UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CHARLES T. EVANS, DAVID McBRIDE, RONALD E. FAIRLEY, LARRY J. SIMPSON, ROBERT B. BONDS, and STEVE HINCH,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.: 3:10-cv-217**
TENNESSEE VALLEY AUTHORITY RETIREMENT SYSTEM and TENNESSEE VALLEY AUTHORITY,	)	**Judge Trauger**
	)	**Magistrate Judge Brown**
Defendants.	)	

TVARS'S RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT

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Defendant Tennessee Valley Authority Retirement System ("TVARS") hereby responds in part to Plaintiffs' Motion for Partial Summary Judgment (Doc. 211) and in part to TVA's Motion for Summary Judgment (Doc. 121).

INTRODUCTION AND SUMMARY

In February 2015, the TVARS Board reviewed the summary judgment submissions of both Plaintiffs and TVA. Then, the TVARS Board made or confirmed the fact findings and Rule interpretations in this Response.

First, the TVARS Board gave proper 30 day notice for the 2009 Amendments. TVA correctly argues as much; Plaintiffs incorrectly argue that notice was not properly given.

Second, the 2009 Amendments to the TVARS Rules reduced vested COLAs. The Rules are ambiguous, but the Rules' language and the extrinsic evidence both show that all COLAs were and are vested benefits. Plaintiffs' arguments that COLAs were a vested benefit are generally correct, with identified exceptions. TVA's arguments are not correct.

Primarily based on the 1974 Amendments, TVA incorrectly argues that future COLAs are not vested. The 1974 Amendments, however, changed the Rules to identify three types of retirement benefits in § 11 as "Vested (Nonforfeitable) Benefits:" (1) benefits based on member contributions, (2) benefits based on TVA contributions and member service, and (3) COLAs. Ignoring the fact that COLAs are identified under vested benefits, TVA argues, based on the 1974 Amendments, that the Rules distinguish future COLAs from the other two types of TVARS benefits and thus future COLAs are not vested. The formal amendment notice from 1974, however, explained that the 1974 Amendments identified these three types of vested benefits primarily for funding priority in the unlikely circumstance that TVA became unable to contribute to funding all vested benefits. If TVA cannot make contributions and thus upon discontinuance

or termination some vested benefits cannot be paid, the priority order of benefits to be paid is not relevant to whether the benefits are vested.

Furthermore, an informal legal memorandum, which was based on the Rules' language and did not consider extrinsic evidence, and which TVA provided to the TVARS Board before the 2009 vote, once analyzed, actually supports the conclusion that all of the COLAs are vested. The legal memorandum recognizes that the Rules' using "shall" increase COLAs is relevant. All three subsections describing COLA increases to monthly benefits use "shall" increase the benefits by the COLA, thus using future-oriented mandatory language indicating that all COLAs are vested. In addition, the legal memorandum asserts that the COLAs would be vested if TVARS were governed by ERISA and asserts that courts considering whether COLAs are vested for governmental plans have found COLAs vested. Therefore, when combined with other extrinsic evidence discussed by Plaintiffs, the Rules' language, the extrinsic evidence, and analogous cases show that all COLAs were and are vested benefits.

Third, the interest rate on the annuity savings account is not a vested benefit. Plaintiffs incorrectly argue that the interest rates are a vested benefit. TVA correctly argues that the Rules authorize changes to interest rates, which historically have gone up and down.

Finally, the TVARS Board's interpretations of the Rules, and fact findings related to interpreting the Rules, are due deference.

STATEMENT OF ADDITIONAL RELEVANT FACTS

1. The Tennessee Valley Authority ("TVA") established the Tennessee Valley Authority Retirement System ("TVARS") in 1939 as a pension benefit plan for its employees. Brief in Support of TVA's Motion for Summary Judgment (Doc. 128) ("TVA's Brief") at 3;

Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment (Doc. 212) ("Plaintiffs' Memo.") at 4.

2. On December 9, 1948, TVA Chairman Gordon Clapp wrote to Lindsay Warren, Comptroller General of the United States, that "the Rules and Regulations agreed upon as the basis for [TVARS's] establishment constitute for all practical purposes a contract between TVA and the employees." TVARS Ex. 1 at 4, TVARS-08891.[1]

3. The Rules provide that the TVARS "board's interpretation and application of the Rules and Regulations in these and all other matters pertaining to [TVARS]'s operations and its determination of the facts in making such application shall be final and conclusive as to all parties." Doc. 126-6 at 11 PageID#: 1549.

4. By meeting in February and March 2015, the TVARS Board interpreted the Rules and Regulations ("Rules") and made the fact findings in this Response. TVARS Ex. 2.

5. On November 2, 1967, the TVARS Board amended the Rules to provide for annual post-retirement cost of living adjustments ("COLAs") to increase the monthly pension benefit with inflation. Notice of Amendments, Doc. 126-1 PageID#: 1491.

A. <u>The 1974 Amendments to the Rules and Regulations</u>

6. In December 1974, the TVARS Board amended the Rules and provided detailed explanations for the 1974 Amendments. Doc. 125-1 at PageID#: 1473-487.

7. In the formal Notice dated December 16, 1974, the TVARS Board explained that the 1974 Amendments were "***primarily*** to establish TVA's obligation in the event it should discontinue contributions or reduce them below the amounts set by the [TVARS] Board under section 9, to assure the vested (nonforfeitable) benefits accrued up to the time of the discontinuance or reduction are fully funded." *Id.* at PageID#: 1475-76 (emphasis added).

[1] TVARS Ex. 1, 2 and 3 are attached to the Declaration of Patrick D. Brackett, which is being filed.

8. In a December 13, 1974 memo, the TVARS Board explained that it had amended the Rules that morning in light of the "recently enacted Pension Reform Act," noted that ERISA retirement plans had become required to have certain vesting provisions, and explained at length how ERISA retirement plans had "plan termination insurance" through the Pension Benefit Guaranty Corporation (the "PBGC"), but in contrast "TVA [before the 1974 Amendments] made no firm commitment to make regular or definite contributions to the System and there was no certainty that members of the System would ever receive the benefits described in the Rules." Doc. 125-1, PageID#: 1473.

9. The December 13, 1974 memo also explained "[w]e are proposing to amend sections 9B and 11 to provide a method whereby benefits will become nonforfeitable and for TVA to assure the payment of nonforfeitable benefits, in lieu of TVA providing for plan termination insurance." *Id.* at PageID#: 1473-74.

B. <u>How §§ 9.B and 11 Assure the Payment of Nonforfeitable Benefits</u>

10. As relevant to assuring the payment of nonforfeitable (*i.e.*, vested) benefits, under § 9.B, "[c]ontributions of TVA ***shall*** consist of a 'normal contribution' and an 'accrued liability contribution' . . . . A further 'cost of living contribution' ***shall*** be made" to fund COLAs "under sections 6I, 7L, or 18C3, which became effective after June 30, 1974." *Id.* at 49 PageID#: 1587 (emphasis added). When referring to the total amount of these three annual contributions, TVARS and TVA refer to them, as calculated with the help of an actuary, as the annual required minimum contribution. Declaration of Patrick D. Brackett at ¶ 3.

11. Based on the 1974 Amendments, the Rules limit to two remote possibilities, only if TVA could not fund all of the Rules' vested retirement benefits, where TVARS members

might not have those vested benefits paid. *See* Doc. 126-6 at 53-58 PageID#: 1591-96 (§ 11.B and § 11.C).

12. Under § 11.A, TVA reserves the discretion to discontinue TVARS under § 11.B or terminate TVARS under § 11.C and only make further contributions after discontinuance or termination under subsections 11.B and 11.C, but TVA is required to comply with subsections 11.B and 11.C. *Id.* at 53 PageID#: 1591;

13. As to assuring the payment of vested benefits, while TVA has discretion to discontinue TVARS under § 11.B or terminate TVARS under § 11.C, the Rules confirm that TVA contributions afterwards "may be necessary to comply with sections 11B and 11C." *Id.* at 53 PageID#: 1591.

14. Under § 11.B.4.b, the TVARS Board shall determine "what amount is sufficient to provide" the three types of vested benefits identified in § 11.B for both after a § 11.B discontinuance or after a § 11.C termination. *Id.* at 54-55 PageID#: 1592-93. *See also id.* at 56 PageID#: 1594 (under § 11.C.5, "No such termination of [TVARS] shall effect the obligations of TVA set out in section 11B . . . .").

15. Section 11.B is entitled "Vested (Nonforfeitable) Benefits and Segregation of Funds" and in § 11.B.2 identifies three types of "Vested (Nonforfeitable) Benefits," which are described elsewhere in the Rules: (1) "benefits based on a member's own contributions," described in § 9.A, (2) "accrued benefits from creditable service based on TVA's contributions," described in §§ 6, 7 and 18, and (3) "cost-of-living increases," described in §§ 6.I, 7.L and 18.C.3. *Id.* at 15-45, 47-49 & 80-82 PageID#: 1553-583, 1585-86 & 1618-621.

16. Under § 11.B.1, a TVARS member becomes directly vested based on years of service for the second type of retirement benefits identified in § 11.B.2 and thus indirectly vested

in the COLAs increasing those benefits. For example, under § 11.B.1, "[a] nonforfeitable right to cash balance account benefits shall arise upon completion of 5 years of cash balance service," and the TVARS "board shall increase (subject, however, to the provisions of section 11)" this benefit by the COLA. *Id.* at 44-45 & 53 PageID#: 1582-83 & 1591.

17. Under § 11.B.2, if TVA does not make the required minimum contribution, which is how TVA "discontinues" TVARS, "all benefits which have not then become nonforfeitable and all benefits based on such service after [not making the required minimum contribution] shall be reduced" to amounts based on assets TVARS already has and, if any, additional TVA contributions not made to fund the three types of vested benefits. *Id.* at 54 PageID#: 1592. In other words, if TVA discontinues TVARS, TVARS members might have reduced retirement benefits if (1) the TVARS member did not yet have enough years of service for the benefits already to be vested or (2) the TVARS member's additional benefits would be based on service (*i.e.*, work) after the date of TVA's discontinuing TVARS.

18. Under § 11.B.4, the Rules provide for segregating the three types of vested retirement benefits identified in § 11.B.2, so they might be funded in the priority order identified, in the unlikely circumstance that TVA cannot contribute to fund all of them. *Id.* at 54-55 PageID#: 1592-93.

19. Consistent with § 11.B.2, under § 11.B.4.c, the last benefit to be paid would be COLAs increasing benefits not accrued until after TVA had discontinued TVARS (the COLAs for increasing the benefits in ¶ 17 above that might be reduced). *Id.* at 55 PageID#: 1593.

20. Under § 11.B.4.e, TVA must, upon TVARS discontinuance or termination, "make additional contributions" to fund COLAs "[t]o the fullest extent TVA finds feasible." *Id.* at 55 PageID#: 1592. Here, "feasible" means possible and not impossible. TVA's funding TVARS

retirement benefits would only be impossible if TVA no longer existed, was incurably insolvent, or had some other similar highly unlikely circumstance for any federal governmental entity.

21. Under § 11.C, the TVARS Board upon termination "shall make such arrangements . . . to assure payment of (1) benefits based on members' contributions; and (2) nonforfeitable benefits based on TVA contributions and, so far as it finds feasible, cost of living increases related thereto." *Id.* at 56 PageID#: 1594. These are the same three types of retirement benefits identified as "Vested (Nonforfeitable) Benefits" in § 11.B.

22. Under § 11.C, when TVA terminates TVARS, TVA must fund the retirement benefits "promptly" under the arrangements TVARS "deems necessary or appropriate." *Id.* For example, if TVA terminated TVARS as part of an asset sale with TVA's no longer existing after the sale, TVARS might require a lump sum to be paid to TVARS to pre-fund all vested retirement benefits. TVARS might then have the risk of no further funding from TVA. This hypothetical scenario explains why, when ranking the vested benefits in priority order to be paid upon termination, the TVARS Board has the discretion in § 11.C.1 not to pay COLAs even though they are vested.

23. In summary, for payment priority if TVA cannot contribute and all vested benefits cannot be paid, the Rules identify three types of vested benefits to be paid in this order: (1) based on member contributions, (2) based on TVA contributions and member service, and (3) COLAs. If TVA discontinues or terminates TVARS, TVA must still, unless impossible, contribute to fund these three types of vested benefits. If TVA discontinues or terminates TVARS and TVARS does not already have assets to cover more than the three types of already vested benefits, then two types of not yet accrued benefits may be reduced: (1) if the TVARS member does not yet have enough years of service for the benefits to vest or (2) the TVARS

member's service for the benefits is after the date TVA discontinued or terminated TVARS. If TVA discontinues or terminates TVARS and TVARS does not have sufficient assets, the last benefit to be paid would be COLAs increasing these last two possibly reduced benefits. Finally, if TVA terminates TVARS and TVA cannot contribute to fund benefits, the TVARS Board has the discretion not to increase benefits with COLAs even though COLAs are vested.

24. Accordingly, after the 1974 Amendments, the Rules provide TVARS members assurance, in lieu of plan termination insurance through the PBGC, a federal corporation, by requiring TVA, a federal corporation, to contribute to fund three types of vested retirement benefits even after TVA discontinues or terminates TVARS and the Rules provide priorities for paying those benefits if TVA's contributing to fund them becomes impossible.

C. **Additional Extrinsic Evidence of COLA Vesting**

25. In *Multiemployer Plan Examination Guidelines*, the IRS takes the position that if amendments "are made on a regular basis, the series of amendments – even though each is ad hoc – may give rise to an expectation of a benefit that is subject to Internal Revenue Code 411(d)(6) protection." *See* IRS Multiemployer Plan Examination Guidelines 4.72.14.3.7.3 (05-04-2001), *available at* http://www.irs.gov/irm/part4/irm_04-072-014-cont01.html.

26. COLAs were awarded annually for over four decades. Declaration of Patrick D. Brackett at ¶ 4. Therefore, a reasonable TVA employee had an expectation that annual COLAs would be part of his or her future retirement.

27. The consistent practice of paying all COLAs for decades implies that TVA and TVARS interpreted the TVARS Rules as making all COLAs vested.

28. Under the Rules § 3.5, TVARS "board shall submit annually to the Board Directors of TVA a report showing" detailed financial information about TVARS. Doc. 126-6 at 10 PageID#: 1548.

29. TVARS annual reports have repeatedly reflected that all COLAs are vested benefits. *See, e.g.*, Doc. 213-12 PageID#: 3725-766 (TVARS 2009 Annual Report). Specifically, the annual reports include an accumulated benefits section that calculates vested benefits and non-vested benefits; all COLAs, including future COLAs, are included in the vested benefits section. *E.g., id.* at 22 PageID#: 3748 (2009 Annual Report); Doc. 213-11 at 16, Page 16 of 25 (PageID# illegible) (2004 Annual Report).

30. TVARS certifies each annual report "does not contain any untrue statement . . . ." *E.g.*, Doc. 213-12 at 11 PageID#: 3735; Doc 213-11 at 8, Page 10 of 25 (PageID# illegible).

31. TVA has not suggested that TVARS's Annual Reports might need editing as to this interpretation of the Rules as providing vested COLA benefits. Declaration of Patrick D. Brackett at ¶ 5.

D. <u>The Sutherland Memorandum</u>

32. With an informal June 3, 2009 memorandum, Sutherland Asbill & Brennan LLP responded to TVA's request to consider the proposed 2009 Amendments. TVARS Ex. 3 at TVARS-02143-02150.

33. The Sutherland memorandum was provided to the TVARS Board before its vote in August 2009. *Id.* at TVARS-02142.

34. The Sutherland memorandum's conclusion includes that "the ability of the [TVARS] Board to amend the Rules to make changes in the COLA benefits is not clear cut . . . ."

Id. at 8, TVARS-2150. In other words, the Sutherland memorandum recognizes that the Rules are ambiguous as to whether COLAs are vested.

35. The Sutherland memorandum states that the TVARS "Board may amend the rules, but it may not reduce then accrued benefits that are nonforfeitable. (Rules § 11(B)(1)) The Rules do not ***otherwise*** contain any specific reservation of the right to reduce or discontinue a COLA." *Id.* at TVARS-02146 (emphasis added).

36. In a footnote, the Sutherland memorandum adds that TVA was "not aware of any such reservation of rights with respect to the COLAs in member communications." *Id.*, n. 2.

37. The Sutherland memorandum incorrectly states "[t]he Rules provide that the [TVARS] Board 'will' ('shall' in the case of the supplemental benefit COLA) increase a retiree's monthly benefit" with a COLA," citing §§ 6(I), 7(L), and 18(C)(3). TVARS Ex. 3 at TVARS-02146.

38. For the original pension benefit COLA, § 6(I) says "***shall*** increase" and does not use the word "will." Doc. 126-6 at 26-27 PageID#: 1564-65. For the cash balance benefit COLA, § 7(L) says "***shall*** increase" and does not use the word "will." *Id.* at 45-46 PageID#: 1582-83. For the supplemental benefit, § 18(C)(3) says "shall be increased" and does not use the word "will." *Id.* at 82 PageID#: 1620. Together, these three subsections use "shall" 21 times, including "shall increase" or "shall be increased" specifically in reference to applying a COLA to increase TVARS's monthly retirement benefits. *Id.*

39. The Sutherland memorandum does not discuss what "will" increase COLAs might mean, much less recognize that "shall increase" refers to the future and means the Rules make all COLA increases mandatory or discuss whether such future-oriented mandatory language indicates that the COLAs are a vested retirement benefit. *Id.*

40. Instead, the Sutherland memorandum bases its analysis on a purported difference between "existing COLAs" and "future COLAs," stating as follows: "Based on the foregoing, the Rules seem to treat an existing COLA is [stet] part of the accrued benefit that cannot be reduced by amendment. The Rules, however, support the position that future COLAs as a benefit that has not yet accrued and that could, therefore, be changed or eliminated." *Id.* at TVARS-02147.

41. The Rules do not use the phrases "existing COLAs" or "future COLAs" or otherwise distinguish between existing COLAs and future COLAs as relevant to whether COLAs are vested.

42. The Rules have COLAs for two types of normal retirement benefits (original and cash balance) and COLAs for the supplemental benefit, but the language in §§ 6.I, 7.L and 18.C.3 are substantively the same and do not distinguish between existing and future COLAs. Doc. 126-6 at 26-27, 44-45 & 82 PageID#: 1564-65, 1582-83 & 1620.

43. After the analysis of the Rules, the Sutherland memorandum asserts that all TVARS COLAs would be vested benefits "if [TVARS] were subject to ERISA." TVARS Ex. 3 at TVARS-02147.

44. The Sutherland memorandum also asserts that when considering governmental plans, which are not subject to ERISA, courts have "found that the subject COLAs were part of the accrued benefit that could not be reduced." *Id.* at TVARS-02150.

45. The Sutherland memorandum does not identify or discuss any analogous case law that found the COLAs are not vested. *Id.* at TVARS-02143-02150.

46. The Sutherland memorandum expressly does not consider extrinsic evidence, because TVA did not ask for extrinsic evidence to be considered. *Id.* at TVARS-02143 ("At this

point, you have not asked me to review any additional documentation such as the trust document, meeting minutes or internal or member communications.")

E. The 2009 Amendments and the TVARS Board's Notice of the Amendments

47. On August 17, 2009, the TVARS Board voted to approve proposed amendments to the TVARS Rules (the "2009 Amendments"). Minutes of TVARS Aug. 17, 2009 Meeting, Doc. 47-3 at PageID#: 1022-28.

48. The 2009 Amendments were the first time that the TVARS benefits other than interest rates had been reduced since TVARS was established in 1939. TVARS 30(b)(6) Dep. at 152:23-153:5, Doc. 213-3 at 41-42 PageID#: 3377-78.

49. The 2009 Amendments were the first time that the Board had not paid annual COLAs provided by the Rules since amending the Rules to provide COLAs in 1967. TVARS 30(b)(6) Dep. 152:14-153:5, Doc. 213-3 at 41-42 PageID#: 3377-78.

50. Under § 13, the Rules "may be amended by the [TVARS] Board from time to time, provided that the [TVARS] board gives at least 30 days' notice of the proposed amendment to TVA and to the members, and further provided that TVA may, by notice in writing addressed to the board within said 30 days, veto any such proposed amendment, in which event it shall not become effective." Doc. 126-6 at 63 PageID#: 1601.

51. On August 17, 2009, the day the TVARS Board voted on the 2009 Amendments, TVARS sent notice of the 2009 Amendments to TVARS members through "TVA Today: An Email Newsletter for TVA Employees." August 17, 2009 Email Newsletter, Doc. 124-1 at PageID#: 1467-69.

52. The Email Newsletter informed TVARS members of the 2009 Amendments and further notified members that the changes would take effect January 1, 2010. *Id.*

53. Additionally, the TVARS Board posted the 2009 Amendments on bulletin boards throughout TVA offices and facilities on August 28, 2009, several months before the Amendments took effect. Notice of Amendments to Rules and Regulations, August 28, 2009, Doc. 126-7 at PageID#: 1632-1639.

I. THE TVARS BOARD GAVE THE 30 DAY NOTICE FOR THE AMENDMENTS

The TVARS Board gave proper 30 day notice for the 2009 Amendments. Plaintiff incorrectly argues that the 2009 amendments are substantively invalid because the TVARS Board did not give the 30 day notice before it voted on the amendments. Plaintiffs' Memo. (Doc. 212) at 12-16. TVA correctly argues that the TVARS Board gave a proper 30 day notice under the Rules. TVA's Brief (Doc. 128) at 8-12.

Under § 13, the Rules "may be amended by the [TVARS] Board from time to time, provided that the [TVARS] board gives at least 30 days' notice of the proposed amendment to TVA and to the members, and further provided that TVA may, by notice in writing addressed to the board within said 30 days, veto any such proposed amendment, in which event it shall not become effective." Doc. 47-1 at 63 PageID#: 1601. As such, the Rules provide that when the TVARS Board votes on amendments to the Rules, it must provide to TVA and to the members the same 30 days' notice before the "proposed amendment" takes effect.

Every TVARS amendment is a "proposed amendment" until TVA's 30 days to veto the amendment ends without a veto. *Id.* (providing that TVA may "veto any such proposed amendment"). If TVA vetoes the proposed amendment, "it shall not become effective." *Id.* If TVA does not veto the proposed amendment within 30 days, it becomes part of the Rules and thus is no longer "proposed."

The notice requirement contains no mechanism for TVARS members to prevent an amendment from taking effect the way TVA can veto them. Instead, the notice provision for TVARS members serves an alternative purpose: To allow them an opportunity to change their plans for retiring or investing in light of the amendment.

The TVARS Board voted in favor of the 2009 Amendments on August 17, 2009, at which time they became "proposed amendments" within the meaning of § 13 of the Rules and triggered the notice requirements. That same day, the TVARS Board sent notice of the Amendments to TVARS members through "TVA Today: An Email Newsletter for TVA Employees." August 17, 2009, Email Newsletter, Doc. 124-1 at PageID#: 1467-69. The Email Newsletter informed TVARS members of the 2009 Amendments and further notified members that the changes would take effect January 1, 2010. *Id.* Therefore, the Email Newsletter fully complied with the notice requirements. Additionally, the TVARS Board posted the 2009 Amendments on bulletin boards throughout TVA offices and facilities on August 28, 2009, several months before the Amendments took effect. Notice of Amendments to Rules and Regulations, August 28, 2009, Doc. 126-7 at PageID#: 1632-1639.

Plaintiffs contend that the notice requirement mandates that the Board provide notice of the amendments 30 days before voting on them. Plaintiffs' interpretation of the notice requirement would require the TVARS Board to vote on every amendment twice: First before the notices to TVA and to the TVARS members and then again after TVA did not veto it. The Rules contain no such requirement. Simply stated, Plaintiffs' position is not supported by the text of the Rules or the TVARS Board's longstanding practice in enacting amendments.

II. THE AMENDMENTS REDUCED COLAS, WHICH ARE A VESTED BENEFIT

The 2009 Amendments reduced COLAs, which were and are a vested benefit under the Rules. Plaintiffs incorrectly argue that the Rules ***unambiguously*** vest future COLAs. Plaintiffs'

Memo. (Doc. 212) at 21-27. TVA incorrectly argues that TVARS, with the 2009 Amendments, determined that the future COLAs were not a vested benefit and incorrectly argues that the extrinsic evidence supports interpreting the Rules as providing that the future COLAs are not a vested benefit. Instead, the Rules are ambiguous, but the Rule's language and the extrinsic evidence both show that the all COLAs were and are a vested benefit.

A. The Proper Legal Inquiry as to Whether COLAs Are a Vested Benefit

Whether the TVARS Rules are interpreted as contractual or statutory, the proper inquiry to determine whether COLAs are a vested benefit is (1) to examine the terms of the Rules; and (2) because those terms are ambiguous, to then look to the extrinsic evidence as to the meaning of the terms.

Courts ordinarily analyze retirement benefits as contractual. *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 574 U.S. ___ (2015); *Winnett v. Caterpillar Inc.*, 553 F.3d 1000, 1008 (6th Cir. 2009); *Wood v. Detroit Diesel Co.*, 607 F.3d 427, 432 (6th Cir. 2010). A court will "not infer an intent to vest benefits in the absence of explicit contractual language or, in the case of ambiguous contract language, extrinsic evidence indicating such an intent." *Winnett*, 553 F.3d at 1008.[2] In accordance with ordinary contract principles, "[t]o determine what the contracting parties intended, a court must examine the entire agreement in light of relevant industry-specific customs, practices, usages, and terminology. When the intent of the parties is unambiguously expressed in the contract, that expression controls, and the court's inquiry should proceed no further. But when the contract is ambiguous, a court may consider extrinsic evidence to

[2] TVA argues that future COLAs are not vested because "the Rules do not show, in the required clear and express language," an intent to vest future COLAs, relying on *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998). In *Winnett*, 553 F.3d at 1008, however, the Sixth Circuit states the Sixth Circuit law. In addition, if *Sprague* did have such a peculiar holding, it would be inconsistent with the Supreme Court's recent holding in *Tackett* that courts apply ordinary contract principles when the plan language is ambiguous.

determine the intentions of the parties." *Tackett*, 135 S. Ct. at 937-38 (Ginsburg, J., concurring) (quoting 11 R. Lord, Williston on Contracts § 30:6 at 98-104, 30:7 at 116-124).

Although retirement benefits are contractual, Sixth Circuit precedent has recognized the Rules as statutory in nature. *E.g.*, *Tennessee Valley Authority v. Kinzer*, 142 F.2d 833, 837 (6th Cir. 1944). Whether the Rules are deemed contractual or statutory does not change the analysis here. When determining the meaning of a statute, "[t]he starting point ... is the language of the statute itself." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). Unless otherwise defined, the terms of the statute will be interpreted according to their ordinary meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). If those terms are ambiguous, the court should then look to extrinsic evidence including "other statutes, interpretations by other courts, legislative history, policy rationales, and the context in which the statute was passed." *Brilliance Audio, Inc. v. Haights Cross Communications, Inc.*, 474 F.3d 365, 372 (6th Cir. 2007).

As further explained below, the Rules are ambiguous as to whether the COLAs are vested benefits, but the Rules' language and the extrinsic evidence point to vesting.

B. Plaintiffs' Arguments as to COLAs as a Vested Benefit

As to COLAs' being a vested retirement benefit, Plaintiffs' arguments are generally correct. The Rules, however, do not make this conclusion unambiguous. One must consider extrinsic evidence and examine the entire Rules. In addition, Plaintiffs make an argument about accrued benefits that is not correct. Rather than repeat Plaintiffs' arguments, the TVARS Board otherwise adopts Plaintiffs' Memo. (Doc. 212), § II.B at 21-29.

As mentioned, Plaintiffs' arguments concerning accrued benefits are not correct. As to accrued benefits, Plaintiffs argue that "TVA does not dispute that past and future COLAs are accrued benefits." Plaintiffs' Memo. (Doc. 212) at 24. For purposes relevant to this argument, accrued benefits, vested benefits, and nonforfeitable benefits are three terms that are essentially

synonyms.[3] Therefore, contrary to Plaintiffs' contention, TVARS understands that TVA denies that future COLAs are an accrued benefit, as well as denies that future COLAs are a vested benefit and a nonforfeitable benefit.

C. TVA's Arguments as to COLAs as a Vested Benefit

TVA incorrectly argues that TVARS's 1974 Amendments, amending primarily § 11, support TVA's argument that future COLAs are not a vested retirement benefit. TVA's Brief (Doc. 128) at 16-18. Instead, the 1974 Amendments show that the Rules vest all COLAs.

First, the primary purpose of the 1974 Amendments was to assure TVARS participants that their retirement benefits would be fully funded, if feasible. In the December 16, 1974 formal Notice, the TVARS Board explained that the changes to § 11 were "***primarily*** to establish TVA's obligation in the event it should discontinue contributions or reduce them below the amounts set by the [TVARS] Board under section 9, to assure the vested (nonforfeitable) benefits accrued up to the time of the discontinuance or reduction are fully funded." Doc. 125-1 at PageID#: 1475-76 (emphasis added). In a December 13, 1974 memo, the TVARS Board explained that it had amended the Rules that morning in light of the "recently enacted Pension Reform Act," noted that ERISA retirement plans had become required to have certain vesting provisions, and explained at length how ERISA retirement plans had "plan termination insurance" through the PBGC, a federal corporation, but in contrast "TVA [before the 1974 Amendments] made no firm commitment to make regular or definite contributions to the System and there was no certainty that members of the System would ever receive the benefits described in the Rules." Doc. 125-1 at PageID#: 1473. The memo also explained "[w]e are proposing to amend sections 9B and 11 to provide a method whereby benefits will become nonforfeitable and

[3] Plaintiffs also argue that the Internal Revenue Code requires accrued benefits to be vested to maintain tax exempt status. Plaintiffs' Memo. (Doc. 212) at 25. Plaintiffs' IRS argument is circular since accrued benefits, as relevant for this argument, are essentially the vested benefits.

for TVA to assure the payment of nonforfeitable benefits, in lieu of TVA providing for plan termination insurance." *Id.* at PageID#: 1473-74.

As relevant here, § 11 identified the 1974 vested benefits, still identifies today's vested benefits, and provides for segregating those vested benefits for purposes of prioritizing funding in case TVA discontinued or terminated TVARS and TVA could not contribute to fund TVARS.[4] First, § 11.A requires TVA to comply with § 11.B. Subsection § 11.B is entitled "Vested (Nonforfeitable) Benefits and Segregation of Funds." From the § 11.B title, one expects § 11.B to identify the TVARS "Vested (Nonforfeitable) Benefits." And the subsection identifies three types of "Vested (Nonforfeitable) Benefits": (1) "benefits based on a member's own contributions," (2) "accrued benefits from creditable service based on TVA's contributions," and (3) "cost-of-living increases." Otherwise, § 11.B provides for segregating those three types of retirement benefits, so they might be funded in the priority order listed, in the unlikely circumstance that TVA cannot contribute to fund all of them after discontinuance or termination. Thereby, in lieu of TVARS members having the assurance of plan termination insurance through the PBGC, a federal corporation, TVARS members have the assurance of funding by TVA, a federal corporation.

Upon TVARS discontinuance, § 11.B.4.e requires TVA to "make additional contributions" to fund COLAs "[t]o the fullest extent TVA finds feasible." Doc 126-6 at 55 PageID#: 1593. TVA argues that requiring TVA to fund COLAs to the extent TVA finds feasible is a "level of funding obligation likewise inconsistent with the creation of a guaranteed vested benefit." TVA Brief (Doc. 128) at 15. TVA's argument is mistaken for two reasons. First, "feasible" means possible and not impossible. TVA's funding TVARS retirement benefits

[4] Roughly, under § 11.B.4, discontinuance is TVA's terminating TVARS by not making the required minimum contribution and, under § 11.C, "termination" is a direct decision by TVA, presumably by a TVA board vote.

would only be impossible if TVA no longer existed, was incurably insolvent, or had some other highly unlikely circumstance for any federal governmental entity. For this reason, TVA's "level of funding obligation" for COLAs should be secure, as ERISA plans with PBGC insurance should be. Second, how or whether TVA as an employer does or can fund retirement benefits is not relevant to whether the retirement benefits are vested. *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 377-78 & n. 27 (1980) (quoting approvingly law review article that "pre-ERISA," vesting was not contingent on "the availability of assets in the plan").

In summary, TVA grasps at the 1974 Amendments because they treat COLA benefits differently than the TVARS benefits based on a member's own contributions and based on TVA contributions and creditable service. The Rules, however, identify all three of these types of retirement benefits in § 11.B as "Vested (Nonforfeitable) Benefits." As the formal amendment notice in 1974 explained, the differences among these three types of vested TVARS retirement benefits was and is for priority in the unlikely circumstance that TVA cannot contribute to fund all vested benefits. Therefore, TVA bases its primary argument on the 1974 Amendments, but the 1974 Amendments show that the Rules were intended to make all COLAs vested benefits.

D. The Sutherland Memorandum Supports COLAs as a Vested Benefit

With an informal June 3, 2009 memorandum, Sutherland Asbill & Brennan LLP responded to TVA's request to consider the proposed 2009 Amendments. TVARS Ex. 3 at TVARS-02143-02150. Despite the Sutherland memorandum's not being a formal legal opinion, it was provided to the TVARS Board before its vote in August 2009. *Id.* at TVARS-02142. Despite TVA's engaging the Sutherland firm, and the Sutherland memorandum's nominally including a conclusion that the Rules support an argument that not all COLAs are vested, analyzing the Sutherland memorandum actually supports the conclusion that all COLAs are vested under the TVARS Rules.

The Sutherland memorandum's conclusion includes that "the ability of the [TVARS] Board to amend the Rules to make changes in the COLA benefits is not clear cut . . . ." *Id.* at TVARS-2150. In other words, the Sutherland memorandum recognizes that the Rules are ambiguous as to whether COLAs are vested. It also states that the TVARS "Board may amend the rules, but it may not reduce then accrued benefits that are nonforfeitable. (Rules § 11(B)(1)) The Rules ***do not otherwise*** contain any specific reservation of the right ***to reduce or discontinue a COLA.***"[5] *Id.* at TVARS-02146 (emphasis added). Perhaps inconsistent with the nominal conclusion, the Sutherland memorandum thus in this sentence includes COLAs as among "then accrued benefits that are nonforfeitable." In a footnote, the Sutherland memorandum adds that TVA was "not aware of any such reservation of rights [to reduce or discontinue] . . . COLAs in member communications." *Id.*, n. 2.

Next, the Sutherland memorandum incorrectly states "[t]he Rules provide that the [TVARS] Board 'will' ('shall' in the case of the supplemental benefit COLA) increase a retiree's monthly benefit" with a COLA," citing §§ 6(I), 7(L), and 18(C)(3). TVARS Ex. 3 at TVARS-02146. Therefore, it recognizes the use of "shall" instead of "will" has relevant meaning for COLA vesting under the Rules. For the original pension benefit COLA, § 6(I) says "***shall*** increase" and does not use the word "will." Doc. 126-6 at 26-27 PageID#: 1564-65. For the cash balance benefit COLA, § 7(L) says "***shall*** increase" and does not use the word "will." *Id.* at 45-46 PageID#: 1582-83. For the supplemental benefit, § 18(C)(3) says "shall be increased" and does not use the word "will." *Id.* at 82 PageID#: 1620. Together, these three subsections use "shall" 21 times, including "shall increase" or "shall be increased" specifically in reference to applying a COLA to the TVARS monthly retirement benefits. *Id.*

[5] Contrary to the Sutherland memorandum, the Rules specifically reserve the right to reduce or discontinue COLAs in the limited circumstances described in ¶¶ 17-19 and 22 above. Because the Rules provide for reduced COLAs in these limited circumstances, the implication is that COLAs cannot otherwise be reduced and thus are vested.

The Sutherland memorandum does not discuss what "will" increase COLAs might mean, much less recognize that "shall increase" refers to the future and means the Rules make COLA increases mandatory or discuss whether such future-oriented mandatory language indicates that the COLAs are a vested retirement benefit. *See Black's Law Dictionary* 1585 (10th ed. 2004) (defining "shall" as "Has a duty to; more broadly, is required to"); *see also Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (In statutory language, "the mandatory 'shall' ... normally creates an obligation"); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("The word 'shall' is ordinarily 'The language of command.'").

Instead, the Sutherland memorandum bases its legal analysis on a purported difference between "existing COLAs" and "future COLAs": "Based on the foregoing, the Rules seem to treat an existing COLA is [stet] part of the accrued benefit that cannot be reduced by amendment. The Rules, however, support the position that future COLAs as a benefit that has not yet accrued and that could, therefore, be changed or eliminated." TVARS Ex. 3 at TVARS-02147. This Sutherland memorandum analysis is problematic for two reasons.

First, the Rules do not use the phrases "existing COLAs" or "future COLAs" or otherwise distinguish between existing COLAs and future COLAs as relevant to whether COLAs are vested.[6] The Rules do not have different types of COLAs.[7] Therefore, this Sutherland memorandum analysis is based on factual grounds that are not in the Rules.

Second, this Sutherland memorandum analysis is based on § 11 of the Rules, which concerns TVA's terminating TVARS. As explained above, the primary purpose of § 11 was and

[6] When discussing how segregated funds are to be used in § 11.B.4.c if TVA discontinues TVARS, the Rules include the phrase "excluding subsequent cost-of-living increases." Doc. 126-6 at 55 PageID#: 1593. This vague language is only part of the priorities when funding benefits not accrued until after a discontinuance and addresses the COLAs for those monthly benefits that might be reduced, as discussed in ¶¶ 17-19 above, and is not otherwise relevant to COLAs.

[7] The Rules do have COLAs for two types of normal retirement benefits (original and cash balance) and COLAs for the supplemental benefit, but the language in §§ 6(I), 7(L) and 18(C)(3) are substantively similar and do not distinguish between existing and future COLAs.

is to set priorities for funding different types of TVARS retirement benefits in case of discontinuance or termination and under the highly unlikely circumstance of TVA's not being able to fund all vested retirement benefits. Whether and how an employer can fund retirement benefits is not relevant to whether the retirement benefits are vested. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 377-78 (1980). Therefore, this Sutherland memorandum analysis is based on legal grounds inapplicable to whether retirement benefits are vested.

After the analysis of the Rules, the Sutherland memorandum asserts that all TVARS COLAs would be vested benefits "if [TVARS] were subject to ERISA." TVARS Ex. 3 at TVARS-02147. The Sutherland memorandum discusses four ERISA cases and attempts to argue that "we do not believe that these cases would necessarily influence a court's analysis of the proposed COLA changes under the Rules." *Id.* at TVARS-02148. The only basis for distinguishing the ERISA precedent is that ERISA "is designed to restrict the freedom to contract." Id at TVARS-02149. Moreover, the Sutherland memorandum asserts that when considering governmental plans, which are not subject to ERISA, courts have "found that the subject COLAs were part of the accrued benefit that could not be reduced." *Id.* at TVARS-02150. The Sutherland memorandum does not identify or discuss any analogous case law that found COLAs were not vested.

Recognizing that the Rules are ambiguous as to whether all COLAs are vested, a crucial part of the analysis should be to consider the extrinsic evidence, as in any analysis of an ambiguous contract or statute. *See Tackett*, 135 S. Ct. at 937 ("when the contract is ambiguous, a court may consider extrinsic evidence to determine the intentions of the parties"); *Brilliance Auto*, 474 F.3d at 372 (if statutory terms are ambiguous, the court should look to extrinsic

evidence such as "other statutes, interpretations by other courts, legislative history, policy rationales, and the context in which the statute was passed").

The Sutherland memorandum expressly does not consider extrinsic evidence, because TVA did not ask for extrinsic evidence to be considered. TVARS Ex. 3 at TVARS-02142 ("At this point, you have not asked me to review any additional documentation such as the trust document, meeting minutes or internal or member communications.") As indicated elsewhere, an analysis including extrinsic evidence supports all COLAs' being vested.

In summary, before the August 2009 vote, TVA gave the TVARS Board the Sutherland memorandum, which nominally included a conclusion that the Rules support an argument that not all COLAs are vested, despite the Sutherland memorandum's (1) admitting that the Rules are ambiguous as to whether COLAs are vested, (2) not recognizing that the Rules provide that TVARS "***shall*** increase" retirement benefits with COLAs, (3) relying on a distinction between "existing COLAs" and "future COLAs" that is not in the Rules as relevant to vesting, (4) relying on the Rules' funding upon termination provision when such a provision should be irrelevant to vesting issues, (5) asserting all COLAs would be vested benefits if TVARS were subject to ERISA, (6) asserting that courts considering whether COLAs are vested for governmental plans have found the COLAs to be vested, and (7) expressly not considering extrinsic evidence and thus not applying the required ordinary principles of contract law. Accordingly, once analyzed, the Sutherland memorandum actually supports the conclusion that the Rules vest all COLAs.

III. THE INTEREST RATES ARE NOT VESTED BENEFITS

The interest rate on the annuity savings account is not a vested benefit. Plaintiffs incorrectly argue that the interest rates were a vested benefit, but provide no serious analysis of the language of the Rules and point to no extrinsic evidence. Plaintiffs' Memo. (Doc. 212) at 29-31. TVA correctly argues that the language of the Rules allows interest rates to be changed and

that historically those rates had gone both up and down, as one expects interest rates to do. TVA Brief (Doc. 128) at 19-20. Rather than repeat TVA's arguments, TVARS refers to TVA's Brief at 19-20 on this issue. *Id.*

IV. DEFERRING TO THE TVARS BOARD'S RULES INTERPRETATIONS

Whether the Rules are interpreted as contract or statute, they plainly require deference to the TVARS Board's interpretations of the Rules and related fact findings. The Rules provide that the TVARS "board's interpretation and application of the Rules and Regulations in these and all other matters pertaining to [TVARS]'s operations and its determination of the facts in making such application shall be final and conclusive as to all parties." Doc. 126-6 at 11 PageID#: 1549; *see Tennessee Valley Authority v. Kinzer*, 142 F.2d 833, 837 (6th Cir. 1944) (holding that the Rules "are deemed to have received legislative ratification and, thereby, to have become embedded in the law; and are to be given the same force and effect as the [Tennessee Valley Authority Act] statute, itself"). The TVARS Board has interpreted the Rules and made fact findings as indicated in this Response.

Plaintiffs incorrectly argue that the Court "does not owe deference to the TVARS Board on the 30 day notice issue." Plaintiffs' Memo. (Doc. 212) at 13. Plaintiffs' basis for this argument is that TVARS has not considered the issue and has not given a written statement of its reasoning. To the contrary, TVARS has consistently interpreted the 30 day notice provision the same as it still does today. *See, e.g.*, Dec. 13, 1974 memo and Dec. 16, 1974 Notice, Doc 125-1 at PageID#:1473 & 1475 (giving notice three days after a vote). Furthermore, no written statement of reasons is required. In addition, until this litigation, TVARS has not had occasion to provide its reasoning in writing.

Plaintiffs argue that the Court should defer to TVARS's interpretation, found in many TVARS annual reports, that all COLAs are vested benefits. *Id.* at 21-23. TVARS agrees.

TVA, in contrast, argues that the Court should defer to TVARS's implied 2009 interpretation that the future COLA's are not vested. TVA Brief (Doc. 128) at 12-14. TVARS agrees with TVA that the Court should defer to TVARS's Rules interpretations, but otherwise disagrees with TVA as to the COLA vesting issue for a number of reasons.

First, the TVARS Board first interpreted the Rules as vesting all COLAs in numerous TVARS annual reports. *E.g.*, Doc. 213-12 at 22 PageID#: 3748. TVARS certifies each annual report "does not contain any untrue statement . . . ." *Id.* at 11 PageID#: 3735. This TVARS interpretation carries much more weight, because it is the earlier interpretation, it is an express interpretation certified as not being untrue rather than just an implied interpretation, and it has been repeated and certified as true year after year. In addition, the TVARS interpretation in its annual reports was made publicly and was intended to be relied upon by TVA and TVARS members and TVA has not objected to the interpretation.

Second, the circumstances of the 2009 Amendments supports the TVARS Board's finding that its voting to approve the amendments was not intended to be a Rules interpretation. One, the 2009 amendments were rushed without time to consider issues such as whether they might arguably be considered to be an implied Rules interpretation. Declaration of Leslie P. Bays at ¶ 6, Doc. 214 at 2 PageID#: 4115. Two, the TVARS Board were rushed to approve the 2009 amendments before a TVA board meeting. The alternative, in that chaotic time during the Great Recession,[8] appeared to be no TVA contributions to TVARS and thus termination of TVARS, with the risk of a death spiral and no funding for many retirement benefits. In fact, if the TVARS Board had thought it had an alternative, common sense dictates that it would have delayed the vote and sought independent counsel. Bays Dec. at ¶ 11, Doc. 214 at 2 PageID#: 4115.

[8] TVA described the 2009 Amendments as "in response to the global financial crisis." TVA's Brief at 7.

Third, the extrinsic evidence points to vested COLAs. Plaintiffs' arguments rely on extrinsic evidence, including the TVARS annual reports discussed above. Moreover, COLAs were awarded annually for over four decades. Therefore, a reasonable TVA employee had an expectation that annual COLAs would be part of his or her future retirement. *See* IRS Multiemployer Plan Examination Guidelines 4.72.14.3.7.3 (05-04-2001), *available at* http://www.irs.gov/irm/part4/irm_04-072-014-cont01.html (advising that even retirement plan amendments, if made regularly, "may give rise to an expectation of a [vested] benefit").

Even without any deference, considering the 1974 Amendments and the Sutherland memorandum, when combined with extrinsic evidence, the Rules vest all COLAs. Especially with deference, there is no genuine dispute that the Rules provide all COLAs are vested.

V. CONCLUSION

Based on the foregoing, the TVARS Board requests that the Court grant Plaintiffs' Motion as to the vesting of COLAs, deny TVA's Motion as to the vesting of COLAs, deny Plaintiffs' Motion as to the 30-day notice provision and the vesting of interest rates, and grant TVA's Motion as to the 30-day notice provision and the vesting of interest rates. Furthermore, TVARS requests that this Court schedule a Conference to discuss the possible remedies if this Court were to grant Plaintiffs' Motion as to the vesting of COLAs.

Respectfully submitted,

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