jan. 2008). In this case, by 2012, new prescription drugs not available at the time of the 1998 CBA accounted for *a third* of these Plaintiffs' total prescription costs. R. 423-22:14909; R. 423-22:14873.

As the *Reese III* panel recognized, it is appropriate to consider not just increased *costs* to Plaintiffs, but also the enhanced *benefits* they enjoy. 854 F.3d at 884. Without question, Plaintiffs are demanding—and receiving—improving health care, far beyond what CNH promised

[2] Retiree healthcare costs have pushed numerous entities into bankruptcy, including General Motors, Chrysler, Delphi, and even the City of Detroit. *See* Amicus Br. of Nat'l Ass'n of Mfrs. in *M&G Polymers USA, LLC v. Tackett*, No. 13-1010 (S. Ct., filed July 24, 2014), at 25-32.

in 1998. Requiring them to share in the increased costs directly related to that improving care is, as the panel thrice held, reasonable.

## CONCLUSION

For the reasons set forth above, CNH respectfully requests that this Court deny rehearing of whether the CBA at issue permitted reasonable changes to retiree healthcare benefits, if (contrary to *Tackett*) the Court holds the benefits are vested; or alternatively that the Court hold that such changes are permitted.

Dated: August 8, 2017

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this petition complies with the Court's July 25 order because the body of the response does not exceed ten (10) pages in double-spaced, fourteen-point proportional type.

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## CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2017, I caused the foregoing to be filed with the Court electronically using the CM/ECF system, which will send a notification to all counsel of record, effecting service on them. *See* 6th Cir. R. 25(f)(1)(A).

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