Case No. No. 15-2382

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACK REESE, JAMES CICHANOFSKY, ROGER MILLER, and GEORGE NOWLIN, for themselves and the 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
Case No. 2:04-cv-70592

PLAINTIFFS-APPELLEES' RESPONSE TO DEFENDANTS-APPELLANTS' PETITION FOR REHEARING EN BANC

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I. EN BANC REVIEW IS NOT WARRANTED

> En banc rehearing is "not favored and ordinarily will not be ordered." Fed. R.App. P. 35(a). ... Such a determination should be made only in the most compelling circumstances."

Mitts v. Bagley, 626 F.3d 366, 370 (6th Cir. 2010) (citations omitted).

This case should not be reviewed *en banc* for two reasons. First, the vesting portion of this case does not present a "question of exceptional importance" warranting *en banc* review. Fed.R.App.P. 35(a)(2). The United States Supreme Court directed the Courts of Appeal to construe collectively bargained promises using "ordinary principles of contract law" consistent with "federal labor policy." *M&G Polymers USA., LLC v. Tackett*, 135 S. Ct. 926 (2015) (referenced hereinafter as "*Tackett*"). The panel majority reached the correct conclusion – one this Court and the District Court have now reached six[1] times– that CNH and the UAW contracted for vested, lifetime retiree healthcare benefits. *Reese III* is grounded in a case-specific factual record and analyzed consistently with *Tackett*, and does not, therefore, warrant *en banc* review.

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[1] Sixth Circuit: *Reese v. CNH America LLC,* 574 F.3d 315 (6th Cir. 2009) (*Reese I*), *Reese v. CNH America LLC,* 694 F.3d 681 (6th Cir. 2012) (*Reese II*) and *Reese v. CNH Industrial America LLC,* No. 15-2382 (6th Cir. April 20, 2017) (*Reese III*). District Court: *Reese v. CNH Global N.V.,* 2007 WL 2484987 (E.D. Mich. Aug. 29, 2007), *Reese v CNH Global N.V.,* 2011 WL 824585 (E.D. Mich. Mar. 3, 2011), *Reese v. CNH Indus. N.V.,* 143 F. Supp. 3d 609 (E.D. Mich. 2015).

Second, *en banc* consideration of the vesting decision in this case is not necessary to secure or maintain uniformity of this Circuit's decisions. Fed.R.App.P. 35(a)(1).

A. ON A UNIQUE FACTUAL RECORD, THE *REESE III* MAJORITY CORRECTLY FOUND, RELYING UPON *TACKETT*, THAT THE RETIREE HEALTHCARE BENEFITS ARE VESTED

In *Reese III*, the majority applied ordinary contract principles to facts:

- The majority noted that in the parties' CBA there were carve-outs for certain other benefits, such as life insurance and healthcare insurance that stated that the coverages ceased at a time different than other provisions of the CBA. At p. 7.

- The Court also relied upon the fact that healthcare benefits were coupled to pensioner status and segregated from other entitlements in the CBA. At p. 7.

- Pensioners are eligible for retiree healthcare benefits and pension benefits unassailably vest for life.[2] At p. 7. So long as a retiree is eligible for a pension (for life), he is eligible for retiree healthcare benefits without contribution.[3]

The *Reese III* majority did not discuss an additional contract fact that supports a finding of ambiguity:

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[2] The language of the contract is misstated in the dissent at p. 21. The correct language is set forth in full in the Brief of Plaintiffs-Appellees, ADE.27:pp.13-16.

[3] This is retiree healthcare benefit duration language when read as a whole or at least as an implied term. *Tackett,* 135 S. Ct. at 937–38 (Ginsburg, J., concurring) (citations omitted). A reasonable person could read the language to mean that if a retiree is eligible for a pension, he is also eligible to receive healthcare benefits, regardless of when the contract expired, because the retiree will be eligible for a pension for life. There is no slip toward a *Yardman* inference because this creates no inference, but only calls for extrinsic evidence to decide between possible meanings.

- The parties agreed to implement caps on retiree healthcare spending in 1993 and 1995. The caps would not become effective until *after the contract expired*. In 1998, the parties agreed to ***eliminate*** the caps, with CNH taking on the risk of medical inflation into the future without a cap. The parties understood the obligation to provide retiree healthcare benefits extended beyond the contract term. Otherwise, there would be no point in placing a contractual cap on that obligation or in removing an existing cap.[4]

The panel majority found that the contract language is ambiguous, opening the analysis of the parties' intent to extrinsic evidence. Once extrinsic evidence is reached, there can be no doubt of the intentions of the parties. The evidence is overwhelming and unequivocal that CNH intended to vest retiree healthcare benefits:

Plaintiffs set forth extrinsic evidence of vesting in multiple, factually rich, submissions below. *See e.g.*, Plaintiffs' Motion for Summary Judgment, R.129:5150-5167.[5] The evidence includes:

- A letter from Case's Director of Benefits & Practices sent to retirees in 1971 stated that the Company would fully cover benefits and that benefits would be in effect for life. *Yolton,* 318 F.Supp.2d at 469

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[4] Although the *absence* of the cap letter in 1998 is not found in the four corners of the document, it remains a contract fact that contradicts the blind application of the general durational clause as a temporal limit upon benefits. This contract fact creates an (at least) latent ambiguity. A latent ambiguity is present if someone knowledgeable about the real-world context of the agreement could interpret the contract in more than one way. *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539 542-545, 547 (7th Cir. 2000).

[5] This evidence is also summarized in the *Yolton* decisions, by both the district court in *Yolton v. El Paso Tenn. Pipeline Co*., 318 F. Supp. 2d 455 (E.D. Mich. 2003) and this Court, *Yolton,* 435 F.3d 571 at 583 (assessing "defendant's conduct [that] also indicates plaintiffs' were vested").

- Statements from Case benefits administrators and managers that they were told and in turn told retiring employees "that their medical insurance benefits would continue unchanged for their lifetime ..." *Id*.

- Documents related to various plant shutdown retirement agreements reflect that health insurance benefits "continu[ed] unchanged" "[f]or lifetime." *Id.*

- Medical insurance cards issued to retirees from Case's Industrial Relations Department in Terre Haute, Indiana contain the words "Lifetime" or "Lifetime Coverage." *Id.*

- The plaintiffs also presented benefits information issued to employees upon retirement that stated that the retiree and his wife were entitled to full health insurance coverage and that if the retiree predeceased his wife, her coverage "would continue as before" and would only change if she remarried. *Id.* at 469–70.

- Further, under a section entitled "Spouse's Benefits," the summary provided to the employee states that "In the event that you should die before your spouse and a spouse's option was spplied [sic] for, she will receive 55% of your pension for her lifetime along with the insurance which was mentioned previously." *Id.* at 470.

- The plaintiffs further offered affidavits of numerous other retirees and surviving spouses who were told by Case benefits representatives that they would receive post-retirement lifetime health insurance coverage fully paid for by the company. *Id.* Some of the affidavits include the accompanying documentation promising fully funded health insurance for life. *Id.*

These statements are more than extrinsic evidence of intent. They constitute a series of FRE 801(d)(2) admissions that prove the parties intended that the benefits vested for life. They are also evidence of the parties' understanding of what the language meant when it repeatedly adopted identical language in subsequent sessions of bargaining. The dissent errs in dismissing the parties' words and deeds

because some of them pre-date the 1998 bargaining. These words and deeds are clear evidence of what was meant by the words adopted in every contract since 1971, including in 1998. See ADE.27:pp.3-10, 21-39. While unambiguous contract language is generally interpreted without resort to extrinsic evidence, it need not be interpreted in a vacuum; the underlying goal in interpreting a contract is to ascertain the intent of the parties, and the surrounding circumstances when the parties entered the contract, among other relevant considerations, may well shed light on that intent. II Williston on Contracts § 30:6 (4th ed.) (footnotes omitted) cited in *Tackett* at 933.[6]

The dissent in *Reese III* supposes incorrectly that CNH as a "new corporate parent" "made distinct promises" "for the first time" in 1995. The facts contradict: The same negotiator made the same promises throughout the 1990s. Management's negotiating team signed the CBAs: RE:129-33:5566-5585. Tim Haas was CNH's Manager of Benefits and Director of Benefits from 1990. RE.129-11:5168-76. Haas identified Paul Crist as the person who developed negotiation strategy around benefits, including for retirees in 1990. RE.129-11:5184-86. Crist negotiated in 1995

[6] The practical construction, or the parties' conduct under the agreement, is "highly significant" evidence of the parties' intent. *Alabama v. North Carolina,* 560 U.S. 330, 346 (2010). What Case said the CBA language meant in 1971 when it first agreed to that language, is part of the "surrounding circumstances" that "sheds light" on Case's intent. It is "highly significant" evidence of Case's intent precisely because it discloses exactly what Case understood its obligation to be at the time it negotiated the operative CBA language.

and 1998 as well. *Id.* In 1990, 1995 and 1998, the exact same language was adopted to vest pension benefits and retiree healthcare benefits.

CNH, in its bid for rehearing, relies upon purported "facts" which by now have been refuted ad nauseum, including those mentioned in the *Reese III* dissent. One such "fact" is that because the 1998 CBA "reset" the rules for the retirees under the 1995 CBA, the benefits were not intended to be vested. The record evidence demonstrates that the benefits were improved in 1998, not reduced.[7]

The *Reese III* dissent also speaks to the accounting document that CNH used to show the UAW the extent of its obligation for retiree healthcare benefits, which calculated the benefits for the anticipated actuarial life of the retiree. Judge Sutton

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[7] In *Reese I*, this Court appeared to find that the transition from the indemnity policy to a managed care plan diminished the retiree healthcare benefits in 1998. The retirees moved for rehearing because the benefits were not diminished, but improved. Rehearing was denied, but Judge Sutton wrote, in his concurrence in the denial of Plaintiffs' motion for rehearing, that the panel ***had not concluded the benefits had been diminished during the 1998 negotiations*** and that Plaintiffs ***would win as a matter of law if the evidence on remand showed that the retiree healthcare benefits had not been diminished in the 1998 negotiations***. 583 F.3d 956 (6th Cir. 2009) (emphasis added) ("Concurrence"). On remand, the District Court found that the parties' modifications in 2009 improved and **did not diminish the benefits**. RE.304:11626-11650. In *Reese II,* this Court ignored the Concurrence and found, as a matter of law, that *it had already decided that the benefits could be modified* and that the only question remaining is what the modification would look like. 694 F.3d at 684-685. The effect is that this Court found, ***contrary to the factual record***, that the parties did not intend to grant "irreducible" vested benefits to the retirees. Judge Sutton, in his *Reese III* dissent relies upon this "fact" that the Court raised sua sponte in *Reese I* and conclusively decided in *Reese II.* Plaintiff never had an appeal as of right on this point. *Reese II* at 684-685.

supposes that the actuarial calculations can be discounted as mere expressions of "hope." This attribution of benevolence-without-obligation is unsupported by the record. *Tackett* warned against judicial speculation or supposition about the parties' intention not anchored in the factual record. *Tackett* 135 S. Ct. at 935-936.

CNH and the dissent ignored the meaning of the implementation of the cap letters and the agreement to eliminate them. The parties specifically bargained over the issue of rising healthcare costs and inflation. By eliminating the cap letter in 1998, CNH agreed to assume the risk of future medical cost inflation. It agreed to uncapped benefits. ADE.27:pp.17,19,63-64.[8]

The finding of vesting rests upon a unique factual record, and is not of "exceptional importance" as contemplated by Fed.R.App.P. 35(a)(2).

B. *EN BANC* CONSIDERATION OF THE VESTING DECISION IN THIS CASE IS NOT NECESSARY TO SECURE OR MAINTAIN UNIFORMITY OF THIS CIRCUIT'S DECISIONS

Reese III is consistent with Sixth Circuit precedent. CNH and the dissent take an overly narrow view of the *Gallo* holding *Gallo v. Moen Inc.,* 813 F.3d 265 (6th Cir. 2016), cert. denied 137 S.Ct. 375 (2016), one that would nullify the portion of

[8] Indeed, under CNH's Proposed Plan, CNH's costs for providing healthcare benefits for Medicare participants in 2032 will be $400 a year *less* than the amount of CNH's capped obligation under the rejected FAS 106 Letter. Cap Letter, RE.420-4:14474. In other words, CNH is trying to achieve in litigation what it could not achieve in bargaining.

Tackett that allows a finding of ambiguity despite the existence of a "general durational clause."

The Sixth Circuit's discussion of *Tackett* and *Tackett III* in *UAW v. Kelsey-Hayes Company*, 854 F.3d 862 (6th Cir. April 20, 2017) is consistent with the *Tackett* analysis in *Reese III*. The *UAW v. Kelsey-Hayes* court concluded:

> ... overruling the *Yard-Man* inference did "not preclude the conclusion that the parties intended to vest lifetime benefits for retirees." The Court's language repeatedly emphasized that a court should look to ordinary contract interpretation, remove any thumb on the scale in either direction, and look to the intent of the parties in the instant case.
>
> On remand [in *Tackett III*], we noted a non-exhaustive list of contract principles to apply when interpreting the duration of healthcare benefits in a CBA. First and foremost, *Tackett III* emphasized that "[a]s with any other contract, the parties' intentions control." This was highlighted in particular by citing Justice Ginsburg's concurrence: "Under the cardinal principle of contract interpretation, the intention of the parties, to be gathered from the whole instrument, must prevail."

Id. (citations omitted).

The Sixth Circuit reiterated the following from *Tackett III*:

> [W]hile the Supreme Court's decision [in Tackett] prevents us from presuming that "absent specific durational language referring to retiree benefits themselves, a general durational clause says nothing about the vesting of retiree benefits," we also cannot presume that the absence of such specific language, by itself, evidences an intent not to vest benefits or that a general durational clause says everything about the intent to vest. *Id.* at 867 (quoting *Tackett III*, at 811 F.3d at 209).

Gallo recognized that ordinary principles of contract law did not require blind adherence to a termination date:

> *Tackett* does not create [a clear-statement rule]. It tells courts to apply "ordinary principles of contract law"—identifying relevant principles in this setting along the way—and tells courts to follow those principles where they lead. . . . In overruling *Yard-Man,* in short, *Tackett* does not create a clear-statement rule in the other direction. It instead eliminates the use of inferences and implications not grounded in "ordinary principles of contract law" and explains the kinds of tools properly deployed in this setting.

Gallo, 813 F.3d at 274 (citing *Tackett*, 135 S.Ct. at 933).

The *Gallo* panel's rejection of a clear-statement requirement is entirely consistent with the unanimous Sixth Circuit panel ruling in *Tackett III*, 811 F.3d 204, issued just weeks prior to the divided *Gallo* case. As in *Gallo*, the Sixth Circuit in *Tackett III* recognized that the Supreme Court "declined to adopt an 'explicit language' requirement in favor of companies":

> [T]he Supreme Court's decision prevents us from presuming that "absent specific durational language referring to retiree benefits themselves, a general durational clause *says nothing* about the vesting of retiree benefits," we also cannot presume that the *absence* of such specific language, by itself, evidences an intent *not* to vest benefits or that a general durational clause says *everything* about the intent to vest.

811 F3.3d at 209.

Although *Gallo* found the absence of contract language reflecting a commitment to "provide unalterable healthcare benefits to retirees and their spouses for life" to be a critical starting point, it did not hold that the absence of such specific language or the presence of a general durational clause was dispositive—such a holding would have been plainly at odds with *Tackett* and *Tackett III*. Rather, *Gallo*

relied upon a number of other factors present in *Gallo* but absent in this case, and, moreover, made clear that its holding was specific to "this set of contracts." *Gallo*, 813 F.3d at 274.

Turning to analysis of individualized facts: None of the salient *Gallo* facts are present in this case. Most telling, this case does not involve a reservation of rights clause as the *Gallo* case did. This case also contains language vesting pension benefits, for life, that is identical to the language vesting retiree healthcare benefits. If, as in *Gallo*, a difference in language demands a difference in meaning, then surely the identical language demands the same meaning. At 270, 274.

The Sixth Circuit is uniformly following *Tackett*, case by case.[9] These individualized assessments are what *Tackett* requires.

II. CONCLUSION

En banc review is not warranted on the vesting issue and should be denied.

Respectfully submitted,
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Dated: August 8, 2017

[9] As are the district courts: *Zino v. Whirlpool Corp.*, No. 5:11CV1676, 2017 WL 3219830, at *5 (N.D. Ohio July 27, 2017), *Fletcher v. Honeywell Int'l, Inc*, No. 3:16-CV-302, 2016 WL 6780020, at *8 (S.D. Ohio Nov. 15, 2016), *Sloan v. Borgwarner, Inc.,* No. 09-CV-10918, 2016 WL 7107228, at *13 (E.D. Mich. Dec. 5, 2016).

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2017, I electronically filed:

PLAINTIFFS-APPELLEES' RESPONSE TO DEFENDANTS-APPELLANTS' PETITION FOR REHEARING EN BANC

with the Clerk of the Court using the ECF system which will provide electronic notification of the filing to all registered ECF participants.

Respectfully submitted,

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