COAL INDUSTRY RETIREE HEALTH BENEFIT ACT OF 1992

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT

OF THE

COMMITTEE ON WAYS AND MEANS HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

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COAL INDUSTRY RETIREE HEALTH BENEFIT ACT OF 1992

THURSDAY, JUNE 22, 1995

HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON OVERSIGHT,
Washington, DC.

The Subcommittee met, pursuant to call, at 10 a.m., in room 1100, Longworth House Office Building, Hon. Nancy L. Johnson (Chairman of the Subcommittee) presiding.

[The advisory announcing the hearing follows:]

ADVISORY

FROM THE COMMITTEE ON WAYS AND MEANS

SUBCOMMITTEE ON OVERSIGHT

FOR IMMEDIATE RELEASE
June 7, 1995
No. OV-9

CONTACT: (202) 225-7601

Johnson Announces Oversight Hearing on Coal Industry Retiree Health Benefit Act of 1992

Congresswoman Nancy L. Johnson (R-CT), Chairman of the Subcommittee on Oversight of the Committee on Ways and Means, today announced that the Subcommittee will hold a hearing to examine the operation of the Coal Industry Retiree Health Benefit Act of 1992. This legislation, which was enacted as part of the Energy Policy Act of 1992, related to funding the health benefits of retired coal miners. **The hearing will take place on Thursday, June 22, 1995, in the main Committee hearing room, 1100 Longworth House Office Building, beginning at 10:00 a.m.**

This hearing will feature invited witnesses only. In view of the limited time available to hear witnesses, the Subcommittee will not be able to accommodate requests to testify other than from those who are invited. Those persons and organizations not scheduled for an oral appearance are welcome to submit written statements for the record of the hearing.

BACKGROUND:

The Coal Industry Retiree Health Benefit Act, which was enacted as part of the Energy Policy Act of 1992, established rules for the financing and provision of health benefits to retired mine workers who were members of the United Mine Workers of America (UMWA) and their families.

Prior to the Act, the UMWA and the Bituminous Coal Operators Association entered into a series of collectively bargained agreements to provide members of the UMWA with health and disability benefits. The trusts established to provide these benefits encountered financial difficulties. Of particular concern was the financing of benefits for so-called "orphan retirees" and related beneficiaries whose former employers were no longer in business or were no longer signatories to the collective bargaining agreement (the so-called "reachback companies").

To provide a more stable financing mechanism for coal miners' health and disability benefits, the Act created two new health benefit funds, established eligibility criteria, provided for the assignment of individual beneficiaries to specific companies that will be held responsible for paying premiums on their behalf, and created financing mechanisms. Under the Act, a company is charged an insurance premium based on the number of beneficiaries assigned to the company in its role as the retiree's "last signatory employer." Companies responsible for paying the designated premiums include any company that signed any National Bituminous Coal Wage Agreement since 1950 or any related company as defined under the Act. To cover costs associated with beneficiaries who cannot be assigned, for the first three years after enactment, up to $70 million per year is transferred into the Combined Fund from the surplus in the UMWA 1950 Pension Fund. In addition, interest earnings of the Abandoned Mine Reclamation Fund are transferred into the Fund annually beginning on October 1, 1995. Costs for unassigned beneficiaries in excess of the transfers are allocated to the signatory and reachback companies in proportion to their share of assigned beneficiaries.

The retiree health benefits provisions originated in the Senate; there were no comparable provisions in the House bill. The provisions became effective October 1, 1993.

FOCUS OF THE HEARING:

The hearing will examine: (1) the general effectiveness of the 1992 provisions; (2) the current and future financial status of the Combined Fund; (3) the impact of premiums on small producers and reachback companies; (4) the methods and procedures for collecting premiums and penalties; and (5) the commitment of Social Security Administration resources to calculating premiums, assigning beneficiaries to operators and considering appeals.

"The coal miner retiree health provisions of the 1992 Energy Act addressed a terribly complicated and contentious matter without any input from the House of Representatives," noted Chairman Johnson. "As part of the Ways and Means Committee's ongoing oversight responsibilities, it's time to take a look at whether these provisions are working as they were intended."

DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:

Any person or organization wishing to submit a written statement for the printed record of the hearing should submit at least six (6) copies of their statement, with their address and date of hearing noted, by the close of business Friday, July 7, 1995, to Phillip D. Moseley, Chief of Staff, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. If those filing written statements wish to have their statements distributed to the press and interested public at the hearing, they may deliver 200 additional copies for this purpose to the Subcommittee on Oversight office, room 1136 Longworth House Office Building, at least one hour before the hearing begins.

FORMATTING REQUIREMENTS:

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All statements and any accompanying exhibits for printing must be typed in single space on legal-size paper and may not exceed a total of 10 pages including attachments.

2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. A witness appearing at a public hearing, or submitting a statement for the record of a public hearing, or submitting written comments in response to a published request for comments by the Committee, must include on his statement or submission a list of all clients, persons, or organizations on whose behalf the witness appears.

4. A supplemental sheet must accompany each statement listing the name, full address, a telephone number where the witness or the designated representative may be reached and a topical outline or summary of the comments and recommendations in the full statement. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material being submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press and the public during the course of a public hearing may be submitted in other forms.

Note: All Committee advisories and news releases are now available over the Internet at 'GOPHER.HOUSE.GOV' under 'HOUSE COMMITTEE INFORMATION'.

*****

Chairman JOHNSON. I would like to call the hearing to order.

My Ranking Member will be along soon, but I must excuse myself briefly shortly to testify on the Superfund issue before another Committee, so I would like to start this morning promptly and make a few comments. Then, I will yield the chair to my colleague, Mr. Hancock.

Someone once said that an elephant is a mouse built to government specifications, and it might be said that this morning we are here to examine such a mouse. The Coal Industry Retiree Health Benefits Act of 1992 addressed a legitimate concern about the solvency of the UMWA, United Mine Workers of America, 1950 and 1974 health benefit funds and the ability of those funds to provide benefits for retired coal industry workers and their eligible dependents.

It is less clear whether Federal Government intervention on the order provided under the coal act was an appropriate response. You will recall that it did not get the usual legislative consideration.

I have been trying to think of another instance in which private sector retiree benefits have been negotiated under a collective bargaining agreement, with responsibility for calculating premiums, assigning beneficiaries to specific employers, and considering appeals delegated to the SSA.

I have also been trying to think of another instance in which private sector retiree benefits, negotiated under a collective bargaining agreement, are financed by premiums that are subject to enforcement by the Treasury. I am deeply troubled by the thought that as other employers have difficulty in funding retiree health benefits in the future, public policymakers might turn to the 1992 statute as a model.

Like the story of the "Blind Men and the Elephant," each interest comes to this issue with its own interpretation of reality and, in many cases, even with its own facts.

We have been told that the 1992 statute is the only way to provide fairness to the BCOA, Bituminous Coal Operators' Association, Inc., companies. We have been told that we should provide relief only to the super-reach-back companies, that there should be a carve-out for small companies or hardship cases, and that such a carve-out overlooks inequities faced by larger, profitable companies.

We have also been told that the Combined Benefit Fund is in surplus and is likely to remain so, that the surplus is an anomaly that will soon disappear.

I am not so naive as to believe that we will resolve all of these disagreements today, but it is time to take a look at how the statute is functioning and to establish a factual foundation for considering whether revisions are needed.

It is our intent that every point of view will be heard today. That will take some time.

Welcome. The opening witnesses are at the table.

Mr. Thornton, the Deputy Tax Legislative Counsel for the Department of Treasury, we will start with you, and my apologies for having to be gone.

Before you proceed, there are other Members of the panel who would like to make a statement.

Mr. Hancock.

Mr. HANCOCK [presiding]. Thank you, Madam Chairman.

We will go through this quickly. We have a vote on.

I commend you for holding this hearing today. It is about time we got to the bottom of some of the issues surrounding the coal act of 1992 and the retroactive tax which has been imposed on companies that have been out of the bituminous coal business for decades.

I will say at the outset, I have no constituent interest in this issue. I just believe that the coal act sets a bad precedent and represents bad policy judgment by the Congress.

Perhaps if Congress had properly considered the legislation, reason would have prevailed. Instead, the coal act was added to the Energy Policy Act in conference without prior consideration by the Ways and Means or Finance Committees. Had this issue been properly considered, I am sure that many Members of Congress would have had major concerns over the precedent set by this Act.

I was among only 60 Members of the House who voted against the energy act. Now as I look back at it, that may have been the best "No" vote I ever cast.

Make no mistake about it, the coal act is nothing more than a Congressional bailout of a union benefit plan orchestrated by the Mine Workers Union and those companies which remain in the bituminous coal business. By imposing this tax, which is paid into a private health care plan, Congress has become the ultimate and final arbiter in what was an ongoing collective bargaining process.

Let me remind everyone how we got into this situation. The union and the BCOA, which is comprised of a dozen or so large companies which still mine bituminous coal, got together and formed a coalition 4 years ago to pursue alternative means, including legislation, of solving a health care problem they claimed they could not resolve through normal collective bargaining channels. The BCOA companies pumped almost $3 million into the Coalition and the union contributed about $100,000, but also devoted considerable manpower, material and other resources to the effort.

Let me read just one paragraph from a memorandum the Legislative Director sent to the president of the union in April 1991,

> Creating the atmosphere of crisis is obviously important to our strategy. Getting Congress to act is always difficult in the absence of a pressing need. We are treading a fine line in creating a crisis among the pensioners that can be controlled by us. Using the threat of a strike will be necessary to galvanize interest, but the reality of a strike or a cutoff of benefits creates their own set of problems.

So, the Coalition pushed legislation that used a pension fund surplus, a transfer from the Abandoned Mine Lands Reclamation Fund and reached back to 1950 to impose retroactive taxes on almost 700 businesses.

Was there truly a crisis?

When you look at the status of the health benefit fund today, you see a totally different picture. Not only has every health benefit claim been paid in full and no retiree or dependent been denied a claim due to lack of funds, the UMWA Combined Benefit Fund holds an enormous surplus.

If there was ever any real crisis at all, it was caused by the BCOA's 1988 change in the way health benefit contributions to the

1950 fund were calculated. By changing their funding calculation from a "per-ton" to a "per-hour" contribution method, the BCOA drastically reduced the amount of money they were paying for retiree health benefits. Because tonnage production remained constant and hourly productivity increased, this change saved BCOA companies enormous sums.

Of course, by spreading the cost of these health benefits around to reach-back companies under the coal act, the BCOA companies saved even more. By their own admission, these businesses figure to save $125 million per year between 1993 and 2043. As we listen today to witnesses who say that any change in the coal act will jeopardize a delicate compromise, I hope you question whose interest is served in maintaining the status quo.

Not only have the reach-back companies had to foot the bill for this Act, vast taxpayer resources are being expended to implement it. To start with, the taxpayers gave the Social Security Administration $10 million to assign retirees to the reach-back companies. That money is long gone, but the cash register is still running at SSA.

It is troubling to imagine how much taxpayer money the Departments of Health and Human Services, Labor, Treasury, Justice and others have spent to interject the Federal Government into a private insurance program. In addition to these costs, the Treasury has lost millions in revenue because the money sent to the union for these health care premiums became fully deductible under the act.

John Myers and I have introduced legislation to correct this mess without jeopardizing any benefits enjoyed by those covered by the fund. Twenty Members of the Ways and Means Committee and the Majority Leader in the House have signed on as original cosponsors.

Clearly, some changes will occur in this Act. I consider our bill a compromise between the status quo and outright repeal of the coal act. However, I want to make it clear that I will consider any option that permanently eliminates the onerous retroactive tax that has been placed on the backs of reach-back companies. Since I am Acting Chairman right now, I do not guess I need to thank the chairman. But we are looking forward to the testimony and we are going to recess now to go vote and we will be right back.

Thank you.

[Recess.]

Mr. HERGER [presiding]. We will reconvene the Subcommittee on Oversight, Committee on Ways and Means.

If our first witness on our panel, Michael Thornton, Deputy Tax Legislative Counsel for the U.S. Department of Treasury will proceed, please.

STATEMENT OF MICHAEL B. THORNTON, DEPUTY TAX LEGISLATIVE COUNSEL, U.S. DEPARTMENT OF TREASURY

Mr. THORNTON. Thank you.

Mr. Chairman and distinguished Members of the Subcommittee, I am pleased this morning to present the views of the Treasury Department regarding the Coal Industry Retiree Health Benefit Act of 1992, which I will refer to as the coal act.

The coal act was enacted as part of the Energy Policy Act of 1992. Its goal was to ensure adequate funding of health benefits for retired miners and their families. In 1993, this administration testified before the Committee on Ways and Means in strong support of the goals of this Act. We continue to strongly support those goals.

The Subcommittee has asked us to address several specific issues regarding the coal act: Its general effectiveness, its impact on certain companies, and the procedures for collecting premiums and penalties.

The coal act appears to have been effective in ensuring that benefits that were promised to retired union miners and their families continue to be paid without interruption.

We understand that currently the combined fund is in sound financial condition, although its future financial status is unclear. According to recent analysis by the GAO, the combined fund reported a surplus of about $115 million as of September 30, 1994. However, GAO has stated that future annual surpluses may not occur and annual deficits may erode the current surplus over time. Given this uncertain financial outlook, the administration would be troubled by any modifications to the coal act that would diminish the fund's security.

Finally, the coal act appears to have been effective in ensuring collection of the required premiums, with about 91 percent of the assessed premiums having been collected by the combined fund.

It is difficult if not impossible to isolate the effects of the coal act on the coal industry as a whole or on certain categories of companies within the coal industry. Factors independent of the coal act have reduced the number of mines and mining companies. These factors include major changes in the coal industry, such as a shift to western coal and declining real coal prices. We are aware that concerns have been expressed the coal act may have contributed to financial hardship for certain small companies. However, the administration is concerned that legislative proposals that would provide relief based solely on size or reach-back status could benefit some companies that are not actually experiencing hardship, weaken the combined fund and threaten the health benefits of the retirees and their families.

Responsibilities for administering the combined fund are divided among three entities: the combined fund itself, which is a private nongovernmental multi-employer benefit plan, the SSA, and IRS.

The trustees of the combined fund are responsible for collecting the premiums based on information supplied to them by the SSA. The trustees are restricted by fiduciary duty to the fund from waiving collection of premiums. However, to maximize the fund's return, the trustees may take collection and litigation risk into account in resolving delinquent accounts.

The IRS is not responsible for collecting the premiums, but is responsible for assessing any penalties for noncompliance. The penalty for failure to pay a required premium is $100 per day per beneficiary. Under current law, IRS is limited in its ability to waive the penalty. The situation has not yet created problems because the IRS so far has not assessed the penalty. In its testimony this morning, the IRS will address this matter in detail.

We are concerned that the $100 per-day penalty may be excessive. The first month's penalty alone would exceed the annual premium. As a general policy matter, this level of penalty raises questions in light of the relative level of premiums to which the penalty applies. A revised penalty structure might in certain circumstances provide a better enforcement tool.

If the current penalty structure is retained, it may be desirable to consider limiting the penalty or granting the IRS additional discretion to waive or reduce the penalty in certain cases.

We are willing to work with the Subcommittee to address this and other concerns in a manner that preserves the security of the fund and guarantees that health benefits for retired miners and their families will not be interrupted.

This concludes my prepared remarks.

I will be happy to answer any questions.

[The prepared statement follows]:

STATEMENT OF
MICHAEL B. THORNTON
DEPUTY TAX LEGISLATIVE COUNSEL (TAX LEGISLATION)
DEPARTMENT OF THE TREASURY
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT
COMMITTEE ON WAYS AND MEANS
UNITED STATES HOUSE OF REPRESENTATIVES

Madame Chair and distinguished Members of the Subcommittee:

I am pleased to present the views of the Treasury Department on the Coal Industry Retiree Health Benefit Act of 1992 ("the Coal Act"), which was enacted as part of the Energy Policy Act of 1992, P.L. 102-486. In the letter of invitation, Chairman Johnson has requested that our testimony address: (1) the general effectiveness of the 1992 provisions; (2) the impact of premiums on small and reachback companies; (3) the methods and procedures for collecting premiums and penalties; and (4) whether Treasury has perceived a need to exercise discretion in enforcing premium collection because of the potential impact on some operators.

In testifying before the Committee on Ways and Means in September 1993, the Administration expressed its strong support for the goal under the Coal Act of ensuring adequate funding of retired miners' health benefits. We continue to strongly support this goal.

Background

The Coal Act requires that former employers of retired coal miners finance, in part, the health benefits that previously were negotiated for those miners and their families by the United Mine Workers of America ("UMWA"). Prior to the Coal Act, these benefits were provided for retired miners and their families either by the miner's individual employer or through one of two multiemployer funds -- the 1950 UMWA Health Benefit Fund (the "1950 Fund") or the 1974 UMWA Health Benefit Fund (the "1974 Fund"). Contributions to both Funds were required of signatories to the national wage agreements negotiated between the UMWA and the Bituminous Coal Operators Association, Inc. ("BCOA"). Employers that were not signatories to the national wage agreement also contributed to the Funds under separate wage agreements negotiated with the UMWA.

The 1950 Fund covered miners who had retired as of December 31, 1975, and their beneficiaries. Miners who retired after 1975 generally received health benefits under the single plan of their former employer. However, if the employer went out of business or left the coal industry, the employer's retirees and their beneficiaries were covered by the 1974 Fund. As a result, all of the retirees and their beneficiaries covered under the 1974 Fund were "orphans" for whom no contributions were being made by their former employers. About half of the retirees and their beneficiaries in the 1950 Fund were orphans.

Beginning in the late 1980's, the Funds began to experience serious financial difficulties. As of March 31, 1992, the combined deficit of the Funds reached $140 million and was projected to grow dramatically if no changes were made. The deficit was precipitated by a number of factors, including medical inflation and the trustees' inability to impose certain kinds of containment mechanisms under the Funds. Moreover, the contribution base of the Funds was eroding. In the early 1980's, for example, approximately 2,000 employers contributed to the Funds. That number had fallen to about 300 in 1992.

In March 1990, as part of a compromise that helped settle the Pittston Coal Company strike, then-Secretary of Labor Elizabeth Dole announced the establishment of a special national Coal Commission to study the Funds. In its report, published in November 1990, the Coal Commission agreed that the problems of the Funds could not be solved through private bargaining alone. The Coal Commission recommended establishing a statutory obligation to contribute to the Funds. Although the Coal Commission was divided as to how this obligation should be implemented, there was general agreement that it should cover all then-current signatory employers (companies that had signed the 1988 collective bargaining agreement), as well as certain other signatory employers.

In response to the Coal Commission Report and growing concerns about the continued viability of the Funds and the security of retirees' benefits, Congress passed the Coal Act as part of the Energy Policy Act of 1992.

The Coal Act created two new benefit funds: (1) the UMWA Combined Benefit Fund (the "Combined Fund"), which services beneficiaries receiving health benefits from the 1950 and 1974 Funds as of July 20, 1992; and (2) the UMWA 1992 Benefit Plan (the "1992 Plan"), which services certain employees who retired between July 20, 1992, and September 30, 1994, and whose last signatory employer is not providing them with benefits.

Employees retiring after September 30, 1994, are not covered under the provisions of the Coal Act, but are dependent on the provisions of future bargaining agreements.

Under the Coal Act, any employer that signed a wage agreement with the UMWA since 1950 and has retirees who benefit under the Funds could be obligated to pay premiums for the health benefits of those retirees and their beneficiaries. In addition, employers are obligated to finance the health benefits of "orphans" in the Combined Fund whose former employers are no longer in business. Each employer's share of orphans is proportional to the number of the employer's retirees who receive health benefits under the Combined Fund. Generally, the allocation method assures that costs are shared by all employers that signed UMWA wage agreements providing for retiree health benefits.

In order to reduce premiums associated with orphan beneficiaries who could not be assigned to a particular employer, the Coal Act authorized three annual transfers of $70 million each from the excess assets of the UMWA 1950 pension plan. Beginning October 1, 1995, annual transfers of up to $70 million will come from the interest earnings of the Abandoned Mine Land Reclamation Fund ("AML fund") to cover the costs of orphans.[1] The AML fund is financed by fees assessed on all coal mining companies.[2]

Because beneficiaries were not yet assigned to signatory operators during the first plan year of the Combined Fund,[3] transition rules provided for the 1988 signatories to make contributions to the Combined Fund to finance benefits and administration costs that were not covered by the $70 million transferred from the 1950 Pension Fund. The 1988 signatories receive a credit for these initial contributions against

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[1] To the extent that interest earned on the AML fund falls short of $70 million in any year, the difference is made up out of the interest accumulated during the FY 1993-95 period (about $122 million). In FY 1996, interest earnings on the AML fund are expected to be about $57 million.

[2] The Abandoned Mine Reclamation Fees are levied at the lesser of (a) 35 cents per ton for surface-mined coal and 15 cents per ton for underground-mined coal, or (b) 10 percent of the value of the coal at the mine. For lignite, the rate is the lesser of 10 cents per ton, or 2 percent of the value of the coal at the mine.

[3] The first plan year was a short one, running from February 1, 1993, to September 30, 1993.

subsequent premiums. The 1988 signatories also were required to make transition payments to cover the combined net deficits held by the merged 1950 and 1974 Benefit Plans.

Under the Coal Act, responsibilities for administering the Combined Fund[4] are divided among three separate entities, as described below:

(i) The Social Security Administration (SSA) -- The SSA is responsible for assigning each coal industry retiree receiving benefits to a former employer or related party. The SSA also calculates the annual per-beneficiary premium charged to each former employer. Following the assignment of beneficiaries to employers, the SSA is responsible for informing the former employer and the trustees of the Combined Fund of the assignments. Finally, the SSA is responsible for reviewing appeals raised by employers regarding the assignments of retirees, and reassigning the retirees when appropriate.

(ii) Trustees of the Combined Fund -- As established by the Coal Act under section 9702 of the Internal Revenue Code, the Combined Fund is a private multi-employer plan.[5] The Coal Act provided for a Board of Trustees[6] who were required, among other duties, to establish the Combined Fund, to determine benefits to be paid from the Combined Fund, to establish and maintain accounts of the premiums that are required to be paid to the Combined Fund, to collect the premiums, and to provide information to the SSA, as necessary for carrying out the SSA's duties under the Coal Act.

(iii) Department of the Treasury -- Section 9707 of the Internal Revenue Code imposes a penalty upon an assigned operator for failure to pay a required premium. The statute treats the penalty as an internal revenue tax, and thus the IRS, as part of its general tax administration duties, is responsible for collecting the penalty.

Discussion

1. **The Effectiveness of the 1992 Provisions**

The principal goal of the 1992 provisions was to ensure that benefits promised to retired union miners and their families continue to be paid without interruption. The 1992 provisions appear to have been effective in achieving this goal.

The Combined Fund appears to be in sound financial condition currently, although its future financial status is unclear. According to recent GAO analysis, the Combined Fund reported a surplus of $114.8 million as of September 30, 1994, but future annual surpluses may not occur, and annual deficits may erode the current surplus over time. Given this uncertain financial outlook, the Administration would be troubled by any modifications to the Coal Act that would diminish the security of the Fund.

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[4] The provisions for the 1992 Fund were not developed in as much detail. Responsibility was given to the settlors (the UMWA and BCOA) to work out many of the specific provisions.

[5] The Coal Act provides that the Combined Fund is a plan described in section 302(c)(5) of the Labor Management Relations Act of 1947 (LMRA), an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (ERISA), and a mulitemployer plan within the meaning of section 3(37) of ERISA. Both LMRA and ERISA are administered by agencies in the U.S. Department of Labor.

[6] Section 9702(b) of the Internal Revenue Code provides for the appointment of a board of seven trustees. One trustee is designated by the BCOA to represent employers in the coal mining industry; one trustee is designated by the three reachback companies with the greatest number of eligible employees; and two trustees are designated by the UMWA. These four trustees select the other three.

It appears that the Coal Act also has been effective in ensuring collection of the required premiums. According to representatives of the Combined Fund, approximately 91 percent of the assessed premiums have been paid.[7]

While it appears that the Coal Act has been effective to date, we are aware that concerns about its operation and effectiveness persist. We would be happy to work with the Subcommittee to address such concerns in a manner that will not compromise the security of the funds or otherwise risk interrupting health benefits for retired miners and their beneficiaries.

2. Impact of the Premiums

It is difficult, if not impossible, to isolate the effects of the Coal Act on the coal industry as a whole or on certain categories of companies within the coal industry. The health of the coal-mining industry primarily reflects dynamic factors that are largely independent of the impact of the premiums -- factors such as productivity improvements, price changes and structural shifts.

The coal industry has seen substantial growth in consumption and productivity in recent years. This growth has been accompanied by a shift to western coal, largely due to the higher productivity of long-wall mining and western coal's lower sulphur content. Lower-cost western coal and improved productivity have resulted in declining real coal prices since the mid-1970's.

Technological improvements in mining operations and a shift away from underground mining in the East to less labor-intensive surface mining in the West allowed labor productivity to increase much more rapidly than for most other U.S. industries. Over the period from 1980 to 1992, output per hour of work in coal mining increased at an average rate of 6.65 percent, whereas output per hour of work in all forms of nonfarm business increased at an average annual rate of 1.16 percent. The number of production workers in coal mining fell from 204,000 in 1980 to 101,000 in 1992, while production increased from 830 million tons in 1980 to 998 million tons in 1992. These changes also involved a reduction in the number of operating mines and mining companies. Improvement in mining productivity has placed financial pressure on eastern mines that have not managed sufficient productivity increases.

We are aware that concerns have been expressed that provisions of the Coal Act may have contributed to financial hardship for certain small companies. Legislative proposals have been introduced to provide relief under the Coal Act. The Administration would be concerned, however, about proposals that provide relief without reference to specific financial hardship. These types of proposals could unnecessarily exacerbate the burden of financing retirement health benefits, by imposing an even greater burden on other companies that are not eligible for the relief, but that might be in worse financial condition. In particular, any relief provisions based solely on a company's size or status as a reachback company, which does not necessarily reflect its financial condition, could weaken the Combined Fund and threaten the benefits of the retirees and their families.

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[7] According to representatives of the Combined Fund, its collection program is designed to resolve all the delinquencies, either through collection or uncollectibility determinations, after weighing the time and expense involved in the investigations and the likelihood of successful recovery.

3. Methods and Procedures for Collecting Premiums and Penalties

As noted above, premiums under the Coal Act are assessed and collected through the efforts of the trustees of the Combined Fund, based on assignments made by the Social Security Administration. In addition, the Coal Act imposes a penalty for delinquent premium payments. Pursuant to the Coal Act, this penalty is treated in the same manner as an internal revenue tax. Consequently, the Internal Revenue Service, as part of its general authority to assess and collect taxes and penalties, has jurisdiction over the collection of the penalty.

Because operators have the ability to appeal the assignment by the SSA, reliable information regarding liability for premiums currently is not immediately available following the annual billing.[8] In addition, assessment of the penalty prior to collection action with respect to the premiums by the Combined Fund would reduce funds available for providing benefits to retired miners and their families.[9] Moreover, in some cases the resources required for collecting the penalties may exceed the reasonable expectations of collection, given the financial condition of an operator.

Because it would be premature to attempt to assess penalties before the completion of collection efforts by the Combined Fund, the IRS has not assessed penalties to date. However, representatives of the IRS have met with the Combined Fund regarding the coordination of their collection efforts with the implementation of the penalty. In its testimony this morning, the IRS will address these matters in detail.

4. Exercise of Discretion in Enforcing Premium and Penalty Collection

The trustees of the Combined Fund are responsible for collecting premiums, and they are restricted by their fiduciary duty to the fund from waiving collection of premiums. To maximize the return to the fund, it appears that the trustees could take collection and litigation risks into consideration, as well as the fact that any penalties collected by the IRS would be paid to the government rather than to the Combined Fund.

The IRS is responsible for assessing any penalties for noncompliance. The Coal Act provides for two types of penalties for failure to make required contributions:

(i) Penalty for Delinquent Contributions of Transition-Year Payments. As described above, the Coal Act required 1988 signatory employers to make initial contributions for the Combined Fund's first short year (February 1, 1993, to September 30, 1993). Under section 9704(i)(1)(C) of the Internal Revenue Code, the penalty for failure to make these initial contributions is nondeductibility of contributions to the Combined Fund, until such time as the failure is corrected. No discretion is provided to waive this penalty, nor would any such discretion appear necessary or appropriate, since the penalty terminates once the taxpayer makes the required contribution.

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[8] Under section 9706(f)(5) of the Internal Revenue Code, an assigned operator is required to pay premiums pending review by the SSA. If the retirees are reassigned, the operator is allowed a credit against premiums for other retirees.

[9] Penalties for nonpayment of premiums are paid to the government rather than the Combined Fund.

(ii) Penalty for Delinquent Premium Payments. The penalty for failure to pay a required premium is $100 per day per beneficiary, for the period commencing on the due date for the required premium or installment, and ending on the date of payment of the premium or installment. The penalty is not imposed if it is established to the satisfaction of the Secretary of the Treasury that none of the persons responsible for the failure knew, or exercising due diligence, would have known that the failure existed. In addition, the penalty is not imposed if the failure was due to reasonable cause and not to willful neglect and the failure is corrected within 30 days after any of the persons responsible for the failure knew or should have known that the failure existed. Moreover, if the failure is due to reasonable cause and not to willful neglect, the Secretary of the Treasury has authority to waive all or part of the penalty to the extent that he determines that payment of the penalty would be excessive relative to the failure involved.

Under these provisions, the Treasury Department is limited in its ability to waive the penalty for delinquent premiums. In particular, this standard for relief generally does not allow for the waiver of penalties for nonpayment based solely on the financial hardship of the taxpayer.[10]

Because, as noted above, the IRS has not yet attempted to assess the penalty for delinquent premiums, the IRS's limited ability to waive the penalty has not yet created problems.

Nonetheless, we are concerned that the $100 per-day, per-beneficiary penalty for delinquent premiums may be excessive. The first month's penalty alone (from $2800 to $3100) would exceed the annual premium (about $2350 for FY 1995).

As a general policy matter, this level of penalty raises questions in light of the relative level of premiums to which the penalty applies. Moreover, collection of the penalty may act at cross purposes to the goals of the Coal Act. Enforcing the penalty could adversely affect certain taxpayers' financial conditions, which in turn could jeopardize the payment of future premiums and result in reduced contributions to the Combined Fund, contrary to the goals of the Coal Act.

For these reasons, a revised penalty structure may, in certain instances, provide a better enforcement tool. In this regard, if the current penalty structure is retained, it may be desirable to consider granting additional discretion to the Secretary of the Treasury to waive or reduce the penalty for delinquent premiums in certain cases. In addition, we would be willing to work with the Congress to explore means of restructuring the penalty provision to limit the aggregate penalty while still providing an adequate incentive for prompt payment of premiums.

Conclusion

The Administration believes that the Coal Act has been effective in achieving its goal of ensuring uninterrupted health benefits for retired union miners. We continue to believe that the Coal Act was a reasonable solution to a difficult problem.

With respect to the enforcement provisions, we recognize that under current law the penalty for delinquent premiums may, in certain circumstances, become excessive relative to the required premium. We are willing to work with the Congress to address this and other concerns in a manner that would preserve the security of the Fund and the uninterrupted provision of health benefits to retired miners and their families.

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[10] The IRS has general authority to compromise a full tax liability, including interest and penalties, through an offer in compromise, where it is determined that the tax is uncollectible and the offer in compromise is in the best interests of both the taxpayer and the government.

Mr. HERGER. Thank you, Mr. Thornton.
Phil Brand, Chief Compliance Officer, IRS.

STATEMENT OF PHIL BRAND, CHIEF COMPLIANCE OFFICER, INTERNAL REVENUE SERVICE

Mr. BRAND. Mr. Chairman and distinguished Members of the Subcommittee, I appreciate the opportunity to appear before the Subcommittee today to discuss IRS' participation in administration of the Coal Industry Retiree Health Benefit Act of 1992.

The coal act was enacted as part of the Energy Policy Act of 1992, and it establishes a method for funding health and death benefits for retired coal miners, their spouses and dependents. The act establishes a scheme for funding benefits by assigning retirees to operators and requiring premium payments based on the number of retirees assigned. The SSA is responsible for assigning retirees to operators and calculation of the per beneficiary premium. Trustees of the combined fund are responsible for assessing and collecting the premiums. IRS' role is to impose sanctions for failure to make required payments to the fund.

Payments required of operators during the transitional year, February 1, to September 30, 1993, are called contributions. Payments required after the transitional year are called premiums. The act imposes one sanction if a required contribution is not made, and another if a required premium is not paid.

Penalties are one important tool in administering the tax law. IRS' policy with respect to penalty administration is that penalties should be used to encourage voluntary compliance. Even though other results such as raising revenue or reimbursements of the cost of enforcement may also arise when penalties are assessed, the IRS will design and administer penalty programs solely on the basis of whether they do the best possible job of encouraging compliant behavior.

Since the IRS is not involved in determining and/or collecting the required payments, our responsibility then is to administer the sanctions in a manner that will foster voluntary compliance with the act. Based on information obtained from representatives of the combined fund, it is our understanding that compliance with the act is very high. We believe that approximately 91 percent of the assessed premiums are collected. Furthermore, of the amounts that have not been collected, almost half is either subject to of escrow agreements with operators contesting the constitutionality of the act, or is attributable to operators known to be the subject of bankruptcy proceedings. The remaining uncollected premiums are spread among small or insolvent or defunct operators who have been determined not to be collectible by the combined fund.

Operators who fail to make the required contributions during the transitional year are not allowed a deduction for all such contributions, or other contributions allowable under section 404(c) of the IRS Code on their income tax return until the delinquency is corrected; operators who fail to pay premiums timely are subject to a penalty of $100 per day per beneficiary for each day after the due date until the premium is paid.

IRS then is responsible for ensuring that the deduction is not allowed for delinquent contribution payments. In addition, we are

responsible for assessing and collecting the penalty for delinquent premium payments.

Since the IRS is not involved in determining and collecting the required payments, sanctions can only be imposed when we are aware of whose is delinquent, the amount of the delinquency and the type of payment that is delinquent, a contribution or a premium.

To impose the deduction disallowance sanction, the IRS needs the following information; the identity of the delinquent operators, the amount of the required contribution, and the time when the required contribution is paid in full.

Based on discussions with the combined fund, as to the potential liability of operators being reversed by appeal to the SSA, we have determined that the most efficient use of our enforcement resources is to obtain the needed information on delinquent contributions through referrals from the combined fund.

In August 1993, the trustees of the combined fund sent the IRS a list of delinquent operators and requested IRS to enforce the deduction disallowance sanction. However, after consultation with IRS counsel, we determined that enforcement was premature since few if any of the operators would have filed their tax returns covering any part of the transactional planned year. Thus, action was delayed until the actual filing of the tax returns.

These returns are now due and presumably have been filed. Since we are now selecting business returns for 1993 for audit, we will use a requested update of the August 1993 list to inspect the tax returns and determine if a examination is warranted for the contribution deduction.

When the premium payment is delinquent, the IRS needs the following information to enforce the penalty sanctions: The identity of the delinquent operators; the number of beneficiaries associated with the delinquent premium; the number of days the premium is delinquent for each beneficiary; and the time when the required premium is paid in full.

As mentioned earlier in my testimony, information from the combined fund indicates that 91 percent of the assessed premiums have been paid. The fund has also indicated that proofs of claim, settlement negotiation suits and other actions are pending for 95 percent of the uncollected premiums. Taking into consideration the high level of compliance and that actions are under way to collect 95 percent of the uncollected premiums, the IRS has decided the most judicious use of our enforcement resources would be to focus on those operators referred to us by the combined fund. We are working closely with the fund. To date no referrals have been received, and thus no penalties have been assessed.

In conclusion, our policy is that penalties should be used to foster voluntary compliance. It would not benefit the fund, the beneficiaries, or the IRS to indiscriminately assess penalties against companies that are financially unable to pay the premiums.

This concludes my prepared remarks.

I would be happy to answer any questions you or other Subcommittee Members may have.

[The prepared statement follows:]

STATEMENT OF PHIL BRAND
CHIEF COMPLIANCE OFFICER
BEFORE

SUBCOMMITTEE ON OVERSIGHT
HOUSE COMMITTEE ON WAYS AND MEANS

JUNE 22, 1995

Madame Chairman and Distinguished Members of the Subcommittee:

I appreciate the opportunity to appear before this Subcommittee today to discuss IRS' participation in the administration of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act).

Background

The Coal Act was enacted as part of the Energy Policy Act of 1992. The Coal Act establishes a method for funding health and death benefits for retired coal miners and their spouses and dependents. Three organizations have responsibilities for administering the provisions of this Act -- Social Security Administration, trustees of the Combined Fund, and the IRS.

The Act established a scheme for funding benefits by assigning retirees to operators and requiring premium payments based on the number of retirees assigned. The Social Security Administration is responsible for assigning retirees to operators and calculation of the per-beneficiary premium. Trustees of the Combined Fund are responsible for assessing and collecting the premiums. IRS' sole responsibility is to impose sanctions for failure to make required payments to the fund.

Payments required of the operators during the transitional year (February 1, 1993 to September 30, 1993) are called contributions. Payments required after the transitional year are called premiums. The Act imposes one sanction if a required contribution is not made, and another if a required premium is not made.

IRS Responsibilities

Penalties are one important tool in administering the tax law. IRS' policy with respect to penalty administration is that penalties should be used to encourage voluntary compliance. Even though other results, such as raising revenue, punishment, or reimbursement of the costs of enforcement may also arise when penalties are assessed, the IRS will design and administer penalty programs solely on the basis of whether they do the best possible job of encouraging compliant behavior.

Since the IRS is not involved in determining and/or collecting the required payments, our responsibility is to administer the sanctions in a manner that will foster voluntary compliance with the Act. Based on information obtained from representatives of the Combined Fund, it is our understanding that compliance with the Act is very high. We have been informed that approximately 91% of the assessed premiums are collected. Furthermore, of the amounts that have not been collected, almost half is either the subject of escrow agreements with operators contesting the constitutionality of the Act or is attributable to operators known to be the subject of bankruptcy proceedings. The remaining uncollected premiums are spread among small insolvent or defunct operators and have been determined to be not collectible by the Combined Fund.

Sanctions

Operators who fail to make required contributions during the transitional plan year are not allowed a deduction for all such contributions (or other deductions allowable under section 404(c) of the Internal Revenue Code) on their income tax return until the delinquency is corrected. Operators who fail to pay premiums timely are subject to a penalty of $100 per day per beneficiary for each day after the due date until the premium is paid.

IRS, then, is responsible for ensuring that the deduction is not allowed for delinquent contribution payments until the delinquency is collected. In addition, IRS is responsible for assessing and collecting the penalty for delinquent premium payments.

Since the IRS is not involved in determining and collecting the required payments, sanctions can only be imposed when we are aware of who is delinquent, the amount of the delinquency, and the type of payment that is delinquent -- a contribution or a premium.

Delinquent Contributions

To impose the deduction disallowance sanction, the IRS needs the following information:

- the identity of the delinquent operators,
- the amount of the required contribution, and
- the time when the required contribution is paid in full.

Based on discussions with representatives from the Combined Fund [as to the potential liability of operators being reversed by appeal to the Social Security Administration], we have determined that the most efficient use of our enforcement resources would be to obtain the needed information on delinquent contributions through referrals from the Combined Fund.

In August 1993, the trustees of the Combined Fund sent the IRS a list of delinquent operators and requested that IRS enforce the deduction disallowance sanction. However, after consultation with IRS Counsel, we determined that enforcement was premature since few if any of the operators would have filed their tax returns covering any part of the transitional plan year. Thus, action was delayed until the actual filing of the tax returns.

These returns are now due and presumably have been filed. Since we are now selecting business returns filed for tax year 1993 for audit, we will use a requested update of the August 1993 list of delinquent contributors to inspect the tax returns and determine if an examination is warranted for the contribution deduction.

Delinquent Premiums

When the premium payment is delinquent, the IRS needs the following information to enforce the penalty sanctions of the Act.

- the identity of the delinquent operators,
- the number of beneficiaries associated with the delinquent premium,
- the number of days that the premium is delinquent for each beneficiary, and
- the time when the required premium is paid in full.

As I mentioned earlier in my testimony, information from the Combined Fund indicates that 91% of the assessed premiums have been paid. The Fund has also indicated that proofs of claim, settlement negotiations, suits or other actions are pending for 95% of the uncollected premiums. Taking into consideration the high level of compliance -- 91% -- and that actions are underway to collect 95% of the uncollected premiums, the IRS has decided that the most judicious use of our enforcement resources would be to focus on those operators referred to us by the Combined Fund for delin quent premiums. Thus, we are working closely with the Fund to obtain this information on a systematic basis when they have determined willful nonpayment. To date, no referrals have been received from the Fund; thus, no penalties have been assessed.

Conclusion

In conclusion, our policy is that penalties should be used to foster voluntary compliance. It would not benefit the Fund, the beneficiaries, or the IRS to indiscriminately assess penalties against companies that are financially unable to pay the premiums. In these situations, a large penalty assessment would not result in collections to the Fund, but rather cessation of business operations and/or bankruptcy of the company. In these situations, a penalty does not encourage voluntary compliance with making the required payments under the Act.

Representatives of the Combined Fund are cooperating with the IRS to ensure that we do not indiscriminately and prematurely impose the sanctions under the Coal Act. We are, of course, ready to exercise both sanctions when entities flagrantly disregard the law.

Madame Chairman, this concludes my prepared remarks. I would be happy to answer any questions you or other Subcommittee members may have.

Mr. HERGER. Thank you.

Next is Dr. Lawrence H. Thompson, Ph.D., Principal Deputy Commissioner, the Social Security Administration. You are accompanied by Marilyn O'Connell, your Deputy Associate Commissioner.

STATEMENT OF LAWRENCE H. THOMPSON, PH.D., PRINCIPAL DEPUTY COMMISSIONER, SOCIAL SECURITY ADMINISTRATION; ACCOMPANIED BY MARILYN G. O'CONNELL, DEPUTY ASSOCIATE COMMISSIONER FOR PROGRAM BENEFITS POLICY

Mr. THOMPSON. Thank you, sir.

I am here to discuss SSA's role in administering this program. I am accompanied by Marilyn O'Connell, who has been directing implementation of our coal act responsibilities.

I will begin by briefly reviewing our responsibilities and then I will discuss our progress in carrying out these responsibilities.

The SSA was assigned three responsibilities under the coal act; first, to calculate the amount of the health benefit premium for each beneficiary; second, to assign each miner to a coal operator who will be responsible for the health benefit premiums for that miner and any beneficiary eligible because of the relationship to that miner, and to notify the operator of that assignment; third, to decide requests by the coal operators for review of the assignments.

SSA has calculated the premiums and notified the trustees of the combined fund of the premiums for each year since the law was enacted. We have also completed the process of making the initial assignments. As was required by law we completed that by October 1993.

The third of these responsibilities under the coal act, which has turned out to be very complex and time consuming, is the responsibility for reviewing the assignments when requested. The law provides that an assigned operator may, within 30 days of receipt of the assignment notice, request detailed information from us as to the work history of the miner and the basis for an assignment. The assigned operator then has 30 additional days, after receiving that information, to request a review of the assignment.

After the initial assignment notices were sent out, operators requested from us over 40,000 earnings records, as well as the basis on which the assignments were made for these 40,000 miners. Retrieving these records was a labor-intensive operation. The earnings information that we have since 1978 is available electronically, but earlier earnings information is maintained on microfilm and requires manual searches.

We completed mailing out all of the requests for earnings records by February 1994. After the earnings records were sent to the assigned operators, the operators had 30 days to request a review. We received requests for review from 471 coal operators concerning the assignments of approximately 24,500 miners. The review requests were based on a wide range of allegations; for example, operators disputed that they were ever in the coal business, ever were a signatory to an agreement or that they should be considered a related company.

Because of the variety of the reasons the operators alleged for contesting assignments, we developed a two-stage process. First, we did a determination to see whether a company was in fact a coal operator eligible for assignment of miners. Those companies which were found not to be eligible for assignment were relieved of responsibility for any miners.

Having worked our way through most of the operators, we then went to the second stage, to review the earnings records of all the miners for whom there is a request for review, to determine whether the assignments should be adjusted, and, where adjustments were made, to determine who were the companies that seemed to be eligible for assignment.

The review process has been long and involved because of the difficulties encountered in attempting to secure documentation and in evaluating evidence submitted by the companies. In addition, some operators requested and were granted extra time, as much as 240 days to submit evidence. Much of the evidence submitted was old, incomplete and difficult to interpret. In addition, it was necessary to contact various organizations and agencies to determine the status and relationships of numerous companies.

We have now made decisions on 8,500 of the 24,500 cases included in the review requests. We have informed the requesters whether their appeal is allowed or denied. We will be sending out the new assignment notices by the end of the month.

We expect to have all of this first round of appeals finished by the end of September. Of course, the employers to whom these 24,500 cases were reassigned can appeal the reassignment, starting a new round of reviews and appeals.

By law, SSA cannot use trust fund moneys for work related to this program. Thus, SSA requested and Congress provided a supplemental appropriation of $10 million for fiscal year 1993. Congress also approved a change in our administrative expense account language which permits us to use administrative funds to carry out the coal act and then be reimbursed subsequently.

To date, we have used essentially all the $10 million of the initial appropriation. How much more we will need depends on how many appeals we get of the reassignments that we are now making. If we receive requests for reviews of subsequent assignments at a rate comparable to the rate that we have received for initial assignments, the additional cost could be as much as $10 million.

In conclusion, we have been given a difficult and complex task. We have carried out our responsibilities of calculating the premiums and the initial assignment to the mine operators in the timeframe contemplated by the statute, but we are now in the midst of a complex process of working through the appeals and adjusting the status of the assigned miners when companies bring to our attention new facts about their corporate relationships.

I will be happy to answer any questions you have.

Thank you.

[The prepared statement follows:]

STATEMENT OF LAWRENCE H. THOMPSON
PRINCIPAL DEPUTY COMMISSIONER OF SOCIAL SECURITY

Madame Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the role of the Social Security Administration (SSA) under the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act). Let me begin by briefly reviewing the requirements of the law and the responsibilities which were assigned to SSA. Then, I will discuss SSA's progress in carrying out these responsibilities.

Requirements of the Law

The Coal Act merged the 1950 and 1974 benefit plans of the United Mine Workers of America (UMWA) into a new "Combined Fund," administered by a board of trustees as a private tax-exempt employee benefit plan. This new Fund is designed to provide lifetime health benefits (and death benefits) for beneficiaries of the old plans--retired miners and their dependents or survivors. Benefits are financed from funds transferred from UMWA pension plans, premiums paid by coal operators, and transfers of amounts from the Abandoned Mine Land Reclamation fund.

Under the law, coal operators pay premiums for all beneficiaries who are determined to be their responsibility. The premiums are established by formulas in the law. The law provides for them to pay a pro rata share of the premium cost for beneficiaries for whom no assignment of responsibility can be made (unassigned beneficiaries). However, because the Fund had adequate financing for the two years ending September 30, 1995, the coal operators did not have to pay premiums for unassigned beneficiaries for those years. With the plan year beginning October 1, 1995, these premiums will be transferred to the Fund by the Department of the Interior out of the Surface Mining Control and Reclamation Trust Fund.

SSA Responsibilities

SSA was assigned three responsibilities under the Coal Act:

- To calculate the amount of the health benefit premium for each beneficiary;
- To assign each miner to a coal operator who will be responsible for the health (and death) benefit premiums for that miner and any beneficiaries eligible because of their relationship to the miner, and notify the operator of that assignment; and
- To decide requests by the coal operators for review of assignments.

Let me now briefly discuss each of these responsibilities.

Calculating the Premium

The law states that the health benefit premium amount is to be based on the average dollar amount of health benefits paid per person under the old plans for the plan year beginning July 1, 1991, updated to take account of the increase in the medical component of the Consumer Price Index (CPI). The law requires us to calculate the premium for each plan year beginning on or after February 1, 1993. The first plan year began on February 1, 1993, because that is the date the old plans were merged to create the Combined Fund. By law, subsequent plan years began on October 1, 1993, and each succeeding October 1.

The Coal Act requires that the premium calculation be based on the following information: (1) the aggregate amount of payments from both the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including administrative costs) for the plan year beginning July 1, 1991, for all individuals covered under the plans for

that plan year, and (2) the number of such individuals covered under the plans for that plan year. The aggregate cost divided by the number of individuals, increased by the percentage increase in the medical component of the CPI from 1992 to the year in which the plan year begins, produces the premium per individual.

SSA has calculated the premiums and timely notified the Trustees of the Combined Fund of the premiums for each year since the law was enacted.

Assignment Procedures

Our second task involved assigning responsibility for each miner to the appropriate coal operators. The Coal Act specifies the criteria we were to use.

The Combined Fund identified approximately 80,000 miners--both living and deceased--who were covered by the Act. The Bituminous Coal Operators Association provided us a list of approximately 15,000 of these miners for whom certain large coal operators voluntarily acknowledged premium responsibility. For these miners, and their dependents or survivors, we simply sent a confirming notice of assignment to the coal operators and to the Combined Fund.

The remaining 65,000 miners had to be assigned to a coal operator following the criteria set forth in the law. In general, there are three factors that are considered in determining to which coal operator a miner is assigned--length of a miner's employment with a coal operator who was a signatory to a UMWA wage agreement (also called a signatory operator), recency of that employment, and the date the wage agreement was signed by the operator and the UMWA.

More specifically, the law states that a miner must be assigned to a coal operator according to the following order of priority:

- To the last active signatory operator (as defined previously) for whom the miner worked at least 2 years under a UMWA agreement (or if an inactive signatory, to its related company, if any) provided that the operator is also a 1978 signatory.

- To the last active signatory operator for whom the miner worked under a UMWA agreement (or if an inactive signatory, to an active related company, if any) provided the operator is also a 1978 signatory.

- To the active signatory operator of any agreement for whom the miner worked the longest under a UMWA agreement (or if an inactive signatory, to an active related company) in the period prior to 1978.

- If no assignment can be made under the above criteria, the miner is treated as "unassigned." This means that, because responsibility for the premium cannot be assigned to a particular signatory operator, the miner is assigned to a pool, for which each assigned operator pays a pro rata share of the premiums.

Before we could even begin the assignment process, we had to develop lists of assignable coal operators. These lists were developed by SSA using information which was provided to us by the Bituminous Coal Operators Association and the UMWA, SSA employer records, information provided by operators in court suits and testimony in those suits, and other available sources of information on the coal mining industry, such as the Keystone Manual. It was very difficult to develop an accurate list of

coal operators because most sources of information on companies did not include the employer identification number which SSA records use to differentiate companies with similar (often identical) names. We used as much information as was available, such as similar addresses, but still had many companies erroneously included in the information provided by the UMWA. In fact, we continue to update the lists throughout the assignment process and the review process as we learn more about the companies.

In order to make an assignment using the criteria I described above, we must perform two separate operations: searching Social Security earnings records to reconstruct a miner's individual employment history; and matching that history against the lists of signatory coal operators and related companies who meet the above criteria and are still in business.

Once we have searched our earnings records to establish the miner's work history, we then use the criteria in the law to determine which coal operator is liable for the miner's health benefit premiums by matching the employment history with the lists of signatory operators.

We also use the information we obtained to identify any company which is "related" to a signatory company which is no longer in business. Under the Coal Act, the "related" company of a coal operator no longer in business may also be assigned responsibility for the miner's premium. Companies are related if they were:

- Members of a controlled group of corporations;
- A trade or business under common control with a signatory operator;
- Members with the signatory operator in a partnership or joint venture in the coal industry which employed eligible miners (but not a limited partner); or
- A successor in interest to a related company.

If a signatory operator is no longer in business, we must determine whether there is a company which, as of July 20, 1992, or, if earlier, as of the time immediately before the operator ceased to be in business, was "related" to the signatory operator. If so, and if the related company is still in business, it becomes responsible for the beneficiary's premiums. In general, we based our determinations regarding related companies on the industry sources I mentioned previously.

SSA completed the process of making the initial assignment decisions by October 1, 1993, as required by law.

Review of the Assignment Decisions

SSA's third responsibility under the Coal Act, which has turned out to be very complex and time consuming, was to review each of the assignments, if requested by a coal operator. The law provides that an assigned operator may, within 30 days of receipt of the assignment notice, request detailed information from us as to the work history of the miner and the basis for the assignment. The assigned operator then has 30 days from receipt of that additional information to request review of the assignment. The statute requires the operator to provide evidence constituting a prima facie case of error in order to have the assignment reviewed.

After the initial assignment notices were sent to the assigned operators, operators requested over 40,000 earnings records, as well as the basis on which the assignments were made. In order to provide this information, SSA had to reconstruct some of the earnings records (which averaged eight pages per record) and provide copies of all of the earnings records with the justification for which each assignment was made to the operators.

Retrieving these records was a labor-intensive operation. Each earnings record contains a history of the miner's wages and the names and addresses of employers. While earnings information is electronically available beginning with wages reported for 1978, earlier earnings information is maintained on microfilm and requires a manual search. SSA completed the mailing of the earnings records by February 1994.

After the earnings records were sent to the assigned operators, the operators had 30 days to request a review of the assignment. SSA received requests for review from 471 coal operators concerning assignments for 24,541 miners. The review requests were based on a wide range of allegations, for example, the company disputed that it was ever in the coal business, was a signatory to an agreement, or should be considered a related company.

Because of the variety of the reasons the operators alleged for contesting assignments, SSA developed a two-stage review process:

- For those appeals in which the company alleged that it should not be assigned any miners because it was not a signatory to a UMWA wage agreement or is not in business, or due to a similar reason involving the status of the company, we did a first stage determination in one location to determine whether that company is in fact a coal operator eligible for assignment of miners. Those companies which were found not to be eligible for assignment were relieved of responsibility for all miners.

- The second stage involves reviewing the earning records of all miners for whom there is an appeal from the original assignment. Those miners who were assigned to companies which were relieved of all assignments are reassigned to another company or to the unassigned pool. All others are either affirmed, reassigned, or included in requests for review which are denied because the operator did not file the request timely or failed to submit evidence.

The review process has been long and involved because of the difficulties encountered in attempting to secure documentation and in evaluating evidence submitted by the companies. In addition, some operators requested and were granted extra time to submit evidence. Some were granted up to 240 days to submit evidence. During the review process, all allegations and evidence submitted by the companies required extensive examination and evaluation. Many of the documents were court orders, legal business transaction papers, business permits, contracts, and pages from old business publications. Much of the data were old, incomplete, and difficult to understand. In addition, it was necessary to contact various organizations and agencies to determine the status and relationships of numerous companies. These contacts included State agencies, business bureaus, and public libraries which can verify the current status of certain businesses. We also contact the UMWA Fund to verify signatory agreements, dates of the agreements, and coverage status of employees.

We have completed virtually all of the stage one determinations and more than a third of the stage two determinations. Of the 471 requests, only 15 requests are still being considered at the first stage level. Decisions have been made regarding 8,417 of the 24,541 assignments reflected in these review requests. Of these, 4,930 assignments were modified (3,536 miners reassigned to other companies and 1,394 miners designated unassigned), 3,393 assignments were affirmed, and 94 were included in requests for review which were denied because the operator did not file the request timely or failed to submit evidence. Notices of affirmation and denial have already been released; reassignment notices are expected to be released by the end of June 1995.

If, after considering a request for review, SSA decides to change a miner's assignment, SSA applies the assignment criteria I described above to make the reassignment. Each new assignment is subject to the review process I described above. There are currently about 90 companies involved in litigation concerning the assignment of miners. Because the suits are still pending, I cannot discuss them.

Cost of SSA Workloads

The Coal Act did not provide funding for us to perform the work required of SSA. By law, SSA cannot use trust fund monies for work which is unrelated to Social Security programs. For this reason, SSA requested, and Congress provided, a supplemental appropriation of $10 million for Fiscal Year 1993 to give SSA the necessary initial funding for this work. The funds were adequate to complete the assignments and begin the reviews. Congress also approved a change to SSA's 1994 administrative expense account appropriation language which permits SSA to use its administrative funds to carry out the requirements of the Coal Act and provides for reimbursement to the Social Security trust funds, with interest, not later than September 30, 1996.

SSA spent $8 million of the supplemental appropriation in Fiscal Year 1993, and carried over $2 million into Fiscal Year 1994. SSA spent another $1.3 million of the supplemental in Fiscal Year 1994, and carried over $0.7 million into Fiscal Year 1995.

If SSA receives requests for reviews of subsequent assignments at a rate comparable to the rate of requests for review of the initial assignments, we estimate the cost could increase by as much as $10 million. We expect this amount to be spent over the Fiscal Year 1995-1996 period. Part of this work will be funded through the remaining supplemental appropriation, and the balance from the administrative expense account, with subsequent reimbursement from general revenues.

Conclusion

In conclusion, Madame Chairman, despite being given a difficult and complex task, SSA has carried out all of its responsibilities under the Coal Act concerning the calculation of premiums and the initial assignment of miners to operators. We continue the process of adjusting the status of the assigned miners as companies bring out new facts about corporate relationships and are processing the remaining requests for review as quickly as we can. I would be happy to answer any questions you may have.

Mr. HERGER. Thank you very much.

Mr. Brand, I appreciate your testimony.

Mr. Thornton, we want to welcome you before our Committee for the first time.

I would like to ask you a question.

Do you believe that the trustees have the discretion as to when to impose penalties?

Mr. THORNTON. The trustees have a fiduciary responsibility to the fund to collect the maximum amount of revenues for the fund. In collecting premiums themselves, they have a certain amount of discretion to consider the costs involved in collecting the premiums versus the likelihood of collecting them. I think that once that process is completed, the responsibility for collecting the penalties is not with trustees, but with the IRS. So, in that sense the trustees do not have discretion to waive penalties but they have a certain amount of discretion with respect to collection of the premium itself.

Mr. HERGER. Thank you.

If discretion is needed, and it sounds like it might be in some instances; does that suggest that there is a problem with the act itself?

Mr. THORNTON. There may be an excessive penalty in the act. Currently, the penalty is $100 per day per beneficiary and that can mount up to a sizable penalty in a short time. We would be willing to consider ways to adjust that penalty. As of yet, it has not been a problem because no one has been assessed that penalty.

I think Mr. Brand has explained in some detail why that has happened. Certainly, we could be willing to reopen and explore the penalty structure of this act.

Mr. HERGER. Then the last question, are you satisfied that the fund trustees are meeting their common law and statutory duties under section 4980(b) of the Internal Revenue Code as fiduciaries?

Mr. THORNTON. We have no reason to think otherwise. Since the combined fund is a multiemployer nongovernmental benefit plan, the Labor Department has oversight responsibilities over the plan. To date, we are not aware of any irregularities that have required any particular action on the part of the Labor Department.

Mr. HERGER. Thank you.

The gentleman from Missouri, Mr. Hancock will inquire.

Mr. HANCOCK. I would like to get to the bottom line as quickly as possible.

Why should the Federal Government have any role in any privately financed, privately administered retiree health plan?

Mr. THORNTON. The Federal Government's role in this plan is actually fairly limited. The SSA, is involved in the assignment of employers and beneficiaries. IRS is involved in collection of penalties. The plan itself is a private nongovernmental fund run by trustees representing both coal companies and coal miners.

There is a transfer beginning in 1995 of moneys from the Abandoned Mine Land Fund to help defray the cost of orphan beneficiaries, but that is pretty much the extent of the Federal Government's involvement. I think at the time the act was enacted, it was recognized that this was a unique situation relating to the coal mines going back to the Truman era of 1946.

Then Labor Secretary Elizabeth Dole's commission decided something more than collective bargaining would be needed to fix the situation. The previous administration was active in working out this compromise.

Having reviewed the bill, we have come to the conclusion that it was a reasonable solution to a very difficult situation, the main objective being to make sure miners' benefits are provided.

Mr. HANCOCK. Here again, I think the actual answer to the question is of course that it got included in an act that nobody was in there when you get down to it. Very few people knew it was in there. At least the Ways and Means Committee did not know anything about it at the time.

Can you tell me how many penalty enforcement actions for failure to pay premium Treasury has initiated?

Mr. BRAND. At this time, we have asserted no penalties and thus no attempts to collect have been made.

Mr. HANCOCK. The trustees of the combined fund, are they providing you with names of individuals and corporations that are in arrears in paying their premiums to the fund as directed by the coal act? Are you getting this information?

Mr. BRAND. There are two types of information.

First, there are sanctions that apply to the contributions during the transitional year. They furnished us information previously on companies that had not made those contributions. However, the sanction in that situation is a sanction that applies to a disallowance of certain deductions on the income tax return of the business entity. Since those returns had not yet been due, we have imposed none yet. Those returns now of course would have been due and presumably filed.

In our audit cycle, we will be into the returns this year that relate to that particular year of filing. We expect in August an updated list and we will put them into the return cycle and evaluate them, whether we should examine that or not.

In terms of the penalties, we have not received a referral yet. It would appear that the compliance rate here is so substantial, and the referral of nonpayment would be from defunct small companies, so that the application of penalties wouldn't make sense.

Mr. HANCOCK. What is the SSA's involvement in this? I understand that there is quite a backlog of organizations that have appealed their assignments. Is that backlog problem being solved?

Mr. THOMPSON. Yes. We realized, after we made the initial round of assignments, when people came in to appeal, that a lot of the appeals had to do with whether a firm should have been assigned any miners. Did we have the wrong firm? We did not have the employer identification numbers for a lot of these firms. We had to guess at which firm it was and we got some wrong.

Then there were questions about whether this firm was a legitimate successor of a firm that had been in the coal business. It was clear we were going to have to work through all of those issues before we reassigned coal miners or else we would just be reassigning coal miners from one firm to another firm that shouldn't have been assigned a coal miner in the first place.

We have spent a good deal of time sorting through to make sure that our list of companies eligible to be assigned a miner was a

valid list. We think we have that pretty well straightened out and now we are actually assigning the miners. That has been the delay. We should have that wrapped up for this round in another couple of months.

We have about 24,500 miners involved in requests for review. I said in the testimony we have 8,500 that were assigned as of a week ago. We think the other 16,000 will be taken care of in the next couple of months.

Mr. HANCOCK. I understand that there have been some 200 companies that were initially notified that they might have some liability under this act, that have been released from all liability; is that correct?

Mr. THOMPSON. That is about right.

Mr. HANCOCK. Would you give me an estimate of how many companies that you did not find? Are you convinced that you found all the companies that you were supposed to find?

Ms. O'CONNELL. Let me answer that. In the initial round, we found a lot of wrong companies and that is the 200 you are talking about. As we have gone through the appeals, through the evidence furnished by the companies in the appeals, we have identified companies that did not receive assignments in the first round that will when we do the reassignments. For example, we may have had 20 companies with identical names and very close addresses, and we got the wrong one. Now we presumably have the right one. So, I do not have an estimate of that number until we have done the reassignments, but we will have identified companies who did not receive assignments in the first round.

Mr. HANCOCK. Are you telling me that there are companies out there now that are going to get a notice in the near future that they owe money into a pension plan or into a health benefit plan that were not a party to the contracts and do not know anything about it?

Mr. THOMPSON. They were presumably a party to the contract but previously we had identified a different company and now we realize we made a mistake.

Ms. O'CONNELL. They have to have been a signatory during the appropriate period and the miner had to have worked for them or a predecessor company in the right period, so they would have been a party to the contract.

Mr. HANCOCK. Is it unusual in our scheme of things to have companies that have changed hands a number of times, and have not been in the coal business for maybe 20, 25 years, to later find that there is a contingent liability that the new owners are not aware of and had no record of. Do you know of another instance where we have done something like this?

Mr. THOMPSON. That has arisen several times. I will defer to somebody else on the question of whether that is reasonable or not.

Mr. HANCOCK. I think we know the answer to that.

Mr. THOMPSON. It has happened a couple of times.

Mr. HANCOCK. Can you give me a specific where it has happened?

Mr. THOMPSON. No.

Mr. HANCOCK. Are we going back to 1950 and telling people that they owe money for employee benefit plans?

Ms. O'CONNELL. That is correct.

Mr. HANCOCK. You cannot think of any other time?

Ms. O'CONNELL. Eastern Enterprises is no longer in the coal business. They sold that part of the company, and received assignments for that reason.

Mr. HANCOCK. I understand. The bill that we have introduced, I want to reiterate, is not going to take any benefits away from the miners that are retired. However, I think it is a case of who is going to pay for it rather than taking away any benefits. That certainly is not our position at all.

Thank you, Madam Chairman.

Chairman JOHNSON [presiding]. Thank you.

I did not get a chance in my earlier statement to welcome you, Mr. Thornton. This is your first opportunity to be on the other side.

Mr. THORNTON. Thank you very much.

Chairman JOHNSON. We appreciated your service on the Committee and we appreciate your service in the executive branch.

Mr. THORNTON. It is an honor to be here.

Chairman JOHNSON. Are you having any problems with the premium dollars flowing in and the way they were anticipated? In other words, are people paying and are they paying the amount that you expect them to pay?

Mr. BRAND. I might respond to that. The collection of the premiums is with the fund itself, the combined fund. But the indications are that 91 percent of the premiums are being paid timely and that another 5 percent are subject to various types of arrangements such as escrow, litigation or bankruptcy, so there is a high degree of compliance in the actual payment of the premiums.

The understanding is that the unpaid premiums are small amounts spread among a number of small companies that in many, many instances are insolvent or bankrupt themselves.

Chairman JOHNSON. The figure that we were given was that there were 200 companies that were delinquent.

Mr. BRAND. My understanding is that the 200 companies are not necessarily delinquent. They are in various stages of appeals or may have been relieved of responsibility or may be in bankruptcy. I believe that may be a question that is better asked of the fund representatives themselves. They would have that information.

Chairman JOHNSON. We will certainly do that.

Mr. Zimmer.

Mr. ZIMMER. Thank you, Madam Chairman.

I would like to ask Dr. Thompson and Ms. O'Connell whether you are familiar with the very recent Federal District Court case of the National Coal Association against Secretary Shalala, which was decided June 2 of this year and held that the SSA did not properly compute the premium amount under the 1992 coal act?

Mr. THOMPSON. I have heard of the case. I have been told that the case was decided.

Mr. ZIMMER. Can you tell the Subcommittee whether the SSA plans to appeal this decision?

Mr. THOMPSON. The staff is evaluating that and they haven't brought me a recommendation yet, so I cannot tell you today what we are going to do.

Mr. ZIMMER. Does the staff consider this decision to be an important one?

Mr. THOMPSON. I am sure.

Mr. ZIMMER. Do you know approximately what the total amount of premiums annually is and the total that could be eliminated if the National Coal Association case is upheld on appeal?

Mr. THOMPSON. I would rather supply that for the record.

Mr. ZIMMER. Certainly. I have no further questions. Thank you.

[The following was subsequently received:]

The figures in the first column are the per beneficiary premiums for each of the plan years as determined by SSA. The second column shows what the per beneficiary premium for each year would have been had they been computed using the method determined by the District Court to be the correct computation method. Since SSA does not have information about totals of premiums billed by the combined fund, we cannot determine the total effect of the court decision.

Per Beneficiary Premium	Original	Court Case
1st Plan Year (02/01/93–09/30/93)	= $2,245.83	$2,013.83
2d Plan Year (10/01/93–09/30/94)	= 2,245.83	2,013.83
3d Plan Year (10/01/94–09/30/95)	= 2,349.38	2,106.68

Chairman JOHNSON. I thank the panel for your testimony this morning and for your assistance in the future.

[Additional written Subcommittee questions and the responses submitted to IRS and Treasury follow:]

QUESTIONS FOR TREASURY AND THE INTERNAL REVENUE SERVICE

1. How many penalty enforcement actions for failure to pay premiums has the Treasury initiated, pursuant to section 9707 of the Internal Revenue Code?

A. Taking into account the high level of compliance and that actions are underway to collect 95 percent of the delinquent premiums, the IRS has decided that the most judicious use of its enforcement resources would be to focus on those operators referred to the IRS by the Combined Fund for delinquent premiums. The IRS is working closely with the Fund to obtain this information on a systemic basis when they have determined willful nonpayment. To date, no referrals have been received from the Fund; thus, no penalties have been assessed.

2. Are the trustees of the Combined Benefit Fund providing you with the names of individuals or corporations who are delinquent in making their premium payments?

A. Information from the Combined Fund indicates that 91 percent of the assessed premiums have been paid. The Fund has also indicated that proofs of claim, settlement negotiations, suits or other actions are pending for 95 percent of the uncollected premiums. It would not benefit the Fund, the beneficiaries, or the IRS to indiscriminately assess penalties against the companies that are financially unable to pay the premiums. Representatives from the Fund are cooperating with the IRS to ensure that we do not indiscriminately and prematurely impose the sanctions under the Coal Act.

3. Is it the responsibility of the Treasury Department to inquire as to whether the premiums due the Fund under the Act are actually being paid? Or do you simply wait for referrals of non-payers from the Fund?

A. The statute does not address the reporting of delinquent operators by the Combined Fund. As noted in the answer to question 2, the IRS has met with Fund representatives regarding the coordination of collection efforts with the implementation of the penalty.

4. There are some reports that there are more than 200 delinquent companies. If you have not received referrals from the Fund, does that concern you?

A. The number of delinquent companies does not reflect the amount of uncollected premiums. Our discussions with the Combined Fund indicate that 91 percent of the assessed premiums have been collected. Of the amounts that have not been collected, almost half are either the subject of escrow agreements with operators contesting the constitutionality of the Act or are attributable to operators known to be the subject of bankruptcy proceedings. The remaining uncollected premiums are spread among small insolvent or defunct operators and have been determined to be not collectible by the Fund.

5. Do you believe the Trustees have discretion as to when to impose penalties?

A. No. The Trustees do not impose penalties and therefore have no discretion whether to impose penalties.

6. Does the Treasury or the Service have some discretion as to when to impose penalties?

A. Under the statute, the Secretary of Treasury may waive all or part of the penalty, in the case of a failure that is due to reasonable cause and not to willful neglect, to the extent that it is determined that the payment of the penalty would be excessive relative to the failure involved.

7. If discretion is needed, does that suggest that there is a problem with the Act itself?

A. As stated in our testimony, we are concerned that the penalty may be excessive in certain cases, and a revised penalty structure may provide a better enforcement tool. However, we do not believe that this issue reflects problems with the basic financing structure of the Act -- requiring former employers to finance the health benefits promised to retired miners and their families.

8. Are you satisfied that the Fund Trustees are meeting their common law and statutory duties under section 4980(B) of the Internal Revenue Code as fiduciaries?

A. The Coal Act provides that the Combined Fund is a plan described in section 302(c)(5) of the Labor Management Relations Act of 1947 (LMRA), an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (ERISA) and a multiemployer plan within the meaning of section 3(37) of ERISA. The fiduciary duties are under ERISA. Both the LMRA and ERISA are administered by agencies in the U.S. Department of Labor.

9. Have you received adequate funding from the Congress to carry out your penalty enforcement responsibility under the Act?

A. The IRS did not receive any additional funding to administer the penalty provisions of the Coal Act. It does not benefit the Fund, beneficiaries, or the IRS to assess penalties against companies that are financially unable to pay the premiums or in cases where a penalty assessment will result in cessation of business operations or bankruptcy of the company. Additionally, it would not be a judicious use of IRS resources to assess penalties in these situations.

10. Do you have adequate personnel to carry out your penalty enforcement responsibility under the Act?

A. Since the IRS did not receive additional funding to administer the Coal Act, resources to enforce the penalty provision would be redirected from other compliance activities. The IRS is ready to impose the sanctions in the Act when a penalty assessment will encourage voluntary compliance with making the required payments under the Act.

We will proceed with the next panel.

Russell Crosby, acting executive director of the United Mine Workers; John Ladley, partner, Ernst & Young; and Jeffrey Gathers, principal, Towers Perrin, Cleveland, Ohio.

Mr. Crosby, if you will proceed.

As we mentioned earlier, your full statement will be included in the record, and we ask you to summarize.

STATEMENT OF RUSSELL U. CROSBY, ACTING EXECUTIVE DIRECTOR, UNITED MINE WORKERS OF AMERICA, HEALTH AND RETIREMENT FUNDS

Mr. CROSBY. Good morning, Madam Chairman, gentlemen.

I am Russell Crosby, acting executive director of the UMWA Health and Retirement Funds.

Thank you for inviting me here today to review the status of the UMWA Combined Benefit Fund and the UMWA 1992 Benefit Plan.

In 1992, when Congress passed the coal act, it created both the combined fund and the 1992 plan. Today, the combined fund serves over 92,000 retired miners and their dependents. With an average age of 73, almost 90 percent are eligible for Medicare and about 20 percent also receive Federal black lung benefits.

Four thousand three hundred retired miners and their dependents receive benefits from the 1992 plan, with an average age of 51, and about 44 percent eligible for Medicare; 5 percent also receive Federalblack lung benefits.

The combined fund receives financing from three sources, first, the beneficiaries themselves participate by the transfer of $210 million from the 1950 Pension Trust. This has covered the cost of benefits for unassigned or orphan beneficiaries in the first 3 years of the fund's existence. Transfers of interest from the Abandoned Mine Reclamation Fund are expected to pay for benefits for the unassigned pool of beneficiaries for another 10 years.

Second, companies that signed the 1988 Coal Wage Agreement pay premiums for beneficiaries assigned to them. They paid for the combined fund's first year operations as well. Those companies also fund the 1992 plan while continuing single employer health plans for their retirees.

Third, reach-back companies pay premiums for retired miners and dependents who worked for them and are now assigned to them under the act. This parallels the premium obligation of the companies that signed the 1988 Coal Wage Agreement.

Both the combined fund and the 1992 plan have contracted with United Health Care Corp., a national leader in health care management, to provide claims administration and cost management services on a prepaid risk basis. United is now developing managed care initiatives to maximize the cost efficient delivery of benefits.

Health care cost-containment is not new to retired miners. The 1950 and 1974 benefit plans began cost-containment programs in 1984, with the result that for comparable services, the UMWA Benefit Trust had per capita expense trends almost 1 full percent below those of the Medicare Program.

In 1990, HCFA approved the funds' demonstration program for Medicare part B services. Since then, Medicare has paid the fund

a negotiated flat fee per beneficiary and the fund assumed the risk of providing part B services within that cost.

During the first years of the demonstration, the fund received more in payment than the cost of services, primarily by reducing medical fees. This is the source of most of the combined fund's net asset balance. However, for the current year and the anticipated future, the combined fund is expected to break even on the arrangement because Medicare has significantly reduced the amount it pays us.

The trustees are concerned about the likely effect on the combined fund of any overall reduction in Medicare benefits. Such a development can only increase the risk of future shortfalls in income in relation to the cost of benefits.

A new demonstration proposal to extend the Medicare capitation arrangement to cover part A as well as part B services has been submitted to HCFA. While the proposal is under consideration, the fund and United Health Care are working to develop networks and other managed care interventions to maximize the quality of care while minimizing cost.

We believe that these benefit plans are a model of the kind of health care delivery and payment systems that the Congress has hoped to promote nationally.

While Guy King of Ernst & Young will discuss the financial outlook of the combined fund, I can summarize the current picture. The fund's audited financial statements show that for the plan year ended September 1994, the Combined Benefit Fund had net assets of $114.8 million. It provided $338 million in medical benefits, of which $159 million were covered by Medicare and black lung payments. In addition, death benefits of almost $13 million were paid out.

Roughly, $92 million of the combined fund's net asset balance comes from the Medicare relationship, not premiums paid by employers. Other sources include collection of pre-coal act delinquencies and credits of first-year contributions made by companies that signed the 1988 Coal Wage Agreement but had no beneficiaries assigned.

Audited financial statements for the 1992 plan for the year ended December 31, show it had net assets of $1.3 million. During that year, the plan provided almost $10 million in medical benefits of which $2 million was covered by Medicare and black lung payments.

In October 1993, Social Security provided a list of companies with beneficiary assignments and the fund immediately billed all companies the premiums owed for their retirees and their dependents.

Companies appealed over 35,000 of the individual beneficiary assignments but Social Security expects to complete the appeals process this fall. These ongoing appeal decisions have caused a shifting of liability among companies as well as to the unassigned pool.

To ensure that premiums owed are paid, we maintain a systematic and aggressive program to collect delinquent contributions. While the coal industry includes a number of large, financially stable companies who reliably contribute to the fund, it also has

many small undercapitalized employers who start up and then shut down after a short time, often falling delinquent in the process.

Bankruptcies are also common in the industry, but we have not observed a significant increase in bankruptcy filings since the passage of the coal act. There was an annual average of 44 new bankruptcy filings involving the funds in each of the 5 years prior to the coal act, but there were only 36 new bankruptcy filings in the year after the coal act became effective.

Under the coal act, the combined fund beneficiaries are assigned to 688 different companies which are part of 520 control groups. So far, 215 of these companies have been relieved of liability as a result of Social Security appeal decisions.

Approximately 91 percent of assessed premiums have been paid. Of the $30 million of delinquent premiums, about half is owed by two companies, one of which has entered into an escrow-type arrangement.

A total of 217 operators were delinquent as of March 1995. We are in the process of suing, filing proofs of claim or negotiating settlements in matters covering approximately 95 percent of the delinquent premiums owed by these companies. The remaining 5 percent is owed by numerous small employers who were assigned small numbers of beneficiaries. Many of these are out of business or have filed potentially successful appeals from their assignments.

While the uncertainties resulting from the Social Security appeals process have prevented final calculations of premium shortfalls or surpluses for the first two plan years, premiums appear to have fallen short of expenses.

The trustees asked Guy King of Ernst & Young to prepare actuarial projections of the combined fund's financial position over the next 10 years. As the former Chief Actuary of the Health Care Financing Administration, Mr. King is uniquely qualified for this work.

You have his report.

Mr. King has also explained the reasons why the projections of large surpluses found in the Towers Perrin study are improbable. Towers Perrin apparently relies on inconsistent assumptions, they assume that the combined fund's future cost trends will grow at a dramatically lower rate, but that the MCPI, which governs future premiums, will not experience a corresponding downward movement.

The fund's cost trends are closely linked to Medicare, and Medicare makes up a large portion of the MCPI. As Mr. King will explain in more detail, the pattern of premiums falling short of expenses is likely to continue into the future. The assets gathered from the Medicare Program and prior period collections will be needed to cover these future shortfalls.

I am now prepared to respond to any questions the Committee might have.

Thank you.

Mr. Ladley.

[The prepared statement follows:]

STATEMENT OF RUSSELL U. CROSBY
ACTING EXECUTIVE DIRECTOR OF THE
UMWA HEALTH AND RETIREMENT FUNDS

Before the House Ways and Means Committee
Subcommittee on Oversight
June 22, 1995

Good morning, Madam Chairman and Members of the Subcommittee. It is my pleasure to be here today to address your inquiries concerning the administration of the UMWA Combined Benefit Fund and the 1992 UMWA Benefit Trust in accordance with the provisions of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act").

HISTORICAL PERSPECTIVE

Before I discuss the specifics of the operations of these two funds, let me first provide you with some important background information. As you know, the provision of retiree health benefits in the coal industry has a long history dating back almost 50 years to the agreement between the then Secretary of the Interior, Julius A. Krug and John L. Lewis, President of the United Mine Workers of America ("UMWA"). The Krug-Lewis Agreement established an unprecedented system for providing health and pension benefits to active and retired miners and their families. Through subsequent collective bargaining agreements between the UMWA and the Bituminous Coal Operators' Association, Inc. ("BCOA"), this comprehensive health delivery system was carried forward, funded by contributions paid to the health trusts by signatory employers.

The health delivery system that was established through collective bargaining has been continuously administered by the UMWA Health and Retirement Funds ("Funds"), which is a collective reference to the family of employee benefit trusts that provide health and pension benefits to eligible miners and their eligible dependents. Prior to the enactment of the Coal Act, the Funds consisted of five trusts: the UMWA 1950 Pension Trust, the UMWA 1950 Benefit Plan and Trust, the UMWA 1974 Pension Trust the UMWA 1974 Benefit Plan and Trust, and the UMWA Cash Deferred Savings Plan of 1988.

THE COAL COMMISSION

By the late 1980s the UMWA 1950 and 1974 Benefit Trusts were in deep financial difficulty due to the diminishing number of contributing employers, rising costs and especially the relative growth of the population of "orphan" beneficiaries, those whose signatory employers had either gone out of business or refused to sign subsequent National Bituminous Coal Wage Agreements ("NBCWA") and stopped contributing. In 1989, then Secretary of Labor Elizabeth Dole created the Advisory Commission on United Mine Workers of America Retiree Health Benefits ("Coal Commission") to evaluate the problems facing the Funds and to propose a long term solution. After study, the Coal Commission projected that the financial difficulties of the 1950 and 1974 Benefit Trusts would worsen, resulting in a combined deficit of $300 million by 1993. The Commission also recognized that

> Retired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they planned their retirement years. That commitment should be honored. (Coal Commission Report at 1.)

Consequently, the Coal Commission made a number of recommendations, including a recommendation that companies signatory to past National Bituminous Coal Wage Agreements ("NBCWAs") should bear the cost of providing health benefits to their own retired miners. The Coal Commission also recommended that current and former signatory employers collectively share the cost of providing health benefits to retirees whose employers no longer existed ("orphan" miners). According to the Commission, the fairest method of financing this promised health care encompassed the "imposition of a statutory obligation to contribute on current and past signatories, mechanisms to prevent future dumping of retiree healthcare obligations, authority to utilize excess pension assets and the implementation of state-of-the-art managed care and cost containment techniques." (Coal Commission Report at 60.)

THE COAL ACT

In October 1992, Congress enacted the Coal Act as part of the Energy Act of 1992. It is a stated policy of the Coal Act "to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits..." to coal industry retirees. This policy is effectuated through the identification of the "persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees."

The Coal Act merged the 1950 and 1974 Benefit Trusts into a new private trust fund called the UMWA Combined Benefit Fund. Beneficiaries of the 1950 and 1974 Benefit Trusts as of July 20, 1992 are now covered by the Combined Benefit Fund, which has a statutory mandate to provide benefits on a prepaid risk basis and, to the maximum extent feasible, substantially the same coverage that was provided under the 1950 and 1974 Benefit Trusts as of January 1, 1992.

The Coal Act provides for financial stability of the Combined Benefit Fund by drawing from three constituent sources. First, the beneficiaries themselves were required to participate by the transfer of $210 million from the 1950 Pension Trust in three installments of $70 million in each of the first three plan years. This has been enough to cover the cost of providing benefits to the "unassigned" or orphan beneficiaries in the Combined Fund during these years. (For an additional ten years, transfers from the Abandoned Mine Reclamation Fund are expected to continue to cover this unassigned beneficiary cost.)

Second, operators who signed the 1988 NBCWA are required to pay premiums for beneficiaries assigned to them and a proportionate share of the death benefit cost and the cost of unassigned beneficiaries, to the extent this cost is not covered by the transfers described above. They were also required to advance funds to cover the first plan year's operations. In addition, the 1988 agreement operators provide the guaranteed funding of the 1992 Benefit Plan and are required to continue the single employer health plans for retirees in place as of the effective date of the Act. The creation of the 1992 Plan and continuation of the single employer plans contribute to the stability of the Combined Fund by allowing for the closed population of the Combined Fund, limiting the potential growth of its expenses.

Third, the coal industry operators who signed Coal Wage Agreements prior to 1988, often referred to as "reachbacks," are required to pay premiums for beneficiaries assigned to them and a proportionate share of the death benefit cost and the cost of unassigned beneficiaries, to the extent that this cost is not covered by the transfers described above. This obligation of the reachbacks parallels the 1988 agreement operators' premium

obligation. However, unlike the 1988 agreement operators, the reachbacks have no other obligations. Moreover, under the assignment criteria of section 9706, retirees are generally assigned to the employers who employed them more recently, so that a retiree who worked first for a reachback company and later for a 1988 agreement operator would be assigned to the 1988 agreement operator.

Pursuant to the Act, the UMWA and the BCOA created the UMWA 1992 Benefit Plan to provide health benefits to a class of orphan beneficiaries not covered by the Combined Fund. This class includes beneficiaries who would have received benefits from the 1950 or 1974 Benefit Trusts but were excluded from the Combined Fund by its cut-off date of July 20, 1992. It also includes those beneficiaries whose employers have failed in their duty under the Act to provide benefits under single employer plans. Beneficiaries of the 1992 Benefit Plan must derive their eligibility from mine workers meeting the age and service requirements for eligibility as of February 1, 1993, who have retired on or before September 30, 1994. Thus the maximum number of potentially eligible beneficiaries of the 1992 Plan is the number who could be eligible for benefits under single employer plans mandated by section 9711.

The 1992 Benefit Plan is funded by two kinds of premiums. Prefunding premiums are paid by all 1988 agreement operators who maintain single employer plans under the Act, based upon the roughly 62,000 beneficiaries in such plans, as they are all potentially eligible beneficiaries of the 1992 Plan. Per beneficiary premiums are owed by employers who last employed beneficiaries actually receiving benefits from the 1992 Plan.

DEMOGRAPHICS OF THE COMBINED BENEFIT FUND AND THE 1992 PLAN

There are currently 92,083 retired miners and dependents covered by the Combined Benefit Fund. These beneficiaries, on average, are over 73 years old. Approximately 36% of Combined Fund beneficiaries are over 80 years old and that number is expected to exceed 50% in the next 6 years. Over 88% of Combined Benefit Fund beneficiaries are eligible for Medicare benefits and more than 19% of these beneficiaries also receive federal Black Lung Benefits.

There are 4,301 retired miners and dependents covered by the 1992 Benefit Plan. The average age of this population is 51; approximately 44% are eligible for Medicare benefits and 5% also receive federal Black Lung benefits.

Beneficiaries of the Combined Benefit Fund and the 1992 Benefit Plan are spread across the United States. However, the heaviest concentrations of beneficiaries are found in the coal field areas in southern West Virginia, western Pennsylvania, Ohio, Virginia, Kentucky, Alabama, Illinois, Tennessee, Florida and Indiana.

COVERED BENEFITS

Pursuant to the Coal Act, the health benefits provided to eligible beneficiaries under both the Combined Benefit Fund and the 1992 Plan is a continuation of the level of coverage that was provided by the former 1950 and 1974 Benefit Trusts. That plan of benefits is designed to provide beneficiaries with access to high quality health care with minimal out-of-pocket expenses while also containing costs. The Trustees do, however, have authority under the Coal Act to make certain revisions to the health plan in order to preserve its financial solvency. At the present time, covered services include inpatient and outpatient hospital care, physician and other primary care services, insulin

and prescription drugs, skilled nursing care and extended care, certain home health services and other benefits such as vision care, durable medical equipment, hearing aids and necessary ambulance services. For services that are covered by the plans, the cost sharing requirements are a $5 copay per physician visit, up to annual maximum of $100 per family, and a $5 copay per 30-day prescription or refill, up to an annual maximum of $50 per family. Beneficiaries are also protected by the Funds' Hold Harmless program against costs resulting from certain payment denials (i.e. charges that are denied payment as medically unnecessary or as excessive fees).

ADMINISTRATION OF THE PLANS

Both the Combined Benefit Fund and the 1992 Benefit Plan provide a "one stop shopping" approach for eligible beneficiaries and their providers. The Funds has processed and paid Medicare benefits on behalf of its beneficiaries since the inception of the Medicare program in 1965. Pursuant to the continuation of an arrangement with the Health Care Financing Administration ("HCFA"), the Funds pays Medicare Part B benefits (except for those Part B services that are processed by the Part A fiscal Intermediaries) for the Medicare eligible beneficiaries of the Combined Benefit Fund and the 1992 Benefit Plan. In addition, under an arrangement with the U.S. Department of Labor entered into in 1984, the Funds administers the health benefits portion of the federal Black Lung program for Funds' beneficiaries. Thus, plan benefits "wrap around" both the Black Lung and Medicare benefits.

As a result of a competitive bidding process, effective January 1, 1995, the Trustees of the Combined Benefit Fund and the 1992 Benefit Plan contracted with the United HealthCare Corporation ("UHC") for the delivery of administrative and cost management services to their beneficiaries. UHC is a large, well-recognized, national leader in the health care management industry. Pursuant to its agreements with the Combined Benefit Fund and the 1992 Benefit Plan, UHC assumed the administration and management of the health care benefits of each fund on a pre-paid risk basis. UHC is now developing managed care initiatives to continue cost efficient delivery of benefits to this population.

Although some of the UHC initiatives will be new, the idea of cost containment in health care is not new to the UMWA Benefit Funds' population. The UMWA 1950 and 1974 Benefit Plans began successful cost management programs under the NBCWA of 1984 and expanded those programs under the NBCWA of 1988. Because of these programs, the 1950 and 1974 Benefit Trusts experienced significantly lower rates of cost increase per beneficiary than did the national population and dramatically lower rates than populations of comparable age. As the Ernst and Young study demonstrates, in a comparison of comparable services, from 1986 through 1994, the UMWA Benefit Trusts have had a per capita expense trend of increase of 0.8% below the trend of increase for the Medicare program.

Among the most successful cost management programs of the UMWA Health Funds prior to the formation of the Combined Fund were a national medical fee limit program, a drug pricing program based on negotiated acquisition cost for prescription drugs, strict limits on fees for durable medical equipment, including oxygen, drug and medical utilization review, including rebundling of lab and surgery fees, and promotion of the use of generic drugs. While the 1950 and 1974 Benefit Trusts paid providers on a fee for service basis with beneficiaries free to choose providers, the beneficiary population has always been extremely cooperative with the Funds' cost containment efforts, and this has enabled the Funds to negotiate for providers' cooperation in

programs to reduce costs. The Funds has maintained good communications with beneficiaries and providers to implement these programs through staff members at eight field service offices in the coalfields and through frequent mailings of information in beneficiary news letters.

THE MEDICARE ARRANGEMENT

As I mentioned earlier, the Funds has enjoyed a longstanding relationship with the Medicare program. At the time the Medicare Act was passed in 1965, the Funds provided most physician and related services through clinics in the coalfields that it helped sponsor. These clinics were paid on a retainer or other non-fee-for-service basis. However, starting in 1978, a fee-for-service system that embodied freedom-of-choice of providers was adopted. At the inception of the Medicare program, the Funds became a Group Practice Prepayment Plan and subsequently assumed its current status as a Health Care Prepayment Plan ("HCPP"). For a number of years, Medicare reimbursed the Funds for its beneficiaries' Part B medical and administrative expenses on a "reasonable cost" basis. That arrangement changed in 1990 when HCFA approved the Funds' demonstration proposal and entered into a capitation agreement for Part B services. Pursuant to that arrangement, HCFA pays the Funds a negotiated flat fee per beneficiary per month and the Funds assumed the risk of providing the Medicare Part B services for that fee. To the extent that these benefits cost less than the monthly fee to provide the services, the excess monies are the Funds' to keep and use to pay other benefits. However, HCFA's liability is also capped. Consequently, if the cost of Medicare services exceed the HCFA payments, the Funds must absorb the difference.

During the first years of the Medicare demonstration, the Funds received more in payment than the cost of services, and this is the source of most of the Combined Funds' current net assets. However, for the current year and the anticipated future, the Funds are expected barely to break even on the arrangement.

In January 1995, the Funds, on behalf of the Combined Benefit Fund and the 1992 Benefit Plan, submitted a demonstration proposal to HCFA to extend the capitation arrangement to cover Part A as well as Part B services for its beneficiaries. The Funds developed this proposal jointly with United HealthCare as a means of more effectively managing the health care costs of the Combined Benefit Fund's and the 1992 Benefit Plan's elderly population. The proposal is under consideration at HCFA. In the meantime, the Funds and UHC are moving forward with the development of networks and other managed care interventions to maximize the quality of care received by beneficiaries while minimizing cost.

COAL ACT ASSIGNMENTS

Under the Coal Act, the Secretary of Health and Human Services was required to assign beneficiaries to operators in accordance with certain attribution rules that are set out in the Act. 26 USC Section 9706. Beneficiaries who could not be assigned using the assignment rules set forth in the Coal Act are placed in the unassigned pool. As required by the Coal Act, the Fund transmitted to the Secretary information relating to the benefits and covered beneficiaries under the former 1950 and 1974 Benefit Plans and financial information for the Secretary's use in the calculation of the annual health premium. The Funds has also provided information as requested by the Secretary concerning the signatory status of operators and the work histories of covered beneficiaries for use in the assignment process.

In October 1993, the Secretary provided the Funds with a comprehensive list of assignments, and the Funds immediately billed all assigned operators and their related persons for the premiums and has pursued collection of the monies owed to the Fund. However, many operators appealed the assignments made by the Secretary--over 35,000 individual beneficiary assignments have been appealed--and the Secretary expects to complete that appeal process in the Fall of 1995. As a result of the appeals, there has been a shifting of liability among operators, as well as to the unassigned pool. The Funds hopes that much of the liability will be finally established by early next year. In the meantime, the Funds tracks the appeals decisions made by the Secretary, making adjustments to operator billings where appropriate.

FINANCIAL STATUS OF THE COMBINED BENEFIT FUND

Although Guy King of Ernst & Young is here today to discuss the financial outlook of the Combined Benefit Fund, let me briefly summarize the current financial picture of that Fund. The most recent audited financial statements of the Combined Benefit Fund show that for the plan year ended September 30, 1994, the Combined Benefit Fund had net assets of $114,829,000. During that plan year, the Combined Benefit Fund provided medical benefits to beneficiaries in the amount of $319,211,000, of which $159,280,000 was covered by Medicare and DOL (black lung) payments. In addition, $12,653,000 in death benefits was paid to the families of deceased beneficiaries.

As I stated earlier, most of the Combined Funds' net assets, approximately $91.5 million of the total of $114.8 million, comes from the margin of success in the early Medicare capitation program. Other sources have been collections of pre-Coal Act delinquencies and credits of first year contributions of 1988 Agreement operators. While the uncertainties resulting from the Social Security Administration appeal process have prevented final calculations of premium shortfalls or surpluses for the first two plan years, we can discern that premiums appear to have fallen short of expenses for these years. Therefore, premium payments have not been the source of the net assets. As Mr. King will explain in more detail, it appears most likely that this pattern of premium shortfalls will continue into the future, so that the assets gathered from the early years of the Medicare demonstration program and collections of past obligations are likely to be needed to cover these shortfalls.

The figures presented here are from our statements of accrued assets and liabilities. It is important to note that Generally Accepted Accounting Principles require accrual-based accounting for employee benefit plans that pay health care claims. This is because of the fact that health care services are received by beneficiaries months and even years before the plan receives, processes and pays the providers' bills. Thus, the cash receipts for any given period, even up to a year, are not likely to correspond to the cash disbursements for the same period. The appearance of cash surpluses or shortfalls at any given time is, therefore, never a good indication of the plan's financial position.

FINANCIAL STATUS OF THE UMWA 1992 BENEFIT PLAN

I also will present a brief summary of the financial situation of the 1992 Benefit Plan. The most recent audited financial statements for the plan year ended December 31, 1994 show that the 1992 Benefit Plan had net assets of $1,295,000. During that plan year, the 1992 Benefit Plan provided medical benefits to beneficiaries in the amount of $9,783,000, of which $2,126,000 was covered by Medicare and DOL (black lung) payments.

DELINQUENCY COLLECTION

As required by the Employee Retirement Income Security Act of 1974 (ERISA), the Funds maintains a systematic, diligent, program to collect delinquent contributions. This program is designed to take appropriate action to pursue every delinquency until contributions due are collected or a determination is made that the contributions are not collectible after diligent effort, due to insolvency and shutdown of the employer, including all jointly and severally liable entities. While the coal industry includes a number of large, financially stable employers, it also includes many small employers who often commence operations and then cease after a few years, (and sometimes after only a few months) due to adverse business conditions or adverse mining conditions. Such employers are often undercapitalized and often become delinquent in their contributions prior to cessation of operations.

Thus, bankruptcies are common in the coal industry, primarily because of its competitive nature. Since the enactment of the Coal Act, the number of bankruptcy filings appears to be trending slightly downward. The number of bankruptcy cases involving the Funds averaged 51 new filings annually in the ten years prior to the Coal Act, and averaged 44 new filings annually in the five years prior to the Coal Act, and numbered 36 new filings in the year after the Coal Act became effective. The frequency of bankruptcy poses a special challenge to the Funds' collection program. The Funds has met this challenge by maintaining a professional audit staff, located in the field service offices, that perform regular audits of signatory employers, and a staff of delinquency and withdrawal liability lawyers and paralegals, assisted by local counsel in firms specializing in this practice in coal field locations. The Funds' auditors and legal staff have developed expertise in pursuing those employers who seek to evade their contribution obligations. During the five years prior to the Coal Act, the Funds delinquency collection program collected over fifty million dollars for all of the Trusts, with the lions' share of this amount recovered to the 1950 and 1974 Benefit Trusts.

Under the Coal Act, the Combined Fund beneficiaries have been assigned to 688 different assigned operators. These 688 operators can be identified to approximately 520 different controlled groups of related persons, which we identified in earlier correspondence with the Subcommittee. So far, 215 operators have been relieved of liability as a result of SSA appeal decisions. To date, approximately 91.1% of the assigned premiums have been paid. Of the $29.9 million of premiums that have not been paid, approximately $6.3 million is due from a large assigned operator which is in litigation with the Fund and has entered into an escrow-type arrangement with the Fund. An additional $6.6 million is accounted for by another assigned operator's Chapter 11 bankruptcy proceeding. The Combined Fund has filed proof of claims in this bankruptcy and taken extraordinary steps to protect the assets in the bankruptcy estate from unlawful dissipation. The Combined Fund has obtained one multi-million dollar settlement in another complex bankruptcy, which was also already pending at the time of the passage of the Act, resulting in payment of most of the premiums assigned to the bankruptcy debtor. Most significantly, the Combined Fund has defeated an attempt by one of the largest assigned operators to have its premium obligations discharged through a Chapter 11 bankruptcy proceeding commenced in 1986.

A total of 217 operators were delinquent, as of March 1995. We have sued, filed proofs of claim or commenced settlement negotiations in matters covering approximately 80% of the premiums owed by these operators. We have suits or other actions in preparation for an additional 15% of the premiums owed. The

remaining 5% is owed by numerous small employers who were assigned small numbers of beneficiaries each. Investigation indicates that many of these are out of business or have filed potentially successful appeals from their assignments.

The Coal Act also requires 1988 Last Signatory Operators and related persons to pay an annual prefunding premium to the 1992 Benefit Plan for all eligible and potentially eligible beneficiaries attributable to such operator. At the same time, the Coal Act requires 1988 Last Signatory Operators, Last Signatory Operators and related persons to pay a monthly per beneficiary premium to the UMWA Benefit Plan for each beneficiary receiving benefits from that plan attributable to such operator. We estimate the 1992 Benefit Plan's collection rate for the annual prefunding premium, paid by 1988 agreement operators, is approximately 90%. However, the collection rate for the per beneficiary premiums owed to the 1992 Benefit Plan is only 19%. The low collectibility of the per beneficiary premiums is not surprising, given that the employers that owe such premiums have already failed to meet their obligation to maintain individual employer plans and are most often in bankruptcy or no longer financially viable. Nonetheless, the Funds undertakes all reasonable efforts to pursue collection of the monies owed to the 1992 Benefit Plan, and it has brought actions for injunctions to compel employers who are able to continue their single employer plans, required by section 9711 of the Act, to do so.

Russell U. Crosby
Acting Executive Director

Chairman JOHNSON. Thank you, Mr. Crosby.
Mr. Ladley.

STATEMENT OF JACK LADLEY, PARTNER, CONSULTING ACTUARY ERNST & YOUNG, L.L.P.

Mr. LADLEY. Thank you for the opportunity to speak to this Subcommittee. I am Jack Ladley, a partner of Ernst & Young, L.L.P., and the managing partner of its national actuarial services. I will testify on behalf of the firm.

I have been an actuary for over 25 years. Ernst & Young was engaged by the Board of Trustees of the United Mine Workers of America Combined Benefit Fund, to assist in projecting and reporting on the fund's future revenues and expenses. This was not an audit of the fund that we performed, but rather a series of actuarial projections, 10 years' future results.

We submitted our report to the UMWA Board of Trustees on March 13, 1995, and I will include a copy of that report for the record.

[The information was not available at the time of printing]

Mr. LADLEY. Projections involving future health care costs are inherently uncertain. In addition, we have found the results in this case are highly sensitive to certain assumptions, most notably trend. For these reasons, Ernst & Young prepared projections under five different future possible scenarios.

The baseline or middle scenario indicates that the fund balance at the end of fiscal year 2004 is projected to be negative $39 million. However, I would note that fund balances in this projection prior are positive until the year 2003.

Two alternative scenarios were also projected which focused only on changes to health care cost trend rate. Alternatives 1 and 2, as they were called, to the baseline scenario, assumed that health care costs increased three-quarters of 1 percent per year less rapidly and three-quarters of 1 percent per year more rapidly respectively than the baseline scenario. The first alternative projects the fund balance to remain positive throughout the forecast and to end fiscal year 2004 at $65 million. That is a positive. The second alternative to the baseline scenario indicates the fund in 2004 will be a negative $147 million, but that a negative fund balance will first occur in 2002.

In addition, two other scenarios were projected which we termed most pessimistic and most optimistic. In this case, a number of our assumptions were changed, generally portraying situations where either all experience turned out very favorable or all the experience turned out to be quite adverse. The most pessimistic scenario produced a negative fund balance of $624 million at the end of 10 years and the optimistic scenario produced a positive $270 million.

It is clear from the summary results that wide swings in fund position can result from assumption changes which are relatively modest over a 10-year future period. The assumptions to which I am referring include population projections, mortality, medical costs, medical trend rates, expenses and investment earnings.

All of the underlying economic and health care assumptions in our report, including trend, are consistent with those in the 1994 Annual Report of the Board of Trustees of the Federal SMI Trust

Fund. We believe that this is with an appropriate and actuarial sound base from which to develop our assumptions.

We believe that in using this base, our resulting trend assumptions are not inconsistent with those typically used to value post-retirement medical benefits, and that the ultimate long-term trend rate through 10 years is reasonable.

There is clearly a plausible range of views as to whether health care costs can continue to grow as a percentage of the GDP. One plausible view is that they will slow down. However, we believe it is plausible that health care costs can continue to grow as a percentage of the GDP at least for a 10-year period.

Considering all of these factors, we continue to feel that the five projected scenarios we presented in March to the combined fund trustees are reasonable. Other approaches to setting assumptions for projections such as this is are possible within current standards of actuarial practice. Because of the sensitivity of results, such assumption sets may produce different and even more widely varying results.

We understand the GAO will be examining the base and methodology for assumption-setting and performing their own projections for the fund. We expect the GAO may evaluate the appropriateness of one set of functions relative to another.

Thank you for the opportunity to speak to this Committee. I will be happy to address questions.

[The prepared statement follows:]

TESTIMONY BY
Jack Ladley, Partner and Consulting Actuary with Ernst & Young, LLP
before the Subcommittee on Oversight
House Committee on Ways and Means
June 22, 1995.

Madam Chairman, My name is Jack Ladley. I am a Partner of Ernst & Young, LLP (E & Y) and the Managing Partner of its National Actuarial Services Practice. I have been an actuary for 25 years.

E &Y was engaged by the board of trustees of the United Mine Workers of America (UMWA) Combined Benefit Fund (Fund) to assist in projecting and reporting on the fund's future revenues and expenses. Our report analyzes revenues and expenses related to funding the health and death benefits of the approximately 96,400 covered beneficiaries of the Combined Fund. Our work focused on trust fund balances for the ten year period ending in the year 2004. We submitted our report to the UMWA Board of Trustees on March 13, 1995. I would like to include that report with my testimony for the record.

Projections involving future health care costs are inherently uncertain, but projections of balances in the Combined Benefit Fund are even more uncertain because of litigation and appeals which affect the Fund's revenue. In addition, we have found that the results are highly sensitive to certain of the assumptions. For these reasons, E & Y prepared projections under five different future scenarios.These scenarios are intended to illustrate various possible outcomes and also the sensitivity of the outcomes to changes in the assumptions made. It is highly unlikely that actual results for the fund will match those of any of these projections because of the sensitivity of results and the wide range of factors which impact results. Naturally, we sought to establish our assumptions on a sound actuarial footing.

The baseline or middle scenario indicates that the Fund balance at the end of the fiscal year 2004 is projected to be a negative $39 million. However, I would note that Fund balances in this projection prior are positive until year 2003.

Two alternative scenarios were also projected which focused on changes to the health care cost trend rate assumption only. Alternatives one and two to the baseline scenarios assumed that health care costs would increase 3/4 percent less rapidly and 3/4 percent more rapidly, respectively, than the baseline scenario. Alternative one projects the Fund balance to remain positive throughout the forecast and to end fiscal year 2004 at $65 million. Alternative two to the baseline scenario indicates the Fund in the year 2004 will be a negative $147 million, but that a negative Fund balance first occurs in the year 2002.

In addition, two other scenarios were projected, which we termed "most pessimistic" and "most optimistic". A number of assumptions were changed for these scenarios, generally portraying the situations where either all experience was very favorable or all experience was quite adverse. The most pessimistic scenarios produced a negative Fund balance of $624 million, and the optimistic scenario produced a positive $270 million.

It is clear wide swings in Fund positions can result from assumption changes which are relatively modest, over a ten year future period.

The assumptions to which I have referred to include, but are not limited to, the following:

- Population Projections
- Mortality
- Medical Costs
- Medical Trend Rates
- Expenses
- Investment Earnings

Of these assumptions, the trend assumption is the most critical. Since they focus only on trend, alternatives one and two illustrate that Fund balances at the end of ten years are quite sensitive to changes in this assumption. It is necessary to link this assumption not only to the cost of the plan but also in an appropriate way to the income received by the plan. Some of the sources of reimbursement to the Fund are linked to trend assumptions.

All of the underlying economic and health care assumptions in our report, including trend, are consistent with those used in the 1994 Annual Report of the Board of Trustees of the Federal Supplementary Medical Insurance (SMI) Trust Fund. We continue to feel that this is an appropriate and actuarially sound base from which to develop our assumptions. It provides a linkage between the income and outgo of the Fund.

We believe that in using this base, our resulting trend assumptions are not inconsistent with those typically used to value post-retirement medical benefits, and that the ultimate long-term trend rate through ten years is reasonable.

Financial Accounting Standard Board (FASB) Statement 106 computations deal almost exclusively with the portion of retiree health care benefits which are not covered by Medicare, but our trend assumptions reflect a much broader array of benefits. FAS 106 post-retirement health care benefits typically fill in the coinsurance and deductible amounts which Medicare does not pay. These copayments increase more slowly than health care costs for the elderly, generally. For example, the Medicare hospital insurance (part A) deductible, which is indexed, has increased only about 4% per year and the Medicare supplementary medical insurance (part B) deductible, is frozen at the current level of $100; thus, it would be expected that FASB 106 trend factors would be lower than trend factors for a plan like the UMWA Combined Fund, which is also at risk for the faster growing portions of Medicare benefits.

There is a plausible range of views as to whether health care costs can continue to grow as a percentage of the GDP. One plausible view is that they will slow down. However, we believe it is plausible that health care costs can continue to grow as a percentage of the GDP, at least for a ten year period.

Considering all of these factors, we continue to feel that the five projected scenarios we presented in March to the UMWA Combined Fund Board of Trustees are reasonable. Other approaches to setting assumptions for projections such as this are certainly possible within standards of actuarial practice. Because of the sensitivity of results, such assumption sets may project different, and even more widely varying results. We understand that the Government Accounting Office (GAO) will be examining the base and methodology for assumption setting, and performing their own projections for this fund. We expect that the pGAO may evaluate the appropriateness of one set of assumptions relative to another.

Thank you for the opportunity to speak before this committee. I will be happy to address any questions you may have.

Chairman JOHNSON. Thank you.
Johnson. Mr. Gathers.

STATEMENT OF JEFFREY L. GATHERS, PRINCIPAL, TOWERS PERRIN, CLEVELAND, OHIO; ACCOMPANIED BY DAVID ALLEN, GENERAL COUNSEL, UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND

Mr. GATHERS. Good morning.

My name is Jeff Gathers. I am a fellow in the Society of Actuaries and a member of the American Academy of Actuaries. I am employed as a principal and senior health and welfare actuary in the Cleveland office of Towers, Perrin, Forster and Crosby. This company, Towers Perrin, is a privately owned international firm of actuaries and management consultants.

My testimony describes the results of analyses performed by myself and other Towers Perrin actuaries of the outlook for future balances in the UMWA combined fund for retiree health care benefits. Thank you, Madam Chairman and Members of this Subcommittee, for the opportunity to present this statement today.

Towers Perrin began its analysis of the fund in 1994 by developing a preliminary financial forecasting tool or model to project how the fund's various income and outgo items would behave under alternative future economic scenarios. We most recently documented the results of our initial forecast model in a report dated January 27, 1995. At about the same time the trustees of the fund retained the firm of Ernst & Young to perform similar projections of funds operations.

The chart on your left summarizes the results for three Ernst & Young scenarios and for the January Towers Perrin results. The table compares the projected cumulative surplus at the end of the 2004 fiscal year.

You can see the Towers Perrin baseline had a projected positive balance of just over $240 million relative to the other numbers referenced by Mr. Ladley.

I would like to comment on the nature of the difference between Towers Perrin's projections of results at the end of the 10-year period and the range of Ernst & Young forecasts. The Towers Perrin and Ernst & Young approaches are similar overall. However, there are distinct differences in several areas involving the demographic changes in the group, fund operations and most notably, the rate of increase in health care costs as measured by both prices, that is the medical CPI, and the trend in total benefit costs.

We subsequently revised the Towers Perrin model to include some new data that Ernst & Young had used and essentially to emulate their approach. We found that if we duplicate all of the Ernst & Young assumptions in our revised model, we were able to reproduce their baseline forecast of a $39.9 million deficit in 2004.

However, we do not believe it is equally reasonable to use all of the Ernst & Young assumptions. If we adjust our calculations to change the assumptions related to every element except the medical cost trend, the combined effect is to increase the projected surplus from $240 million to $289 million relative to the Ernst & Young baseline of negative $38.9 million. The significant difference between the Towers Perrin and Ernst & Young baseline estimates

is thus due to the different assumptions about the trend in medical benefits cost per beneficiary.

Ernst & Young has based their assumption on a series of annual rates that they describe as consistent with those used in the 1994 annual report of the Board of Trustees of the Federal SMI Trust Fund. It is most notable that these assumed future rates generally increase throughout the 10-year projection period to a maximum of 9.9 percent in 2004.

Past trend patterns do provide one source of information from which to project future health care cost trends. However, current actuarial practice has judged the continuation of high past trend rates indefinitely into the future to be an inappropriate assumption for postretirement benefit projections. Such trends imply ongoing growth in the health care economy that is much faster than the growth in other sectors. As a result, health care's share of the GDP would continue to increase to levels that the rest of the economy could arguably not support.

Towers Perrin has recently surveyed a number of Fortune 400 companies as to the assumptions used to value future postretirement benefits under Financial Accounting Standard No. 106. We found that more than 95 percent of respondents are using a declining trend rate assumption. The median assumption starts at 11 percent in 1995 and grades to 5.5 percent over 8 years.

Towers Perrin's approach for the fund's projection also uses a declining trend assumption. Specifically, our proposed trend assumption uses a basic annual trend rate of 8 percent in 1995 and grades to an ultimate rate of 4 percent over 8 years.

In addition, we have adjusted the basic trend rate from 8 to 4 percent for the first 2 years of the projection to reflect additional projected savings from the fund's new capitated pharmacy program. Prescription drugs account for more than 60 percent of the fund's net benefit cost.

We have selected rates slightly lower than the 25th percentile of our survey results to reflect the expected ongoing effects of the trustees' comprehensive commitment to cost management in plan administration. These effects are already evident in the plan's results.

The second table shows the sensitivity of the revised Towers Perrin model to the cost trend assumptions across a range of current actuarial practice. All scenarios, including the Towers Perrin revised estimate and the Ernst & Young baseline, have been adjusted to include a 4 percent short-term reduction of the 1995 and 1996 trend rates to adjust for the pharmacy plan phase-in. You can see the range of results on the table here, all of them in the surplus area.

These results demonstrate that a surplus in the combined fund is expected after 10 years under a range of economic assumptions. We believe that the combination of recent results and the cost management approaches being taken by the trustees provide a strong basis for optimism in this period. In our opinion, the fund surplus in 2004 is likely to fall in the range of $100 to $300 million, reflecting the current health care environment and the trustees' commitment to cost management.

Thank you for the opportunity to present this testimony.

[The prepared statement follows:]

Congressional Statement
of
Jeffrey L. Gathers, FSA, MAAA

My name is Jeff Gathers. I am a fellow in the Society of Actuaries, and a member of the American Academy of Actuaries. I am employed as a Principal and senior health and welfare actuary in the Cleveland, Ohio, office of Towers, Perrin, Forster and Crosby, Inc. This company, more commonly known as Towers Perrin, is a privately owned international firm of actuaries and management consultants. About 12 percent of our employees are stockholders – called "Principals" – of the firm. We have been providing retirement plan actuarial services since 1917, when we designed one of the first private pension plans in the United States.

This testimony describes the results of analysis performed by myself and other Towers Perrin actuaries of the outlook for future balances in the UMWA Combined Fund for retiree health care benefits (the Fund). I have prepared this testimony today on behalf of the member companies of The Reachback Tax Relief Coalition. Thank you, Madam Chairman and members of this subcommittee, for the opportunity to present this statement today.

Towers Perrin began its analysis of the Fund in 1994 by developing a financial forecasting tool, or "model," to project how the Fund's various income and outgo items would behave under alternative future economic scenarios. We subsequently updated our model several times as more was learned about the actual financial experience under the Fund and the management approaches adopted by the Fund's trustees. We most recently documented the results of our initial forecast model in a report dated January 27, 1995.

At about the same time, the trustees of the Fund retained the firm of Ernst & Young to perform similar projections of fund operations. Ernst & Young submitted a report on March 13, 1995, which included results under five assumed economic and operating scenarios. The following table summarizes the results for the three principal Ernst & Young scenarios and for the January Towers Perrin results. The table compares the projected cumulative surplus at the end of the 2004 fiscal year (September 30).

Projected Fund Results as of September 30, 2004 ($ Millions)

Model/Scenario	*Cumulative Surplus/(Deficit) as of September 2004*
Ernst & Young - Baseline	($38.9)
Ernst & Young - Most Optimistic	269.8
Ernst & Young - Most Pessimistic	(624.3)
Towers Perrin - January Baseline	240.8

It is also notable that we extended our January projection model for 50 years; by this point, the surplus was projected to reach $2.6 billion.

In the following paragraphs, I comment on the nature of the difference between Towers Perrin's projections of results at the

end of the ten-year period and the range of Ernst & Young estimates.

Because of the complexity of the Fund's operations, many assumptions are necessary to forecast the results. The Towers Perrin and Ernst & Young approaches are similar overall. However, there are distinct differences in several areas including:

- the distribution of the eligible population between assigned and unassigned beneficiaries
- assumed death rates
- the implications of premium delinquency
- conditions for transfers from the AML fund
- the cost of medical benefits per beneficiary at specific ages
- the rate of increase in health care costs, as measured by both prices (Medical CPI) and the trend in total benefit cost.

For several of these items, assumption differences reflect certain data that were used by Ernst & Young but to which Towers Perrin did not have access until after we had prepared our January report. We have subsequently reviewed most of these data and have modified our forecast model to reflect the new data and to emulate Ernst & Young's approach. If we duplicate *all* of the Ernst & Young assumptions in our revised model, we can essentially reproduce their baseline forecast of a $38.9 million deficit in 2004.

However, we do not believe it is equally reasonable to use all of the Ernst & Young assumptions. If we adjust our calculations to change the assumptions related to assigned/unassigned populations, death rates, payment delinquency, AML transfers, initial cost per beneficiary and future Medical CPI – that is, every assumption except the medical cost trend – the combined effect is to *increase* the projected surplus from $240.8 million to $289.4 million, relative to the Ernst & Young baseline of ($38.9) million.

The significant remaining difference between the Towers Perrin and Ernst & Young estimates is thus due to different assumptions about the "trend" in medical benefits cost per beneficiary. Ernst & Young has based their assumption on a series of annual rates that they describe as "consistent with those used in the 1994 Annual Report of the Board of Trustees of the Federal Supplementary Medical Insurance (SMI) Trust Fund," i.e., the fund through which Medicare Part B benefits are financed. It is most notable that these assumed future rates generally *increase* throughout the ten-year projection period, to a maximum of 9.9 percent in 2004.

Past trend patterns provide one source of information from which to project future health care cost trends. This notion appears to be the key to the SMI Trustees' and Ernst & Young's approach. However, current actuarial practice has clearly judged the continuation of high past trend rates indefinitely into the future to be an inappropriate assumption for postretirement benefit projections. Such trends imply ongoing growth in the health care economy that is much faster than growth in other sectors. As a result, health care's share of the Gross Domestic Product (GDP) would continue to increase – to levels that the rest of the economy could not support. For example, some projections have shown health care growing from its current 14 percent of GDP share to nearly 25 percent by 2010 if cost trends do not decline.

To confirm current practice in the area of trend assumptions, Towers Perrin has recently surveyed a number of *Fortune 400*

companies as to the assumptions used to value future postretirement benefits as of the end of their 1994 fiscal years. These assumptions appear in published financial results and are required (by SFAS No. 106) to reflect the employers' best estimates of future events. The reasonableness of the reported results is certified by each company's independent auditors. We found that more than 95 percent of respondents are using a *declining* trend rate assumption. The median assumption starts at 11 percent in 1995 and grades to 5.5 percent over eight years. The corresponding 25th percentile (relatively optimistic) rates are 9.5 percent grading to 5 percent, and the 75th percentile rates are 12 percent grading to 6 percent. Some employers select assumptions outside this range, when particular circumstances indicate that it is appropriate.

Towers Perrin's approach for the Fund's projection uses a declining trend assumption. Our proposed trend assumption uses a basic annual trend rate of 8 percent in 1995 and grades to an ultimate rate of 4 percent in 2003 (over eight years). We have selected rates that are slightly lower than the 25th percentile assumptions because of the trustees' comprehensive commitment to cost management in plan administration. The effect of this commitment is already evident in the plan's results. As stated in the Ernst & Young report, for example: "In 1993, the plan actually experienced an 8.5% reduction in per capita trend." In addition, we have adjusted the basic trend rate from 8 percent to 4 percent for the first two years of the projection to reflect additional projected savings from the Fund's new capitated pharmacy program. Prescription drugs account for more than 60 percent of the Fund's net benefit cost.

The table below shows the sensitivity of the revised Towers Perrin model to the cost trend assumption across a range of current actuarial practice. All scenarios, including the Towers Perrin revised estimate and the Ernst & Young model, have been adjusted to include a 4 percent short-term reduction of the 1995 and 1996 trend rates to adjust for the pharmacy plan phase-in. In addition, we have slightly adjusted the Medical CPI increase rates from the Ernst & Young assumption in later years to ensure that the assumed CPI increase for each scenario is less than the total benefit cost trend in each year.

Effect of Trend Assumptions on Projected Fund Results as of September 30, 2004 ($ Millions)

Scenario (Initial/Ultimate Trend)	*Cumulative Surplus*
Survey Median (11.0%/5.5%)	$157.7
Survey 25th Percentile (9.5%/5.0%)	257.4
Survey 75th Percentile (12.0%/6.0%)	67.9
Towers Perrin Updated Estimate (8%/4%)	289.4
Ernst & Young Baseline (8.1%/9.9%)	179.2

These results demonstrate that a surplus in the Combined Fund is expected after ten years under a range of economic assumptions. We believe that the combination of recent results and the cost management approaches being taken by the trustees provide a strong basis for optimism in this period.

In our opinion, the Fund surplus in 2004 will fall in the range of $100 to $300 million, reflecting the current health care environment and the trustees' commitment to cost management. Moreover, we believe that, if health care cost trends have fallen permanently by the early years of the next decade as virtually all actuarial projections now assume, the outlook for growing surpluses after 2004 increases significantly.

Thank you again for the opportunity to present this statement.

Chairman JOHNSON. Thank you.

I thank the panel for your testimony. I have a couple of questions that I would like to pursue.

First of all, and all of you can comment, could you briefly describe for the Subcommittee the scope of the benefits that this plan provides?

Perhaps, Mr. Crosby.

Mr. CROSBY. It is a comprehensive set of health benefits including drug, inpatient, outpatient coverage, home health care under certain circumstances. It is quite a comprehensive program of benefits for the retirees with minimum out-of-pocket expenses for the individuals concerned.

Chairman JOHNSON. Dental, vision, home care—

Mr. CROSBY. No dental.

Chairman JOHNSON. When you say minimal out-of-pocket, what do you mean by that?

Mr. CROSBY. There is roughly a family copayment of $100 a year. It is relatively small.

Chairman JOHNSON. It is my understanding that these benefits are age 22?

Mr. CROSBY. That is correct.

Chairman JOHNSON. Is it also true that they are available to unmarried grandchildren up to the age of 22?

Mr. CROSBY. When they are living as a dependent in the home, yes.

Chairman JOHNSON. And also parents of the retiree?

Mr. CROSBY. Yes, when living for 1 year or longer in the same household as a dependent.

Chairman JOHNSON. So, they are broader in scope than most employer benefit plans both in terms of benefits provided and the number of people included in the family unit; would you agree with that?

Mr. CROSBY. I think that is an accurate statement.

Chairman JOHNSON. Why is it that the net expenses—this is according to some materials that came from GAO—the premiums billed, and actual per capita reimbursed expenses, between 1993 and 1995 over a 2-year period essentially doubled from $122 to $228 million. That seems odd—at the same time the population declined from 109,000, roughly, to about 97,000. Is there any explanation for that?

Mr. CROSBY. I do not believe those figures are accurate. That doesn't strike me as correct.

Chairman JOHNSON. You are welcome to submit figures to us on what the net expenses were, because the figures that we have raised a lot of questions.

Mr. CROSBY. That is for the period 1993 through—

Chairman JOHNSON. 1993 to 1995. You mentioned in your testimony that Medicare recipients were about 95 percent of your population; is that correct?

Mr. CROSBY. No, they are about 90 percent of the population.

Chairman JOHNSON. In 1993 and 1994, gross medical expenses were—the figures do not really matter—the Medicare payments were only about 50 percent of that. Now, that does surprise me. When 90 percent of your people are covered by Medicare, I would

expect that Medicare reimbursements would cover more than 50 percent of your gross medical expenses.

Mr. CROSBY. Almost 60 percent of our net benefits are in drugs, which are not covered through Medicare.

Chairman JOHNSON. Do you use any of the companies that are out there in the market that manage drug benefits?

Mr. CROSBY. Absolutely. We have a contract with Diversified Pharmaceutical Services and it is a capitated arrangement so that we pay them a flat fee each year under a 2-year agreement that will be renegotiated at the end of 2 years.

We pay them a flat fee and then they are responsible beyond that for the actual costs incurred.

Chairman JOHNSON. What impact has that had on your costs?

Mr. CROSBY. That program started in January, so it is early to tell.

Chairman JOHNSON. Last, does your organization support moving from a per-ton basis for figuring the employer obligation to a per-hour basis?

Mr. CROSBY. We have no input into the negotiations between the union and the Bituminous Coal Operators Association.

Chairman JOHNSON. Thank you.

I would yield to my colleague, Mr. Herger.

Mr. HERGER. Thank you, Madam Chair.

Maybe a question for you, Mr. Gathers. In reviewing reports, it appears that Ernst & Young used actual fiscal year 1994 and first quarter fiscal year 1995 fund expense data for your analysis. On the other hand, the Towers Perrin model appears to be based largely on fiscal year 1993 actual data. Using fiscal year 1993 data requires Towers Perrin to adjust your estimate to reflect the changes in the Medicare reimbursement rate in fiscal year 1994 and 1995.

My question is, do you feel that fiscal year 1995 estimates of the funds deficit or surplus—to what extent does a difference in the projections result from the fiscal year 1993 base year data used as a starting point?

Mr. GATHERS. If I understand the question correctly, I think that the difference in the starting data or the baseline data was adjusted for as Towers Perrin moved from the initial model that we developed in 1994 to the revised model, which was referenced in my testimony, as having been updated to reflect the same data as Ernst & Young had used.

During the course of that development, that data, though it had not been available to us initially, was made available and we adjusted all of our starting points to be consistent with the Ernst & Young study in fact, so that that would not be a matter of difference between the two projections.

Mr. HERGER. Do you have any comment also, Mr. Ladley?

Mr. LADLEY. No. I would echo that they have reproduced our model in every regard, I think, but one, perhaps a minor one. They seem to be consistent. I have not studied their approach, though.

Mr. HERGER. Thank you.

Chairman JOHNSON. Mr. Cardin.

Mr. CARDIN. Thank you, Madam Chairman.

I am concerned about trying to figure what the fund balances will be based upon, the projections that you have made, understanding of course that we are looking at this with the benefit levels remaining constant and out-of-pocket costs to beneficiaries remaining constant.

Mr. Gathers, you are suggesting that you believe that the appropriate growth level of the cost of the benefits will—should be phased down to 4 percent? Is that what your model does?

Mr. GATHERS. That is correct. The baseline trend assumption starts at 8 percent at the beginning of this period and gradually reduces over the 10-year period, so that in the last year of the projection the trend rate for benefit costs is 4 percent, while the assumed trend rate for medical price increases is 3.5.

Mr. CARDIN. Half a percent above the market basket for general products. You base that on the fact that there would be no diminution of benefits to the beneficiaries; this is strictly holding down the cost of services?

Mr. GATHERS. There is no expectation of pulling down the cost of services. As we say, these are positive trend rates going forward. There are no negative trend rates anticipated.

Mr. CARDIN. Do you have any historical data to reflect that any large health care plan has been able to sustain a growth rate as low as 4 percent?

Mr. GATHERS. Over a long term in the past, that has not taken place, but we need to be cautious not to be so reliant on what has happened in the past that we overlook very likely outcomes that are different in the future.

Mr. CARDIN. There have been many innovative approaches that have been taken to health care that have worked, that have brought down the health care costs. I understand that.

What we have not been able to demonstrate, unless you have information that I am not aware of, is any sustained effort to keep the growth rate at 4 percent or anywhere close to that over a sustained period of time. We have seen 1 year progress through innovative approaches where growth rate was held well below 4 percent, but we have not seen any, that I know of, any program where they have had a sustained lower growth rate anywhere close to what you are suggesting we should be using to plan the fund balances.

I read an article very recently from a periodical that used the same arguments that you used in projecting health care costs, saying that our society wouldn't tolerate an ever-growing share of the gross national product in health care and that there were innovative approaches being taken and that we must get the growth rate down to the levels that you are talking about. The problem was that article was written in the sixties.

What hope can you give me that we can sustain, without cost-shifting, that we can bring down the health care costs to that level? Is there something out there that I am not aware of?

Have there been some programs that have successful in doing this? How did you plan a model that you get down to 4 percent?

Mr. GATHERS. The principles of managed care have demonstrated that they are able to produce slower rates of increase across the board than unmanaged care arrangements and I think the notion

that at some point the citizens of this country will not put up with chain reductions in their standard of living as we go from $1 in $7 being used for health care benefits to $1 in $4—

Mr. CARDIN. If I could get me some documentation for that, this Committee would be very grateful. I have seen one-time savings and short-term savings. I have not seen long trend lines of projected savings on the managed care programs.

If you can provide this Committee with some documentation to support that statement, it would be very helpful because, to my knowledge, we do not have that to date.

We had a group of business leaders in health care reform before this Committee not long ago looking at innovative ways in which health care plans' costs had been brought down within large business plans. At that time I made an offer to the business people there whether they would take over the Medicare system at a growth rate of 3.9 percent adjusted for the demographics.

We did not have any takers that would take over our plans at a 3.9-percent growth rate; yet you are using as your projection a 4-percent growth rate in a similar population group where most are eligible for Medicare.

I would like you to supply the Committee with documentation to support a 4-percent growth rate.

[The information was not available at the time of printing]

Mr. GATHERS. As I mentioned, it is not possible to document expectations for the future. We do have as documentation the survey of what prevailing actuarial practice provides. These are not just my own assumptions; these are not just Towers Perrin assumptions, but these are assumptions practicing actuaries use to evaluate postretirement benefit commitments for private employer plans throughout the country. The results of that survey information is included in my testimony and referenced in this table.

Mr. CARDIN. Because many of those plans are in trouble today.

Mr. GATHERS. I do not understand that reference.

Mr. CARDIN. Insolvencies, these plans are in jeopardy.

Mr. GATHERS. These are projections of future benefits, not with reference to the actual financing of the plans. These are obligations of the companies that are recognized on their balance sheets and the basis for that recognition is certified by the auditors for these companies.

Mr. CARDIN. Just document for us the results where we have been able to achieve that. I would appreciate it.

[The information was not available at the time of printing]

Chairman JOHNSON. Thank you, Mr. Cardin.

I would like to just pursue Mr. Cardin's comment about what information, Mr. Gathers, you might be helpful in getting back to the Committee.

Since this plan has so much of its money going out into prescription drugs as opposed to overall health care growth rates, which we hope we will bring down in Medicare due to reform efforts that we intend to make in Medicare, I think very significant to your projections is what savings you might project from better managing the prescription drug benefit and that your expectations in that area could be very useful to us.

Thank you.

Mr. Hancock.

Mr. HANCOCK. Thank you.

Mr. Crosby, I am sure you recall that the Committee on Ways and Means in the House did not play a very significant role in developing the 1992 coal act. Can you tell the Subcommittee why it was necessary to establish two separate funds, the combined fund and the 1992 UMWA Benefit Plan, to provide health benefits to participants, rather than only one plan?

Mr. CROSBY. Basically, they involve cutoff dates of when people were eligible so that the combined fund was sealed as of one date and then there was another date for when eligibility began under the 1992 plan—

Mr. HANCOCK. Is the plan administered by the same people with the same overhead or is it set up with a separate staff?

Mr. CROSBY. No. It is all handled out of the UMWA Health and Retirement Fund staff.

Mr. HANCOCK. In other words, there is one set of overhead that covers the entire plan?

Mr. CROSBY. Yes; and several other plans as well.

Mr. HANCOCK. In your testimony you mention there is, roughly, $29.9 million in delinquent premiums, and you have indicated that you are actively pursuing $12.9 million of that. What is the situation on the other $17 million?

Mr. CROSBY. What I said was that, roughly, $13 million of it was reflected in just two companies, one of which has established a $6 million escrow. Regarding the other delinquent cases, roughly, 95 percent of those delinquent amounts are now being worked either through bankruptcy court filing, proofs of claim, or other kinds of legal actions to pursue those other employers.

There are, roughly, 5 percent that involve very small companies with limited numbers of beneficiaries who have been assigned where we have not yet pursued those. In some cases, it simply is not going to be cost beneficial to pursue some of the very small cases where it costs us a minimum of $4,000 to file an uncontested claim and do the necessary research to pursue a claim that might well be smaller than that amount.

Mr. HANCOCK. Have these delinquencies been referred to the IRS?

Mr. CROSBY. They have not at this point, because the SSA is still in process of handling appeals and moving assignments between companies and between the assigned pool and the unassigned pool. It simply does not make sense at this time to refer those cases to the IRS until that stabilizes.

Mr. HANCOCK. Do you know of any companies, in your judgment, that can afford to pay and have chosen not to pay?

Mr. CROSBY. It is usually not a matter of cannot afford to pay or do not want to pay; if there is nothing out there, the company is no longer in business, the mail is returned—

Mr. HANCOCK. Companies that can afford to pay but, have decided they are not going to.

Mr. CROSBY. I am not aware of any like that. We are pursuing all who can afford to pay through the legal process and the collection process.

Mr. HANCOCK. Getting to another area, our figures indicate that only 28 percent of the entire beneficiary pool are actually retired coal miners. The other 72 percent are surviving spouses and spouses of the miners and dependent adults.

Let me ask you a question about your plan. In the event of the death of a retired coal miner surviving spouse, can that include more than one spouse?

Mr. CROSBY. Not at any one time.

Mr. HANCOCK. What about situations where there are two, a spouse and an exspouse, and both are drawing Social Security under that one name? In the event of the miner's death and the spouse's death, are the dependent children still covered under the plan?

Mr. CROSBY. I believe they are. Our plan is not at the discretion of our trustees. The plan was negotiated between the UMWA and the Bituminous Coal Operators Association over a period of years and in fact the union opted for reductions or not to have additional income either through their pensions or current income in order to have lifetime health benefits. That is what they negotiated over the years. Our trustees are presented with the results of those negotiations and do not have discretion to modify the plans.

Mr. HANCOCK. Do you know of other plans that give lifetime benefits both to the employee and the surviving spouses?

Mr. CROSBY. I wouldn't have any information on that.

Mr. HANCOCK. OK. You understand, we are still concerned about guaranteeing the integrity of this benefit plan, getting back to the question of who is responsible to fund it.

Mr. CROSBY. It is important to note that the plan was negotiated between the union and the companies. This legislation simply froze that in time to say that the benefits that were in place as of the date are the benefits to be provided.

Mr. HANCOCK. I understand that, Mr. Crosby, and that is part of the problem. If in fact this was negotiated between the companies and the union, how come the SSA is having to spend millions of dollars administering it—why are the taxpayers putting up this money?

Mr. CROSBY. That was the wisdom of Congress.

Mr. HANCOCK. You might have a very valid point.

We have got a declining enrollment in this, I would think. What is the projection? Are we talking about 2045?

Mr. CROSBY. They are dying at the rate of, roughly, 6 percent a year, and you can pick a point in time and it is—from today, each year, roughly, 6 percent of this population dies. That is why when you look back at the original record on how many beneficiaries were to be covered by this plan, we are down to 92,000 today because after 3 years we have had substantial deaths in this population and they continue to die. The average age is 73. They are very old.

Mr. HANCOCK. One final question for Mr. Ladley. Your analysis on the combined fund—this gets back to Mr. Cardin's question—used a medical cost trend assumption rate as high as 9.9 percent on the outyears. I understand that is roughly twice the rate that you are using for other audit clients in their estimated liability or funding obligations for their health care benefits.

Can you explain why the differential there between 9.9 and roughly half of what you are using for other of your audit clients?

Mr. LADLEY. The rate that you are referring to, that is much lower, is being used generally for Financial Accounting Standards Board analyses according to statement 106. Those computations deal with postretirement medical benefits typically for corporate plans. They deal almost exclusively with the portion of retiree health care benefits which are not covered by Medicare, filling in the gaps. That is not entirely but generally true.

Our trend assumptions reflect a different mix of benefits. This plan covers a variety of Medicare benefits, not just the gaps in Medicare. For example, the Medicare hospital insurance part A deductible which is indexed has increased only about 4 percent a year and the Medicare supplementary medical insurance part B deductible is frozen at a level of $100. Therefore, it would be expected that the kind of rates that we are using in this projection and for this purpose would be different from the trends rates in FAS 106. The rates that we did select were chosen according to what I would call our assumption base, which is the SMI 1994 report, and that was adjusted for the specifics of this population. We think it forms an appropriate base.

Mr. HANCOCK. Do you agree with that, Mr. Gathers?

Mr. GATHERS. I believe I understand the distinction that Mr. Ladley is making, but I believe he overstates the differences in expected trends that would come from this distinction. Certainly in my experience in working with the valuation of employer obligations, I find that they have many of the same elements and that they are not just focused on the part A and part B deductibles, as he may suggest. They, in fact, cover a broad range of benefits for retired participants who have not yet reached Medicare eligibility.

Many of our clients, and I suspect Mr. Ladley's as well, have upward of 40 or 50 percent of the future benefits they are valuing for non-Medicare eligible participants. They also very commonly provide prescription drug programs, perhaps not as generous as the UMWA Fund Benefit Plan, but still in some cases quite expensive and accounting, as in the UMWA case, for more than half of the benefit cost for participants over age 65.

It is also true that the UMWA Combined Benefit Fund is experiencing the same benefit of the low rate of increase relative to the part A copayment amounts for hospitalization benefits under Medicare. So, my sense is, and in fact as we approach FAS 106 valuations, it is our general strategy to look at the gross benefit costs and to recognize the effect of Medicare as an offset much as he is describing is going on in the combined fund. So, I believe that there is a minor distinction, not a substantive difference, that would account for the difference in outlook for long-term trend.

Mr. HANCOCK. Thank you, Madam Chairman.

Chairman JOHNSON. Mr. Portman.

Mr. PORTMAN. Thank you.

Thank you all for being here.

Let me follow up with the final question.

It seems to me that one of the assumptions that has not been discussed and that one must make is the degree to which having a population that has an average age of 73, and I think 74 percent

of the beneficiaries are over the age of 70, that there would be certain health care cost differences between that population group and a group of younger workers. Has that been taken into account, Mr. Gathers, in the analysis as to the percentage?

Mr. GATHERS. Yes. I think that there is another element which contributes to the year-to-year increase in the cost per beneficiary in this program or in other private programs, and that is to the extent the average age of the population is increasing, then that further increases the cost per capita, but that is not something that the methodology for the projection models includes with the trend. Rather, it is a separate element that recognizes that as any of the beneficiaries grows older, they will have costs at a higher rate than they would have at a younger age. I think that is recognized outside the scope of the trend rate.

Mr. PORTMAN. Mr. Ladley, do you have a comment?

Mr. LADLEY. Our report takes a similar approach with the actuarial model. In starting with the SMI base we actually remove any built-in aging factor that might be in there. So, we have it adjusted. We turn around and apply the resulting trend factor to the population projection, which would automatically adjust for the age differentials as this group moves forward. It is incorporated, and recognized there.

Mr. PORTMAN. The other major assumption I would think that would affect that would be the 6 percent figure, whatever the death rate might be and how that is actuarially figured. I would assume the 6-percent increases, given that we have 74 percent of the beneficiaries over the age of 70.

I guess my conclusion from listening to the testimony and reading as much as I have been able to is that this is a relatively fluid situation. There is likely to be some surplus. What it is is hard to tell.

I would think given that 60 percent of the funds are currently being used in the pharmaceutical drug area for prescription drugs, that whatever arrangement you have with Diversified should be monitored closely by this Subcommittee. I hope you will get back to us.

To the extent that the capitation program could reduce costs, I think that might be as significant as the Medicare capitation, working the other way. I just would hope that we could get a better record of that. Apparently, that is just since January?

Mr. CROSBY. Correct.

Mr. PORTMAN. Given the aging population, given the emphasis on drugs, I would hope that we could get a better handle on this over the course of the next few months so that we can have a better sense of this. Having listened to the testimony, I am not sure that I have a good sense of where we are going to end up. I think it is a relatively fluid situation.

Any comments on that? Would you agree with that summary or am I missing something?

Mr. GATHERS. It sounds appropriate to me.

Mr. PORTMAN. Mr. Crosby, any thoughts on that?

Mr. CROSBY. I think you are correct.

Mr. PORTMAN. I yield back. I look forward to hearing from the companies that are present. I appreciate your giving us all this data.

Chairman JOHNSON. Would you provide us with information on your 6-month experience in the prescription drug area, Mr. Crosby. I would like to alert the panelists that we will be sending you some additional questions in writing. I would like Mr. Crosby, for the purposes of the Committee, if you could just explain to us why there are two funds?

This Committee was not a part of developing this legislation, as you may recall, and it is not clear to me why you have to have the combined fund and the 1992 UMWA Benefit Plan Fund to provide benefits instead of one fund?

Mr. CROSBY. The trustees do not participate in the legislative process either, so—

Chairman JOHNSON. All right. I will try that question later on. Could you briefly tell me whether or not you have received any amounts as a result of the evergreen litigation, and if not, what kind of revenue you expect to receive from that source?

Mr. CROSBY. Actually, I have with me our general counsel who can address—

Chairman JOHNSON. That would be fine. If you will state your name for the record.

Mr. ALLEN. I am David Allen. I am the fund's general counsel. The evergreen litigation was commenced in 1988. At this time, there have been some substantial settlements in the litigation. Litigation against those who have not settled is still pending in the district court here after a court of appeals decision, and has been referred to a mediator. Negotiations are underway. It would be at this time impossible and indeed inappropriate to comment on any likely outcome of that process.

Chairman JOHNSON. Thank you.

Mr. CROSBY. Madam Chair, you had asked earlier about net assets or net expenses changing between the first and second plan years. While I was sitting here, it dawned on me what you are looking at is the first plan year was an 8-month year. It was not a 12-month year.

Chairman JOHNSON. In 1993?

Mr. CROSBY. Yes. Fiscal year 1993 was a transition year that ran for 8 months. That is the only explanation on why you are seeing a dramatic increase in net expenses. In fact there have been only two plan years since the act came into effect.

Chairman JOHNSON. That is helpful. However, the increase from 1993 to 1994 is from $122 to $177 million, roughly $50 million, and from 1994 to 1995, it is $177 to $228 million.

Mr. CROSBY. We are not in 1995 yet.

Chairman JOHNSON. That is projected on the basis of your experience at this point. Thank you very much.

I thank the panel and call the next panel. In the next panel we will hear from Clifford Miercort, the North American Coal Corp.; John Faltis, Anker Energy Corp.; Jim Chenoweth, Lone Star Steel; John Patton, Davon Inc., Alan Law, Mountain Laurel Resources Co.

I would like to particularly welcome Lone Star and North American. Sam Johnson, an esteemed colleague, is tied up in a markup today.

Mr. Miercort, please proceed.

STATEMENT OF CLIFFORD R. MIERCORT, PRESIDENT AND CEO, NORTH AMERICAN COAL CORP., DALLAS, TEXAS

Mr. MIERCORT. I am Cliff Miercort, the president and chief executive officer of the North American Coal Corp. I appear here today with representatives of eight other reach-back companies and we represent some 307 companies who are currently being billed for reach-back premiums mandated by the coal act, also known as the Rockefeller Act.

Each of us has a different story to tell of injury inflicted upon our companies, and in many cases upon our personal lives as well by this arbitrary, retroactive tax. Even though currently making a profit, the tax of the Rockefeller Act has imposed a tremendous burden upon us. To put it into perspective in 1992 we wrote off $110 million to cover the new liabilities imposed on us by this tax.

This writeoff is more than 70 times the average annual profit we ever made from the mines that employed UMWA personnel. The story is set forth in more detail in my prepared statement which I ask permission to submit for the record.

In the few minutes I have this morning I would like first to review how Congress was induced, maybe a better description would be to say deceived, into passing this retroactive and unprecedented legislative rewrite of prior collective bargaining agreements, and then to discuss the financial dimension of the reach-back tax, and finally to suggest a couple of approaches to fix the problem.

In early 1988, during negotiations for a new wage agreement, the executive committee of the BCOA, Bituminous Coal Operators Association, told the UMWA, United Mine Workers of America, that they were prepared to walk away from their responsibility to fund the health benefits of UMWA retirees.

By using this threat, the BCOA was able to force a fundamental change in the 1988 wage agreement that was eventually signed. Previously, both pension and health benefits for UMWA retirees had been financed on a pay-as-you-go basis primarily on a per-ton charge for the production of each signatory company.

As shown on the chart on your left, the total contributions to the benefit and pension funds for 1987, which is the column on the far left, totaled $640 million. That was for 1987, which was the last year of the 1984 wage agreement.

The 1988 agreement changed the funding formula to entirely a charge per hour for the signatory company and a lower unit amount as well. This resulted in a contribution of only $255.5 million in 1989, as shown on the next column, a reduction of nearly $385 million per year or approximately $1.30 per ton of bituminous coal produced.

To their credit, the UMWA leadership was concerned that the reduced level of contribution would put the benefit funds into jeopardy. However, the negotiating Committee of the BCOA said that they would agree to guarantee the costs which would require the

BCOA signatory companies to increase the level of funding if it were required to keep the funds solvent.

Later, in a comprehensive review of the situation, a Federal District Court confirmed that the BCOA had deliberately set its health fund contribution at a minimal rate in the face of clear indications that it would result in underfunding. Unfortunately, in 1992, when the day came that the benefit funds were running out of money, the BCOA refused to honor their contractual commitment. Instead they sought to perpetuate their self-generated funding crisis until finally a Federal District Court ordered them to honor their guarantee to keep the fund solvent.

It is clear that the so-called funding crisis was entirely manufactured and manipulated by the BCOA so as to create a climate of panic with which they hoped to impact the legislative process. Then they were successful in getting the UMWA to join them in an effort to force a legislative solution.

The documents that were produced in the Pittston versus the UMWA litigation in Abingdon demonstrate the cynical record of cooperation between the UMWA and the BCOA and the deliberate creation of fear among the retirees to produce the passage of the Rockefeller Act.

The Lobbying Act reports show that the BCOA and the UMWA spent $3 million in their efforts to achieve the economic bonanza of the Rockefeller Act. As shown on this chart, it was money very well spent.

The passage of the Rockefeller Act resulted in a further reduction of $132 million in the amount the companies who signed the BCOA agreement had to pay into the fund. This is the level of savings the head of the BCOA boasted to members they would receive from the passage of the act. When you add that amount to the amount that the BCOA saved from the 1988 agreement, you get the column that says $516.8 million. That was their total savings per year from what they had been paying in 1987.

At the same time, the act put a tax of $52.7 million on reach-back companies, who had been out of the business of mining bituminous coal for 10, 20, 30 and in some cases 40 years. That is shown on the column on the right side of the chart.

It is instructive to review how much the funds were in a deficit position during the period of 1988 to 1993, the deficit that BCOA made into a supposed national crisis. The average deficit was only $10,800,000 per year. Thus, the true issue was not a financial crisis of the funds, but rather how much the BCOA could take from someone else, primarily the reach-back companies who, unfortunately, did not have the same political clout they did.

What can Congress do to fix this terrible inequity? The reach-back companies currently pay the combined fund about $53 million per year, which is only 10 percent of the yearly savings that have been realized by the BCOA companies. One partial solution is H.R. 1370, the Myers-Hancock bill, which would dedicate any surplus in the funds above a safety cushion to credit against reach-back company premiums. This bill would alleviate the reach-back as long as there is a surplus in the funds. Because of this, it is not a complete fix to the problem.

We believe based on the combined fund statements from March 1995 that there is at least a surplus of $221 million on a cash basis and a $147 million surplus on an accrual basis.

Another solution would be to remove the reach-back portion of the act entirely. As the chart reflects, a complete replacement of the reach-back payments by the current signatories would require the giving up of only $53 million, which is 21 cents per ton of their previously realized yearly savings of $1.83 per ton. This would put the responsibility for retiree benefits back onto the signatory companies, where they had always been prior to the Rockefeller Act.

It would get the government out of enforcing an obvious unfair and discriminatory law. It would place the cost of collective bargaining on the parties who negotiated the agreements, where it has always belonged. This system works for everyone else in America. Why not for the bituminous coal industry?

Thank you.

[The prepared statement follows]:

CONGRESSIONAL STATEMENT
OF
CLIFFORD MIERCORT

It has frankly not been much fun at times to be the CEO of North American these past three years since the Rockefeller Coal Act was passed. My company has been accused by various adherents of the bill of a failure of corporate citizenship and worse. I am grateful to you and the committee for the opportunity to set the record straight.

First, as I am confident will be demonstrated by the record of this hearing, it is increasingly clear that passage of the Rockefeller Act with its attendant infliction of pain on a host of American companies was entirely unnecessary. The records of the Fund itself demonstrates that the only funding crisis was one deliberately induced by the BCOA through its change in the rate and method of contribution to the Funds from per ton to a per hours worked basis, producing a deliberate under-funding of the both the 1950 and 1974 health benefits fund by 1992.

Second, the Rockefeller Act has unilaterally transferred the hitherto unquestioned responsibility of the current 1988 signatory operators to meet the entire liability of the 1950 and 1974 Funds on a pay-as you-go basis to a combination of the reachback companies, the coal industry generally, and the 1988 signatories through mandatory contributions to the Combined Fund created by the Act. This has created a wealth transfer to the BCOA companies estimated by at least two sources at more than $130 million a year and the legalized confiscation of approximately $50 million annually from the reachback companies. The amount of this windfall was confirmed in February 1993 in a letter from the President of the BCOA to his members. This kind of legislative restructuring of collective bargaining arrangements is unprecedented in American history and can only be explained as the outcome of a highly cynical and sophisticated political lobbying campaign which carefully concealed from the Congress the purpose and the effect of what it was being asked to do. No one can believe that any legislator would willingly create the kind of economic and psychological damage which has been described here today.

Third, North American has been falsely accused of hiding behind smaller reachback companies in its expressing its outrage over the unprincipled, but painstakingly crafted economic rape of the reachback companies produced by the Rockefeller bill. The truth is that the BCOA companies have been and continue to hide behind North American in an effort to justify the legalized theft of reachback company assets produced by the Coal Act. Let me explain.

Historically, as companies chose not to participate in subsequent Bituminous Coal Wage Agreements, the remaining signatory companies continued to cover the costs of retirees who had worked for others. New companies who entered the business and signed a Bituminous Coal Wage Agreement paid into the Funds on the same basis as companies who had been in the business for a long time, even though they may have yet not had any retirees. This approach was the core concept behind the multi-employer retiree health benefits system. In fact, during the 34 years that North American Coal contributed to the Funds, we paid millions of dollars for benefits to orphan miners from other companies that had gone out of business or elected not to sign a new Bituminous Coal Wage Agreement. In addition, when we left the business in 1984, the Funds were fully solvent.

In 1978 the BCOA agreed to change in a fundamental way the method of providing health care to current employees and subsequent retirees. In order to end two decades of perceived waste and abuse by the funds, each company would henceforth run its own health benefits program to provide the level of benefits established by the current NCBWA. The 1974 Health Benefits Fund was preserved at the insistence of the UMWA to be an explicit multi-employer safety net to provide health benefits to those who retired after 1975 when the 1950 fund was closed and whose employer ceased to be

a NCBWA signatory. By the mid-1980's several companies left the ranks of NCBWA signatories and successfully established through clear judicial precedent (over the opposition of the BCOA and the UMWA) that they had no continuing liability for payments to the funds and that their retirees were entitled to receive benefits from the 1974 fund. North American left the bituminous coal industry in 1984.

Since that time the BCOA has hidden behind us and the other reachback companies to justify:

1. the false statement that a financial crisis existed that would bankrupt the funds because the BCOA could not afford to meet its clear contractual commitments;

2. the false statement that legislation was needed to prevent future withdrawals from the NCBWA when withdrawal liability had already been established by the 1988 NCBWA; and

3. the confiscation of reachback company assets to relieve BCOA companies of a large share of liability for 1950 and 1974 Fund retirees.

The unconscionable nature of the wealth transfer to the already rich BCOA companies engineered by the Rockefeller Act is difficult to overstate.

A final reason why the Coal Act is particularly unfair to North American Coal is that there is no mechanism for passing on to our customers any of these retroactive assessments. Under the terms of our sales contracts, our customers had the obligation to pay for all costs of our employee benefits. When we made the business decision to leave the bituminous coal industry, we made every effort to assure that North American Coal had fulfilled all of its multi-employer benefit obligations, and to ensure that these obligations were paid by our customers as provided for in our contracts. We relied on the clear and unambiguous language of the Wage Agreement, in making this judgment. Our interpretation of this language has been confirmed by several federal court decisions. Had we any way of knowing that new benefits obligations would be imposed on us retroactively, many years after leaving the bituminous coal business, we would have included such costs in the closing that would have been paid by our customers. Our customers, had they been advised of these costs, would have been fully prepared to pay them. As you can well understand, with the complete closure of all of our bituminous coal mines, we no longer have the ability to pass along the reachback assessments to our former customers for whom we mined the bituminous coal in question. For us there is no Rockefeller Act to pass these costs backward on a retroactive basis.

The net result of the retroactive re-writing of all of our contractual obligations has been that in 1992 my Company had to take a one-time charge to earnings of $110,000,000 after tax. To put this amount in perspective, this charge was more than 70 times greater than the average annual profits made by all of North American Coal's bituminous coal mines during the entire 21-year period from 1960 to 1980. However, since 1992, the large BCOA companies have been pocketing over $130 million each year. This simply is neither right, nor fair.

It is my hope that, as a result of this hearing, your committee (and ultimately the entire Congress) will correct these inequities so that small reachback companies will no longer be pushed to the wall by this law and that you will rectify the extraordinary financial burden on the larger reachback companies. This can be done in such a way that it would not adversely affect the BCOA member companies. Indeed, even if the reachback companies were completely removed from the Rockefeller Act, the BCOA companies would still pay less into the Funds on a per ton basis than the amount we paid when we were a signatory to the Bituminous Coal Wage Agreement. The reachback tax is unfair, it has been held unconstitutional by one Federal court, and needs to be changed. Thank you for your time, Madam Chairman.



THE NORTH AMERICAN COAL CORPORATION

SIGNATURE PLACE II, 14785 PRESTON ROAD, SUITE 1100
DALLAS, TEXAS 75240-7891

CLIFFORD R. MIERCORT
President and
Chief Executive Officer

July 28, 1995

The Honorable Nancy Johnson
House Subcommittee on Oversight
1136 Longworth House Office Building
Washington, DC 20515

Dear Chairwoman Johnson:

I appreciated very much the opportunity to provide testimony regarding the "Reachback Tax" issue to the Subcommittee on Oversight of the House Ways and Means Committee. I hope you agree with me that the Reachback Companies offered compelling cases, illustrating that a retroactive tax to pay for health benefits that were never promised by those companies and that reaches back ten, twenty, thirty, and, in some cases, forty years, is totally unfair.

I am pleased to submit answers to the questions raised in your letter to me dated July 10, 1995. My answers are detailed in the enclosure entitled, "Questions for Clifford R. Miercort of The Reachback Company Panel". In addition, I would like to make the following observations and recommendations.

In reading the transcript of the June 22 hearing, I was struck by the inaccuracies that were presented by those who testified on behalf of the United Mine Workers of America (UMWA) and the Bituminous Coal Operators Association (BCOA). One inaccuracy that must be addressed is their assertion that the Reachback Companies promised lifetime medical benefits to their former union employees. This is a baseless contention without factual or legal support. Do you know of any company that would agree to pay for a future liability when they do not know with any certainty the level of benefits or the costs? I know that North American Coal would not and did not do so. The BCOA/UMWA National Wage Agreements that we signed, the last one being in 1984, never obligated us, nor any of the other Reachback Companies, to pay for lifetime medical benefits.

To help you make an informed decision on this matter, I am enclosing a copy of a letter and summary that we sent last year to Mr. Allen Huffman, Tax Counsel for Senator Dorgan, debunking the theory that we and other Reachback Companies promised lifetime medical benefits (also known as the "Evergreen Theory"). In addition, I would call your attention to the detailed analysis, entitled "Who Promised What to Whom When?", already submitted to the Committee by Jonathan C. Rose, partner of Jones, Day, Reavis and Pogue. I am convinced that, after you and your staff analyze these materials, you will concur with me that the "Evergreen Theory" is without merit, and that none of the Reachback Companies promised to provide lifetime benefits.

The other blatant inaccuracy which must be addressed is the false charge that the healthcare of the retirees will somehow be jeopardized by your addressing the Reachback tax issue. The Reachback Companies have not advocated any change in the benefit levels for the retired miners. The UMWA and BCOA representatives continue to make this unfounded and irresponsible accusation to deliberately worry the retirees, so they will become active in opposition to your fixing the problem. The real issue involves not the taking away of any retiree benefits, but deciding which companies should pay for them.

I know as you go forward in your deliberations on this issue that there will be intense opposition from those companies who have unjustifiably benefited by the unfair imposition of retiree healthcare costs on the Reachback Companies. However, the serious and unjust burden imposed on the Reachback Companies by the Coal Act can and must be relieved.

My sense from the hearing was that a number of the Members would prefer legislation that would provide a comprehensive and final solution to the problems faced by the Reachback Companies. As I mentioned in my testimony, a solution would be to remove the Reachback portion of the Act and have the Reachback beneficiaries reassigned.

Thank you for the opportunity to provide this additional information for the official record of the hearing.

Sincerely,

Clifford R. Miercort

Chairman JOHNSON. Thank you.
Mr. Chenoweth.

STATEMENT OF JIM CHENOWETH, DIRECTOR, CORPORATE AFFAIRS, LONE STAR STEEL CO., DALLAS, TEXAS; ACCOMPANIED BY RHYS BEST, PRESIDENT AND CHIEF EXECUTIVE OFFICER, LONE STAR STEEL CO.

Mr. CHENOWETH. Thank you, Chairman Johnson, for allowing me to come before you this afternoon. I also wanted to introduce the chief executive officer of Lone Star Steel, chief executive officer and president Rhys Best, who is here also and would be able to answer questions should you want to ask them.

I am here to tell you the shocking story of what the coal industry Retiree Health Benefit Act of 1992 has done to Lone Star Steel Co. and to the good men and women who work there.

Lone Star is a fully integrated steelmill located in northeast Texas. We are able to produce 1 million tons of steel a year and we convert virtually all of that steel either into pipe that is used in oil and gas wells or into tubes used in the automotive industry.

Lone Star was founded during World War II as a defense manufacturer. Coal was a necessity in the steel-making process then, but modern technology changed that long ago. We haven't needed coal at Lone Star since the new electric furnaces replaced the old blast furnaces and open hearth furnaces many years ago. Lone Star ceased coal mining in 1963. In other words, we have not had a coal miner on our payroll since President Clinton was in high school; not in the last 32 years, not one. Had a coal miner retired from Lone Star Steel Co., he would now be 97 years old.

Lone Star Steel has never been a member of the Bituminous Coal Operators Association. Since at least as far back as 1963, we have not signed a coal miners union agreement nor a health care agreement nor pension agreement, not one. That did not seem to matter to Congress when it passed the Coal Industry Health Benefits Act of 1992 and ordered us to begin paying $69,561 each month to the health care fund. We do not have that kind of money sitting around Lone Star ready to ship to Washington.

We consider what the Congress has done is an illegal taking, unjustly and unnecessarily confiscating our assets without a moral or ethical right, much less a legal right. Already a Federal District Court has held that this act is an illegal taking and is therefore unconstitutional at this moment.

Our recently retired-Congressman from Texas, Jake Pickle, the past Chairman of this Subcommittee, described the egregiousness of this act better than I could. This is a statement that he made to this Subcommittee in October 1992.

> Today the eastern States' coal industry is dominated by foreign-owned companies and about 4 years ago the coal operators decided they were no longer going to live up to their responsibility to pay the health benefit plan, so they reduced their contributions and the plan today faces insolvency.

That was 1992.

Now Congress is being blackmailed into bailing this plan out by taxing companies that have no current connection with the bituminous coal industry. It is as if Congress is a gang mugging an innocent passerby and justifying it by saying, well, our family and

friends are hungry. Mr. Pickle's complete comments are attached to our printed testimony and I strongly urge you to read every bit of it.

By deciding to assign this obligation to Lone Star Steel without good reason or logic, the government caused an unanticipated drain on our funds and necessitated the establishment of a $11 million reserve to cover this imposed liability straight out of cash flow. It was hard, and it hurt us severely. Worst of all, it hurt our people.

These takings represent 40 cents an hour for every one of our active employees. Put another way, these takings add $2 a ton to our cost of all pipe we ship, and nowadays it means a lot of pipe we do not ship due to being no longer competitive. It is especially true for exports. When it comes to transferring funds to another industry mandated solely by government fiat, we not only cannot afford it, but we are confident that the courts some day will uphold our contention that this 1992 act is illegal and it is unconstitutional.

Thirty-two months ago Congress acted quickly, and in so doing has harmed a class of American businesses now known as reachbacks. This was done with no hearings, no comments, no consideration to the harm done. The act of 1992 is bad legislation at its worst and, again, as Mr. Pickle described it, "I believe that the coal provision is a travesty of justice, an embarrassment to the Congress and we should never let ourselves be put in this corner again."

Now the facts are evident. Will Congress be just as quick to stop our bleeding and heal our wounds? Lone Star Steel asks to be relieved of this undeserved burden of being forced to pay someone else's bills.

Thank you for the opportunity to plead our case today.

[The prepared statement and attachment follow]:

STATEMENT OF JIM CHENOWETH
OF LONE STAR STEEL COMPANY

UNITED STATES HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON OVERSIGHT

Thursday, June 22, 1995

Good morning, Madam Chairwoman. Thank you for this opportunity to tell the shocking story of what the Coal Industry Retiree Health Benefit Act of 1992 has done to Lone Star Steel Company and the good men and women who work there.

Lone Star is a fully integrated steel mill in a town in Northeast Texas of the same name. It's a nice town and we think we have a pretty nice company. We are able to produce a million tons of steel per year. We convert virtually all of our steel either into pipe used in oil and gas wells, or into tubes used in the American industrial equipment, transportation equipment and automotive industries.

Lone Star Steel was founded during World War II as a defense manufacturer. Coal was a necessity in the steel-making process then. But modern technology changed that long ago. We haven't needed coal at Lone Star since new electric furnaces replaced old blast furnaces and open hearth furnaces many years ago.

Lone Star Steel ceased coal mining in 1963 -- when President Clinton was still in high school! Lone Star has not had a coal miner on its payroll in 32 years. Not one.

Lone Star Steel has never been a member of the Bituminous Coal Operators Association. Since at least as far back as 1963, we have not signed a coal miners' union agreement, a health care agreement or a pension agreement. Not one.

That didn't seem to matter to the Congress, however, when it passed the Coal Industry Retiree Health Benefit Act of 1992 and ordered us to begin paying $69,561.02 per month into this union retiree healthcare fund. Madam Chairwoman, we do not have that kind of money sitting around Lone Star, ready to ship off to Washington. We consider what the Congress has done an illegal taking, unjustly and unnecessarily confiscating our assets without a moral or ethical right, much less a legal right. Already a federal district court has held this act as an illegal taking and is therefore unconstitutional.

Our recently retired Congressman from Texas, Jake Pickle, the past chairman of this subcommittee, described the egregiousness of this act far better than I ever could. Allow me to quote briefly from his statement to this subcommittee in October 1992. (QUOTE)

"Simply put, the mine workers and the bituminous coal operators agreed decades ago to establish a health plan that would be paid for by all who mined coal in the eastern United States. As long as 'coal was king' this agreement worked reasonably well."

Mr. Pickle went on (QUOTE), "Unfortunately, the coal industry changed dramatically. Today, the eastern states' coal industry is dominated by two foreign owned companies. About four years ago the coal operators decided that they were no longer going to live up to their responsibility to pay for the health benefit plan. And so they reduced their contributions, and the plan today faces insolvency."

Then Mr. Pickle emphasized (QUOTE), "Now congress is being blackmailed into bailing this plan out by taxing companies that have no current connection with the bituminous coal industry. It is as if Congress is a gang, mugging an innocent passerby, and justifying it by saying 'Our family and friends are hungry'."

By deciding to assign this obligation to Lone Star Steel without good reason or logic, the government caused an unanticipated drain on our funds, and necessitated the establishment of an $11 million reserve to cover this imposed liability. It has hurt us and hurt us severely. Worst of all, it has hurt our people. These takings represent 40 cents for every hour worked by our active employees. Also think of the huge ripple effect a 40 cents per hour pay raise would have on the local economy. Put another way, these takings add $2 per ton to our cost for all pipe we ship. Often it means pipe we don't ship because we no longer are competitive. This is especially true for exports. These takings are threatening our economic viability and severely limiting our global competitiveness.

Now, Mr. Pickle continued, and (QUOTE), "We can all be sympathetic to the plight of the mine workers, but their benefits should be paid by the coal companies, not everyone else. Why are we kow-towing to these huge foreign owned companies? It was their cut throat business practices that drove the domestic coal companies out of business. And now we bail them out? We let them escape their obligations while they ship their profits overseas. We should be ashamed," he told the committee.

Let me further describe how Lone Star Steel has been impacted by this act.

Lone Star Steel Company in 1994 had annual revenues of $350 million and 1500 employees with approximately half of them members of the United Steel Workers Union. We are leaders in the marketplace of energy industry tubulars and automotive industry tubulars. We have received the "E Star" award for excellence in exporting our products into more than 60 foreign countries.

The energy boom of the 70's ended in a bust in the 80's and Lone Star Steel was forced to cut 5,000 jobs. Revenues dropped from $1 billion to $200 million. We finally were driven into Chapter 11 and, in slightly less than two years, Lone Star reorganized. We paid our creditors in cash of 84 cents on the dollar. Now in the 1990's we are slowly recovering. We are paying our bills. Our business has become marginally profitable again. We are investing heavily in environmental protection. We are leaders in environmental management. We are a leader in recycling of ferrous scrap and other materials.

But when it comes to transferring funds to the government due solely by government fiat, we not only cannot afford that, but we are confident the courts will someday uphold our contention that the Coal Industry Retiree Health Benefit Act of 1992 is illegal and unconstitutional.

In a note of prophesy, Mr. Pickle added (QUOTE), "Let me also warn my colleagues, you have not heard the last of this issue. I tell you, we are setting a precedent today that will come back to haunt us. Today, we are bailing out the mine workers' plan, and letting the mine operators have a windfall. Who will be next? Will it be the steel industry? The airlines? Tire and rubber companies? Or perhaps it will be the auto industry?"... Finally, he stated, "I believe that the coal provision is a travesty of justice and an embarrassment to the Congress. We should never let ourselves be put in this corner again."

In October 1992, Mr. Pickle warned this committee that the talk of the fund going under was bogus, and sure enough today we see this fund is awash in cash. The actual fact is that the miners' union did not need the money that was taken from companies like Lone Star Steel.

Why then is Congress forcing us to continue to further bloat the Fund's glutted surpluses?

Another question more basic is why should the Congress even be involved at all in the micro-management of a non-government healthcare fund, directly interfering with a collective bargaining process which was working?

Thirty-two months ago, the Congress acted quickly to severely harm a class of American businesses now known as "Reachbacks". This was done with no hearings, no comments, no consideration to the harm done. The Coal Industry Health Benefit Act of 1992 is bad legislation at its worst. Now that the facts are evident, will Congress please be just as quick to stop our bleeding and heal our wounds? Lone Star Steel asks to be relieved of this undeserved burden of being forced to pay someone else's bills. I thank you for the opportunity to plead our case today.

REMARKS OF CONGRESSMAN J.J. PICKLE
BEFORE THE HOUSE WAYS AND MEANS COMMITTEE
OCTOBER 5, 1992

Mr. Speaker, I rise today in support of the energy bill. I support this bill because it includes important incentives for solar energy and much needed relief for independent producers who explore and develop energy supplies. And I'm especially pleased about new incentives for expanding our use of alternative fuels, like compressed natural gas. Alternative fuels will not only help curb our imports of petroleum, but will also improve our environment by cutting down on harmful emissions. These are all good, and vital pieces to our national energy strategy.

But there is one part of this bill which is deplorable, and that is the bituminous coal health benefit bailout. Mr. Speaker, this bailout, as well intended as it may be, is a terrible injustice, and sets a precedent in the area of employee benefits that we will all live to regret.

Simply put, the mine workers and the bituminous coal operators agreed decades ago to establish a health plan that would be paid for by all who mined coal in the eastern United States. As long as "coal was king" this agreement worked reasonably well. Unfortunately, the coal industry has changed dramatically. Today the eastern states coal industry is dominated by two foreign owned companies and the number of miners has drastically declined. About four years ago, the coal operators decided that they were no longer going to live up to their responsibility to pay for the health benefit plan. And so they reduced their contributions to the plan, and the plan today faces insolvency. And now the Congress is being blackmailed into bailing this plan out by taxing companies that have no current connection with the bituminous coal industry.

Mr. Speaker, we should not do this! It is wrong! It is as if we are a street gang mugging an innocent passerby, and justifying it by saying that our family and friends are hungry. We should stick to the original agreement and force those companies who are mining eastern coal to meet their obligations. We can all be sympathetic to the plight of the mine workers, many of whom are elderly and in ill health. But these benefits should be paid by the coal companies, not everyone else. Why are we kowtowing to these huge foreign owned coal companies? Why are we raising taxes on domestic energy companies to pad the profits of these foreign profiteers? It was their cut throat business practices that drove the domestic coal companies out of business, and now we bail them out. We let them escape their obligations and ship their profits overseas. We should be ashamed!

Let me also warn my colleagues, you have not heard the last of this issue. We pay for this bailout by taxing any company or its successor which ever had any connection with mining coal under the BCOA agreement. We have no idea who all these companies are. There will now be a rush to track them down and tell them that they will have to pay millions of dollars a year into this health plan over which they have no control. Some will be forced into bankruptcy, others will be forced to lay off workers. And they will blame you and me, and they will be right. So plan today what you will tell them, it won't be easy.

Finally, I tell you that we are setting a precedent today that will come back to haunt us. Today we are bailing out the mine workers plan and letting the mine operators have a windfall. Who will be next? Will it be the steel industry? The airlines? Tire and rubber companies? Perhaps it will be the auto industry? I tell you right now that there is good reason to believe that the steel industry is already making plans to get a similar bailout.

The members should know that our defined benefit pension plans, which are guaranteed by the Pension Benefit Guaranty Corporation, are underfunded by over $40 billion dollars. Some of the largest companies in America have deliberately chosen to underfund their plans by billions of dollars. And, when I raise this issue no one wants to talk about it. The companies refuse to appear before the Oversight Subcommittee. I am accused of frightening people and undermining confidence in our pension system. I do not want to frighten anybody. But we must insist that companies that make benefit promises keep their promises.

At the same time the other Body was hatching this plan to bail out the coal health plan, it balked at adopting a proposal to make companies properly fund their pension plans. It seems inconvenient to pressure companies to keep their pension promises. There are always a thousand excuses for putting this responsibility off to a later day. But the later day always comes. For the coal industry it comes today and we have chosen to rob Peter to pay Paul. Who will we hijack when the time comes to bail out the rest of our retirement system? Every company that has ever sponsored a pension plan or ever intends to should ask that question. Because today we are telling the world that if you play by the rules and meet your responsibilities you pay the penalty, and the sharp operators who run and hide go free.

Mr. Speaker on balance this is a good bill. It would be better if we had stood our ground and held the coal operators to their own promises. This provision to make other companies pay the coal industry's bills is just a selfish regional request. The other body has caved in to this blackmail by three or four key senators. We can all agree to protect the miners' benefits, but we should have agreed to make the mine owners and operators pay. I, for one, was willing to do so. However, I am not willing to block this entire bill for this one reason. But, I believe that the coal provision is a travesty of justice and an embarrassment to the Congress. We should never let ourselves be put in this corner again.

Chairman JOHNSON. Thank you very much, Mr. Chenoweth. Your testimony is a stark reminder that the words in the pediment of the Supreme Court are indeed difficult to realize. I used to walk to work past the Supreme Court building every day and on the pediment it reads, "equal justice under law." It is very hard to write the law so that there is equal justice and the injustice that is imposed on your company by this law is really appalling.

I am going to yield the chair to my colleague, Mr. Portman from Ohio—he has voted and I have not. I will be back shortly and he will take over. I think hearing from the companies has been very useful to us. We will finish the panel, have questions and then have a short recess before the next panel so those of you serving on the next panel might want to get a bite of lunch.

Mr. PORTMAN [presiding]. Thank you, gentlemen, and apologies for the inconveniences. I left about 10 minutes ago to offer an amendment on the House floor and I learned that we now have two additional procedural motions before that. I appreciate your patience.

Mr. Faltis.

STATEMENT OF JOHN FALTIS, PRESIDENT, ANKER ENERGY CORP., MORGANTOWN, WEST VIRGINIA

Mr. FALTIS. Distinguished Members of the House Subcommittee, thank you for the opportunity to testify. I am John Faltis, president of Anker Energy Corp. I am here today on my own behalf. I am anxious to tell you about how my company is affected by the Coal Industry Retiree Health Benefit Act, because as it stands, the act unfairly puts Anker Energy at a competitive disadvantage with large BCOA companies.

It is no coincidence that the large BCOA companies spent a great deal of time and money getting the act passed. There is no question that the miners should receive the retiree health benefits as promised. However, under the act, companies like mine, companies who never promised to pay the benefits, and who never had representatives in a position to affect management of the retiree health funds are now forced to pay for an unfair share of those benefits, while the largest coal companies, the ones who fought so hard to pass this act in the first place, reap huge windfalls.

Anker is a medium-sized, West Virginia-based coal company with offices and operations in Connecticut, Maryland, Kentucky, Indiana, Oklahoma and Pennsylvania.

We supply our coal to customers in 14 States, including Connecticut, New Jersey, New York, Ohio, Maryland and Missouri. Two of our affiliates had only limited periods of employment under UMWA coal wage agreements.

In both cases the miners were employed for only a fraction of their mining careers. However, the act is forcing Anker to pay full lifetime retiree and dependent health benefits. This is unfair, especially since the BCOA companies we compete with receive a windfall of hundreds of millions of dollars under the act, giving them an unfair advantage in the marketplace.

The bottom line is this act has put at risk my 600 employees and put at risk hundreds of additional contractors and other people

that rely on our business to survive. It has put their job security and their benefits at risk as well.

Anker has been assigned liability under the act two ways. First, 20 years ago, one of Anker's affiliates, King Knob Coal Co., operated as a contract miner for a BCOA member company, one of the largest coal companies in the world. Under the contract mining arrangement, the BCOA company owned the coal reserves and King Knob mined the coal. King Knob is required by the BCOA company to sign a coal wage agreement and use only union workers to mine the coal.

Unlike many contract mining arrangements, it was the BCOA company and not King Knob that was liable to pay the health benefits for the miners employed at the operation.

In the early eighties, the BCOA company unilaterally terminated its contract with King Knob, causing the layoff of most of the miners. Briefly, King Knob later took over the mine to complete reclamation required by law, rehiring some of the workers for a short period. Under the reach-back provision of the act, Anker will be asked to pay the liability that the large BCOA company dumped on us.

Anker has another very limited relationship with union workers. Over a 6-month period in the late seventies an Anker affiliate purchased the stock of Reliable Coal Co., a small, insolvent UMWA-organized company. Reliable was about to lay off its 200 workers when it became an affiliate of Anker.

Unfortunately, market conditions forced the mine to close after only 6 months and the Reliable miners were laid off. Under the act Anker is solely liable for the lifetime retiree health benefits of the former Reliable miners and their families, as well as a portion of the retiree health benefit costs of unassigned miners.

To bring this inequity into focus, the Reliable miners worked in the mines for more than 20 years. An Anker affiliate employed them for only 6 months, one-fortieth of their work life, but Anker must foot the bill for all in lifetime retiree health benefits and that of their families as well.

Ladies and gentlemen, this amounts to a huge retroactive payment for the few hours these Reliable miners were employed. Clearly this imposes a severe and unfair burden on Anker.

As a result of the act, Anker has been informed by the combined fund that it can anticipate 220 assignees for a one-time cost of $1.2 million and an annual cost of $500,000. These are huge costs for my company to bear, especially as they were not bargained for, were not anticipated, and have no relationship to any revenue-producing operation of my company. Again, costs like these jeopardize the jobs of my 600 active employees and the many others that depend on our company.

In closing, I ask you to help my company and its employees by removing the unintended inequities caused by the act and providing for a more evenhanded allocation of retiree health benefit liability. Undoubtedly, proposals such as H.R. 1370 will alleviate some of these burdens, but to be truly fair, these costs must be borne by those BCOA companies that reap the benefits of long-term labor agreements while having market dominance. Action or inaction on this act could mean the difference between survival and insolvency for Anker and many other companies. Thank you.

[The prepared statement follows:]

STATEMENT OF JOHN FALTIS
PRESIDENT OF ANKER ENERGY CORPORATION

INTRODUCTION

Thank you for the opportunity to present the views of Anker Energy Corporation regarding the Coal Industry Retiree Health Benefit Act ("the Act"). Anker Energy is a related person to a "reachback company". A reachback company is a company which was not signatory to a contract with the UMWA in 1992, but was signatory to a UMWA contract at some time since 1950 and employed at least two UMWA miners for at least one day. Under the Act, such companies are assigned liability to the "Combined Fund" created by the Act not only for the health benefits of miners they employed, but also for a percentage of the benefit costs of miners whose employers are no longer in business.

Anker Energy never signed a union contract. But the Act contains a "related person" clause, which provides that if a former employer is insolvent or no longer in business, companies related to the former employer (such as its parent or its sibling corporations) will be liable for the former employer's retiree health benefit costs. The reachback provision, together with the related person provision, burdens operators like Anker Energy with onerous and unfair liability for the health benefits of persons with little or no connection to the operator. Reachback operators are forced to pay benefits that they never contracted to provide.

The fundamental goal of the Act is to ensure that these miners receive adequate retiree health benefits. Anker Energy wishes to contribute to this goal, and is willing to pay its fair share of the costs of these benefits. However, Anker Energy believes that the disproportionate and unfair impact of the Act in its present state, not only overburdens coal companies that had limited union involvement, but negatively impacts the livelihood of its workers.

Anker Energy is a West Virginia coal company that provides coal to customers in 14 states. In its 20 years of business, Anker Energy affiliates had only two limited periods of employment under the UMWA coal wage agreements. The first occurred in the late 1970s when an Anker Energy affiliate, acquired and unsuccessfully tried to revitalize a mine owned by an insolvent unionized operator. This involvement lasted only 6 months. The second occurred in the early 1980s when another Anker Energy affiliate acquired a coal mine from one of the largest members of the Bituminous Coal Operators Association ("BCOA"), and operated it for only 4 years.

In both cases, Anker Energy affiliates employed the miners for only a fraction of their mining careers; they worked the bulk of their careers for someone else. But in both cases, the Act forces Anker Energy to pay full lifetime retiree health benefits to these miners and their dependents', as well as a portion of the retiree health benefit costs of unassigned miners and beneficiaries, resulting in a disproportionate and unfair burden on Anker.

Anker Energy competes with large BCOA companies that are receiving a substantial cost savings as a result of the Act. Even the BCOA has estimated annual savings to its members in excess of $100 million. As a result, Anker Energy is placed at a competitive disadvantage. The competitive disadvantage is especially severe because Anker Energy sells coal in the spot market where BCOA companies traditionally sell coal at lower prices. This competitive disadvantage has serious implications for Anker Energy and the over 600 West Virginians it employs. While the Act raises Anker Energy's per-ton cost of producing coal, it lowers the per-ton cost of Anker Energy's BCOA competitors -- clearly not the original intent of the Act.

Anker Energy supports proposals for alleviating the Act's burdens for all coal operators, such as H.R. 1370, but it believes that bill would better serve its purpose if it rectified the disproportionate effects of the Act. Full relief would exempt from the Act coal producers whose union activities have been limited. As it stands, the bill reduces premiums based in proportion to an operator's assigned beneficiaries as a percentage of all assigned beneficiaries. Even though this helps reachback operators compete with companies that rely

heavily on union employment, it makes no special provisions for the reachback operators who have suffered the most under the Act. The unfair competitive advantage that the Act gave to the larger operators when the Act was passed will not be removed.

A Company should not be assessed liability as a "related person" when the miners were employed by the company less than one year.

In the late 1970's, an affiliate of Anker Energy purchased the stock of Reliable Coal Company, a small, insolvent UMWA-organized coal company. Anker Energy intended to turn the company around by re-tooling Reliable's facilities to mine metallurgical coal -- a highly competitive business where coal prices are established in the world market. Anker Energy borrowed large sums of money and invested it in the mine, intending to sell metallurgical coal at a price high enough to service the debt. However, Anker Energy's cost of borrowing skyrocketed when interest rates climbed above 20 percent, and its expected revenues plummeted when the price of metallurgical coal dropped, making it impossible to continue the operation without losing the entire company. Market conditions forced Anker Energy to close the mine after only 6 months. It is worth emphasizing that the Reliable miners were laid off because of unavoidable market forces, not because of union affiliation.

Under the Act, Anker Energy is considered a related party to Reliable, the last employer of these miners to have signed a coal wage agreement. Therefore, even though Anker Energy's controlled group employed Reliable's miners for only 6 months, the Act holds Anker Energy solely liable for the lifetime retiree health benefits of 50 former miners of Reliable and every member of their families, as well as a portion of the lifetime retiree health benefit costs of unassigned beneficiaries. The 50 Reliable miners worked in the mines for more than 20 years. The Anker affiliate employed them for only 6 months. Yet Anker must foot the bill for all of their lifetime retiree health benefits, and that of their families. In other words, they worked for an Anker affiliate for less than 1/40th of their work life, but Anker must pay 100% of their benefits and the benefits of their families. Clearly, this imposes an unfair burden on Anker.

The Act should be amended to protect companies that have employed miners for short periods of time from being held liable for lifetime health benefits earned through years of employment with other coal operators.

Contract miners should not be liable under the reachback provision for the health benefits of retirees who were employed in a contract mining arrangement.

Coal mining operations often involve a bifurcation of rights, with one company owning the economic rights to the coal reserves (the "contracting company") and another company (the "contract miner") performing the mining under contract for the benefit of the contracting company. In certain circumstances, the reachback provision of the Act has the effect of unfairly allocating liability for retiree health benefits to contract miners rather than to the contracting company.

One of Anker Energy's affiliates, King Knob Coal Company ("King Knob"), operated as a contract miner for one of the largest coal companies in the United States. The contracting company is a BCOA company and a member of the BCOA team that negotiates the coal wage agreements. As a condition of its contract mining relationship with this large contracting company, King Knob was required to sign a coal wage agreement and use only union workers to mine the coal. Under the mining agreement, the contracting company, not King Knob, was required to pay the health benefit contributions for the miners employed by King Knob on the contracting company's behalf. This arrangement

continued for 15 years, at which time the contracting company unilaterally terminated its contract with King Knob, causing the layoff of most of the miners. King Knob later acquired the reserves from the contracting company, hired back some of the laid off miners, and over the next 4 years mined out the remaining reserves and closed down the mine.

Under the reachback provision of the Act, however, even though the contracting company (i) effectively employed these miners for 15 out of the 19 years coal was extracted from this mine, (ii) was contractually obligated to pay all miner health benefits during the 15 years, and (iii) caused the layoff of these miners when it unilaterally terminated the contract, the Combined Fund has assigned it none of the liability for the retiree health benefits. Instead, the Combined Fund has required King Knob to pay all the retiree health benefits of the miners employed by the operation, the health benefits of their dependents, and a portion of the retiree health benefit costs of unassigned beneficiaries.

To rectify this inequity, the reachback provision of the Act should be modified in the context of a contracting company/contract miner relationship so that upon termination of a mining contract by a contracting company, the retiree health benefits of miners who were laid off as a result of the contract termination are attributable to the contracting company rather than the contract miner.

CONCLUSION

In closing, we ask this subcommittee to review the Act and the inequity it has created in its attempt to protect miner's benefits. We support efforts to reform the Act, such as H.R. 1370, which would rebate surplus assets to all entities paying into the Combined Fund. But to be truly fair, reform should provide for a more equitable allocation of retiree health benefit liability than that provided by the Act. These changes could mean the difference between survival and insolvency for many coal companies.

Mr. PORTMAN. Thank you. John B. Patton, president of Davon Inc., Columbus, Ohio is recognized.

STATEMENT OF JOHN B. PATTON, PRESIDENT, DAVON INC., COLUMBUS, OHIO

Mr. PATTON. Distinguished Members of the Committee, thank you for asking me to testify. I am John Patton. I am the owner and president of Davon Inc., an Ohio business. We manufacture and deliver ready-mixed concrete products and mine and process limestone, sand and gravel. We employ 275 people, with excellent wages and benefits in the high unemployment areas of south central Ohio. Many of our employees are represented by the International Union of Operating Engineers. The union has actively supported us in seeking relief from the 1992 coal act.

There are three groups of companies affected by this legislation and the differences between them are significant. The first group is the post-1988 companies, those in the coal business after 1988, including the current members of the BCOA.

The second group is the reach-back companies, those in the coal business from 1978 through 1988. The third group is the super reach-back companies, those who left the coal business before 1978. Davon is a super reach-back company.

Please review the summary chronology attached to my written testimony, which shows there is absolutely no connection between super reach-back companies, including Davon, and the alleged problems that Congress sought to address in the 1992 coal act.

Davon's predecessor, the New York Coal Co., sold all of its coal mining interest in 1954. I would like to repeat, in 1954. We have in no way been affiliated with the coal business since then. Davon was formed in the late fifties after my family purchased the stock of the New York Coal Co., then a Maine corporation. They renamed the company and reincorporated it into Ohio. So, Davon has never been in the coal business.

Let's focus on 1978, a crucial year as it relates to Davon and the 1992 coal act. In 1978, the year the UMWA retirees were promised lifetime benefits at the bargaining table by all companies then in the coal business; 1978, the year singled out to delineate the super reach-back companies from the reach-back companies; 1978, the Coal Commission report which led to this act recommended only applying the act to the post-1978 companies. The commission would not have included Davon and other super reach-backs; 1978, Davon and Templeton, who you will hear from in the next panel, had been out of the coal business for 24 years.

The act does not even generate significant revenues from super reach-backs. They represent only about $10.8 million or no more than 3 percent of anticipated fund revenues, which is insignificant to the fund's revenue from other sources or its surplus, which is well over $100 million.

Super reach-backs should be excluded before battle lines are drawn over the amount of the surplus and what, if any, other changes should be made to the act.

They should be exempt because it is wrong to include them in the first place, not because there may now be a surplus. A super

reach-back exemption should not be contingent upon any specific level of surplus.

Miners were promised benefits and they should get them, but those who promised the benefits should pay for them. If it were not for this law, the BCOA and others would have to pay these health insurance premiums, as they promised to do in collective bargaining.

This brings us to the true effect of this law. The act, without any conceivable justification, takes our money and uses it to pay for an obligation of the BCOA and others.

The 1992 coal act has cost Davon over $800,000. It has drained capital from our company and cost us jobs. The proposed Myers-Hancock bill does not give super reach-backs the complete exemption they deserve. It treats us like other reach-back companies. We are not like them. We were long gone in the coal industry when retiree health benefits were promised in 1978.

A mistake has been made. Remember 1978. Honor it as a legitimate cutoff date and please exempt all super reach-backs from this legislation. We do not belong in it.

[The prepared statement follows]:

TESTIMONY OF JOHN B. PATTON
PRESIDENT OF DAVON INC. OF COLUMBUS, OHIO
BEFORE THE SUBCOMMITTEE ON OVERSIGHT,
COMMITTEE ON WAYS AND MEANS,
UNITED STATES HOUSE OF REPRESENTATIVES
Washington, D.C., June 22, 1995

Good morning Madam Chairman and members of the subcommittee. Thank you for inviting me to testify.

I am the owner and president of Davon, an Ohio business. We manufacture and deliver ready-mix concrete products and mine and process limestone, sand and gravel. We employ 275 people, with excellent wages and benefits, in the high unemployment areas of south central Ohio. Many of our employees are represented by the International Union of Operating Engineers. The union has actively supported us in seeking relief from the 1992 Coal Act.

There are three groups of companies affected by this legislation and the differences between them are significant:

1) **Post-1988 companies:** those in the coal business after 1988, including the current members of the BCOA;

2) **"Reachback" companies:** those in the coal business from 1978 through 1988; and

3) **"SUPER" Reachback" companies:** those who left the coal business before 1978; Davon is a SUPER Reachback company.

Please review the summary chronology attached to my written testimony which shows there is absolutely no connection between SUPER Reachback companies, including Davon, and the alleged problems that Congress sought to address in the 1992 Coal Act.

Davon's predecessor, New York Coal Company, sold all of its coal mining interest in 1954. We have in no way been affiliated with the coal business since then. Davon was formed in the late 1950's after my family purchased stock of the New York Coal Company, then Maine corporation. They re-named the company and re-incorporated in into Ohio. So,

DAVON HAS NEVER BEEN IN THE COAL BUSINESS.

Let's focus on 1978, a crucial year as it relates to Davon and the 1992 Coal Act.

1978: the year UMWA retirees were promised lifetime benefits at the bargaining table by all companies then in the coal business.

1978: the year singled out to delineate the SUPER Reachback companies from Reachback companies.

1978: The Coal Commission report, which lead to this Act, recommended only applying the Act to the post-1978 companies; the Commission would not have included Davon Inc. and other SUPER Reachbacks.

1978: Davon (and Templeton) had been out of the coal business for 24 years.

The Act does not even generate significant revenue from SUPER Reachbacks. They represent only about $10.8 million, or no more than 3% of anticipated fund revenues, which is insignificant to the Fund's revenue from other sources, or its surplus which is well over $100 million.

SUPER Reachbacks should be excluded BEFORE battle lines are drawn over the amount of the surplus and what, if any, other changes should be made to the Act. They should be exempt because it was wrong to include them in the first place, not because there may now be a surplus. A SUPER Reachback exemption should not be contingent on any specific level of surplus.

Miners were promised benefits and should get them. But those who promised the benefits should pay for them, not SUPER Reachback companies. If it were not for this law, the BCOA and others would have to pay these health insurance premiums, as they promised to do in collective bargaining. This brings us to the true effect of this law. The Act, without any conceivable justification, takes our money and uses it to pay for an obligation of the BCOA and others. The 1992 Coal Act has cost Davon over $800,000. It has drained capital from our company and cost jobs.

The proposed Myers Hancock Bill does not give SUPER Reachbacks the complete exemption they deserve. It treats us like other Reachback companies. We are not like them! We were long gone from the Coal Industry when retiree health benefits were promised in 1978.

A mistake has been made. Remember 1978. Honor it as the legitimate cut off date and please exempt all SUPER Reachbacks from this legislation. We do not belong in it!

Mr. PORTMAN. Thank you.
Alan T. Law is recognized.

STATEMENT OF ALAN T. LAW, PRESIDENT, MOUNTAIN LAUREL RESOURCES COMPANY, MOUNT HOPE, WEST VIRGINIA

Mr. LAW. I am Alan Law, president of the Mountain Laurel Resources Co. Thank you, Mr. Chairman and Members of the Subcommittee for this opportunity to address you on an issue which is of utmost concern for me and my company.

I am here to represent not only my company, but also all of those small reach-back companies whose corporate lives and in some cases personal livelihood have been destroyed by the coal act. Through a stock purchase, I acquired Mountain Laurel in 1992 before the enactment of the coal act.

In 1989, Mountain Laurel negotiated an agreement with trustees of the health and retirement funds for a full and complete settlement of our obligations to the funds at that time.

I would like to quote from a letter dated July 25, 1989, whereby Mountain Laurel sent a letter to the fund expressing our condition on accepting the agreement.

> The UMWA health and retirements funds hereby release and discharge forever Mountain Laurel Resources Co. and its predecessor, the New River company, and all persons acting by, through or for said companies from any and all claims, complaints, liabilities, obligations, courses of action and demands of any kind whatsoever, either currently pending against said companies or unasserted, known or unknown to the United Mine Workers of America health and retirement funds for and in consideration of the withdrawal of liabilities here and before set forth to be paid by Mountain Laurel Resources Co.

Based on that agreement and what we thought was a valid and binding agreement, we proceeded to restructure our company. With only six employees, we were primarily interested in the property holdings for the recreational development potential and not in further development of its coal holdings.

I had absolutely no interest in running a coal mining company and I have never employed a coal miner. For nearly a decade the coal activity of our company has been limited to the receipt of passive income from coal leases. I first became aware of the magnitude of our potential disaster in mid-1993 and my worst fears were confirmed in October of that year when we received premium properties for a total of 2,071 miners and dependents.

The annual premiums assessed were in excess of $5.1 million, or five times the company's current annual revenues. Obviously, this amount was beyond our financial capability, and all the more frightening was the IRS penalty of more than $200,000 per day if we failed to pay. I appealed to the new combined fund and to then Treasury Secretary Lloyd Bentsen for their urgent help, all to no avail.

In testimony before your Committee in September 1993, I heard then-Assistant Secretary Leslie Samuels advise the members that while the administration could not support a bankruptcy exemption for companies which could not pay the premiums due, he was confident that companies could respond to their premium notices by asking the combined fund trustees for a stretched out payment schedule, and that this would be discretionary with the trustees.

I am here before you today to testify that based on my experience, no such stretched out payment schedule is possible. Based on the conduct of the combined fund in my case, it appears that the trustees possess no such discretion whatsoever to enter into long-term pay out agreements.

With our first $420,000 monthly premium due on November 25, 1993, and with no response from the fund to our plea for help or assistance, we were forced to file for bankruptcy on November 19, 1993. Unfortunately, our nightmare did not end with the filing of our petition for reorganization.

Our initial assignment of beneficiaries was so inaccurate, many of our premiums were required to pay for benefits for the dead. Our assigned beneficiaries included my wife's uncle, who died 16 years ago, and literally dozens of beneficiaries who are allegedly more than 100 years old. Other assigned beneficiaries only worked for the company for a matter of weeks, but that did not matter. They said if you once employed a miner under the UMWA agreement and are technically still in business and the miner has retired, you could be liable for a lifetime of benefits.

So, Mountain Laurel was put into bankruptcy. Eighty-eight years' worth of work proudly serving West Virginia and our Nation's industrial sector down the drain. It is not enough to be put in bankruptcy, however. Lawyers for the combined fund continue to hound me and my wife over every single company expenditure, including the company-provided health insurance policies for us.

Every time we travel to Washington to plead for relief from this nightmare, every expense is challenged by their examiners. In their latest move, the trustees have threatened to sue me and my wife personally under some ultra ego theory for the total net present value of the liability, which is now to be estimated to be $40 million. Indeed, they have given me a copy of their proposed complaint to prove that they are serious.

In the past months since going into bankruptcy, I have attended several meetings with Senator Rockefeller and even more meetings with his staff. I believe that they are honestly dismayed and concerned at the impact the coal act has had on companies like mine. However, no corrective legislation has yet been proposed that has been acceptable by all parties.

Mr. Chairman, I applaud you. I know no one wants to revisit this enormously complex and contentious issue, but this problem needs fixing. If any form of relief is justified, is reasonable, is reasonable and is fair, it is relief for small reach-back companies who do not have the financial resources to meet their obligation imposed by the act. It is not that we just do not want to pay; we cannot.

Small companies need relief and we need it now. We cannot wait. With your help in the coming months, we can prevent more Mountain Laurel bankruptcies this year. Thank you.

[The prepared statement follows:]

CONGRESSIONAL STATEMENT
OF
ALAN T. LAW

I am Alan Law, President of the Mountain Laurel Resources Company, Mt. Hope, West Virginia. Thank you, Madam Chairman and members of the subcommittee, for this opportunity to address you on an issue which is of the utmost concern for me and my company.

I am here to represent not only my company but also all of those small reachback companies whose corporate lives and in some cases personal livelihood have been destroyed by The Coal Act.

Through a stock purchase, I acquired Mountain Laurel[1] in 1992 before the enactment of The Coal Act. I have never employed a miner. With only six employees, we were primarily interested in the property holdings for their recreational development potential and not in the further development of its coal holdings. I had absolutely no interest in running a coal mining company. For nearly a decade, the coal activity of our company has been limited to the receipt of passive income from coal leases.

I first became aware of the magnitude of our potential disaster in mid 1993 and my worst fears were confirmed in October when we received premium notices for a total of 2,071 miners and dependents. The annual premiums assessed were in excess of $5.1 million or five times the company's current annual revenues. Obviously, this amount was beyond our financial capability -- and all the more frightening was the IRS penalty of more than $200,000 per day if we failed to pay. I appealed to the new Combined Fund and to then Treasury Secretary, Lloyd Bentsen, for their urgent help -- all to no avail.

In testimony before your full committee in October of 1993, I heard Assistant Secretary Leslie Samuels advise the members that while the Administration could not support a bankruptcy exemption for companies which could not pay the premiums due, he was confident that companies could respond to their premium notices "by asking the Combined Fund trustees for a stretched-out payment schedule" and that this would be "discretionary with the trustees."

I am here before you today to testify that based on my experience no such stretched-out payment schedule is possible. Based on the conduct of the Combined Fund in my case, it appears that the trustees possess no such discretion whatsoever to enter into long-term payment agreements.

With our first $420,000 monthly premium due on November 25, 1993, and with no response from the Fund to our plea for help, we were forced to file for bankruptcy on November 19, 1993. Unfortunately, our nightmare did not end with the filing of our petition for reorganization.

Our initial assignment of beneficiaries was so inaccurate, many of our premiums were required to pay for benefits for the dead. Our assigned beneficiaries included my wife's uncle who died 16 years ago and literally dozens of beneficiaries who are allegedly more than 100 years old. Other assigned beneficiaries only worked for the company for a matter of weeks. But that didn't matter. They said that if you once employed a miner under a UMW agreement and are technically "still in business," you could be held liable for a lifetime of benefits.

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[1] Mountain Laurel is the successor company to "The New River Company," historically one of the largest coal producing companies in West Virginia after its original founding in 1906. In the 1960's New River was acquired by CSX Railroad and subsequently sold off during its reorganization. Subsequently due to changing domestic and world metallurgical coal markets, Mountain Laurel ceased coal production in 1985 and was restructured into a coal reserve holding and service organization.

So Mountain Laurel was put into bankruptcy. Eighty-eight years worth of work, proudly serving West Virginia and our nation's industrial sector, down the drain.

It's not enough to be put in bankruptcy, however, lawyers for the Combined Fund continue to hound me and my wife over every single company expenditure including the company- provided health insurance policies for us -- every time we travel to Washington to "plead" for relief from this nightmare -- every expense is challenged, by their examiners. In their latest move, the trustees have threatened to sue me and my wife personally under some sort of "alter ego" theory for the total net present value of the liability which is now estimated to be $40 million. Indeed they have given me a copy of their proposed complaint to prove that they are serious. They now have my wife's small, inactive landscaping firm, known as Mother Nature's Designs, in their gunsights -- when her firm only generated $5,000 in earnings some five years ago.

In the past months since going into bankruptcy, I have also attended several meetings with Senator Rockefeller and even more meetings with his staff. I believe that they are honestly dismayed at the impact of The Coal Act has had on companies like mine, however, no corrective legislation has yet to be proposed to me.

Madam Chairman - I applaud you. I know no one wants to revisit this enormously complex and contentious issue, but this problem needs fixing. Small companies need relief and we need it now. We just can't wait. Only with your help in the coming months can we prevent more "Mountain Laurel" bankruptcies this year.

Thank you.

Mr. PORTMAN. Thank you, Mr. Law, and I thank all the panelists for excellent testimony. Some of my colleagues will be coming back in a moment.

The first question would apply to any of the companies represented. Given the liabilities you have talked about, what kind of litigation have you proceeded with—I would imagine that the litigation might stem from the 1992 Act. Maybe we can just go down the line, Mr. Miercort, starting with you. Have you filed any lawsuits subsequent to the 1992 Act?

Mr. MEIRCORT. We have filed a constitutional challenge against the act. It has been consolidated with some other companies' challenges as well. It is being heard by the Washington district court. The oral argument will be next week. I think someone earlier did mention that the Federal District Court in Pittsburgh recently did declare that in the Unity Realty Case that the act is indeed unconstitutional.

Mr. PORTMAN. Do other companies have a different basis for litigation?

Mr. CHENOWETH. This is Rhys Best, chief executive officer of Lone Star Steel Co. I think he can answer that very directly.

Mr. BEST. He has worked so long on the problem. He has already retired from the company, so he is not familiar with our litigation. We filed a constitutional challenge in Texas in Federal Court and that is in discovery and preparation of papers. We are just filing responses to the requests from the various lawyers. It has not been set for hearing.

Mr. PORTMAN. And that also is on a constitutional basis?

Mr. BEST. Yes, it is. It is based as a constitutional challenge on Federal law on one case and the other challenge is that Lone Star filed for bankruptcy reorganization in June 1989 and was reorganized in May 1991, and so we do have a bankruptcy challenge, as well, under the Code.

Mr. FALTIS. We haven't filed any suit or started any action yet. We are asking for relief, though, at least on an administrative basis because we do not feel we rightfully have the liabilities that are being imposed on us.

Mr. PORTMAN. Mr. Patton?

Mr. PATTON. We have filed, again, a constitutionality issue. We have lost at the lower level. We are appealing. We made a very conscious decision when we began the litigation process to position this to go all the way to the Supreme Court if we could possibly get there, and that remains our intention today. We have also sought administrative relief from the SSA.

Mr. PORTMAN. Mr. Patton, you mentioned in your testimony that your company has expended over $800,000 already in relation to the super reach-back status that you have in relation to the problems before the Subcommittee today.

Does that $800,000 include your legal fees that you have expended?

Mr. PATTON. Yes, sir, it does.

Mr. PORTMAN. Could you give us an estimate of what your legal fees have been to date?

Mr. PATTON. Approximately $330,000 to $350,000.

Mr. LAW. Our company is in the reorganization process in the bankruptcy court. I might tell you that under the combined fund's basic interpretation of this act, is that they consider these premiums or contributions to be a tax, and they consider them to be a necessary and actual expense of the estate that should be paid as an administrative expense.

Certainly I do not hold this position and we will be filing challenges to that assertion in the near future. But if it is considered to be an administrative expense and a tax, then filing for bankruptcy protects no one. It becomes a nondischargeable item and they dictate the terms of their settlement with you or perhaps destroy your company completely and try to press for liquidation. So, we are actively involved in litigation with them.

Just last week we were served with some potential litigation where they want to lift the automatic status afforded by the bankruptcy court to proceed against my wife and I personally. So, it is an ongoing battle with us.

Mr. PORTMAN. Thank you. I would like to relinquish the gavel and recognize the Chair of the Committee, Nancy Johnson, for questions.

Chairman JOHNSON [presiding]. Have any of you challenged assignments made by the SSA of orphaned individuals?

Mr. MEIRCORT. Yes, Madam Chairman. We have challenged a number of the assignments. We had been assigned approximately 1,300 beneficiaries in total and we have challenged approximately 25 to 30 percent of them, on the order of 250. We have yet to hear one word from the administrative review. We have been told that ours is probably the last in the pile.

Chairman JOHNSON. How long ago did you challenge?

Mr. MIERCORT. This was several years ago; within the timeframes required by the act.

Chairman JOHNSON. And are you paying for that 30 percent at this time?

Mr. MEIRCORT. Yes, ma'am, we are.

Chairman JOHNSON. If they reallocate them, will you be reimbursed?

Mr. MEIRCORT. It is my understanding that we will be if they are inappropriately allocated.

Chairman JOHNSON. And what does it cost you to challenge?

Mr. MIERCORT. The administrative cost of the challenge is probably in the tens of thousands of dollars for staff time and other work.

Chairman JOHNSON. Millions?

Mr. MEIRCORT. Thousands. In terms of the challenge, that itself is just staff time. In terms of our answer to Mr. Portman's earlier question, we have spent on the order of half a million dollars on our legal challenge.

If possible, I would like to add one other comment regarding the legal challenge. I think it goes to a point that was made by one of the other members of this panel. The president of Davon made the point that there were lifetime benefits promised to all UMWA retirees in the 1978 agreement. That is factually incorrect. It is not true. It is clear by the documents that were entered into by the BCOA companies in 1978 that there was never a lifetime guaran-

tee of benefits. That is one of the points in our oral arguments we will be making next week on the constitutionality challenge.

I can point you to the point in the documents, but will just read a couple of quotes from the agreements that we entered into, the only ones that we signed.

The explicit agreement by the signatory employers to make specific contributions to the trust are effective during the life of this agreement. Another part of the agreement, ending when the agreement is terminated. Also, in the general description which some people cite as the area that says we promised lifetime employment, it says, health benefits are guaranteed during the term of this agreement subject to the terms of the agreement at the levels of benefits provided in the plans. There has never been ever a lifetime guarantee of payments.

[Additional written Subcommittee questions and the responses submitted to North American Coal Corp. follow:]

QUESTIONS FOR CLIFFORD R. MIERCORT
OF THE REACHBACK COMPANY PANEL

1. *Have you appealed any assignments of employees made by the Social Security Administration? With what result? At what expense?*

   Yes, 231 beneficiaries to date. After 13 months, we received review of only 46. Of this 46, 35 were removed from our billing list. There are currently 185 challenges outstanding. To date, these challenges have cost us approximately $200,000.

2. *Do you have any pending litigation under the 1992 Act?*

   Yes, a constitutional challenge.

3. *Can you describe what your legal costs have been?*

   Approximately $200,000.

4. *What is your approximate annual premium liability under the Act?*

   $3 million

5. *What steps would you recommend that Congress take to remedy the problems created by the 1992 Act?*

   H.R.1370 would provide some temporary relief; however, I recommend consideration be given to providing permanent relief to reachback companies.

Chairman JOHNSON. Thank you. We have to leave to vote in 5 minutes and when we leave to vote I am going to recess the hearing for half an hour.

I want to ask the panel if you could very quickly compare the benefits you are providing under this program to the benefits you are providing to your own employees?

Mr. FALTIS. If I may, we have extensive benefit plans for our employees and cover almost 100 percent of everything. We have an incentive program that we share cost savings with our employees, but the actual benefit that we guarantee our employees is very broad and we have adopted in our own operations, our employees aren't represented by a union, but we also provide for retiree health costs as well.

Chairman JOHNSON. Do you provide for grandparents and grandchildren? In your definition of family benefits, do you include grandparents and grandchildren?

Mr. FALTIS. No. What we do is we have a defined contribution plan, so we provide a pool of money to our employees both through a 401(h) and a 401(k) so that they will have a pool of money to draw upon. It is different for retirees. It is not a defined benefit plan, but a pool of money that they can draw upon for their benefits.

Chairman JOHNSON. For their medical benefits?

Mr. FALTIS. Medical, yes. We have both a 401(h) and a 401(k).

Chairman JOHNSON. Any others?

Mr. BEST. I am Rhys Best, chief executive officer of Lone Star Steel Co. We employ 1,500 employees approximately, 1,000 represented by the United Steelworkers of America. So, we have union employees.

Our health care plan extends to the employee and their immediate dependents through age 22 and that is all. We also by contract do not provide any health care benefits beyond age 65. That is a contract that we have had for over 30 years.

The actual benefits within the plan are very adequate, but are much less than what I have read in the BCOA agreements.

Mr. MIERCORT. For North American Coal we provide benefits for the employee and direct dependents until age 21 and we have an 80/20 copay situation so the level of benefits is much more modest.

Mr. PATTON. We have a comprehensive health care program, again, 80/20, benefits for dependents up to age 21. We presently have no health care benefits for retirees.

Chairman JOHNSON. So, you are contributing under this plan to a considerably richer benefit plan that defines dependent benefits far more broadly in terms of who is provided benefits as well as what benefits are provided than you are for your own employees; is that a fair statement?

Mr. PATTON. That is correct.

Chairman JOHNSON. I assume, Mr. Law, that before you ended up in bankruptcy that you had a similar situation.

Mr. LAW. Currently we have an 80/20 copay with $1,000 deductible, but it is just two employees, myself and a receptionist/secretary.

Chairman JOHNSON. There are many fairness issues here and you have helped to shed some light on some of them and we thank you for being here and for your testimony.

[Recess.]

Chairman JOHNSON. The hearing will reconvene.

Members are tied up with a vote still, but they will be returning promptly and we have a series of amendments that are going to be considered and then the votes bunched, so that will result in another significant recess. I want to get started and move as quickly as possible.

Mr. Kindig, the president of Pittston Coal Co., will begin.

Welcome.

STATEMENT OF KARL K. KINDIG, PRESIDENT, PITTSTON COAL CO., STAMFORD, CONNECTICUT

Mr. KINDIG. Thank you.

I am Karl Kindig, president and chief executive officer of Pittston Coal Co. from Lebanon, VA. Pittston is a subsidiary of the Pittston Co. located in Stamford, CT.

I would summarize my testimony and ask that my full testimony be included in the record.

The Pittston Co., and specifically Pittston Coal Co., support retiree medical benefits. As a company, we provide medical benefits for thousands of our retirees, not all of them as generous as those that have been mandated by the coal act, but we do provide those benefits for our retirees and strongly support the concept of retiree benefits, particularly those negotiated in a collective bargaining arrangement.

I would like to make three points. Some of them have been made before today. First of all, that the coal act resulted in a very significant shift of the burden for retiree health care in the coal industry, from a group of companies that had agreed in a collective bargaining agreement to assume that burden to a large number of companies that had not agreed to assume that burden; that the crisis that led to the enactment of the coal act was largely manufactured; and that the coal act is a significant threat, in my view, to the concept that collective bargaining is the foundation for the Federal labor policy.

The shift of the burden by the coal act has been well documented. It is documented in the staff Committee report which I would note is a very thorough job, by and large. It is an excellent report.

Clearly in their and in other testimony before this Committee, is documented the significant financial benefit that was received by the large BCOA companies at the expense of the reach-back companies and others.

I would also like to submit for the Committee's consideration a report by energy ventures analysis, a very reputable analytical firm in the coal industry, that details in some length the benefits received by the large BCOA companies and the burden shift that has been occasioned by this legislation.

The crisis that—the apparent crisis that led to the enactment of the coal act was largely manufactured by a series of events. The first event was the 1988 BCOA–UMWA agreement which shifted

the mechanism for funding retiree medical benefits for the 1950 fund retirees from dollars per ton to cents per hour.

The rates set in that agreement were set at a level far below that necessary to fund those benefits and that fact was known by BCOA and UMWA at the time that that contract went into effect. They dealt with the problem in that contract by including a guarantee clause that provided that the signatory companies would make up any deficit caused by any underfunding.

The problem, of course, occurred—when the time came to honor that commitment, the BCOA companies simply did not pay. They refused to honor their guarantee clause and, therefore, caused a minor underfunding in the benefit fund which was used by the BCOA and the UMWA as a public relations ploy to create the appearance of a crisis that led to the enactment of the coal act. I think the statement that was read into the record by Congressman Hancock at the early part of this hearing is very good evidence of that.

From a collective bargaining standpoint, Pittston engaged in a lengthy collective bargaining process with United Mine Workers in 1989 and 1990, that ultimately culminated in a collective bargaining agreement. That process was with the direct participation of the Federal Government.

The collective bargaining process was under the auspices of then-Secretary Dole and former Secretary of Labor William Usury as mediator through much of that process. The Federal Government was very much involved in the collective bargaining agreement, people were aware of what was in the collective bargaining agreement, and as part of that collective bargaining agreement, we made provision for millions of dollars of contribution to the 1950 fund, as well as continuing to provide our single employer benefit plan under the 1974 fund.

The coal act, despite that Federal involvement essentially abrogated our collective bargaining agreement. I think that Congress ought to ask the question whether it is going to set itself up as the arbiter of last resort for parties to collective bargaining agreements who want to improve their position after the collective bargaining process is over. If that is to be the policy of the Federal Government, I think it has grave consequences for what heretofore has been the foundation of Federal labor law, that is the encouragement of collective bargaining between private parties.

That concludes my remarks.

[The prepared statement follows:]

Testimony of Karl K. Kindig
Before the Ways and Means Subcommittee on Oversight
to Examine the Operation of the Energy Act of 1992 Related to the Funding
and Providing of Health Benefits of Retired Coal Miners
June 22, 1995

Good morning Madam Chairman and Members of the Subcommittee. My name is Karl Kindig and I am President and Chief Executive Officer of the Pittston Coal Company (Pittston), a subsidiary of The Pittston Company of Stamford, Connecticut. I am here today to voice support for the Committee's thorough review of the impact of the Coal Act.

In doing so, I want to emphasize that over the years we have been, and continue to be, committed to supporting health benefits for retired mine workers. Amending the flawed Coal Act will not in any way harm the beneficiaries of the Combined Fund. We appreciate the opportunity to appear before you Madam Chairman and distinguished members of the Oversight Committee, to explain the devastating effects of this punitive tax and why it is necessary to amend the Act.

The Coal Act

The Coal Industry Retiree Health Benefit Act of 1992 established the Combined Fund as of February 1, 1993 by merging two existing UMWA retiree health benefit trusts. The Combined Fund is financed mostly by annual premiums assessed to certain companies, called operators, that signed any coal wage agreement with the UMWA after 1950, irrespective of whether those companies (i) were signatory to the 1988 National Bituminous Coal Wage Agreement between the BCOA and UMWA, (ii) had entered into a separate agreement with the UMWA for retiree health care or (iii) had exited the coal business. For companies, like Pittston, which had negotiated and fulfilled all of its commitments in a separate labor agreement, and for those companies which had complied with all contractual obligations prior to leaving the coal business, the Act constituted a punitive, retroactive employer mandate.

The Reachback Tax was promoted as an emergency effort to avoid a projected "deficit" in the United Mine Workers of America (UMWA) Retiree Health Benefit Funds. This deficit, however, never materialized. Instead, the UMWA Combined Benefit Fund Trustees estimate a more than $145 million surplus growing at $6.5 million per month. Meanwhile, the number of beneficiaries with claims against the Fund -- currently at less than 95,000 -- will continue to decline because of mortality. The underlying principle of the Reachback Tax was to protect against a shortfall that never occurred. This ill-conceived tax was tacked on to the 1992 energy bill and was never critically reviewed. Had it been scrutinized, the damage done so far could have been avoided.

Shifting the Burden

The UMWA and the BCOA garnered support for the Coal Act by predictions of an imminent financial crisis in the health benefits plan, but the deficit which first appeared in the aggregate UMWA benefit funds in 1989 was entirely foreseen by the BCOA and the UMWA when they signed the 1988 wage agreement. This agreement changed the BCOA contribution formula from one based largely upon tonnage produced by a signatory company to one based exclusively upon the aggregate annual number of hours worked by its miners and set the hourly rate at a level known at the time to be inadequate. In addition to disadvantaging metallurgical coal producers like Pittston (which due to mining conditions produce fewer tons per man hour than steam coal producers), this change virtually guaranteed a static or declining level of BCOA contributions to the benefit funds in the face of rising health costs. While BCOA coal production remained constant, industry productivity increased and miners' man-hours plummeted. The less well capitalized producers and those who were engaged in more labor-intensive mining of metallurgical coal had imposed on them a greater proportion of the benefits obligation.

With the enactment of the Coal Act, the 1988 signatories further reduced their retiree medical expense by some $135 million or 57%!

The manipulation of the funds for the benefit of the large BCOA companies is pervasive and well documented:

- 1988 Agreement - BCOA and UMWA recognize that the new hours-based contribution formula was insufficient and would lead to under-funding. The BCOA maintained, and the UMWA agreed, that the Guarantee Clause, obligating the BCOA signatories to make up any shortfall, would adequately protect the Funds.

- 1990 - 1992 - BCOA companies renege on the Guarantee Clause obligations knowing that they would eventually have to pay but manufacturing the appearance of a crisis. The UMWA makes no effort to couple compliance with this contractual commitment.

- 1991 - 1992 - UMWA cynically outlines a strategy to exploit the manufactured crisis in order to achieve Congressional action.

- 1992 - Coal Act passed.

- 1993 - Retirees' medical fund deficit "magically" disappears without any contribution from BCOA companies as contemplated by the Coal Act.

Abrogation

Pittston was uniquely impacted by the Coal Act since the statutory reachback provision abrogated Pittston's existing collective bargaining agreement with the United Mine Workers (UMWA). This agreement was negotiated after a long and bitter strike which resulted in civil penalties of over $64 million being imposed upon the UMWA for violations of court-ordered injunctions. Following the intervention of former Labor Secretary Elizabeth Dole, and as a result of the direct mediation of former Labor Secretary William Usery, a complex settlement agreement was reached wherein Pittston agreed to contribute millions of dollars to the UMWA benefit funds and to continue providing medical benefits to post-1974 retirees under its single employer plan. The agreement also contained a unique provision requiring UMWA opposition to legislation such as the Coal Act. This provision was critical since Pittston feared, justifiably so in hindsight, that the UMWA and certain major producers would attempt to shift the burden of their benefit contributions to the backs of others and, in the process, upset our freely negotiated collective bargaining agreement. By its active support of the Coal Act, the UMWA breached this major provision. The Coal Act, in many ways, abrogated Pittston's collective bargaining agreement and undermined the Federal Government's commitment to collective bargaining as the cornerstone of national labor policy.

Soft Export Markets

Pittston's competitors in the metallurgical marketplace are principally foreign companies or mining arms of socialized governments. Exporters of metallurgical coal, doing business in a highly competitive worldwide market, do not enjoy any form of long-term contract and cannot pass through the significant costs imposed by the Coal Act. Producers of steam coal for the domestic market, on the other hand, sell coal under long-term contracts which may allow such costs to be passed through to the consumer. Pittston, therefore, stands with a small number of similarly impacted companies having its ability to compete severely hampered. Today, because of the Coal Act, Pittston finds itself under severe financial pressure. Without Congressional action, Pittston will be hampered in its ability to raise the capital necessary to replace mines as their reserves are exhausted, thereby resulting in lost jobs in Appalachian communities which can ill afford additional economic hardship.

The major coal producers with multi-national interests, in a calculated move designed to freeze-out and eliminate competition, have become beneficiaries of the Coal Act at the expense of the Reachback companies like Pittston. Since 1988, the major coal companies which control the BCOA have used the retiree health care issue to improve their competitive position relative to their smaller competitors.

- Prior to 1988, retiree health care expense was assessed on the basis of dollars per ton of coal produced. Since coal is priced by the ton, no competitive advantage resulted.

- The 1988 shift from dollars-per-ton contributed to dollar-per-employee-hour produced a competitive advantage to the larger, highly-capitalized companies to the detriment of smaller, more labor-intensive companies.

- The Coal Act resulted in a further cost shift by substituting <u>past</u> employment rather than current economic activity which had been the historic measure of contribution. As a result of these manipulations, the BCOA companies as a whole have dramatically reduced their retiree medical liability, shifting the cost burden to those companies less able to pay.

Over time, the economic hardship visited by the Coal Act will result in further concentration in the coal industry as the smaller companies succumb to the economic burden of the Coal Act and either fail or are bought out by the BCOA companies.

<u>Hancock-Myers Reachback Tax Relief Amendment, H.R. 1370</u>

It is our goal and that of other Reachback companies to improve the Coal Act without causing harm to retired miners. The Hancock-Myers bill is one such effort. The growing surplus in the Fund would be used to reduce or eliminate the premiums assessed against the Reachback companies while maintaining a safety cushion of at least 10% of the previous year's costs. In the improbable event the Fund's expenses exceed the safety cushion, the Reachback Tax would be resumed.

Congress did not intend for the Fund to develop a surplus and did not provide for its occurrence. It is now Congress' responsibility to remedy a burdensome mandate in excess funding for the Combined Fund in order to reduce the surplus that is rapidly accumulating. The most recent report released by the internationally recognized benefit consulting firm, Towers Perrin, projects a January surplus of $240.8 million by the year 2004. The Fund is a private fund created by Federal statute, which is financed by a small group of companies; as such, it is appropriate that Congress direct that any unintended surplus be distributed to the payor companies in a manner which is fair and equitable. The Hancock-Myers bill addresses the excess funding and remedies an unintended result by restoring surplus funds to those who have suffered the most under the Act's provision without, in any way, undermining the financial viability of the Retired Mine Workers Health Benefits Fund. It is important to emphasize that under the Hancock-Myers proposal the Reachback companies will continue to serve as guarantors of the Fund, fully liable for immediate payment of their premiums, should the Fund experience a shortfall.

<u>Coal Act Benefits</u>

Pittston is firmly committed to supporting those retirees, and their families, who worked for Pittston for a significant portion of their career, and who retired from Pittston, that is, Pittston's own retirees. While we are open to other legislative suggestions which correct the Coal Act's deficiencies, Pittston has not and will not support any action which assigns retired miners' health benefits costs without considering reasonable vesting standards and a company's ability to make payments. The Coal Act contains no such protections or provisions, assigning to Pittston and other Reachback companies responsibility for lifetime health care for former "employees" (and their families) who

worked for the company for as little as one shift, one day, one week, decades ago. Indeed, of the total beneficiaries, only 28% ever actually worked in the mines. We consider the transition from tonnage to man-hours to liability based on past employment to be a harsh lesson about power and special interest politics. The real winners under the Coal Act are not the retired miners, whose benefits were never at risk, but the large BCOA companies which, with the complicity of the UMWA, have used this issue in the most cynical manner imaginable to further their own economic interests.

Closing

We are extremely pleased that the majority of the Ways and Means Committee has cosponsored legislation amending the Coal Act. We urge prompt enactment of corrective legislation to remedy the effects of the flawed Act. I would be happy to answer any questions from the Chairman and the distinguished members of this Subcommittee.

Chairman JOHNSON. Very useful remarks Mr. Kindig.
Mr. Ives.

STATEMENT OF J. ATWOOD (WOODY) IVES, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, EASTERN ENTERPRISES, WESTON, MASSACHUSETTS

Mr. IVES. Thank you, Madam Chairman, and good afternoon.

I am chairman and chief executive officer of Eastern Enterprises. Eastern Enterprises owns a gas utility in New England and a marine transportation company operating on the inland waterways. So, why am I here?

In September 1993, out of the blue, we received a bill for over $5 million under the coal act. I did not know what the coal act was. I did know that Eastern had previously been in the coal business, but it had not employed a single coal miner since 1965. Yet, under the act, we are being asked to pay for lifetime health and death benefits for more than 1,400 miners and dependents. Some of these miners had worked for Eastern for less than a week.

The projected aggregate cost of these benefits imposed on us is between $70 and $100 million. Now you know why I am here.

Eastern does not challenge the basic principle that miners and their dependents should receive all of the benefits contracted for on their behalf by their union, but what we do question and what is simply wrong, is the decision to reach back and impose millions of dollars of liability on companies that are no longer in the coal business, never made any of the promises that the act is intended to enforce, and never contributed in any way to the creation of the perceived funding crisis. Eastern should not have been included in the act because it never made the promises the act seeks to enforce.

Let me explain. First, prior to 1965, when Eastern was in the coal business, it met all of its contractual obligations to its miners. Eastern left the coal business 30 years ago when it created a separate corporation, Eastern Associated Coal, which took over all of the assets and liabilities of Eastern's coal operations, including responsibility for its miners' benefits.

Second, Eastern never signed a Coal Wage Agreement after 1964. The Coal Commission, appointed by Secretary Dole, found that only the 1978 and subsequent UMWA agreements had promised and guaranteed retiree health and death benefits for miners and their dependents. However, the act as finally passed inexplicably reached back to include former operators who never promised lifetime benefits or signed the guarantee or evergreen clauses in the 1978 agreements. Even the Senate sponsors of the act admit that they never intended to include those super reach-back companies in the act.

Third, one of the problems the coal act sought to cure was that of coal companies dumping their miners into the fund when leaving the industry. Eastern never dumped a single miner. The successor company to Eastern's coal operations continued Eastern's former mining operations, employed its union miners and made all of the contributions to the fund that Eastern would have made had Eastern itself continued in the business.

If you want to talk about dumping, the BCOA is the real dumper. They reduced their annual contribution to the fund by $350 million as a result of the 1988 UMWA agreement. Further, under the act, they dumped the financial responsibility for the promises they made on super reach-backs and reach-backs alike.

The coal act hits us where it hurts. The imposition of this grossly unfair liability significantly impedes Eastern's ability to invest in its current operations and interferes with the legitimate expectations of Eastern's shareholders. The up to $100 million liability imposed on Eastern by the act has dollar-for-dollar, reduced its ability to invest in its current operations located in New England, Florida, Minnesota, Missouri, Ohio, and Pennsylvania, among other States.

In sum, it is totally inappropriate to include super reach-back companies such as Eastern in the coal act.

Fact, super reach-backs in the aggregate have less than a $13 million annual assessment under the act. This is less than 4 percent of the $350 million annual reduction BCOA members negotiated for themselves in the 1988 contract. Any principled modification to the act should address this gross inequity.

Thank you.

[The prepared statement follows:]

STATEMENT OF
J. ATWOOD IVES, CHAIRMAN AND CEO
EASTERN ENTERPRISES, WESTON, MA

BEFORE THE
SUBCOMMITTEE ON OVERSIGHT
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

ON THE
COAL INDUSTRY RETIREE HEALTH BENEFIT ACT OF 1992
JUNE 22, 1995

Madam Chairman and Members of the Subcommittee, I greatly appreciate the opportunity to appear before you today as you review the impact of the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"). Because of the unfairness of this statute and its unjust effects on companies like Eastern Enterprises ("Eastern"), which I will describe, I urge you to enact legislation to provide relief from the Act to that group of companies most unfairly included within its reach.

Eastern stopped mining coal in 1965. After that time it never again employed a miner and never again signed a United Mineworkers of America ("UMWA") coal industry wage agreement. Nonetheless, the Coal Act imposes liability on Eastern for over $70 million to fund the lifetime health and death benefits for retirees and their families that were promised by other coal operators in later UMWA agreements, years after Eastern left the industry.

Eastern does not challenge the basic principle that miners and their dependents should receive all of the benefits contracted for on their behalf by their union. We do question, however, whether Congress actually had to step in and take such extraordinary measures to insure that miners' benefits would be funded, and believe it was simply wrong for Congress to reach back and impose millions of dollars of liability on companies like Eastern that never made any of the promises that the Act is intended to enforce and that never contributed in any way to the creation of the perceived funding problem.

Let me give you a brief overview of Eastern and how it came to be involved with the Coal Act. The facts will show that the Coal Act's imposition of liability on super reachback companies such as Eastern is inequitable and should be rectified. H.R. 1370 is a beginning -- a more principled response would be to exempt super reachbacks from the Act altogether.

Eastern Enterprises

Eastern is a holding company headquartered in Weston, Massachusetts, which owns two operating subsidiaries: Boston Gas Company, a gas utility, and Midland Enterprises, a marine transportation company headquartered in Ohio that operates barges on the inland waterways. Since Eastern owns no coal fields or coal leases and has been out of the coal business for thirty years, you can imagine how surprised we were when, on a Friday in September 1993, out of the blue, we received an initial bill for $5 million for Coal Act liabilities. According to the bill, Eastern was assigned 1,427 coal miners and dependents for whose lifetime benefits Eastern and its subsidiaries would thenceforth be responsible. All of the miners worked for Eastern 30-50 years ago; some worked for a total of less than a week and earned a total of less than $100 in wages. Nonetheless, the Coal Act requires Eastern to

pay lifetime health premiums for such individuals and their dependents. Eastern's total liability under the Coal Act is projected at $70-100 million!

How did Eastern get saddled with this unbelievable liability without any knowledge of or involvement in the funding problem that gave rise to the Coal Act? That is a question we have been asking ourselves for almost two years.

The Coal Act of 1992

As this Subcommittee is well aware, the purpose of the Coal Act is to assure that UMWA retirees and dependents will receive for life the benefits promised in collective bargaining agreements negotiated by the UMWA and the Bituminous Coal Operators' Association ("BCOA"). The Act is based substantially on the 1990 findings of the Coal Commission, a body appointed by then Secretary of Labor Elizabeth Dole, to address the perceived funding crisis. As it turns out, the so-called funding crisis may actually have been created by the BCOA, which negotiated dramatic changes in the funding formula in 1988, significantly reducing the signatory coal operators' annual payments to the funds and inevitably leading to the problem. The initial bill approved by Congress would have replenished the funds through an industry-wide coal tax. That measure was vetoed by President Bush. Congress next considered legislation to reach back and lock in earlier commitments made by signatories to the 1978 and later national bituminous coal wage agreements ("NBCWAs") in accordance with the Coal Commission's conclusions that signatories to those later agreements had promised and guaranteed contributions for UMWA retiree health and death benefits to the funds and thus could be statutorily forced to contribute to their funding.

It is important to remember that the collective bargaining agreements prior to 1974 provided for defined contributions to the UMWA funds and made no promise of any particular level of benefits, or even that benefits would continue once available monies were spent. The 1974 agreement for the first time committed funds to provide lifetime benefits for miners and greatly expanded the class of covered individuals; the 1978 agreement for the first time committed employers to contribute enough to assure payment of the 1974-promised benefits into the future. Thus, those agreements brought about major transformations in the nature and funding of retiree health benefits, completely replacing and fundamentally restructuring the benefits promised to miners and retirees under previous agreements.

When Congress finally enacted the Coal Act, it included at the last minute -- without hearings or full public airing -- provisions that would "reach back" to hold liable for fund contributions any signatory to a union coal wage agreement not just going back to 1978, but going all the way back to 1950, notwithstanding the Coal Commission's recommendations. While firms that had signed the 1974 and 1978 agreements had at least arguably made promises to pay lifetime benefits indefinitely, the Act inexplicably also held liable those who had exited the coal industry before 1974.

Thus did Eastern, which had been out of the coal business since 1965, get pulled into the Coal Act.

Eastern's Former Coal Business

Eastern was in the coal business and was signatory to wage agreements with the UMWA only from 1950 through 1964. During that time, Eastern complied fully with each and every obligation it had under those agreements and contributed in excess of $50 million in defined benefit contributions to the miners' benefit plans.

In 1965, Eastern transferred its coal operations to a new subsidiary, Eastern Associated Coal Corp. ("EACC"). EACC was the successor to Eastern's coal operations; it took over Eastern's assets and assumed Eastern's coal-related liabilities, including responsibility for all Black Lung benefit claims as well as for all other past and future obligations to miners. EACC continued virtually every aspect of the operations of Eastern's former coal division: it employed the same miners, utilized the same management, operated the same mines and machinery, maintained the same company housing and stores, operated the same summer camp for the children and grandchildren of miners, and assumed the banking relationships of its predecessor. Most important, EACC fulfilled Eastern's obligations under the existing 1964 - NBCWA, thereafter signed the subsequent NBCWAs, including the 1974 and 1978 agreements, and made all of the contributions to the UMWA funds that Eastern would have made had it stayed in the coal business. It thus only seems logical and appropriate that EACC, not Eastern, should be financially responsible for the promises it made.

Peabody Coal Company, owned by Hanson PLC, a British conglomerate with over thirty billion dollars in assets, now owns EACC and continues its operations and derives revenues therefrom to this day. Ironically, one effect of the Coal Act is to allow companies, like Peabody, that signed the 1974 and 1978 agreements, to reduce substantially their funding obligations for retiree health benefits while huge liabilities for those obligations are directed to companies like Eastern that are no longer in the coal business.

Eastern Never "Dumped" Miners

Both the Coal Commission and Congress identified as a key factor giving rise to the funding problem the exit from the coal business of bituminous coal operators in ways that left their mines unworked, or their employees without jobs or at work for nonunion companies that did not contribute to any UMWA funds. Unlike those operators, Eastern never abandoned its miners by terminating coal operations. Eastern never converted its operations to nonunion status. In short, Eastern never "dumped" a single union miner or retiree -- it never shifted the liability for the health care of its employees to other employers. Quite the contrary, Eastern's former coal operations have continued in operation under Peabody and have continued to generate revenues to support the UMWA funds. Eastern was not a contributor to the problem, but, under the Coal Act, it was forced, without notice, to be part of the solution.

Fairness and Equity

Many of the stories being related to the Subcommittee today tell of family firms and small companies being bankrupted by the Coal Act. Many of the stories involve hardship and distress. That is not Eastern's tale. We are, fortunately, a healthy company. However, the $70-100 million in premiums that we have been assessed under the Coal Act represent almost a quarter of Eastern's total net worth (shareholder investment). This huge liability has a direct dampening effect on Eastern's existing operations by decreasing the amount of capital -- dollar for dollar -- available for investment in such non-coal operations. Eastern already has or will have to contemplate reduced investments in New England, Ohio, Minnesota, Missouri, and

Florida, among other states. This drain on capital ultimately reduces Eastern's ability to be competitive in the solely non-coal businesses in which it is engaged.

Investors, whether managers of giant retirement funds or individuals with their personal savings, should be able to rely on an understanding of a company's current operations when making investment decisions. The Coal Act manifestly interferes with the legitimate expectations of Eastern's shareholders and investors by imposing, long after the fact, a totally unexpected and unreasonable retroactive liability. Neither Eastern nor its investors could have anticipated this enormous liability in the absence of any rational connection between the liability and Eastern's former coal operations.

The people who have a stake in Eastern and its operating companies, whether investors, employees, retirees, or customers, should not have to bail out companies that remain in the coal business today. Those who sell coal and can properly allocate the cost of miners' health care benefits to those sales can and should pay for these benefits, particularly since they, and not Eastern, promised them.

Imposing liability on Eastern under the Coal Act is unfair and inconsistent with the purposes of the Act. The objective of the legislation was to affirm -- and to provide a framework for -- administering preexisting private contractual promises and agreements voluntarily made by signatories to the 1974 and subsequent UMWA agreements. Eastern and other super reachback companies never signed those agreements and never made those promises. They should be relieved from Coal Act liability.

Strong arguments have been advanced by reachback companies as to why they should not be liable under the Coal Act. While they did sign the 1978 UMWA agreement (and later agreements prior to 1988), their commitment was limited to contributions from current operations, and they completely fulfilled that obligation. Eastern supports relief for all reachback companies.

Legislative Proposals and Coal Miners

Neither H.R. 1370 nor even the entire elimination of Coal Act liability for Eastern and other super reachbacks would deprive a single UMWA retiree or dependent of his or her benefits. Not only does there currently exist an estimated $145 million surplus in the Fund, but it is also our understanding that premiums from all super reachbacks amount to only $10-13 million annually, and not all super reachbacks are able to pay.

In closing, let me summarize: Eastern is a super reachback company that never promised the benefits the Coal Act was meant to protect. Moreover, Eastern never shut down union mining operations or dumped miners or retirees for others to support. As a non-dumping, super reachback company, we in no way created or added to the funding problem, and any modification to the Coal Act should address our situation. Certainly, there is no principled basis for including super reachbacks in the Coal Act or otherwise requiring them to pay for promises made by other companies. At the very least, everyone ought to be able to agree that the Act needs to be amended to exempt this class of companies.

I appreciate having the opportunity to testify today and urge the Subcommittee to approve legislation to relieve from liability under the Coal Act those companies, like Eastern, that should have never been included in the first place.

Chairman JOHNSON. Thank you.
Ms. Gerwin.

STATEMENT OF SUZANNE GERWIN, ON BEHALF OF THE BUCHANAN COUNTY COAL CO., CINCINNATI, OHIO

Ms. GERWIN. Good afternoon, Madam Chairman. I am Suzanne Gerwin, appearing on behalf of my mother, Viea Taylor, who due to extremely poor health is unable to appear before you today. She asks that I tell you all how much she appreciates your Subcommittee examining the impact of the coal act and to hearing testimony on the plight of the reach-back companies, apparently the only parties to suffer due to the enactment of the 1992 coal act.

My mother is the president of Buchanan County Coal Corp., and under the 1992 act, the company was assigned 57 beneficiaries, mostly surviving spouses. Buchanan has not mined any coal since 1974 and has not been party to UMWA wage agreement since 1966. And yet our first 12 months of premiums totaled nearly $200,000.

Thanks to the coal act, my mother was made responsible for the lifetime health care benefits for miners and their dependents who worked for my grandfather for a matter of months in the fifties and sixties. Currently, Buchanan County Coal receives only passive income through the receipt of income on one land lease, but that lease income is not nearly enough to pay for the premiums. To forestall bankruptcy and the imposition of huge IRS penalties, mother has been forced to liquidate personal assets to pay the reach-back bill.

Her total contributions as of May 25 have been $274,887.86. I have spent a number of months trying to understand how we could be held responsible for these people. I have struggled through verbal smog and rhetoric of evergreen clauses, obligations, dumping, orphan miners.

I have tried to understand the significance of the 1978 agreement and the reach-backs and what all this had to do with me. When it came to me, it was pretty simple. When my grandfather's coal company was in business, UMWA Health and Pension program was run by the union. The plan was supported by a multiemployer agreement to make a pay-as-you-go contribution based on current production. Buchanan and every other company paid asset contributions whether or not it had any retirees at all.

When the company left the coal business, it stopped paying and new entrants started to pay. This is how things always worked.

Basically, I feel that we have all been exploited. I think that BCOA has become a cartel and that they have exploited everyone from the retired mine worker, current mine worker, the Federal Government, and ultimately the American taxpayer. BCOA exploited the fear of retirees. They are afraid of losing their health care. They exploited the union fear of losing union jobs.

They exploited Congress by deceiving it into believing there was a crisis which justified it rewriting collective bargaining agreements, imposing this reach-back tax and handing over public dollars to support a private pension fund. This cynical exploitation of us all by BCOA has forced the following tragic results:

Some companies are snuffed out immediately. The Lanzendorfer Trucking Co. in Pennsylvania cannot even afford to make the first premium payment. Other companies like the Codell and Ward Coal Co. in Lexington, Kentucky, would never be able to pay the first premium, and the surmounting penalties I think of about $6 million will send Codell to its grave, I know.

There are other companies like Rick Wienzierl's company, Barnes and Tucker, in Pennsylvania, they will die a slow death. They have been paying nearly $4 million a year into the fund and he has been forced to cannibalize his company to generate enough cash to pay the premiums each month. He has 12 employees and his company probably will not survive the year.

I want to conclude by saying that I resent the position that my mother and I have put in. We are being portrayed as rich coal barons who want to do nothing but make money and we do not want to pay for our miners's health care. Neither my mother or grandfather ever operated Buchanan County Coal in a dubious fashion or dumped anyone. They paid what they owed.

I think that this whole shifting of costs and retiree health care is a shell game and I think the red ball is the miners' health care fund, and I think you all know who I think the shell game operator is—it is basically the BCOA.

I hope that this hearing will provide the necessary momentum for the Congress to act this year in enacting relief for all reach-back companies irrespective of size, particularly before all small reach-back companies disappear.

Thank you.

[The prepared statement follows:]

STATEMENT OF SUZANNE GERWIN
on behalf of
THE BUCHANAN COUNTY COAL CO

I am Suzanne Gerwin and I am appearing on behalf of my mother, Viea Taylor, who due to her extremely poor health was unable to appear before you today. She asked that I tell you how much she appreciates your subcommittee examining the impact of The Coal Act and to hearing testimony on the plight of the reachback companies -- apparently the only parties to suffer due to the enactment of the 1992 Coal Act.

My Mother is the president of Buchanan County Coal Corporation and under the 1992 Act, the company was assigned 57 beneficiaries - mostly surviving spouses. Buchanan has not mined any coal since 1974 and it has not been a party to a UMWA wage agreement since 1966. And yet our first twelve months of premiums totalled nearly $200,000. Thanks to The Coal Act, my mother was made responsible for the lifetime health care benefits for miners and their dependents who worked for my grandfather for a matter of months in the 1950's and 1960's.

I have spent a number of months trying to understand exactly how we could be held responsible for these people. I struggled through the verbal smog of BCOA rhetoric about "evergreen clauses", moral obligations, and dumping of orphan miners. I tried to understand the significance of the 1978 agreement and the reachbacks and what all this had to do with me. Finally, when it came to me, it was pretty simple. When my grandfather's coal company was in business, the UMWA health and pension program was run by the union. The plan was supported by a multi-employer agreement to make pay-as-you-go contributions based on current production. Buchanan and every other company paid a set contribution whether or not it had any retirees at all. When a company left the coal business, it stopped paying and new entrants started to pay. This is how things always worked.

The game changed somewhat after 1978 when the employers set up their own individual benefit plans in order to stop the continuing waste in a plan run by the union.

However, the rules never changed for retirees pre-1976 -- they were still in the union plan supported by multi-employer pay-as-you-go contributions. The pre-1976 retirees are the vast majority of the current retirees (more than 80,000). They were in the so-called 1950 Fund.

The BCOA and the Rockefeller bill applies to those pre-1976 retirees the concept of individual company responsibility and the concept of "orphan miner" which never existed with respect to those retirees.

Under this verbal facade, the BCOA has constructed a bold and ingenious scheme to saddle the reachback companies and the entire coal industry through the AML fund with a huge share of costs of the 1950 Fund which belongs rightfully only to them.

This is truly shameful particularly when it is obvious that the BCOA could fully afford to pay what it actually owes.

Currently Buchanan County Coal receives only passive income through the receipt of income from one land lease but that lease income has not been nearly enough to pay the premiums. To forestall bankruptcy and the imposition of huge IRS penalties, my mother has been forced to liquidate personal assets to pay the reachback bill. Her total contributions are now $274,887.86.

Just last week in response to her appeal to SSA, she was notified by one of the Social Security field offices that the beneficiaries may have been improperly assigned. We still don't know if this decision is final but if it is, she won't be forced to liquidate her holdings in Premier Industries where my brother and I are employed. Premier makes paper plates, hot dog holders and ash trays -- it has never had any connection to the coal industry. Without relief from SSA, the Coal Act had put Premier Industries at

risk and the jobs of 54 people (primarily single mothers) in Covington, Ky. at risk. Premier provides health care coverage for these employees - many of whom have pre-existing conditions. How sad and how ironic if the Coal Act had resulted in the elimination not only of the employment of 54 workers but their health insurance coverage as well.

I hope the SSA decision will become final and that we may be among the lucky few to escape the reachback web. For those who have not been so lucky and who previously testified before you, I would like to update you on their woes:

1) Rick Wienzierl of Barnes and Tucker in Pennsylvania has been paying nearly $4 million annually to the Fund. He has been forced to cannibalize his company to generate enough cash to pay the premiums each month. His 12-employee company will probably not survive the year;

2) The Lanzendorfers' only ties to the coal industry were through the hauling of Union-mined Coal. This three employee trucking firm could never afford to pay any of their monthly premiums and they wait each day in fear that the trustees will enforce the obligation and force them into bankruptcy;

3) The Coal Act forced M&H Coal, a small 1988 signatory, into bankruptcy resulting in the loss of more than one hundred and twenty jobs in West Virginia.

4) CF&I Steel's bankruptcy judge discharged their Coal Act obligations and the company was subsequently acquired by an Oregon steel company.

This is but a small sample - the list goes on and on.

I hope Madam Chairman that this hearing will provide the necessary momentum for the Congress to act this year in enacting relief for all reachback companies irrespective of size -- particularly before all of the small reachback companies disappear - Thank you.

Chairman JOHNSON. Thank you for your testimony.
Mr. Templeton.

STATEMENT OF THOMAS E. TEMPLETON, PRESIDENT, TEMPLETON COAL CO., TERRE HAUTE, INDIANA

Mr. TEMPLETON. Thank you, Madam Chairman. I am Tom Templeton, president of Templeton Coal Co. Inc., of Terre Haute, Indiana. I am here on behalf of my company, our subsidiary, Sherwood Templeton Coal Co. and Princeton Mining Co., and we support H.R. 1370. Although all three companies I speak for today have coal or mining in their names, all of us left the mining industry in the fifties and sixties and have never reentered the coal mining business.

The coal act imposes a tax liability on the former reach-back coal companies who had signed UMWA agreements as far back as 1950. The whole premise of the coal act was that coal companies had made so-called promises to provide lifetime health care benefits for retired miners and their families in 1978 and later. Super reach-back companies are those that did not sign the 1978 or later agreements with the UMWA. The coal act sponsors said they wanted to stop companies from dumping their responsibility onto the companies that had faithfully kept their commitments. Instead, the coal act empowers major largely foreign-owned operating coal companies to abandon the contracts they negotiated and dump their obligation on companies like us who left the industry generations ago. This is a travesty and surely not what Congress truly intended to happen.

There are four major reasons why the reach-back tax should not apply to companies like Templeton, Princeton Mining and Sherwood Templeton. The alleged promises were in an agreement signed by BCOA companies in 1978 and later. The coal act imposed liability on Templeton for promises it could not have made since it left the collective bargaining process in 1954, 24 years before these agreements were negotiated.

Second, Templeton has been given responsibility for about 36 beneficiaries, including an estimated 9 orphans. Only 4 of the 36 beneficiaries ever worked for Templeton and only 2 of those are still alive. Templeton's funding of the original plan should have been sufficient to carry those four miners through their retirement, though Templeton did not promise it would. But the new plan that BCOA and UMWA created in the seventies, added 23 Templeton miners' wives and dramatically increased benefit levels without Templeton's knowledge or consent. The funding formula of the old and new plan still withstood all these increases until the BCOA and UMWA changed the funding formulas in 1988.

Third, the coal act compels Templeton to pay for orphan beneficiaries. Some of these orphans retired from other companies as recently as 1992, 38 years following Templeton's exit from coal mining. We will be required to pay for orphan benefits until about the year 2030 and probably longer.

This is 76 years after we left the coal business and 24 years after mortality tables suggest our last assigned beneficiary will die. These orphans were never associated with Templeton and likely do not even know we exist. Even though fund transfers have paid the

orphans so far, we expect transfers to end in about 2004, leaving us to pay the next 26 years.

Templeton expects to pay just over a million dollars for all the coal act premiums over the 30 to 40 years of liability. We estimate we could pay $52,000, if only paying for our assigned miners.

Fourth, we do not believe even the coal act primary sponsors intended to involve companies signing UMWA contracts earlier than the alleged 1978 promises. In fact, the Dole Commission which Congress appointed in 1989 to study the problem and make recommendations, did not suggest going back further than 1978. The super reach-back provisions were added by the conference Committee and were never debated by the House or the Senate.

Let there be no confusion about our interest in the well-being of miners. Our company's founders, my grandfather, John A. Templeton, and my great-uncle Philip Penna left dismal lives as miners in their native Scotland and England to come to America in search of better working conditions.

Eventually, Templeton worked his way through the mining ranks to become a mine boss, and Penna was instrumental in the founding of the UMWA, becoming its second international president. Then in 1920, Templeton and Penna founded Templeton Coal Co. Inc. Templeton mines were always union mines.

However, demand for our deep coal declined significantly in the fifties, and in 1954 we decided to close our last mine. Though the company was in financial crisis, it did what was right for its employees, as it always had done in the past. Templeton satisfied all its obligations to its miners and their benefits under the 1950 Welfare and Retirement Fund.

Templeton began diversifying in the fifties. Instead of mining coal, we now produce laboratory equipment, inspirational gifts, electric heating elements and plastic bathroom accessories and distribute plumbing, heating and air-conditioning products. We also lease land to others for farming and coal production.

We hope the Congress will completely exempt coal act liability for super reach-back companies like ours who left the industry before 1978. Super reach-backs have no accountability to the situation and represent no more than three percent of anticipated fund revenues.

In conclusion, I ask that you please consider our story carefully. Is it right that Congress impose a tax on our companies for a business we left four decades ago?

Is it fair that we be held accountable for promises operating companies may have made over two decades after we left the coal mining business? How long should we be forced to fund retiree health care benefits for people who never worked for Templeton, and how can it be that a company is legally mandated to pay retiree benefits 24 years after its last retiree dies?

We have been paying our coal act premiums while spending countless hours and dollars resisting this dreadful circumstance. We could be using this time and these dollars developing new business as our competitors are doing. It is not right and only Congress can make it right.

Thank you for your time and consideration.

[The prepared statement follows:]

HOUSE OF REPRESENTATIVES
COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON OVERSIGHT

HEARING ON PROVISIONS OF THE ENERGY ACT OF 1992 RELATED TO THE FUNDING AND PROVIDING OF HEALTH BENEFITS OF RETIRED COAL MINERS

June 22, 1995

STATEMENT

Thomas E. Templeton
President
Templeton Coal Company, Inc.

Speaking On Behalf Of

TEMPLETON COAL COMPANY, INC.

Terre Haute, Indiana

SHERWOOD-TEMPLETON COAL COMPANY, INC.

Indianapolis, Indiana

PRINCETON MINING COMPANY, INC.

Terre Haute, Indiana

I. Introduction

My name is Tom Templeton, and I am president of Templeton Coal Company, Inc. of Terre Haute, Indiana. I am here on behalf of my company, our subsidiary Sherwood-Templeton Coal Company, Inc., and Princeton Mining Company. We support H.R. 1370. Although all three companies I speak for today have "coal" or "mining" in their names, please understand that all of us left the mining industry in the 1950's and 60's and have never re-entered the coal mining business.

Templeton's history is illustrative of the fundamental unfairness thrust upon it and similarly situated companies, such as Princeton Mining and Sherwood-Templeton, because of changes made to the health care benefits of retired coal miners decades after we left the coal mining business. The Coal Act imposes a tax liability on former "Reachback" coal companies who had signed a UMWA agreement as far back as 1950. The whole premise of the Coal Act was that coal companies had made so-called promises to provide "lifetime healthcare benefits" for retired miners and their families in 1978 and later.

"Super-Reachback" companies are those, like Templeton, that did not sign the 1978 or later agreements with UMWA. The Coal Act sponsors said they wanted to stop companies from dumping their responsibilities onto the companies that have faithfully kept their commitments. Instead, the Coal Act empowers major, largely foreign-owned, operating coal companies to abandon the contracts they negotiated and dump their obligations on companies like Templeton, Princeton, and Sherwood-Templeton who left the industry generations ago! This is a travesty, and surely not what Congress truly intended to happen.

II. Why The Reachback Tax Should Not Apply to Super-Reachbacks like Templeton, Sherwood-Templeton, and Princeton

There are four major reasons why the Reachback tax should not apply to companies like Templeton, Princeton, and Sherwood-Templeton:

1. The first reason is obvious. The alleged "promises" were in agreements signed by BCOA companies in 1978 and later. The Coal Act imposed liability on Templeton for promises it could not have made, since it left the collective bargaining process in 1954, 24 years before these agreements were first negotiated.

2. Templeton has now been given responsibility for about 36 beneficiaries, including an estimated 9 orphans. Only 4 of the 36 beneficiaries ever worked as miners for Templeton and only 2 of those are still alive. Templeton's funding of the original plan should have been sufficient to carry those 4 miners through their retirement, though Templeton did not promise it would. The BCOA and UMWA created a new plan in 1974 after dissolving the plan Templeton had funded. The new plan added 23 Templeton miners' wives and dramatically increased benefit levels without Templeton's knowledge or consent. The funding formula of the old and new plans still withstood all of these increases until the BCOA and UMWA changed the funding formulas in 1988.

3. The Coal Act compels Templeton to pay for orphan beneficiaries. Some of these orphans retired from other companies as recently as 1992, 38 years following Templeton's exit from coal mining. We will be required to pay for orphan benefits until about the year 2030, probably longer. That is 76 years after we left the coal business and 24 years after mortality tables suggest our last assigned beneficiary will die. These orphans were never associated with Templeton and likely do not even know we exist. Though fund transfers have paid the orphan charges so far, we expect these transfers to end in about 2004, leaving us to pay the next 26 years. Templeton expects to pay just over $1 million (including Sherwood-Templeton) for all Coal Act premiums over the 30 to 40 years of liability. Templeton expects it would only pay $51,910 if paying only for its 4 assigned miners and not wives or orphans.

4. We do not believe even the Coal Act's primary sponsors originally intended to involve companies signing UMWA contracts earlier than the alleged 1978 promises. In fact, the Dole Commission, whom Congress appointed in 1989 to study the problem and make recommendations, did not suggest going back further than 1978. The Super-Reachback provisions were added by the Conference Committee and were never debated by either the House or Senate.

III. Background of Templeton, Sherwood-Templeton, and Princeton

A. Templeton Coal Company, Inc.

Let there be no confusion about Templeton's interest in the well-being of the miners. Our company's founders, my grandfather, John A. Templeton the first, and his brother-in-law, my great uncle Philip H. Penna, left dismal lives as miners in their native Scotland and England to come to America in search of better working conditions. Eventually, Templeton worked his way through the mining ranks to become a mine boss, and Penna was instrumental in the founding of the UMWA, becoming its second international president. Then in 1920 Templeton and Penna founded Templeton Coal Company, Inc. as president and vice president respectively. Templeton mines were always union mines. Mining was still dangerous, hard work, but Templeton, Penna, and the generations of Templeton family since then never forgot their past and treated miners with dignity, respect, and concern for their well being. The Company and its employees thrived in the 1920's, 30's, and 40's.

Templeton was signatory to National Bituminous Coal Wage Agreements (NBCWA) from 1950 until 1955, though it was never a member of the BCOA. Templeton last contributed $.40 per ton of mined coal to that retirement and welfare fund. Templeton's contribution supported health care for retired miners as required by the NBCWA. Wives were not covered under the NBCWA. Wives were added by BCOA companies and the UMWA to the NBCWA in 1974. That year they abolished the plan Templeton had funded and created a new plan, to which Templeton was not a party.

Demand for our deep mined coal declined significantly in the 1950's, and in 1954 our board decided to close the last mine. Some miners worked into 1955 shutting down the mine. Though the company was in financial crisis, it did what was right for its employees, as they always had in the past. Templeton satisfied all its obligations to its miners, the miners' benefits under the 1950 Welfare and Retirement Fund, and its entire obligation to the UMWA. Templeton

contributed approximately $850,527 into the Welfare and Retirement Fund between its beginning in 1950 until closure activities ended in 1955.

Templeton began diversifying in the 1950's. Instead of mining coal, we now produce laboratory equipment in Terre Haute Indiana, inspirational gifts in Seymour Indiana, electric heating elements in Allegan Michigan with some administrative services in Indianapolis, bathroom accessories in Franklin Indiana, and distribute plumbing, heating and air-conditioning products at 10 locations throughout Iowa. We also lease land for farming and coal production, mostly in Indiana and Illinois.

Under the broad definition of "related persons" in the 1992 Coal Act, all of these businesses suddenly bear liability for the cost of benefits for retired UMWA coal miners. Those costs are determined by the benefit levels and eligibility criteria as negotiated between the UMWA and the BCOA in 1988, 34 years after we closed our last mine. This sudden liability erodes the financial viability of these subsidiary companies.

Templeton was originally notified of 41 assigned beneficiaries. Through appeals with SSA the 41 has been reduced to 27, with a prospective liability of 9 orphans, or 36 beneficiaries altogether. Of the 27, 10 have already died. The Coal Act includes the dead when prorating orphan liability. Those 10 dead assigned beneficiaries and those who die later will create orphan liabilities for Templeton from the time orphan payments are expected to begin in 2004 until the fund ends around the year 2030. Only 4 of Templeton's 36 beneficiaries are retired miners that once received a health benefit while working for Templeton, and only 2 of those are still living. Templeton expects to pay $924,000 for its 30-40 years of liability under the Coal Act, just over $1 million when including Sherwood-Templeton. It would pay only $51,910 if paying only for the miners it once covered.

B. Sherwood-Templeton Coal Company, Inc.

Sherwood-Templeton was signatory to National Bituminous Coal Wage Agreements from 1950 until 1960, though it was never a member of the BCOA. Sherwood-Templeton's contribution supported health care for retired miners as required by the NBCWA. Again, wives were not covered under the NBCWA. Wives were added to the NBCWA in 1974 under an entirely new plan.

In 1960 Sherwood-Templeton sold its last mine to AMAX. Sherwood-Templeton satisfied all its obligations to its miners, the miners' benefits under the 1950 Welfare and Retirement Fund, and its entire obligation to the UMWA. Sherwood-Templeton contributed approximately $2,043,626 into the Welfare and Retirement Fund between its beginning in 1950 and the mine sale in 1960.

Sherwood-Templeton began diversifying in the 1970's. Instead of mining coal, it now produces electric heating elements in Allegan Michigan. It also leases land for farming and coal production, mostly in Indiana and Illinois.

Under the broad definition of "related persons" in the 1992 Coal Act, its Michigan business suddenly bears liability for the cost of benefits for retired UMWA coal miners. Those costs are determined by the benefit levels and eligibility criteria as negotiated between the UMWA and the BCOA in 1988, 28 years after selling its last mine and 18 years before the Michigan businsess was acquired. This sudden liability erodes the financial viability of this Michigan company.

Sherwood-Templeton was originally notified of 5 assigned beneficiaries. Through appeals with SSA that number has been reduced to 3, with a prospectiive liability of 1 orphan, for a total of 4 beneficiaries. One of the 3 dead. The Coal Act includes the dead when prorating orphan liability. The dead assigned beneficiary and those who die later will create orphan liabilities for Sherwood-Templeton from the time orphan payments are expected to begin in 2004 until around the year 2030. None of Sherwood-Templeton's assigned beneficiaries are retired miners that once received a health benefit while working for Sherwood-Templeton. Sherwood-Templeton expects to pay $78,200 for its 30-40 years of liability under the Coal Act for people it

never, ever, provided a health benefit in the past. It would pay nothing if paying only for the miners it once covered.

C. Princeton Mining Company, Inc.

Princeton Mining Company was signatory to National Bituminous Coal Wage Agreements from 1950 until 1966, though it was never a member of the BCOA. Princeton Mining Company's contribution supported health care for retired miners as required by the NBCWA. Again, wives were not covered under the NBCWA. Wives were added to the NBCWA in 1974 under an entirely new plan..

In 1966 Princeton Mining Company leased its last mine to an unrelated corporation. Princeton Mining Company satisfied all its obligations to its miners, the miners' benefits under the 1950 Welfare and Retirement Fund, and its entire obligation to the UMWA. Princeton Mining Company contributed approximately $3,300,000 into the Welfare and Retirement Fund between its beginning in 1950 and 1966.

Instead of mining coal, Princeton now produces agricultural commodities, processes and distributes popcorn wholesale, and owns certain oil well working interests, certain non-producing coal rights, and real estate

Princeton Mining Company has been assigned 127 beneficiaries, with 16 now dead. Princeton has a prospective liability of about 42 orphans, for a total of 169 beneficiaries. The Coal Act includes the dead when prorating orphan liability. Those 16 dead assigned beneficiaries and those who die later will create orphan liabilities for Princeton Mining Company from the time orphan payments are expected to begin in 2004 until the fund ends around the year 2030. Only 13 of 127 of Princeton Mining Company's assigned beneficiaries are retired miners that once received a health benefit while working for the Company. Princeton Mining Company expects to pay $260,781 in 1995, though it would pay only $30,542 if paying only for the miners it once covered. Princeton expects to pay several million dollars for its 30-40 years of liability under the Coal Act.

IV. **Conclusion**

We hope Congress will completely exempt Coal Act liability for Super-Reachback companies like ours who left the industry before 1978. Super-Reachbacks have no more accountability to the situation than car dealers and cattle ranchers and represent no more than 3% of anticipated fund revenues.

Please, consider our story carefully. Templeton's history was founded on the principles of respect of our union employees and doing what is right. Is it right that Congress imposed a tax on our companies for a business we left four decades ago? Is it fair that we be held accountable for promises operating coal companies may have made over two decades after we left the coal mining business? How long should we be forced to fund retiree health care benefits for people who never worked for us? How can it be that a company is legally mandated to pay retiree benefits over 24 years after its last retiree dies?

We have been paying our Coal Act premiums while spending countless hours and dollars resisting this dreadful circumstance. We could be using this time and these dollars developing new jobs and new business as our competitors are doing. It is just not right! Only Congress can make it right! Thank you for your time and consideration.

Chairman JOHNSON. Thank you.

I thank the panel.

Mr. Templeton in your testimony, you make a statement that was not one of the ones that you included in your oral testimony. You say that Templeton will spend just over $1 million on these benefits, when if it had to pay only for the miners it once covered, it would only have to pay about $52,000?

Mr. TEMPLETON. That is right.

Chairman JOHNSON. In other words, if you paid for the health benefits of the people that you employed even though you are no longer in the business, but if you reached back just to your own employees, it would cost $52,000, are you talking about per year?

Mr. TEMPLETON. No, that would be over their remaining lives rather than $1 million.

Chairman JOHNSON. The reality is you will pay $1 million?

Mr. TEMPLETON. Yes.

Chairman JOHNSON. That is very helpful, and the detail that you included in your statement was very helpful.

Suzanne Gerwin, I wanted to clarify your conversations with the SSA. You say in your testimony that, just last week, in response to her appeal to SSA, your mother was notified by one of the field offices that the beneficiaries may have been improperly assigned.

What do they mean by, may have improperly assigned, and what impact will, may have, have on the payments that you are required to make?

Ms. GERWIN. It is—we were notified by the Southeast Regional Office that we may have been erroneously assigned. We appealed our assignment on the basis of passive income, that Buchanan County Coal is no longer in business, and it is not. It has no activity. The impact may have been relieved is just that, it is I do not know what they mean and I won't know until I get the final letter from the Baltimore office. I am assuming that is where the head of the SSA is.

Chairman JOHNSON. At this point, you have some hope that your appeal has succeeded?

Ms. GERWIN. Very much hope. I believe that every indication is that—we are not sending in our June 25 payment, and I know of only two other companies that have gotten relief in this fashion, and they ultimately do get their money back. That however—the impact that this 18-month or 16-month ordeal has had on my employer and my business—I make paper plates. That is what I do in Covington, Kentucky.

My brother and I run a paper plate manufacturing company. As soon as my mother's money was going to run out, probably around August, we were going to have to start paying the, I believe it is ten thousand-nine hundred something dollars a month premiums to the fund. We weren't going to let my mother go through bankruptcy. We would have stepped in and used basically moneys from Premier Industries, the paper plate manufacturing company to pay this fund, this tax. That impact would have been a drastic impact on my company and Premier.

We have 54 employees. We insure them. We find it ironic that we have 57 beneficiaries and the 54 jobs at Premier were in jeop-

ardy. They were going to lose their health care and their jobs, so I jokingly said I will pay for the difference.

Chairman JOHNSON. From what you have heard today, are the benefits that you provide your employees more generous or less generous?

Ms. GERWIN. They are far less generous. We just do single coverage. We do not have the ability to pay full family coverage and do not at this point have a retiree benefit plan for our workers.

Chairman JOHNSON. Thank you.

Mr. Ives, in your statement on the third page, you mention that Eastern never converted its operations—Eastern never dumped a single miner or retiree. It never shifted the liability for the health care of its employees to other employers. Quite the contrary. Eastern's former coal operations have continued in operation under Peabody and have continued to generate revenues to support the UMWA fund. If your successor company is continuing to pay, aren't you double reimbursing for those same people?

Mr. IVES. Technically, I think the answer is no to that. What I said in the testimony was that Eastern when it owned Eastern Associated Coal, paid all of the contributions that Eastern Associated Coal as a subsidiary of Eastern should pay, and when it left the business, the funds were sound and in good financial shape. The coal act reaches back to employees who were employees of Eastern when it operated its coal businesses in 1965 and prior. This was back when the UMWA agreements and the BCOA agreements—

Chairman JOHNSON. Is there an overlap between the employee group of 65 prior, and the employee group of 65 post?

Mr. IVES. Not that I am aware of.

Chairman JOHNSON. So, the successor company generated a whole new work force?

Mr. IVES. No. The people who worked for Eastern Associated Coal now work for Eastern Associated Coal owned by Peabody.

Chairman JOHNSON. I understand that there would be some people that were not employed by the new company that had been employed by you but had left for one reason or another.

Mr. IVES. Prior to 1966.

Chairman JOHNSON. Are you paying only for those? Has there been an adjustment so that you are not paying for the people who went to the successor company and who are being paid for through the successor company?

Mr. IVES. We have only been billed for those who worked for Eastern prior to 1966.

Chairman JOHNSON. And who did not continue in the employ of the successor company?

Mr. IVES. That is my belief.

Chairman JOHNSON. Thank you. I wanted to clarify that.

Mr. Kendig, you mention on the second page of your testimony that this agreement changed the BCOA contribution formula from one based largely on tonnage produced by a signatory company, to one based exclusively on the aggregate number of hours worked by its miners. That shift from tonnage to hours worked seems to be the cause of the change in liability burden amongst the companies, the shifting of that burden from basically high-production, low-

worker companies to the less-efficient, higher labor cost companies. What would happen if we shifted that back?

Mr. KINDIG. I think that certainly—we sell coal by the ton, not by the hour and we certainly believe that a tonnage based payment is more equitable because it distributes the costs across the economic units that we actually sell. When the BCOA determined to move from a tonnage rate to an hourly rate, that created a discrimination among all the coal companies subject to that agreement in respect to their productivity.

Those that have very large highly productive surface mines or long wall mines would have a benefit, and those that operated thin seams for different qualities of coal—in our case, we mine a substantial amount of metallurgical coal from very thin seems, some in the 42-inch range, and you do not get a lot of tons per man-hour. When you shift from a tonnage burden to an hourly burden, those companies that are less productive because of their mining conditions or because of their capitalization bear a greater burden than those that are highly efficient.

Chairman JOHNSON. Thank you.

Mr. Hancock.

Mr. HANCOCK. Mr. Templeton, when did you first hear about the coal act?

Mr. TEMPLETON. I think the first notice I got was an article in Forbes Magazine. I was aware of things going on in the industry, but never anything like this. Then because of that we began to look into it and one of our people went to a seminar about the coal act, and it was at that time, later in 1993, that we really learned the magnitude of what had hit us. Because of that, I wrote the National Coal Association, which one of our subsidiaries is a member of, and asked why didn't you inform the members of something like this?

In their return, they decided to remain neutral and mute on the issue. I wish they would have come out in favor of it. At least we would have known what was going on. So, it was only at that later time we found out what had happened.

Mr. HANCOCK. Do you know of any reach-back companies that did have input in the drafting?

Mr. TEMPLETON. There were no hearings, as I understand it, so there was no input. The only thing I received later from the National Coal Association was that the Dole Commission Report indicated that there was consideration ongoing back as far as 1978 in assessing liability, but never anything going back to 1950.

Mr. HANCOCK. That is kind of an expo facto deal.

Mr. TEMPLETON. It certainly was—is.

Mr. HANCOCK. Ms. Gerwin, the situation that you are in—exactly how is Premier Industries connected to Buchanan Coal? Buchanan Coal is a corporation?

Ms. GERWIN. Yes, sir.

Mr. HANCOCK. A privately held corporation?

How many stockholders are involved—you have no stockholders other than your mother?

Ms. GERWIN. No, sir. My grandfather died in 1976 and he left Buchanan County Coal to his two daughters. My mother gave my aunt a lump sum of money and my mother retained the land-lease

income. I believe there is a tipple or some form of structure on the land down in Virginia somewhere, and she receives an income based on an easement situation.

Mr. HANCOCK. Are we talking about a mineral right lease of some kind?

Ms. GERWIN. Maybe. I do not really know. They call it like a—it is a very long lease, like 99 years. It is kind of like China or Hong Kong. They just pay us—we have never really, you know, wanted to rile them up and ask them why they keep sending us this money, because the company that pays us has not mined coal since I think the late seventies, and we continue to receive a lump sum ever spring from this company. That is basically what Buchanan is.

And Premier Industries, my father bought it in 1981 and he passed away in 1983. We make paper plates in Covington, Kentucky. Now, obviously, when my father died, he was president, the stock went to my mother, but she doesn't own Premier Industries. My brother and I own it.

Mr. HANCOCK. You and your brother own the stock of Premier Industries?

Ms. GERWIN. Yes, sir. It is nonvoting stock because she did not want her children to be able to have their way with the company. It is not voting stock. She basically has control of the purse-strings of Premier and we just run the company.

Am I clear?

Mr. HANCOCK. OK.

Ms. GERWIN. Basically this law, because what is going to happen is that there is no way my mother can afford to pay these premiums. She was—what am I going to do? Good luck mom—so then the obligation was going to fall onto Premier Industries.

Mr. HANCOCK. I understand that. Where I am having a bit of a problem, Buchanan Coal, it doesn't have any assets; is that correct?

Ms. GERWIN. It has an income once a year, one lump sum. We receive I think it is $100 and something, $100 and change, not much, and we receive it once a year. She has two—there are some bookkeepers that were on a pension, a retirement account in that company that she has to pay out of that.

Mr. HANCOCK. And she has paid in $274,000 of personal assets?

Ms. GERWIN. Yes, sir, and capital gains tax when she liquidated some stocks, P&G, Coca-Cola, so she had to sell stock and pay capital gains and then pay this. I was screaming at her, she was crazy to do that and she was terrified about the penalties.

Mr. HANCOCK. It seems she should just transfer the stock and let them sell it and she wouldn't have to pay capital gains on it. That wouldn't work except through some charity.

Has anybody on this panel heard of any type of a situation like this that has occurred before that the U.S. Congress has done?

Mr. IVES. No, sir. As a person not in the coal business and not finding out about the act until we got the bill, I said how can our country do this to us, interfere between two contractual parties who have the capacity to settle their differences and to pay the price? I saw the miners out there with their signs, keep the promises. We agree. Those who make them, should keep them.

Mr. HANCOCK. This Committee wants to make sure that, as I have mentioned two or three times, that the members of the UMWA get exactly what they were promised. It is a case of who is legally obligated to pay for it.

One other question. We are in a situation now with Superfund. We have spent I do not know how many billions of dollars and most has gone for legal fees. Not much has been accomplished. Do you have any idea of what kind of legal fees have been involved in this thing since it started? I am sure that you all have been—

Ms. GERWIN. I know just to generate—

Mr. HANCOCK. Say legal and accounting fees.

Ms. GERWIN. To generate the appeal and to keep coming to Washington and lobby to find out, I know our Cincinnati law firm, we are in excess of $60,000 and that is just last count. The bills keep coming in. I would estimate that we are approaching $75,000 that we have spent so far. And that is to appeal. That is to basically get where we never should have, which is not here.

Mr. KINDIG. I have no idea what our legal fees are but I am sure that they would be shocking. They generally are anyway. I know that we have spent well over $100,000 just to have a firm go through and check the assignments that were made to us of the various beneficiaries, found several people who were dead. They are still dead, but we are still paying for them, and that process seems to drag on.

We cannot seem to get the relevant parties despite the fact that we have submitted evidence that these people are dead to stop paying for them, so we keep sending them a check every month. I guess it will get adjusted sooner or later, but the cost of dealing with this act over and above the premium expense has been very significant.

Mr. TEMPLETON. We have spent in excess of $250,000 in legal expense in contesting the legislation.

Mr. IVES. Eastern Enterprises has spent in excess of $1 million. We have challenged over 800 individual assignments. Each booklet that we have sent to the SSA is about an inch thick. The lady who testified today, Ms. O'Connell, says she has 34 cartons of filings that we have made with her. It takes that much time when the people that you are talking about worked for a company that you no longer own, that have been gone for 25 years.

The act is insidious in that it covers anybody who is an affiliate, so you have to look at not only who employed the people, but what is the affiliate company, which can be three or four transactions away from who the person on the Social Security card was in order to determine who the appropriate person is. The SSA has a difficult job. We also have challenged the constitutionality of the act in the Federal Court of Massachusetts, which is pending.

Mr. HANCOCK. Madam Chairman, we have four companies represented here. We just mentioned 1.36 million dollars' worth of legal fees, and that probably does not count all the in-house time just to these four companies and not a penny of that went to help the miner; did it?

Mr. KINDIG. I did not want to know this number. Counsel informs me that the legal fees are in excess of $2 million, in addition to the other costs.

Mr. HANCOCK. You just added another $1.7 million, four companies, and not a penny of it to the benefit of the miners that we are concerned about.

Thank you, Madam Chairman.

Chairman JOHNSON. Mr. Portman.

Mr. PORTMAN. I thank the Chairman.

I have read all the testimony and I appreciate your being here and the very excellent statements by all companies.

Ms. Gerwin, looking at your testimony and hearing some of the questions and answers, I want to commend you for taking the time to analyze this situation, and then in your testimony to put it in plain English. You have done a remarkable job of cutting through some of the bureaucratic language and some of the distracting arguments here and there, and have distilled it pretty well, especially as to the super reach-back companies. I think it is a huge fairness issue.

When you look at the super reach-back companies and what percentage they are paying into the fund, it is de minimus. The saddest part is it wasn't even necessary, and yet you have incurred all these fees.

I hope we can get to the point where we can go beyond the good legislation that Mr. Hancock has introduced and deal with the super reach-back problem.

You have also spent a lot of time, looking at your testimony, in talking to others. You have testimony about the Lanzendorfers and H&H Coal, and CF&I, and Barnes & Tucker, so you have probably spent time talking to small businesses that are in your situation.

With that information, is there anything else you would like to add for the record about what these other companies are going through who are in a super reach-back position and struggling to make ends meet?

Ms. GERWIN. I think the Committee needs to know there are a lot of companies out there. I have talked to about 40 in Kentucky alone, 10 or 15 in West Virginia, 2 or 3 in Ohio, a couple in Pennsylvania. The response is they are suspicious; this doesn't affect me. I said, that is what I said. They are like, I am not going to pay it. That is what I said.

My advice to them or what I was trying to get them to realize is that it is a law and that some day these penalties will have to be collected, and that being an ostrich and sticking your head in the sand may be an immediate solution, but it is not going to go away. This was before I knew we were going to have the chance to testify and bring this slight oversight to your attention.

They are scared. They are running, changing phone numbers. If I can call you on the phone and find you, I surely think the IRS will be able to.

Lyda Codell, I talked to her. She is 78 years old. I tried to get her to come to Washington with me to talk to Senator Ford and Senator McConnell last year, she is too sick to come. Her granddaughter said that she would come but she did not like to leave her grandmother. This woman's premiums are $22,000 a month and she has not paid.

I calculated her penalty at around $4 million and that was 11 months ago. So, I do not know what she is going to do if she ever

gets a notice in the mail from IRS. She will probably have a heart attack or something.

To answer your question, there are a lot of companies out there and they are not able to appeal like I did. There are a lot of companies that have nowhere to turn. The law the way it is written applies to them. They employed miners; therefore, they are responsible.

Mr. PORTMAN. Let me ask a couple of other questions. Mr. Ives, you talked about super reach-back and reach-back and why you think there is a difference. Obviously, the 1978 date is critical to that. Can you expand as to why you think super reach-back and reach-back companies should be treated differently?

Mr. IVES. Yes, sir. I think both have been disadvantaged. I think that in 1974 and in 1978, when the promises of extended benefits were included in the contract, prior to 1974—most of the super reach-backs are prior to 1974—the benefit plans were defined contribution plans, which meant that the payments that were made by coal operators prior to that time paid the money to the UMWA Welfare and Retirement Fund of 1950, the union had their own funds, and they provided the benefits and were responsible for them, and there was zero promise of anything further than making those payments. And if the union ran out of money or misappropriated, or whatever else, that was their issue, not the company's issue. So, we feel that the companies who never had an implied promise and were paying into defined contribution plans had completed all their obligations.

I think that the reach-back companies were companies that had entered into agreements. I think they got torpedoed by the 1988 agreement where the funding got changed and they have a legitimate argument as well. I think our predicament is totally—is the most egregious thing I have ever heard.

Mr. PORTMAN. Because you had not made a commitment?

Mr. IVES. No commitment at all.

Mr. PORTMAN. Thank you all for being here.

I hope we will be able to learn enough in today's proceedings to come up with a remedy for the most egregious example, I think, which is the super reach-back situation.

I yield back.

Chairman JOHNSON. Are your employee benefit plans as generous in benefits offered and in definition of family coverage as this plan?

I asked Ms. Gerwin that.

Mr. KINDIG. I am not aware of any plan other than the plans that are associated with the United Mine Workers that are anywhere near this generous. We think we provide adequate retiree medical care for our employees, but they are nowhere near this generous. If all our plans were this generous, we would be doing nothing but funding the plans, not investing in new job opportunities or anything else.

Mr. TEMPLETON. The same thing applies. We pay for employees, we share dependent coverage cost, but we have no plans that cover health benefits for retirees.

Chairman JOHNSON. Thank you.

Mr. Ives.

Mr. IVES. We have health care benefit plans. We, like most other companies, have put in various capitation and copay as well as preferred provider programs that have actually lowered and significantly reduced the rate of increase in costs. Several of our plans have actually gone down in costs.

As a matter of fact, both regular employees and union employees at both Boston Gas and at Ohio River Co. are wondering why their benefits are being reduced at the same time we are being asked to make significant contributions for people, for the miners who never worked for us.

[Additional written Subcommittee questions and the responses submitted to Pittston Coal Co., Eastern Enterprises, and Templeton Coal Co., Inc. follow:]

PITTSTON

Karl K. Kindig
President & Chief Executive Officer
Pittston Coal Company
Direct dial 703.889.6337

August 25, 1995

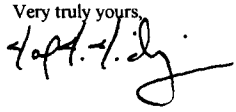
Honorable Nancy L. Johnson
Chairman, Subcommittee on Oversight
Committee on Ways and Means
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Johnson:

Enclosed are the answers of Pittston Coal Company to the additional questions relative to the Coal Act posed by the Subcommittee on Oversight. As you will note from our answers, we continue to believe that the Act, in addition to its other deficiencies, has been very destructive to the collective bargaining process, heretofore the keystone of federal labor policy.

I would like to reiterate the appreciation of our Company for you concern about this ill-conceived law. Hopefully, your efforts and those of your colleagues will be successful in redressing its obvious inequities.

Very truly yours,



QUESTIONS PRESENTED FOR THE PITTSTON COAL COMPANY

1. **What relevance does the 1992 Act have to Pittston's faith in its ability to rely on collective bargaining to resolve issues with its employees?**

Madam Chairman, the answer is quite simple, the Act has greatly undermined the collective bargaining process. The 1992 Coal Act represents unprecedented federal intrusion into a private contract, the implications of which carry far beyond the interests of coal companies. The entire system of collective bargaining, which affects many industries, has been compromised. The assumption by Congress of the role of final arbiter in labor disputes will undermine confidence in the collective bargaining process. No employer, or union for that matter, will be able to make concessions in bargaining for fear that what it receives in return will be taken away by Congressional action.

2. **What impact did the 1992 Act have on Pittston's collective bargaining agreement with the UMWA? What added costs did it impose? How?**

Because of the Act, important provisions of Pittston's hard fought labor agreement with the UMWA was completely abrogated. This agreement was reached following the direct intervention of the Federal Government in the person of then Secretary of Labor Dole after a very difficult mineworker strike against Pittston Coal Company. The Act had the effect of codifying the concessions made by Pittston Coal as part of its collective bargaining agreement, while negating substantial benefits Pittston Coal received as quid pro quo.

In its 1990 labor agreement with the UMWA, Pittston Coal contractually agreed to make a substantial payment to the UMWA 1950 Benefit Trust and to maintain first dollar medical benefits for its employees through its single employer plan. The Act extends the scope of Pittston Coal's liability to mineworkers who were never employed by Pittston Coal, an imposition that was specifically avoided in the collective bargaining agreement.

Not only must Pittston Coal struggle to fund over $10 million annually in newly imposed health care costs, it may no longer negotiate over health care cost containment issues affecting pre-1993 retirees. In summary, Pittston Coal's cash flow has been substantially affected and Pittston Coal cannot reinvest in its core coal business to the extent necessary to meet long term objectives all because Congress, in the case of the Coal Act, abandoned collective bargaining in favor of legislative intervention.

3. **Please elaborate on the portion of your testimony that describes the alleged windfall that the 1992 Act provided for large, foreign-owned coal companies.**

The windfall was the result of a well conceived public relations and legislative plan directed by the BCOA, which is largely comprised of multi-national coal companies. First, in the 1988 National Bituminous Coal Wage Agreement, the BCOA engineered a change in the way miner benefits were calculated from tonnage to man-hours worked, thereby successfully shifting beneficiary costs from larger companies to smaller companies whose operations were more labor intensive. This resulted in huge annual savings for the largest and most profitable companies at the expense of smaller operators. But this formula also caused an artificial retiree's health plan funding crisis. To solve this artificial "crisis" the BCOA supported the ill-conceived Coal Act to further reduce their financial obligations and shift these costs (i) to companies which had left the coal business, (ii) to companies, like Pittston, which had negotiated independent labor agreements, or (iii) to smaller coal companies which could not afford to guarantee lifetime health care for all UMWA retirees.

The BCOA's windfall was augmented by the inability of companies like Pittston, which rely heavily on exports, to pass through the added costs of the additional premiums. Finally, the smaller companies are effectively frozen out as future competitors due to cash flow disparities. The BCOA companies will be able to buy up the coal reserves of former signatories, which are driven out of business by the federally mandated retiree health care costs. Thus, not only is the Coal Act an abandonment of over sixty years of federal labor policy promoting collective bargaining, it is anti-competitive as well.



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J. Atwood Ives
Chairman and
Chief Executive Officer

July 24, 1995

Representative Nancy L. Johnson
Chairman, Ways and Means Subcommittee on Oversight
1136 Longworth House Office Building
Washington, DC 20515

Re: The Coal Act

Dear Chairman Johnson:

I am pleased to respond to your July 10, 1995 letter seeking responses to various questions for the official record of the Subcommittee on Oversight's hearing on the Coal Act. I have already elaborated on some of the issues raised by those questions in my July 7, 1995 letter to you, but I will be more detailed here in response to your specific questions. Your questions are right on the mark and Eastern's responses, as well as those of other companies, will further demonstrate that the Coal Act imposes an unprecedented burden that is both unprincipled and bad public policy.

1. Have you appealed any assignments of employees made by the Social Security Administration? With what result? At what expense?

Eastern's appeal efforts have been two-pronged: they have involved both a blanket challenge on a single ground to all of the assignments made to Eastern and individual challenges on numerous other grounds to over 1,000 of the beneficiary assignments. The process began for Eastern in September 1993 when we received the initial assignments of 2,323 beneficiaries. In October 1993, we were billed for 1,494 of these beneficiaries. Since Eastern had long ago sold its coal operations and simultaneously transferred all of its records, we had no means to confirm whether these individuals had ever worked for Eastern, let alone whether they were eligible for benefits under the Act or properly assigned to Eastern. We realized that a Herculean effort would be required to uncover the rationale for these assignments when SSA repeatedly refused to provide Eastern with the basis for its decisions or with any information that would permit Eastern to evaluate whether the assignment was correctly made, or whether the beneficiary was eligible for benefits. As a result, in order to meet the strict appeal deadlines, Eastern employed a sizeable team of outside and in-house lawyers, paralegals, investigators and other support personnel to determine whether the assignments had been properly made.

As a result of our efforts, which took the better part of a year, we found that hundreds of beneficiaries should have been assigned to other companies whose corporate status and history we researched, at great expense, because SSA considered it too costly and burdensome for the government to do so. Additionally, we determined that numerous beneficiaries were ineligible because the beneficiary was either deceased or did not otherwise meet the eligibility requirements of the plan. In the end, after compiling a database of information containing over 12 megabytes of information (approximately 50 metropolitan area phone books!), Eastern filed individual appeals with SSA from the assignment of 1,079 beneficiaries. These appeals contained detailed analyses and historical information regarding the beneficiaries and the other companies for whom they worked. The appeals together comprised 34 shipping boxes of material transmitted to SSA. This nine month process of developing information and filing the challenges required thousands of man-hours of work by lawyers, paralegals and other support staff and has cost Eastern nearly a million dollars in legal and consulting fees and costs to date! (This does not include litigation and lobbying expenses which have also been enormous). The bill just for shipping the 34 boxes to SSA was over $2,000!

To date, while SSA has not yet ruled on all of the individual appeals submitted by Eastern, it has already agreed with Eastern's analysis on 53 out of the 112 appeals that SSA has reviewed so far. In addition, SSA has acknowledged that a number of the beneficiaries are ineligible for benefits and therefore should never have been assigned to Eastern in the first instance! While Eastern can derive some satisfaction from the reduction in its liability resulting from its successful appeals, Eastern (and other companies) should never have been required to bear the burden and expense of researching and analyzing these assignments.

In addition to challenging the propriety of individual assignments, Eastern has also mounted a blanket appeal calling into question the propriety of assigning any beneficiaries to Eastern. The basis for our challenge is that EACC (Eastern's former subsidiary, now owned by Peabody Coal Company) is the successor to Eastern's former coal division and should therefore have received all of the assignments made to Eastern based on SSA's own internal guidelines. SSA repeatedly represented that Eastern would receive a decision on its successor company challenge prior to the time the individual miner challenges would otherwise be due. Nonetheless, that was not the case and, as discussed above, SSA ultimately required that Eastern file all of its individual appeals before it would rule on the successor issue.

In the end, SSA denied Eastern's claim that EACC should be responsible for all of the beneficiaries assigned to Eastern. SSA's decision was, and is, completely at odds with the assignment provisions of the Coal Act and with SSA's own internal guidelines and instructions. Notwithstanding SSA's refusal to reassign beneficiaries to EACC, we

have recently learned, through a limited response by SSA to a FOIA request, that SSA has reassigned beneficiaries to successors in other instances nearly identical to Eastern's case. SSA has refused to provide additional evidence of assignments to successors unless Eastern pays SSA up front $74,000 in "costs"! Eastern has appealed SSA's decision; that appeal has been consolidated with the federal court action now pending in the United States District Court for the District of Massachusetts, discussed in greater detail below.

Finally, and unfortunately, lest it appear that Eastern is nearing the end of the assignment and appeal phase of the Coal Act, a little over a week after the Subcommittee hearings on the Coal Act, Eastern received 413 *new* assignments from SSA (presumably reassignments from other companies to whom the beneficiaries had been erroneously assigned). Many of these assignments appear to be based on purported employment for a predecessor of Eastern's subsidiary, Midland Enterprises Inc., a marine transportation company that has never been in the coal business, never employed a single coal miner and never signed a single UMWA coal wage agreement. The tenuous connection to Eastern apparently arises from the purchase by Midland of certain barge assets from another company which then ceased its operations. That same company had previously sold certain coal operations to a current BCOA member. This is truly a perverse result of SSA's interpretation of the Coal Act! These new assignments may not only add tens of millions of dollars to the amount of Eastern's liability, but it begins anew the agonizing, time-consuming and expensive appeal process! Moreover, SSA has indicated that this is not the end of the reassignment process, but rather that it is an ongoing process that will continue to result in new reassignments in the future.

2. Do you have any pending litigation under the 1992 Act?

Yes. Eastern Enterprises v. Donna Shalala, et al. and Eastern Enterprises v. Peabody Holding Co., Inc., et al., Civil Action No.93-12372-WF (D. Mass. 1993).

On November 1, 1993, Eastern filed a complaint in Federal District Court in Massachusetts against the Secretary of Health and Human Services and the Trustees of the UMWA Combined Benefit Fund challenging the constitutionality of the Coal Act as applied to Eastern on due process and takings grounds.

Eastern also filed a third party complaint in that action against Peabody Holding Co., Inc. and Eastern Associated Coal Corp. alleging that Peabody and EACC are responsible for any liability Eastern is forced to bear under the Coal Act on account of the transfer of Eastern's Coal Division to EACC in 1965 and the subsequent sale of EACC to Peabody in 1987.



On February 15, 1995, Eastern amended its complaint to add an appeal of SSA's denial of Eastern's blanket appeal on successor company grounds, described above. A hearing on Eastern's motion for summary judgment on its appeal of SSA's decision is scheduled for August 15, 1995.

3. Can you describe what your legal costs have been?

Eastern's legal fees and costs for its outside counsel and support staff covering the administrative challenges, the federal court case and its efforts to obtain a legislative solution by way of an exemption from the Act total approximately $1.5 million through June 30, 1995. This figure, however, does not capture the huge resources Eastern and its subsidiaries have expended in terms of executive and other in-house staff time devoted to these issues.

4. What is your approximate annual premium liability under the Act?

Eastern's approximate annual premium liability is $3.2 million for the first full year (October 1, 1993 - September 30, 1994). Eastern's total projected liability based on the original assignments (not including the 413 new assignments or any future assignments) is between $70-100 million. With the addition of the most recent assignments, Eastern's liability could increase by $20 million or more and the annual premium could exceed $4 million or more. As noted above, it is also possible that Eastern will receive additional assignments that will add to its total liability.

5. What steps would you recommend that Congress take to remedy the problems created by the 1992 Act?

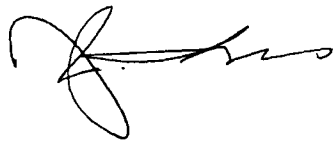
Eastern strongly recommends that Congress amend the 1992 Coal Act, *not just to "remedy the problems," but to right the injustices and undo the harm caused by that statute.* Congress should start with the simple proposition that those who are not responsible for the problem should not pay for the remedy: Reachback companies that did not sign the 1988 UMWA agreement should not be liable for Coal Act payments. Period. This would not affect miners' benefits, since present BCOA companies -- who are the sources of the problem -- will remain responsible for maintaining the funds' viability to pay for benefits that those BCOA companies guaranteed.

Should the Committee conclude that it is not feasible to carve out all reachback companies from the 1992 Act, Eastern urges that basic tenets of justice and fairness require that Congress exempt from the Act those super reachback companies like Eastern that never signed the 1974 and 1978 UMWA agreements, these agreements

being the sources of any possible argument that signatories promised lifetime health benefits to coal miner retirees and their dependents.

I hope you will find the above information useful in determining how best to resolve the many inherent problems with the Coal Act. I think you will agree that the Act is unprecedented not only in its retroactive effect, but also in the outrageous burden it has imposed on companies unfortunate enough to be caught in its web. I know you will try to assist us in obtaining complete relief from this truly unfortunate and ill-conceived piece of legislation. Please let me know if I can provide you with any additional information that will assist you in this task.

Sincerely,



JAI:law

cc: ✓Donna Steel Flynn, Subcommittee Staff Director
Wm. R. McKenney, Professional Staff
Phil Moseley, Chief of Staff, Committee on Ways and Means

HOUSE OF REPRESENTATIVES
COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON OVERSIGHT

HEARING ON PROVISIONS OF THE ENERGY ACT OF 1992 RELATED TO THE FUNDING AND PROVIDING OF HEALTH BENEFITS OF RETIRED COAL MINERS

Hearings Of June 22, 1995

This Response is Submitted Tuesday, August 01, 1995

Response To "Questions For The Reachback Panels", As Requested By Chairman Johnson's Letter Dated July 10, 1995

Thomas E. Templeton
President, Templeton Coal Company, Inc.

QUESTIONS FOR THE REACHBACK COMPANY PANELS

1. **Have you appealed any assignments of employees made by the Social Security Administration? With what result? At what expense?**

   Answer: Templeton appealed its originally assigned 41 beneficiaries. Our wholly owned subsidiary, Sherwood-Templeton Coal Company also appealed their original 5 assignments. Through appeals with SSA, Templeton has had 14 beneficiaries removed, for a total of 27 remaining assignments. Most of these appeals were successful because we were able to show the miners should be assigned to other companies or they worked for us in non-union capacities. However, since the June 22, 1995 Hearings, SSA assigned us 16 new beneficiaries based on 8 miners, though it remains unclear if all 16 are alive to be assigned. Sherwood-Templeton has had similar appeals experience and is now responsible for 4 beneficiaries after winning 3 appeals and getting 2 new assignments. We have begun the appeals process on all new assignments.

   Templeton and Sherwood-Templeton spent $43,109 in legal expenses preparing the first round of appeals. We have no estimate what the second round will cost. We are unable to determine how many hours our staff spent sorting through 40 year old boxes of dusty records searching for information that might help us.

2. **Do you have any pending litigation under the 1992 Act?**

   Answer: Yes. Templeton and Sherwood-Templeton filed suit challenging the constitutionality of the Coal Act under the "Due Process" and "Takings" Clauses. We were not successful in the U.S. District Court, Southern District of Indiana, and have

filed an appeal in the Seventh Circuit Court in Chicago, Illinois. We firmly believe the 1992 Coal Act to be unconstitutional as it pertains to Templeton Coal Company, Inc. and Sherwood-Templeton Coal Company, Inc..

3. **Can you describe what your legal costs have been?**

Answer: Through May of 1995, Templeton and Sherwood-Templeton have spent $214,240 in legal fees, including the $43,109 for appeals of assignments, but excluding legislative expenses.

4. **What is your approximate annual premium liability under the Act?**

Answer: Templeton and Sherwood-Templeton *paid $164,790 for the fiscal year ending 9/30/94*. We expect to pay *$40,339 in fiscal year 1995*, which was a substantial reduction primarily because of credits owed and reduced liability from successful appeals. In 1996 our costs are expected to more than triple. If we are required to pay on all 16 new assignments plus 2 more for Sherwood-Templeton, we will owe 20 months of back premium amounting to approximately $62,614. In addition, we would pay $94,633 in regular premiums. After adjusting for $19,923 in credits we are owed from successful appeals, we expect to pay *$137,325 for fiscal year 1996*. Costs could go much higher. We are told SSA will not complete this round of the reassignment process until September 1995. New assignments could further increase our costs. Templeton has always been and hopes to always remain current in its Coal Act obligations.

5. **What steps would you recommend that Congress take to remedy the problems created by the 1992 Act?**

Answer: Though we support H.R. 1370, we agree with Congressman Hancock's opening remarks saying we should consider legislation that goes further. It is wrong that Templeton pay even one dollar, considering we have not signed a UMWA contract in over four decades.

We support suggestions that legislation relieve all Reachback Companies of all future liability. To be successful, we believe alternatives must (1) remove all future liability imposed upon Super-Reachback companies, (2) be revenue neutral, perhaps by shifting costs back to the companies who made the promises or through use of the surplus, and (3) not effect the security or benefit level of the miners.

Congress should consider that if the relief it passes is not complete and equitable, it will likely face harmed companies seeking relief for years to come. We urge Congress to consider total relief for all Reachback companies.

Chairman JOHNSON. Thank you very much. I appreciate the testimony of this panel.

I look forward to working with you in the months ahead to see if we can create legislation that is fairer to all.

Thank you.

The next panel will be Mr. Trumka, president of the United Mine Workers of America, Chris Farrand, vice president of Peabody Holding Co., and Page Henley, senior vice president of Development, Westmoreland Coal.

Mr. Trumka, if you will start please.

STATEMENT OF RICHARD L. TRUMKA, INTERNATIONAL PRESIDENT, UNITED MINE WORKERS OF AMERICA

Mr. TRUMKA. Thank you.

If I might ask just a procedural question. I listened intently to some of the things you were saying. I heard a number of misstatements. For instance, Mr. Ives said that the money was paid to the union over this period of time. The money was never paid to the union but was always paid into a tripartite trust that his company always had a say in.

Mr. Kendig said that he did not know of any benefit plans as lucrative as the plan that is under question here, and all of his employees received those exact benefits.

My question is can, after reviewing the transcript, we submit corrections or at least our side of the story with those gross misstatements?

Chairman JOHNSON. You certainly will be able to do that and we encourage you to do that. We want the record to be straight.

When you do that, I want you to look at not only the benefits but the copaid structure. Because the reason that I am asking those questions is that the Employee Benefit Research Institute which looks at these plans has written about the UMWA benefits and they say the absence of significant beneficiary cost-sharing requirements, they say that two reports comparing the UMWA benefits with those offered under other large group plans highlight both the generosity of the UMWA benefit package and the absence of significant beneficiary cost-sharing reforms. These features remain essentially unchanged under the 1992 Act.

They go on later that the lack of an annual deductible premium contribution requirements, those kinds of things, plus the unusually broad definition of dependent coverage are unique to those plans. At least that is my understanding.

Mr. TRUMKA. We will be happy to respond to each of those.

When comparing those benefits, please understand that over the years mine workers' beneficiaries have fore-gone pension payments. Their pensions are far lower than anybody else's pensions, so they could have a health care benefit. When you look at that, please compare the pension benefits.

We will be happy to respond to that in absolute detail, because I think when you look at it, you will understand that these are promises made to these people by the White House a number of years ago, and I think they have earned these benefits and we will do everything we can to make sure they maintain them.

Madam Chairman, and Members of the Subcommittee, thank you for the opportunity to appear on behalf of nearly 100,000 retired miners and survivors who receive their medical insurance coverage from the UMWA.

Chairman JOHNSON. Before you get started, I need to clarify an earlier statement.

You cannot offer rebuttal remarks that will be included in the record, but we will be submitting questions to everyone who appeared and we will submit a broad enough question so that you will be able to offer whatever information you think is relevant and the answers to the question do become part of the record.

Mr. TRUMKA. Will we have sufficient time after we get a transcript of this hearing?

Chairman JOHNSON. The transcript will be ready in about 10 days and you are welcome to come and read it. We do not give out copies. Then you will have time to submit the answers to questions at your pace.

Mr. TRUMKA. The transcript will be ready in 10 days and we can come read the transcript?

Chairman JOHNSON. It will be transcribed in 10 days and available.

Mr. TRUMKA. Can we copy it ourselves?

Chairman JOHNSON. Apparently not. You can come read it.

But I am not sure that you need to go over it in that detail. I think the things that you want to say, we will ask you questions, we want to be sure that you have a chance to put on the record everything you think is relevant, and I think that is probably the more important fact.

Mr. TRUMKA. I sat here for a very short period of time and I listened to a number of misstatements, and I do not want the Committee to be misled because of a misstatement. I heard a number of them, and we would like to correct them. If we cannot do anything other than read the transcript, we will do our best.

Madam Chairman and Members of the Subcommittee, thank you for the opportunity to appear on behalf of nearly 100,000 retired miners and survivors who receive their medical insurance coverage from the UMWA combined fund. The Coal Industry Retiree Health Benefit Act which established the Miners Health Benefit Fund was enacted in 1992 with bipartisan support and was signed into law by President Bush after a series of negotiations with the Bush White House.

It averted what would have been the end of a nearly 40-year-old health care system for one of our Nation's most vulnerable populations. At the time of the act's passage, the average beneficiary was 76 years old and more than half were elderly widows. Most of these retirees worked their entire lives in the mines under conditions that average Americans would find appalling.

Many still suffer from the debilitating effects of mine accidents or respiratory problems caused by exposure to coal dust. Cutting off health insurance benefits for this group of Americans was unthinkable to Congress, and it acted wisely to fashion a compromise that has provided real health security to tens of thousands of elderly retirees and widows.

In addition to discussing the status of the coal act and its effect on various groups, I would like to discuss H.R. 1370, a bill that would reduce the medical payments of a select group of companies in the combined fund based on the fund's short-term surplus.

H.R. 1370 would result in the one thing that everyone agrees should not happen, including one of its sponsors, Representative Hancock. I was very pleased to hear you reiterate that you did not want the elimination of health care benefits for the retirees who were promised those benefits and who are now too old and too infirm to find alternative health insurance coverage.

Simply from our perspective, H.R. 1370 is a dagger very pointed and sharp pointed straight at the heart of the coal act and at the welfare of the combined fund's beneficiaries. Recent information from GAO and a well-respected accounting firms, details the precarious financing of the Miners Medical Fund.

The studies make it clear that eliminating all but 10 percent of the surplus as has been proposed in the Myers-Hancock bill would cause the fund to become insolvent almost overnight. If this occurs, the combined fund trustees will be left with the same impossible dilemma that confronted the trustees for the old 1950 and 1974 health funds; that is, a mandate to provide a specific level of benefits but insufficient income to pay for them.

When this happened in 1991, doctors, hospitals, pharmacies, and other medical service providers went unpaid until eventually the trustees concluded that they had no choice but to cut benefits.

Madam Chairman, I spent each and every day during that period of time working with the trustees, working with hospitals, working with beneficiaries, small pharmacies, ma and pa pharmacies, trying to prevent the cutoff of those benefits. In the end, the benefits were not cut, but only because the court stepped in and forced the employers to sharply increase the amount of their contribution, and because the following year Congress passed the coal act.

The studies prove another important point and that is that the current surplus is temporary and is due in large part to the rate at which the Federal Government was, and I reemphasize the word, was reimbursing the fund for Medicare services. However, in July 1994, the contract with Medicare was renegotiated and the rate was reduced by 25 percent.

I want to emphasize that the surplus is not the result of premium payments made by any companies that have been assigned benefits, neither reach-back companies nor BCOA companies.

The bottom line is that the Myers-Hancock bill will greatly exacerbate the fund's financial flight and lead inevitably to a situation where benefits will once again be threatened.

When it passed the coal act, Congress was keeping the commitment made by President Truman, who, after taking control of the mines during a nationwide strike, negotiated a settlement with the coal operators that included the creation of the UMWA Welfare and Retirement Fund. Congress must not now go back on that promise.

Many of the major companies supporting H.R. 1370, in fact, its major beneficiaries, dumped their own retirees less than a decade ago on companies that were still bargaining with the UMWA. In effect, the bill rewards the companies that promised their employ-

ees lifetime medical benefits and then walked away from that promise, thus causing the crisis that led to the coal act's passage.

I am absolutely certain that Congress will not want to grant this group of companies what amounts to a significant tax break at the cost of medical care for retired coal miners.

Importantly, H.R. 1370 would also make it impossible to consider the claims of the small number of companies that may have legitimate problems meeting their full premium obligation under the act. If premium relief is to be considered, it should be based on provable hardship, not on the claim that an employer should be able to lawfully unload its retiree health care liabilities on others despite having the financial ability to continue paying.

Madam Chairman, I am ready to work with the Subcommittee to address the problem of small companies that might have legitimate problems meeting the premium obligations under the act. The UMWA has no reason, and I emphasize no reason, to want any company pushed into bankruptcy by the act, but I believe that such cases are few and far between, and we should be careful not to overreact to suggestions that legions of small companies are being forced out of business because they must now pay for retiree health care.

As the Subcommittees moves forward with its deliberations over the coal act, I urge you to place yourself in the role of fiduciaries of the Miners' Health Fund and that you take extra special care that the security of the retirees is not put in jeopardy.

Thank you, Madam Chairman.

[The prepared statement follows:]

Statement of
Richard L. Trumka
International President
United Mine Workers of America

to the
Subcommittee on Oversight
Committee on Ways and Means

U.S. House of Representatives
June 22, 1995

Madam Chairwoman and members of the Subcommittee, thank you for this opportunity to appear on behalf of the nearly 100,000 retired miners and survivors who receive their medical insurance coverage from the UMWA Combined Fund.

The Coal Industry Retiree Health Benefit Act, which established the miners' health benefit fund, was enacted in 1992 with bipartisan support and signed into law by President Bush. It averted what would have been the end of a forty-year-old health care system for one of our nation's most vulnerable populations; at the time of the Act's passage, the average beneficiary was 76 years old and more than half were elderly widows.

Most of these retirees worked their entire lives in the mines, under conditions that average Americans would find appalling. Many still suffer from the debilitating effects of mine accidents or respiratory problems caused by exposure to coal dust. Cutting off health insurance benefits for this group of Americans was unthinkable to Congress, and it acted wisely to fashion a compromise that has provided real health security to tens of thousands of elderly retirees and widows.

In addition to discussing the status of the Coal Act and its effect on various groups, I would like to discuss H.R. 1370, a bill that would reduce the medical payments of a select group of companies in the Combined Fund, based on the Fund's alleged surplus.

H.R. 1370 would result in the one thing that everyone agrees should not happen, and that is the elimination of health care benefits for the retirees who were promised these benefits and who are now too old and too infirm to find alternative health insurance coverage. Put simply, H.R. 1370 is a dagger pointed straight at the heart of the Coal Act and at the welfare of the Combined Fund's beneficiaries.

Recent information from both the General Accounting Office and a well-respected accounting firm details the precarious financing of the miners' medical fund and suggests that eliminating all but 10% of the surplus--as has been proposed in the Myers-Hancock bill--will cause the Fund to become insolvent almost overnight.

If this occurs, the Combined Fund trustees will be left with the same impossible dilemma that confronted the Trustees to the old 1950 and 1974 health funds--a mandate to provide a specific level of benefits but insufficient income to pay for them.

When this happened in 1991, doctors, hospitals, pharmacies, and other medical service providers went unpaid, until eventually the trustees concluded that they had no choice but to cut benefits. In the end, benefits were not cut, but only because the courts stepped in and forced the employers to sharply

increase the amount of their contribution and because the following year Congress passed the Coal Act.

According to the General Accounting Office, which in June 1994 projected a continuing surplus, "it now appears that annual deficits--instead of surpluses--are likely to occur, which would erode the current surplus over time." The current surplus of approximately $114 million will be necessary to cover annual operating deficits, which, according to the GAO, may occurr as soon as this year.

It is important to keep in mind that for the first 18 months of the Combined Fund's existence, a surplus accumulated largely due to the rate at which the Health Care Financing Administration had contracted to reimburse the Funds for Medicare services. However, when the risk contract with HCFA expired in July 1994, it was renegotiated and reduced by nearly 25%.

According to the GAO, which had used the old HCFA contract rate in its June 1994 forecast, the new rate will not result in a surplus, and as a result, deficits are likely to occur. A projection of long-term revenue and expenses conducted in March by the firm of Ernst and Young found that the most likely case--which it called its baseline projection--is for the Fund to begin experiencing annual operating deficits in 1995. By 2003, the study predicts, the Fund will face a negative balance of $3.5 million; in 2004 the deficit will grow to almost $40 million.

Although the Committee will have an opportunity to question actuaries on both sides of the issue, it is important to understand that the projections relied upon by the Funds and by the GAO were based on medical cost trends that have been accepted by the Ways and Means Committee in its Medicare deliberations and should therefore be an acceptable basis on which to form a conclusion about the Fund's financial condition.

The bottom line is that the Myers-Hancock bill will greatly exacerbate the Fund's financial plight and lead inevitably to a situation in which benefits will once again be threatened. When it passed the Coal Act, Congress was keeping the commitment made by President Truman, who, after taking control of the mines during a nationwide strike, negotiated a settlement with the operators that included the creation of the UMWA Welfare and Retirement Funds. Congress must not now go back on that promise.

In decisions upholding the constitutionality of the Coal Act, numerous federal courts have cited the government's role in the establishment and continued existence of the miners' medical care program. In one recent case, the court wrote:

> "Given the fact of continued provision of health care to UMWA represented retirees, as well as the pervasive nature of the government's regulation of virtually every facet of the coal industry, multi-employer benefit funds in general, and the UMWA Funds in particular, any expectation that any Last Signatory Operator may have had that it could freely and forever walk away from its responsibilities to UMWA retirees, and dump its share of the liabilities on the operators that were still contributing to the UMWA 1950 and 1974 Benefit Plans, would be patently unreasonable." Holland, et al. v. Kennan Trucking Co., et al., Civ. No. 2:93-1223 (S.D. W. Va. March 15, 1995).

At the time of the Act's passage, we faced the imminent collapse of the multi-employer trust funds, known as the 1950 and 1974 Benefit Trusts, that provided health care benefits to over 120,000 retired coal miners and their survivors. Skyrocketing health care costs and a steady decline in the number of contributing companies had resulted in a deficit of over $100

million, and the likelihood that benefits would be cut off when the then-current UMWA-BCOA agreement expired, on February 1, 1993.

By 1992 fully two-thirds of the beneficiaries in the UMWA Funds had worked for companies that were no longer contributing toward their benefits. The signatory companies--those companies with whom the UMWA still bargained--had employed only 30% of the retirees covered by the Funds. The other 70%, known as orphans, had been employed by companies that were no longer signatory to a UMWA agreement. But that did not mean that these employers were out of business or unable to continue paying for their retirees' medical coverage.

The compromise that was worked out between the Bush White House and the Congress followed the recommendations of the Coal Commission, the panel established by Labor Secretary Elizabeth Dole to examine and make recommendations concerning the financial crisis facing the UMWA Funds.

The basis for the Commission's recommendation is summarized in its introduction: it says "retired coal miners have legitimate expectations of health care benefits for life; that is the promise they received during their working lives and that is how they planned for their retirement years."

That conclusion framed the congressional debate that followed. It echoed what the courts had said and what the miners have always believed, that upon retirement they are entitled to health care for life. To guarantee that this commitment would be honored, the Commission recommended that a statutory obligation to contribute should be imposed on current and former signatories to the National Bituminous Coal Wage Agreement (NBCWA).

Adopting the Commission's conclusion that coal companies that had signed the 1950 or later NBCWA bear the responsibility for providing lifetime health benefits to their own retirees, the final compromise looked back to 1950 to find companies to whom current beneficiaries could be assigned.

The funding mechanism Congress established guarantees that only those companies that signed collective bargaining contracts that promised retiree health care would be liable for premiums under the Act. In many respects, the Act represents a codification of the contractual commitment that former signatories once voluntarily undertook.

Many of the major companies supporting H.R. 1370--in fact, its major beneficiaries--dumped their own retirees less than a decade ago on companies that were still bargaining with the UMWA. In effect, the bill rewards the very companies that promised their employees lifetime medical benefits and then walked away from that promise, thus causing the crisis that led to the Coal Act's passage. I am certain that Congress will not want to grant this group of companies what amounts to a significant tax break at the cost of medical care for retired coal miners.

H.R. 1370 would also make it impossible to consider the claims of the small number of companies that may have legitimate problems meeting their full premium obligation under the Act. If premium relief is to be considered, it should be based on provable hardship, not on the claim that an employer should be able to lawfully unload its retiree health care liabilities onto others despite having the financial ability to continue paying.

Madam Chairwoman, I am ready to work with the Subcommittee to address the problem of small companies that may have legitimate problems meeting their premium obligations under the Act. The UMWA has no reason to want any company pushed into bankruptcy by the Coal Act. But I believe that such cases are few and far between, and we should be careful not to overreact to the suggestion that legions of small companies are being forced out of business because they must now pay for retiree health care.

As the Subcommittee moves forward with its deliberations over the Coal Act, I urge you to place yourselves in the role of fiduciaries of the miners' health fund and that you take special care that the security of the retirees is not put in jeopardy.

Chairman JOHNSON. I regret that we are going to have to break for half an hour. We have 7 minutes left in this vote and there are four 5-minute votes.

When we come back we will through questioning give you a chance that will fit in better. I think rather than getting halfway through the next statement, it is probably better to lay over the next two statements until we return.

The hearing will be in recess for half an hour.

[Recess.]

Chairman JOHNSON. The hearing will resume. We probably will be interrupted with one more vote, but we are going to start back on our track here.

Mr. Farrand.

STATEMENT OF CHRIS FARRAND, VICE PRESIDENT, CORPORATE DEVELOPMENT, PEABODY HOLDING CO., ST. LOUIS, MISSOURI; ON BEHALF OF BITUMINOUS COAL OPERATORS OF AMERICA

Mr. FARRAND. Thank you, Madam Chairman. I am vice president of Peabody Holding Co., but I am here representing the Bituminous Coal Operators Association today and, as you know, BCOA is a multiemployer group that represents certain producers of coal in the U.S.

My company has two subsidiaries that are members of BCOA, Peabody Coal Co. and Eastern Associated Coal Corp. I would ask the Committee's permission to submit my written statement for the record and make a few brief comments, if I may.

I would like to address the questions that were raised today about the crisis, it was called, whether the crisis was real in 1992, and what choice or choices the Congress and the Bush administration had when they passed the Coal Mine Retiree Health Benefits Act. I would like also to address the comments that were made earlier about the so-called windfall to BCOA companies.

The crisis was indeed very real from our standpoint and I am going to give a brief recitation of why I think that is the case. A promise was made, it has been referred to several times today, that really began back in 1950, and through a succession of labor agreements, the promise was maintained. In fact subsequently the courts ruled that it was in fact a promise, but the court's rulings did not affirm any methods of keeping the promise.

There was no funding mechanism defined on a permanent basis to support the promise that these certain closed groups of coal mine retirees and their dependents would receive retiree health care benefits for life. Under the 1988 National Bituminous Coal Wage Agreement, the situation was exacerbated. The funding base for the benefit trust, was depleted, not, I might add, because the funding mechanism switched from tons to hours worked.

If I can digress for a minute, Madam Chairman, since you asked the question, in 1988 the fund was a defined benefits plan and the courts ruled that the signatories—who were more than just the BCOA companies, but the entire body of signatories to the 1988 agreement—would have had to put up contributions in any case to fulfill the promise for at least that term that benefits would be forthcoming.

It is irrespective of whether we did it on the basis of hours or tons; the same amount of money had to be put forth by the same signatory group. It was a question which members of the group would pay how much, but nevertheless the tons versus hours funding mechanism itself did not create the crisis.

What created the crisis was the fact that the funding base in total had shrunk because you had fewer signatory companies. You had a number of companies who had either left the coal business or, frankly, refused to continue to pay. They did not feel they were obligated to fulfill the promise and therefore refused to pay into the funds.

As this funding base shrunk, the obligation on individual producers, whether it is tons or hours, grew. It was like a downward spiral, Madam Chairman, because, as the premiums rose per unit of output, whether you call it hours or tons, there was an incentive or an impetus for more and more companies to get off and we were heading off a cliff, frankly, at the end of the 1988 agreement.

Looking to the end of that agreement, which expired in February 1993, we knew there was no way that signatory companies could continue to pay premiums and remain in business. I will put some parameters on that.

At the end of the 1988 agreement, each of us was paying a combined premium of $3.67 per hour worked by each employee. What that meant was that we were paying an increment of about 25 percent of our hourly wages not for our employees', but mostly for somebody else's retirees' benefits.

For example, our two subsidiary companies were paying premiums that amounted to 16 percent of the total premiums paid to the funds. We only have about 4 percent of the beneficiaries in that fund, so we were paying $3 to pay for somebody else's retirees for every $1 we were paying for our retirees.

During the term of the 1988 agreement, the signatories to that agreement put $1.1 billion into the two benefit trusts and the funds staff have calculated that about $600 million of that $1.1 billion was to pay for companies who were no longer paying for their own retirees.

In effect, if you put yourself in our position at the time, we were subsidizing our competitors. Many of these companies are still in the coal business competing with us every day. To put that $3.67 number into perspective, at the productivity rates in 1992, for a typical Eastern underground mine, it is about a dollar a ton cost disadvantage in a market that sells coal based on pennies a ton.

The fact remains we could not as producers have agreed to another National Bituminous Coal Wage Agreement under the conditions we had in the 1988 agreement. We simply could not do it.

The Bush administration had a foretaste of this problem as a result of the 1989 Pittston strike and out of that strike, as has been mentioned earlier, came the Dole Commission. The Dole Commission looked at the problem and said we have three choices to deal with this. One, we can make all of the current and former signatories pay into a fund on a shared basis. But that begs the question of who is going to get which share, and they decided that wouldn't work.

A second option was to apply an industrywide tax, and we have a history of that in our industry. We have the abandoned mine land fee, which is an industrywide tax, to pay for the liabilities of some other companies which are no longer in business, and we have the black lung excise tax, which is also an industrywide tax, to pay for abandoned orphaned beneficiaries who are determined to have black lung disease.

The third choice, of course, was—and it was the administration's choice, which Congress adopted, which was to say that the people who made the promise or their successor corporations should be held accountable for the benefits of the people who retired from either those entities or their predecessor entities, and they should do it individually, and for the true orphans we will find other sources of funds.

The other source of funds was the surplus in the 1950 pension trust. So, we found a surplus which, in essence, the BCOA companies put up, and used these funds to deal with the orphans and gave the reach-back companies the obligation to pay for their own retirees only. That was the solution.

They faced a dilemma and they came up with a solution that was the fairest and simplest of the three options. I am not suggesting that all are perfect or any of them are perfect, but they chose an option that stands on the principle. The principle is that if there are retiree benefits promised, they should be paid by their former employees and not by the people who did not employ them, many of whom must compete against them.

The other option, of course, was to let the system collapse. In that case there would have been, I think, Mr. Trumka would agree, probably a long and bitter strike. We did not feel that was an option either. So, the choice that Congress selected, imperfect though it may be, was the fairest and simplest of those available at the time.

Madam Chairman, I want to address one other issue, which is the windfall concept that was spoken of this morning. I am sorry we do not have the nice colored chart that was up here earlier—

Chairman JOHNSON. We have it individually.

Mr. FARRAND. If you have copies of it, I would like to address it, if I may. The chart suggests that, it was a BCOA created crisis. First, numbers associated here are not reflective of BCOA companies, but of all the companies who signed the 1988 agreement. There were only 14 companies in BCOA and over 300 companies signed the agreement. The most important point I would like to make about this chart is the fact that the so-called savings that have been mentioned, $385 million, includes about $450 million associated with the pension trusts, not the benefit trust, not health care, but pensions.

The reason why the 1988 signatories were no longer paying pension fund premiums is that the pension fund had become fully funded. In fact, it had a surplus and we are now using that surplus to deal with health care benefits for orphaned miners, orphaned retirees.

We had, in essence, advance paid the fund. It was fully funded—

Chairman JOHNSON. Would you clarify for me what amount of the $384 million you were putting in your pension fund or the com-

panies were putting in their pension fund? You are saying that this combines health and pension payments.

Mr. FARRAND. What is reflected on this chart is a combined payment amount including the pension fund, and my point is simply this. The pension fund payments disappeared not because anybody shirked their duties. In fact, it had been fully funded. In fact, it had been overfunded.

I would argue, I guess, that those signatories of 1988, of the 1988 agreement, were in effect paying the pension obligations of a whole lot of companies who had dumped their retirees into the fund, and we took care of those pension obligations, and now we simply argue that they ought to at least pay their retiree health benefits. We have taken care of their pension obligations. So, I question the validity of the assumption that we saved all this amount of money.

To sum that up, I would argue that in our industry, like all commodity prices, the coal price has gone down in real terms dramatically, over the last 10 years, about 50 percent. Had we continued to fund, or I would argue continued to subsidize the people who were no longer paying their obligation in those combined funds, we could not remain in business. That was the crisis. Nobody could afford to sign an agreement similar to what we had in 1988 and remain a competitive, effective company in the coal business. Congress recognized that. They chose the best of the three options available, and that is what we have today.

I will be happy to respond to any questions you have.

[The prepared statement follows:]

STATEMENT OF CHRIS FARRAND
VICE PRESIDENT, CORPORATE DEVELOPMENT
PEABODY HOLDING COMPANY, INC.
ON BEHALF OF BITUMINOUS COAL OPERATORS' ASSOCIATION

Madame Chairman and members of the Subcommittee, my name is Chris Farrand. I am Vice President for Corporate Development of Peabody Holding Company, Inc. I am appearing on behalf of the Bituminous Coal Operators' Association (BCOA), the multi-employer bargaining association representing a group of employers in the bituminous coal industry. Two Peabody Holding Company subsidiaries, Peabody Coal Company and Eastern Associated Coal Corporation, are members of BCOA.

A Brief History of the Events Leading to the Coal Industry Retiree Benefit Act of 1992 ("Coal Act")

I understand a representative of the UMWA Health and Retirement Funds will provide the Subcommittee with a history of evolution of retiree health care in the coal industry. Nevertheless, a brief history is necessary to understand the predicament facing our industry, Congress and the Bush Administration when the Coal Industry Retiree Health Benefits Act was passed in 1992.

The provision of health benefits in the coal industry dates back almost 50 years, when the government seized the nation's mines and imposed a settlement to a labor dispute. The agreement between President Harry Truman and John L. Lewis, then president of the United Mine Workers of America (UMWA), resulted in the establishment of a system for providing health care benefits to both active and retired miners. This system was incorporated into the 1950 labor agreement. The 1950 Benefits Plan and a second fund called the 1974 Benefits Plan were later established as the multi-employer mechanisms through which these benefits were funded. Provisions for retiree health care benefits were included in every subsequent national labor agreement between the union and the industry.

In essence, the successive labor agreements had perpetuated the inherent promise made by President Truman, but the payment mechanism underpinning that promise was negotiated on a contract by contract basis.

However, in recent years, especially between 1988 and 1992, the funding base for the 1950 and 1974 Plans deteriorated badly as many companies left the business or just refused to pay.

Meanwhile, the courts in several different actions confirmed that a promise of lifetime benefits had been made, but they did not affirm a payment mechanism for fulfilling that promise. In what can only be called extraordinary interpretations of contract law, the courts imposed upon the remaining signatories to the 1988 National Bituminous Coal Wage Agreement higher and higher premiums to cover the shortfalls in the Benefit Plans. As the premiums rose, so too did the impetus for more employers to leave the plans. More beneficiaries in the multi-employer funds became "orphaned" to be supported only by the remaining companies who were signatory to the 1988 Labor Agreement.

As an example, by the time the Coal Act passed in 1992, two of Peabody Holding Company's subsidiaries, Eastern Associated Coal Corp. and Peabody Coal Company were paying a total of 16 percent of all the premiums paid into the Funds, but only 4 percent of the beneficiaries in the Funds had retired from the two companies and their predecessors.

This "crisis" was not manufactured by BCOA companies. Rather, as the premiums continued to rise, fewer employers could justify paying them and remain in business. With this "snowballing" effect, the Funds became ominously known as the "Last Man's Club." Collapse of the multi-employer funding system was inevitable.

By 1992, with impending expiration of the National Bituminous Coal Wage Agreement (NBCWA), the funding mechanism had deteriorated even further as more companies had dumped retirees into the Funds. Of the $1.1 billion contributed for health benefits by 1988 signatory companies during the term of the 1988 labor agreement, over $600 million was for retirees of companies that were no longer making payments into the Fund. Left unresolved, this issue would have made renewal of the NBCWA impossible for

one simple reason: 1988 signatories could not afford to continue to pay for the benefit costs of others companies' retirees and, in order to survive, they were prepared to end their relationship with the Funds.

In 1992, BCOA employers were paying a premium of $3.67 per hour per worker, not to their employees or even their retirees, but to a Fund to pay benefits largely for someone else's retirees. In a very competitive industry such as ours, the operating cost differential associated with these contributions made continuation of that system untenable. The contention that the 1988 signatory companies received a "windfall" as a result of the Act is simply incorrect.

At issue, of course, was the fate of the 118,000 beneficiaries if the system and the funding base for their health care benefits collapsed.

In 1988, as a result of a protracted strike against Pittston Coal Company by the UMWA primarily over this issue, Secretary of Labor Elizabeth Dole created a special commission to seek a long-term solution to the coal mine retiree health care issue. The Dole Commission recognized the dilemma and offered three possible solutions:

1. Past signatory employers could pay for their own retirees.

2. Current and former signatories could share the cost of benefits.

3. An industry wide tax could be assessed against all current coal operators.

Of the three choices identified by the Dole Commission, the funding mechanism selected by Congress and the Bush Administration was the simplest and fairest. The 1992 Coal Act, as a matter of principle, assigned responsibility for retiree benefits to former employers and related companies of the retirees, not to companies that did not employ them.

The Coal Act is Working Reasonably Well

The Coal Act is essentially working as envisioned by Congress. It should be noted that the Combined Benefit Fund created by the Act encompassed a closed group of beneficiaries whose average age is now 73. In fact, the number of beneficiaries has decreased by 20 percent since implementation due to the age of the population, and there are now approximately 95,000 beneficiaries remaining in the Combined Fund.

Also, it should be noted that the health care cost containment measures required by the Act have been implemented, resulting in a more efficient and cost effective system. The rate of increase in per capita health care costs has slowed, despite the increasing average age of the beneficiary population.

As a result of the assignments by the Social Security Administration (SSA), the number of orphan beneficiaries in the Funds - those whose former employers either refused to pay or were thought to be no longer in business - decreased from 74,000 before the Act, to less than 28,000 currently. That is because the number of these so-called orphans were in fact retirees from companies still in business -- many still in the coal business -- and the beneficiaries have been assigned to them accordingly.

It should also be noted that the Coal Act provided a process for appeal of incorrect assignments. Some 175 companies have already been relieved of liability as a result of the appeals process, which is continuing.

The underlying principle of the Act is that employers should pay for their own retirees, and retiree benefits should not be subsidized by other companies, especially those in the same business.

As a result of the Act, the cost of health care benefits for this closed group of beneficiaries has improved. Moreover, no reachback company is

paying anything more than a per capita charge for its own former employees and dependents.

Finally, the Second and Sixth Circuit Courts of Appeal have upheld the Constitutionality of the Act.

H.R. 1370

H.R. 1370, a bill recently introduced, proposes a moratorium on payment obligations for a select group of so-called "reachback" companies whenever there is a cash surplus of 10 percent or more in the Combined Benefit Fund at the end of any year.

As a result of the initial assignments by the Social Security Administration, responsibility for per capita premiums covering 85 percent of the beneficiaries in the Combined Fund were assigned to just 25 companies, most of which are very large corporations. Of the remaining companies assigned beneficiaries under the Act, 186 companies pay less than $25,000 per year and 132 pay less than $10,000 per year.

Under H.R. 1370, 10 of these 25 largest companies would be excused from paying premiums whenever a cash surplus exists in the Combined Benefit Fund. These 10 companies now contribute more than $42 million annually to the Combined Fund. These contributions would have to be replaced by funds substantially derived from other companies' contributions, or from the Pension Fund or from pre-payments from the Medicare system. In other words, health care costs for 19,000 beneficiaries of these 10 large companies would have to be partially, if not wholly, subsidized by other companies.

A shortfall of $42 million is 25 percent of the premium contribution base of the Fund and is a very serious shortfall that would accelerate the prospect of a deficit in the Fund. Not only can the Combined Benefit Fund not afford to relieve this amount of premium payments, to do so would be grossly unfair to the companies which would be forced to continue to pay, especially those who are in competition with many of the same companies who would be relieved of their obligations.

BCOA is also concerned about the provision in HR 1370 which would calculate the annual surplus in the Combined Fund on a cash basis, rather than an accrual basis. As indicated earlier, H.R. 1370 excuses certain companies of premium payments whenever there is a cash surplus of 10 percent or more at the end of a year in the Combined Fund. This measurement of a surplus in the Fund ignores the 60 to 90-day backlog of claims payable at the end of a given period. Without the continued premiums from the excused companies to help pay these backlogged claims, the Fund would immediately face cash flow difficulties.

If the Social Security System, which currently is well funded, were to adopt this same approach, in which contributions from employers and employees would be excused in any year after the fund had a 10 percent cash surplus, the System would soon collapse. Yet that is exactly what is being proposed in H.R. 1370 for the Combined Benefit Fund.

Projections for the Combined Fund

Ernst and Young has recently performed an independent actuarial analysis of the financial condition of the Fund. The actuary, Mr. Guy King, has concluded that the current surplus in the Fund is temporary and not large from an actuarial standpoint. Moreover, Mr. King projects that the Fund may be in a deficit position by 2003. GAO has subsequently supported Mr. King's projections.

Subsequent to Mr. King's analysis, the Federal District Court for the Northern District of Alabama overturned the initial per capita premium rate set by the Department of Health and Human Services. This ruling will result in a reduction in premiums of as much as 10 percent for all employers who contribute to the Combined Benefit Fund, and, if upheld on appeal, will further reduce the prospects for any future surpluses in the Combined Fund.

Chairman JOHNSON. I have to go vote, but I wanted you to finish. It will take me about 7 minutes and I will recess the Committee for 7 minutes, but I expect to be back promptly.

Mr. FARRAND. I have already missed my flight. Fine.

[Recess.]

Chairman JOHNSON. The hearing will reconvene. Some of my colleagues are on their way, but I think we will proceed without them and they will join us late.

Mr. Henley.

STATEMENT OF R. PAGE HENLEY, JR., SENIOR VICE PRESIDENT OF DEVELOPMENT, WESTMORELAND COAL CO., PHILADELPHIA, PENNSYLVANIA

Mr. HENLEY. Thank you, Madam Chairman. Recognizing that I am tail-end Charlie of a long day, I would like to submit my written remarks for the record—

Chairman JOHNSON. Your testimony, as everyone else's, is included in the permanent record.

Mr. HENLEY. My name is Page Henley. I am senior vice president of development for Westmoreland Coal Co. Westmoreland is the Nation's oldest independent coal company. It began its operations in 1854 and as you would expect over the years has had quite a number of employees, many of whom are currently retirees under the United Mine Workers BCOA agreement.

The other point I would like to make is that Westmoreland, while a signatory company to the National Coal Wage Agreement since 1950, is not today a member of the Bituminous Coal Operators Association. We have in the past been members of BCOA, but today we negotiate with the United Mine Workers through a separate organization and agreement.

We are vitally interested in this subject because like the Peabody group of companies, $3 out of every $4 we paid over a number of years went to pay for retirees of companies other than Westmoreland.

Today, Westmoreland, with approximately 650 hourly workers is paying for 2,213 former employees who are now retirees of our company. If you were to quadruple that figure, you would get an idea of what the 650 employees would have to generate in the way of income for our company to cover the costs of not only our own retirees, but the other industry retirees which we were paying for prior to the passage of the act.

We believe that the act restored what should have been present all along, and that is an sense of fairness and equity. You have heard a great deal about fairness today and you have heard from a number of situations which I would agree with the presenters create unique hardships. However, there is a process for working out those hardships, and one of those today, the Buchanan Coal Co. operation, has apparently received an exemption from the act. The act is working. I believe that is the proper recourse for those persons and companies who have had an unfair situation thrust at them by the act.

What I would like to emphasize is, as Mr. Farrand said, many of the companies that are complaining about the act are companies that are still in the coal business, still competing with us, and are

very glad to have us pay for their retirees. That is a nice thing to do, and we believe in being beneficent, but we cannot do that anymore.

As a practical matter, Westmoreland Coal Co. is a company experiencing significant financial distress. In 1994 Westmoreland sought protection under chapter 11 of the U.S. Bankruptcy Act to enable it to be protected from its creditors while it sold a large property it owned in the State of Kentucky to enable it to pay off its significant debt.

We have come out of Chapter 11 and are currently in the process of restructuring the company to be able to continue to compete in this business. However, with the costs that we are paying through the combined fund and the other funds, today Westmoreland Coal Co. is, in effect, being operated to pay health benefits for its retirees.

We are not here to seek sympathy, but I think it is a point that not all of the companies that are benefiting from the fairness and equity which this act reinstituted are companies that are large, wealthy and owned by a diverse group of owners. Westmoreland is an American publicly held company.

We would call upon the Committee to carefully examine the act and the impact of the act on this industry. I think the Committee and all of the speakers here, regardless of their viewpoint on the act, have said that we owe the retirees their promised retirement.

The medical program under the act was instituted a number of years ago when views on medical insurance and medical care for persons was entirely different than it is today. These men, for the most part, that are the retirees worked for many companies, built this industry, made a lot of money for the companies that are currently paying for their retirees and a lot of companies who are now complaining about paying for their retirees. There is no question but that these people and their dependents are due the moneys they receive. The issue is how in equity and fairness should those moneys be paid to fund those programs.

We say that this act did restore a proper balance. It says in very simple terms that if you hired someone to work for you, you were a signatory to the Bituminous Coal Wage Agreement since 1950, and you are capable of making those payments, these are your people, and you should pay for them. That is all this act really does, bottom line.

For those companies who are now our competitors to come in and say that is not fair because for some other reason they have managed to remove themselves from this obligation is really an effort to achieve a competitive advantage, and this is nothing more than a standard economic battle. We recognize our obligation to take care of our employees and we will run our company in such a way as we will honor that obligation. We just do not think it is fair that we should be required not only to honor our obligation, but to honor the obligation of those who have dumped their obligation on the remaining signatory companies.

Thank you, Madam Chairman. I will be delighted to answer any questions.

[The prepared statement follows:]

Statement of R. Page Henley, Jr.
Senior Vice President -- Development, Westmoreland Coal Company
June 22, 1995

Before The
U.S. House of Representatives Committee on Ways and Means

Mr. chairman and Committee members,

My name is R. Page Henley, Jr. and I am Senior Vice President of Development, Westmoreland Coal Company, the nations oldest independent coal company. In December of 1994 we emerged from Chapter 11 bankruptcy proceedings. Our company operates mines in the states of Virginia, Kentucky and Montana. Prior to the Chapter 11 proceeding, we also produced coal from mines in West Virginia and Kentucky which we no longer own. In fact we were the nation's 24th largest coal producer out of hundreds in 1993 producing about 11.6 million tons of coal.

Primarily because of noncompetitive mining costs, in an extremely competitive market, we had to close our West Virginia mines and sold our Kentucky Criterion mining operation in Kentucky.

We have been assigned 2, 213 retirees under the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act.") Our annual contribution to cover these retirees' costs is approximately $5,200,000.

We understand that there are some companies complaining about the burdens of the Coal act and that is why you are holding these hearings. The reasons I am here today is to tell the Committee that as a financially strapped coal company, fighting for our very existence, we are extremely concerned about maintaining the equities of the Act as passed by the Congress in 1992. Our pre-act obligations created a very inequitable dilemma which contributed to our financial difficulties.

Up until the passage of the Act, Westmoreland like other signatories to the wage agreement with the UMWA, was not only paying for the benefits of our own coal miner retirees and their dependents but was paying for other retirees "dumped" by companies far more capable than we to provide contractually promised benefits for their own retirees. The financial burden of assuming a share of paying for other companies' retirees benefits was a significant burden upon our company at a critical time. Those who dumped their beneficiaries on Westmoreland and other signatories of the 1988 Wage Agreement now have the audacity to now claim that since we no longer have to pay for their former retirees' benefits we have obtained a "windfall!" This is a ridiculous assertion. In truth the Act restored the equity which should have been there all along.

I would hope that you would not reburden our company in any way by the passage of such ill-conceived and unfair legislation as that currently before you in the form of H.R. 1370 or other proposals suggested to this or the 103d Congress. For our part, we feel the Coal Act is working as intended, equitably placing the burden of funding benefits upon all employers both former and current.

I'm sure there have been some improper assignments of liability, but I understand the appeals process is working and over 175 companies have been excused. This is the proper way for companies to achieve relief if there are inequities. If there is any relief to be granted because there are surplus funds, then relief should go across the board to all contributors to the Combined Benefit Fund, not just to those who were forced to own up to their responsibilities by the Coal Act.

In closing I would like to reiterate that the Coal Act restored the proper equity to the Coal industry's responsibility to care for its retirees. If legislation such as H.R. 1370 is passed this equity will be destroyed and we will revert to the former time when just a few companies bore the burden of many other companies' retirees as well as their own. We trust the Committee will see this campaign to pass H.R. 1370 for what it is -- a blatant effort to pass their responsibilities to others for their economic and competitive advantage.

Thank you.

Chairman JOHNSON. Thank you for your testimony, and I apologize that the order of the panels wasn't better. It was before, but they got switched around.

I welcome back my colleague from Ohio, Mr. Portman. We really need to get at the issue of promises made because my understanding is that only the companies that signed the 1978 agreement and following agreements committed themselves to what is called the evergreen provision and we did have someone on the record today read from the contract that they had signed which made it very clear that, as most labor contracts, the obligation was for the life of the contract.

In 1978, when you adopted a contract with an evergreen clause, you did something different; we are obliged to pay this whether these people worked for us, whether we are in business, no matter what happens. I consider that one kind of promise. I think one of the problems is that the promise wasn't the same all along the line. All of you have said that it is not true, so let's hear it.

Mr. TRUMKA. I guess I will go first. That was considered at great length, and the same argument was made to the Dole Commission appointed by Secretary of Labor Elizabeth Dole under the Bush administration.

Chairman JOHNSON. Weren't the 1978 agreements the first agreements to conclude the evergreen clause?

Mr. TRUMKA. Madam Chairman, the evergreen clause is not the only promise that was made. Back in 1950 miners were told this and this is what the Dole Commission found as a matter of fact, that when they retired, they would get two things, a pension and health care for life. They took reduced pensions since 1950 in order to help pay for that health care. That is what the conclusions of the Dole Commission were, as a matter of fact.

Chairman JOHNSON. But at the time that that agreement was made, there was a pool that employers paid into. When they got out of the business they paid up and left. So, on both sides it was a different agreement. When it was put in writing in 1978 and provisions were made in writing for long-term obligations, there was also a long-term commitment of funding.

The preceding agreement—I agree with you miners had a right since that seemed to be, even though it wasn't in the contract, but companies also had a right to believe that their obligations could be fulfilled if they left by paying up on their own people and the successor company, whoever hired them. I guess I am saying that the obligation pre-1978 was in fact different from the obligation of post-1978 although I hear what you are saying about the expectation.

Mr. TRUMKA. The expectations are absolutely clear. Everybody agrees, I think even the people that say they want out of the reach-back provision would agree that the expectations were clear, that miners were led to believe in contract, in word and in deed that when they retired they would get two things; a pension and health care for life.

In 1978, a new clause was instituted. Some of the people that testified here today, regardless of this act, were post 1978 signatories. Pittston, for one, has been judged to owe an evergreen obligation. That is the clause you are talking. Nonetheless—I am speak-

ing from the beneficiaries' point of view. They were promised two things, health care and pensions. They took lower pensions so that they could have health care.

Chairman JOHNSON. Thank you.

Mr. Farrand.

Mr. FARRAND. I would respond very simply that there have been at least two court decisions which affirmed that a promise of benefits was made. What they did not do is affirm a method of paying for those promises and the obligation to provide benefits was there, the obligation to pay for them went from contract to contract.

I might point out that even the BCOA companies, who did live up to those obligations, had a legal right after expiration of the 1988 agreement to say, I am sorry; we are not going to do this anymore. We did not. We found another way to do it, and we are paying for our obligations and retirees and for the orphans with moneys we previously put into the pension trust.

Chairman JOHNSON. Mr. Farrand, I found your comments on the chart very useful.

Mr. FARRAND. Thank you.

Chairman JOHNSON. Also in our background materials there is the information that absent the provisions of the 1992 coal act, the 1988 signatory companies would have been paying essentially 100 percent of the expenses of the retiree health benefits fund.

In contrast, during fiscal year 1995 the premiums paid by the 1988 signatory operators are expected to contribute approximately 38 percent of the income of the combined fund. Premiums paid by reach-back companies will account for approximately 24 percent and a transfer from the pension fund about 32 percent and investment income from accumulated assets 6 percent. This agreement did give the operating coal companies extraordinary relief. It went from 100 percent liability down to 38 percent.

Mr. FARRAND. Madam Chairman, I beg to disagree. We did not have to provide any benefits after the 1988 agreement expired. The relief we got was not from the obligations that we owed our own retirees or their dependents. The relief we got was an implied obligation that existed from the 1988 agreement to pay for somebody else's retirees.

If anybody had relief, it was the reach-back companies that dumped their retirees into the funds that we were subsidizing. We were in effect subsidizing our competition and we couldn't afford to do that anymore and that is why we came to Congress.

Chairman JOHNSON. And your sense of outrage at having to pay for employees that were not yours is parallel to the outrage we heard on the earlier panels, companies having to pay for employees that were not theirs.

Mr. FARRAND. There is a fundamental difference, if I might. The obligation for a lot of those people, and there may be individual cases which are erroneous. In fact, I think the SSA has already relieved 175 companies of their obligation that they were erroneously assigned beneficiaries.

I am sure each case differs and I have some familiarity with some, but I do not pretend to be an expert. But there is a difference; that is, that those companies or most of them had either

predecessors or subsidiaries that signed an agreement that had the promise in it, to put it in simple terms.

Chairman JOHNSON. That is where we get into muddy water. A lot of those companies did not sign agreements. There was an assumption, but later on there were agreements that were clear. Before the agreements were only based on the environment in which we were all operating.

Mr. FARRAND. Our industry has a long history of having companies go in and out of business or be traded or sold or whatever. We have a phrase in our industry called legacy costs. If you acquire something you better be damned certain what those legacy costs are.

Legacy costs by definition in our industry are retiree health care, retiree pension obligations and post mine reclamation obligations. Some of those companies had those obligations, but may not have been aware of it. They acquired those obligations either in the purchase of other companies or they had them in the contract which they signed, but did not really understand.

Chairman JOHNSON. Mr. Hancock would like to join in this.

Mr. HANCOCK. You are talking about legacy costs. In 1990, how would anybody have been able to predict the legacy costs that they are involved in now? In 1991, how would any legal advisor or financial advisor have been able to predict the legacy costs of the employee benefit plan of this company that you might be buying?

Mr. FARRAND. I am not certain I understand your question.

Mr. HANCOCK. You say when you buy a company, an obligation of the buyer is to look at the legacy costs. How could anybody prior to the passage of the coal act be able to predict the legacy costs?

Mr. FARRAND. The act was designed, Congressman, to assign beneficiaries—

Mr. HANCOCK. I understand. I am saying that if I had wanted to buy a coal company in 1990 or a company that was no longer in the coal business, but had at one time been in the coal business, how could I possibly have predicted or analyzed or determined any potential unfunded liability of the legacy costs of a pension plan and health plan on a law that did not even exist?

Mr. FARRAND. Well, there were contracts that existed that people signed and they had clauses in them that had at least an implied obligation. The fact that Congress changed the definition of that obligation they could not have anticipated, and to that extent I agree with you.

The fact is that those companies did sign agreements. Many of them who appeared today signed agreements that had an evergreen clause in them. Certainly, the court decisions, if they had any connection with the coal industry, they knew what the court decisions were that said the promise had been made as far back as 1950 and there was an obligation there.

Mr. HANCOCK. This is for Mr. Trumka. In correspondence to the Congress you have suggested that you think relief for some small businesses may be necessary. If the coal act has resulted in economic problems for these companies, then wouldn't a comprehensive review of the coal act be reasonable, not just a quick fix for a few businesses?

Mr. TRUMKA. First of all, I think we have to give the act a chance to work and let things start to settle down. It has only been there 18 months. You have just seen and heard testimony today how it is working.

I believe that if we let it work for awhile and we find out that there are companies that are truly going to be jeopardized, and not the claim of it, but come in and talk about it, that they are going to be jeopardized, if that is the case, we would be interested in looking at a way to help them solve that problem, because it doesn't do us any good to say to a company your out of business.

We would be better off saying if you cannot afford to do a full loaf, then you should perhaps give a part of a loaf. We would all be better off. I think we need to let the act work to see if it can sift out. You talked about legal bills today. There is a lot of them, all because they challenged the constitutionality of this act, all of which they have lost. There have been a number of challenges about assignments, some successful, some not, but the act is starting to work.

What we cannot do without jeopardizing the health care that these people were promised, and they were promised this and they believed the promise, and we gave up pensions in order to keep the health care. We gave, $210 million of our pension money went into this very fund. That is how the orphans, the people without anybody out there, their last company is gone, that is how they are getting health care, from our pension money. So, one more time we are giving it.

Before you say take the surplus out of this thing, let it act, and we made a commitment that if there are companies jeopardized by this—not a company that is making millions of dollars and this would be nice to get rid of so that he or another company has to pay for their pensioners and that is what they are asking us to do, but a company that is genuinely jeopardized, we would be in favor of helping them.

Mr. HANCOCK. I understand you are—in fact, you said several times that the pensioners were promised health care for life and also a pension for life. As you know, we have had some problems there and that is why we had the Pension Benefit Guarantee Corp., because some were improperly funded.

Mr. TRUMKA. That is correct.

Mr. HANCOCK. It would appear to me that when you promise somebody health care for life that you ought to fund it at that time instead of future funding. We also, in 1964–65 when we passed Medicare, promised basically certain minimum standards of health care for life. They were not told that they were going to have to start paying premiums for it later on.

My question is, we are in a different time now and we want to save the system. In fact, even Medicaid now, they are talking about controling costs, that you need to have some type of beneficiary contribution.

The President's plan even said that the only way we are going to get it under control is if the beneficiary has some type of financial investment in it. Have you considered anything like that?

Mr. TRUMKA. Sure. Let me tell you something you may not know. We are pretty proud of this. This group of beneficiaries, we have

a cost-containment program. We were the first ones to do HMOs in the fifties with the funds. Our costs are lower per beneficiary than Medicare are. So, we are doing our part.

When you talked about why we do not fund health care plans, Congress has made it impossible for a company to fund them because if you go beyond this year's current expenses you cannot deduct it. I tried to get them to do that and I negotiated with them three or four times and I said we got to start funding them. They said are you crazy? I cannot deduct it. That makes good business sense, and I guess they convinced me of that.

The other thing, in 1978 our pension funds were very underfunded. In fact, there was a chance at that time that they were going to go belly up. And these companies, the companies that were signatory, actually accelerated the pension funds from 1978 until roughly, 1990, 1992, and we fully funded those plans.

Guess what, a lot of those companies that sat here today and promised their pensioners pensions did not pay a cent to fund those pensions. These guys did. They stayed with it, paid an accelerated amount to fund the pensions that the previous companies had promised but not paid for.

Mr. HANCOCK. One of the things that we are looking at in the tax bill is a modified form of funding of medical care for individuals, which is called the medisave account. I hope we are able to get that done.

Mr. TRUMKA. I hope we can work with you on that.

Mr. FARRAND. May I add an addendum? I am sure he is unaccustomed to having me agree with him, but I am going to agree with him in two respects.

One, I would associate ourselves with his remark that we are willing to work with the Committee to address some ways in which small companies that are financially unable to meet their premium obligations can be dealt with, as long as there is the basic principle that wherever they are capable, the former employers ought to be responsible for their own retirees.

Having said that, I want to address one thing in H.R. 1370 that you reminded me of just now. That bill in simple terms, as I understand it, would relieve the reach-back companies of premium obligations whenever there is a cash surplus in the benefit fund exceeding 10 percent of the annual claims against the fund. That is a real problem.

There is a backlog of payment streams, of payment requirements and claims, maybe 60 to 90 days. If you cut off the cash or cut off a large portion of the premiums due starting in January because there happened to be a 10 percent cash overhang from the previous year, that fund will be certainly in cash flow difficulties if not in deficit in very short order.

The analogy I would think of is if you have a Social Security trust fund now and it is over funded, if you excuse the employers and employees of the country of contributions to the Social Security trust fund because there happened to be a temporary cash surplus in the account, I think you would have to agree that it would go belly up in a hurry and that is the same thing that is in your bill. That is why we are concerned that once you open that door, once

you reduce the payment stream the fund may slip into a deficit quickly.

There is a court case out there that says the premium levy is too high. That needs to be addressed. There may be assignments out there that are erroneous, but that is being addressed within the mechanism of the act and I do not believe it needs to be corrected by statute.

Mr. HANCOCK. Thank you.

Chairman JOHNSON. Mr. Portman.

Mr. PORTMAN. I thank the Chair and appreciate the testimony. I did get to hear from Mr. Trumka before I left. I was intrigued by your comments on small business relief. I was happy to hear your response to earlier questions on that by, Mr. Hancock.

Just a brief comment. We were talking earlier about the constitutional challenges. You indicated that, yes, many of these companies, smaller and midsized in particular, have expended what would seem to be an enormous amount for legal and accounting fees and that their challenges had been unsuccessful. We have the recent Unity Real Estate case.

I understand that goes more to a takings issue than to a due process claim. That case would only, as I read the summary, confirm what we have learned today, which is that there are companies who are in a situation where application of the 1992 act is patently unfair. Are you familiar with that case?

Mr. TRUMKA. Not with that specific case, no.

Mr. PORTMAN. I think it was June of this year or maybe late May, but it was, in essence, saying that this was more an appropriation than a public program concerned with employee benefits, the 1992 Act. I think there is some evidence that, to me, is consistent with what we have heard today that there are certain companies that find themselves in a very unfair situation.

I earlier commented on the super reach-back companies, and I do think they are in an unusual situation. Mr. Farrand talked about the fact that every company situation is different. I am sure it is. And every commitment is different whether in writing or otherwise, but I think the 1978 timeline is a difference with a distinction or a distinction with a difference, or both.

I think we have to be careful about just saying companies that cannot afford to pay or small companies might be deemed to get some relief, which I agree with, but we need to look at the fairness and do this in a principled way. I see super reach-back companies as being in a different situation. Do you have any comment on that?

Mr. TRUMKA. I do indeed. First of all, what I would say is there is a number of—in the coal industry there are a number of situations where we have current companies that are paying for the past sins of some of the companies that were in front of us today, the Abandoned Mine Reclamation Act, for instance.

Whenever a company went out of business before they just left the mine there; we have to reclaim that. Whenever we had companies that had their employees incur black lung and we decided to compensate for that, those people were gone and we had these companies that are ultimately paying through a black lung tax.

Some of the unfairness, I guess, is on both sides, and let me tell you what we face going into the negotiations. We had companies that were still in business that were really trying to be honorable and live up to the promises that they made and they were paying $3 for somebody else's pensioners for $1 of their own pensioners.

They said to us, and they weren't posturing; they said, we cannot do it anymore. We cannot continue to pay because things keep shrinking smaller and smaller. And they tried to address that specifically in 1978, and with the Evergreen clause. It was called the Last Man's Club. They wanted everybody to know that there wouldn't be a last man. But we still kept getting more of a last man around.

The 1950 figure came about with negotiations with the White House, and the 1950 figure, whenever they decided that they did not want an industry tax actually came from the White House negotiators, the Bush administration negotiators. They realized we had to have a certain amount of money and if you weren't going to have a tax across the industry like you did with the abandoned mine lands or the black lung tax, you had to have a funding stream.

He pays for every single one of his pensioners plus he pays a big share for the orphans in addition to his own. He has never gotten a break on that. The only way that we could have got the funding stream necessary was for them to reach back, and that was, as I recall, a proposal from the White House negotiators.

Mr. PORTMAN. Even the Bush White House wasn't perfect, right? I understand that context. I think we could talk all day about the history of that, how it evolved, whether it was a reasonable proposal or not or whether it was put forth as a reasonable proposal in terms of super reach-back or whether anybody thought that it would ever be enacted.

What I come back to is I think it is worth backing up and taking a look comprehensively at the 1992 act and how it applies to various companies. I do see a distinction between those who were part of the Evergreen process in 1978 and those who were not.

You look at individual circumstances and it is not being applied fairly. At the same time, I will agree that based on the testimony I heard earlier today, the degree to which there is going to be a surplus has yet to be seen. I think that is an honest evaluation. I do not think anybody can pinpoint what that number will be or that there will be a significant surplus. I hope I am wrong and I think it would depend on external factors such as the new capitation plan.

Mr. TRUMKA. I hope you are wrong, too.

Mr. PORTMAN. I do think we need to look at the whole thing. I am encouraged by your statement on small business and would encourage you to work with us to look at the whole situation and try to come up with something that is fair, particularly as it relates to those companies who were not in the coal business at the crucial time in 1978, weren't part of that agreement, were not part of the Evergreen clause.

Although I have many questions, Madam Chair, my red light is on and I yield back.

Chairman JOHNSON. There is one other area that I think we need to pursue. Do the participating companies or the union—does anyone exercise any oversight over this fund and the medical expenditures?

Mr. TRUMKA. Yes. There is a number of people that exercise oversight over it. The companies do because they want to keep costs as low as they can. We do because we want to keep medical benefits. Under this fund we are on a locked formula, so costs cannot go out of sight without us losing the benefits. In addition, you have Social Security and DOL.

Chairman JOHNSON. Perhaps one of you could explain why when prescription drugs are such a large part of your expenses you have only this year adopted a protocol to help manage those benefits. It seems to me that would have been done 1, 2 or 3 years ago.

Mr. TRUMKA. It was done several years ago. In the sixties we had mail-order drugs that were mailed out from the funds. Those programs ultimately went by the wayside. There are a lot of prescriptions because this population is so old they are on maintenance drugs.

We have, as far back as 1978, begun doing cost-containment with those health care costs. If you look at them, this group of beneficiaries, despite their age being older than the Medicare population, does better than Medicare does.

Chairman JOHNSON. Why, if that is the case, and 90 percent are Medicare folks and you are getting a capitated Medicare payment and they cost less than Medicare, why are you having trouble paying for this?

Mr. TRUMKA. Here is why. Because Medicare CPI does not use utilization.

Chairman JOHNSON. That is the complaint—

Mr. TRUMKA. It gives you a cost increase for cost, but this group because of their age, and the actuaries talked about this today, I believe; this group has a much greater utilization because of their age. Because of utilization, even though they do better at the cost, the utilization is higher. That is why the medical CPI, as it is predicated being paid to them, will not cover this group, long term costs even if, as we are currently doing, we do better.

Chairman JOHNSON. We need a better explanation of the figures we have showing. What percentage of outlays are covered by Medicare reimbursements, because it is 50 percent one year and 47 percent another year. If you have 90 percent Medicare recipients, you ought to be able to do better than that. Even if Medicare is under reimbursing, it is not under reimbursing 50 percent. It is just—I do not know what the explanation is. I just want to make sure that it is clear that we need better information about the governance of the medical expenses and of this fund as we move forward.

I also want to get back to Mr. Farrand's comment that you want to stay with the principle of people paying for their own employees. You know, in 1988, some companies chose to satisfy by a withdrawal liability provision that was supposed to provide them with freedom in a sense by making a substantial settlement when they left the fund.

Those companies, in a sense, are now paying a second time. I just point that out because I find very disturbing the inequities that this law has imposed on many employers, and I find it disturbing to see employers who are only distantly related to coal production contributing to richer benefits for others than they are contributing for their own employees.

I see this from the point of view of a policymaker who watches these issues across our society, and just as in the pension area where companies went bankrupt, the government picks up those costs through the Pension Benefit Guarantee Fund, but we do not pick up whatever was negotiated. We pick up a minimum cost. The fact that from the 1988 agreement to the 1992 law there wasn't any renegotiation of benefits, which has gone across every industry throughout our society, there wasn't any change in the extraordinary definition of dependents or perhaps any look at the benefits. That is concerning to me.

Mr. TRUMKA. I am concerned about a lot of things. First, your question about the reimbursement rate not paying for Medicare drug costs. If you give it to me, I will be glad to answer it.

Second, if you show me the companies that have paid for it and you think this will be a double payment because they withdrew from the funds and paid for the amount of their health care, I will be happy to answer that as well.

And third, I hope you are not suggesting by your statements that these people do not deserve the benefits they receive. They get pensions of under $200 a month. They gave up pensions to get this level of benefits and then $210 million was taken out of their pension funds to pay for the orphans. They could have received increased pensions. Now, they are too old to go back and strike the deal again.

This deal was they would get this level of benefits and this level of pension and not one of them has said they want anything better than the deal. They just want the deal. Those benefits have been examined by the Dole Commission and found to be fair when you combine them with the pension that they get.

My dad and mother happen to be recipients of those benefits, that pension and that health care, and their employer, LTV, dumped them after my dad worked 44 years for that company, dumped them and said, too bad; you are not going to get health care. It nearly killed my dad. And like my dad, there are thousands of them out there.

I hope you are not suggesting by this that the benefits they get are underserving, because they earned every one of them.

Chairman JOHNSON. We are certainly conscious of the importance of health benefits to retirees and that this industry has managed the health benefits differently than other industries because of the health exposure in this industry, which is different than in most industries.

I just think it is important to recognize that in this particular area under this particular law the issue of fairness is really difficult, and we have reached a point where I think we do have to look at what is happening to some of those that were affected in a way that, frankly, no other law has ever affected people in our society.

Under no other law has government come back 20 years later and said while it used to be this way, now it is that way. The only other parallel I can think of is Superfund and holding people retroactively liable for things that were perfectly legal and actions that they took that they thought were complete. We are having a lot of trouble with that.

I think this all deserves a careful review. We certainly are sensitive to the needs of the people involved, but we are going to be looking and seeing what we can find, how we can alleviate some of the gross injustices that this law has imposed on some companies. That is where I am starting. I am not starting with any conclusions, but I think the questions are significant.

Mr. Farrand.

Mr. FARRAND. Thank you. As the Committee proceeds in this manner, I would ask you to keep the concept of fairness in context. It is a relative term. I go back to the dilemma that I outlined earlier. You had some not very happy choices.

Either you could let this fund go bankrupt and in effect deny the benefits to the people who were promised them and that will be extremely unfair. You could impose the costs of this fund across the entire industry, including companies that never had any connection with the national UMWA agreement, and that was perceived to be unfair.

You could impose these costs on a shared basis across all the signatories past and present and that was deemed to be difficult to do because it did not determine how you would precisely apportion the share of costs. Or you could go back to the principle we mentioned earlier, which is, the companies that made the promise should pay. I am not suggesting in each case that is fair in an absolute context, but I would ask you to keep in mind the relative context.

Mr. HENLEY. I wanted to add that the fairness, as Mr. Farrand said, cuts both ways, and there is a fairness issue in companies like ours being required to pay for other people's retirees, and what I have tried to reiterate in my remarks is that this act restores a good old American custom of taking care of your own, and these men who worked and made these companies, in many ways, what they are today are people that are owed something this act has restored that equity and that balance.

While you have heard many cases that it may be unfair for being brought in, to cast this act out, then, will recreate what was, in fact, an ever-increasing unfair burden on other companies. So, it is a very difficult balancing act that you are about. I fully agree.

Chairman JOHNSON. I thank you for your testimony and for your patience throughout the day. I thank my two colleagues who hung in here with me for most of the day.

The hearing is adjourned.

[Whereupon, at 4:25 p.m., the hearing was adjourned.]

[Submissions for the record follow:]

STATEMENT OF THE ASSOCIATION OF BITUMINOUS CONTRACTORS, INC.

before the

SUBCOMMITTEE ON OVERSIGHT OF THE COMMITTEE ON WAYS AND MEANS

on the

COAL INDUSTRY RETIREE HEALTH BENEFIT ACT OF 1992

The Association of Bituminous Contractors, Inc. ("ABC") submits the following statement to the Subcommittee on Oversight of the Committee on Ways and Means, to be included as part of the printed record of the June 22, 1995, Oversight Hearing on the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act").

ABC is an association of approximately 100 construction companies which perform construction work for coal company customers. ABC members are small and medium-sized independent construction contractors. ABC members are not coal mining companies, and do not mine coal. Unlike coal companies which perform work under the National Bituminous Coal Wage Agreement, ABC members are covered under a separate collective bargaining agreement with the United Mine Workers of America known as the National Coal Mine Construction Agreement. ABC and the UMWA have negotiated a series of such agreements beginning in 1968. Under the National Coal Mine Construction Agreement, retired UMWA construction workers are provided health and other benefits from a separate multiemployer plan known as the 1978 Retired Construction Workers Benefit Trust. These benefits are funded by contributions from employers signatory to the Construction Agreement.

Congress enacted the Coal Act believing that certain coal mining companies had "dumped" their retirees into the old UMWA Benefit Funds (known as the 1950 and 1974 Benefit Funds) and that the only way to make the Benefit Funds solvent was to "reach back" to pre-1988 Coal Wage Agreement signatories for contributions. In formulating the "reachback" definitions to accomplish this goal, Congress inadvertently used language that has been interpreted to bring construction contractors, members of ABC and other employers signatory to the National Coal Mine Construction Agreement, within the scope of the Coal Act. No one in Congress or elsewhere ever expressed the belief that construction contractors were intended to be targets of the Coal Act. Nonetheless, since October 1993, the federal agency charged with assigning UMWA retirees to their former employers (previously the Secretary of Health and Human Services and now the Commissioner of Social Security) has been pursuing ABC members for contributions under the Act.

ABC submits that the Coal Act should be amended to clarify that assignments of beneficiaries cannot be made to employers on the basis that they were signatory to the National Coal Mine Construction Agreement. This can be accomplished by amending the definition of "wage agreement" under the Act to specifically exclude the National Coal Mine Construction Agreement in the same manner that the definition of "wage agreement" specifically includes the National Bituminous Coal Wage Agreement. This amendment is required for the following reasons:

ABC members and their employees are not part of the coal industry to which the "reachback" provisions of the Coal Act were aimed. Rather, ABC members are part of the construction industry. They work under an agreement with the United Mine Workers of America only when they perform construction work for union coal companies.

ABC and the UMWA have successfully negotiated collective bargaining agreements with health and pension plans to take care of retired UMWA construction workers. The most recent agreement went into effect on February 11, 1995, and requires signatory contractors to make contributions to the 1978 Retired Construction

Workers Benefit Trust to fund health benefits for construction worker retirees.

Although a handful of beneficiaries of what was formerly the UMWA 1950 Benefit Plan at one time had some measure of employment with ABC members, the inclusion of these individuals in the 1950 Fund was the result of the UMWA's desire to provide them benefits from the 1950 Fund. With the concurrence of both the UMWA and the BCOA, whose trustees controlled the 1950 Fund, these individuals were provided benefits from the 1950 Fund without any expectation of contributions from ABC members. Therefore, whatever funding difficulties the 1950 Fund ultimately experienced can in no way be attributed to ABC member companies. The concept of "reachback" simply does not apply to construction contractors who did not have any obligation to make contributions in the first place. It is not only unreasonable but totally irrational and arbitrary to hold construction contractors liable for a problem they did not create.

The assignment of Combined Fund beneficiaries to construction contractors unfairly burdens ABC members who have fully provided for the health benefits of their UMWA construction worker retirees, and who have lived up to all their obligations under the National Coal Mine Construction Agreement. Even though the number of Combined Fund beneficiaries assigned to construction companies is small in the overall scheme of the Act (less than 100), it creates an unfair, unreasonable and intolerable burden on those contractors who are required to subsidize another industry's problem.

The inequities being inflicted on construction contractors can and should be eliminated by amending the Coal Act to exclude the National Coal Mine Construction Agreement from the definition of "wage agreement" as that term is used under the Coal Act. Because the number of beneficiaries assigned to construction contractors is so small, such amendment will not significantly affect the current or future financial status of the Combined Fund.

Respectfully submitted,

ASSOCIATION OF BITUMINOUS
CONTRACTORS, INC.

Record Statement by
SMALL NON-COAL PRODUCING COMPANIES AGAINST THE REACHBACK TAX
Submitted to the
SUBCOMMITTEE ON OVERSIGHT
COMMITTEE ON WAYS AND MEANS

Hearing on Coal Industry Retiree Health Benefit Act of 1992
June 22, 1995

This written statement for the printed record of the public hearing on the Coal Industry Retiree Health Benefit Act of 1992 is being submitted on behalf of small, non-coal producing companies, whose existence, and the lives of whose owners and employees, have been drastically affected by the reachback provisions of the Act. The statement is submitted by representatives who have obtained the consent of over 75 companies to express the views of small, non-coal producers under the title, "Small Non-Coal Producing Companies Against the Reachback Tax."

"Small Non-Coal Producing Companies Against the Reachback Tax" is not an officially organized or incorporated entity. It is the name given to a class of companies (a) who are **small**, most having gross annual revenues less than $25 million; (b) who are **reachback and super reachback companies**, none having signed the 1988 UMWA-BCOA Wage Agreement or a subsequent agreement; (c) who **ceased coal mining operations** before February 1, 1988; (d) who **fulfilled all obligations** to the last UMWA-BCOA Wage Agreement to which they were signatory; and (e) who, by virtue of their small size, are **drastically impacted** by the financial burden imposed upon them by the reachback provisions of the Act.

Many of the companies who share the views expressed herein could not afford to hire, for one day, the legal staff and lobbyists on which the large 1988 signatory and reachback companies have expended millions in attempting to shift the cost of UMWA retiree health benefits, which prior to the Act were governed solely by private contract. The position of these small companies needs to be expressed and, more importantly, needs to be heard.

These small companies had no opportunity to participate in any of the discussions or negotiations that led to passage of the Act. Many did not even know about the Act until they received notice that they were expected to pay premiums for beneficiaries of benefit plans into which they had made all required contributions, and which were solvent when they left the coal business.

These small companies cannot be accused of "dumping" retirees. Most were small operators who were forced out of coal mining by large operators, whose capital allowed them to develop large mines with lower production costs, and whose coal pricing tactics left small operators little choice but to cease operations. The reduction in small and medium-sized mines is evident from Table VI. Trends and Number of Mines by Size (Mine Production Range) on page 74 of the Committee Print, "Development and Implementation of the Coal Industry Retiree Health Benefit Act of 1992" dated June 22, 1995 (hereinafter "Committee Print").

These companies, though small in size, represent the largest group in number of companies impacted by the Act. According to the Committee Print, as of March 31, 1995, 257 reachback companies are responsible for premiums for assigned beneficiaries. Of this group, our information indicates that only 103 are actually paying premiums, of which more than half are believed to be small, non-producing companies. The remaining 154 reachback companies are paying nothing, largely because they cannot afford to. Some of these companies have filed bankruptcy. Some are engaged in litigation. All run the risk of crippling fines and penalties under the Act, mainly because they have no other choice.

These small companies, which have now been assessed unexpected premiums under the Act, did not run from their mine operation obligations. They survived. They met reclamation and environmental obligations, preventing these from being dumped on state agencies or the Abandoned Mine Lands Fund. They met Workers' Compensation and Federal Black Lung obligations. Some even moved into new industries, creating jobs, paying wages and taxes. They should be applauded, but instead, Congress rewarded them with the reachback provisions of the Act, imposing totally unexpected and unforeseeable obligations for retiree health care which, by private contract and court decision, had never before been their obligation.

These small, non-coal producing companies now come forward as the group which most closely embodies Congressman Pickle's warning,

> "Let me also warn my colleagues, you have not heard the last of this issue. We have no idea who all these companies are. There will now be a rush to track them down and tell them that they will have to pay millions of dollars a year into this health plan over which they have no control. Some will be forced into bankruptcy, others will be forced to lay off workers. And they will blame you and me, and they will be right. So plan today what you will tell them, it won't be easy." *Remarks of Congressman J. J. Pickle, Before the House Ways and Means Commitee, October 5, 1992.*

These small companies, which no longer produce coal and which did not sign the 1988 Agreement, now seek a fair response. We played by the rules. We met our responsibilities. Why should we pay the penalty while other companies reap substantial benefit from the Act? As the Committee staff has reported:

> "Absent the provisions of the 1992 Coal Act, the 1988 signatory companies would have been paying essentially 100% of the expenses of the UMWA Retiree Health Benefit Funds. In contrast, during fiscal year 1995, the premiums paid by the 1988 signatory operators are expected to contribute approximately 38% of the income of the Combined Fund. Premiums paid by the reachback companies will account for approximately 24%, the transfer from the UMWA 1950 Pension Fund 32%, and investment income on the accumulated assets of the Fund 6%." *Committee Print at page 34.*

The small, non-coal producing reachback companies appeal to the members of this Subcommittee for legislation which will address the devastating impact of the Act upon them. **H.R. 1370 is not such legislation, and Small Non-Coal Producing Companies Against the Reachback Tax oppose it.** H.R. 1370 does not solve any problems for small reachback companies. As indicated previously, many are not paying premiums; H.R. 1370 does not relieve any of these companies from liability for premiums, fines or penalties - they remain subject to collection efforts for premiums due since October 1, 1993, and further subject to litigation costs and expenses for contesting premiums.

More importantly, H.R. 1370 will use up the surplus which has developed in the Combined Fund, eliminating one possible source of funding relief for small companies. The beneficiaries of H.R. 1370 are the large reachback companies, many of whom are still producing coal and would be responsible for payments for retiree health benefits under the Evergreen litigation. H.R. 1370 merely adds injustice upon injustice by relieving producing companies who, absent the Act, would otherwise be liable for retiree health care under the Evergreen clause.

Small Non-Coal Producing Companies Against the Reachback Tax urge that H.R. 1370 be withdrawn and be replaced by legislation which, at a minimum, gives meaningful relief to small, non-coal producing reachback companies drastically impacted by the Act. In oral testimony before the Subcommittee, representatives of the BCOA and the UMWA expressed support for such legislation. Moreover, representatives of our group have met with Senator Rockefeller, the principal sponsor of the Act, and he has expressed a willingness to entertain amendments to the Act which relieve small companies of unnecessary burdens so long as relief does not jeopardize retiree benefits.

Relief for small companies is not an expensive proposition. Small Non-Coal Producing Companies Against the Reachback Tax estimate that of the $47,900,000 in annual premiums now being paid by all reachback companies, only $5 million is being paid by small, non-coal producing reachback companies. With a surplus in the Fund in excess of $100 million, relief of $5 million annually is a relatively small amount, but it will go a long way towards relieving the desperate situation the Act has created for many small companies.

We urge the members of the Subcommittee to consider legislative alternatives to H.R. 1370, and to meet with other interested Congressmen on both sides of the aisle to discuss alternatives which will not again leave small, non-coal producing companies and their employees stranded behind all other interest groups.

We appreciate the opportunity to present this written statement and would welcome the opportunity to meet with and respond to inquiry from any member or staff person concerning the comments herein or possible alternative legislation.

Small Non-Coal Producing Companies Against the Reachback Tax

C. L. Christian, III
Imperial Colliery Company

Richard Weinzierl
Barnes & Tucker Company

James Bailes, Esq.
West Virginia Reachback Coalition, Inc.

STATEMENT SUBMITTED BY RICHARD D. RIVERS
VICE PRESIDENT
BERWIND CORPORATION OF PHILADELPHIA
BEFORE OVERSIGHT SUBCOMMITTEE
HOUSE WAYS & MEANS COMMITTEE
June 22, 1995

Madam Chairwoman, I am Richard D. Rivers, Vice President of the Berwind Corporation of Philadelphia, Pennsylvania.

The purpose of my testimony is to endorse subcommittee action on H.R. 1370 as a first step in rectifying a grievous wrong that was inflicted upon certain "Super Reachback" companies during consideration of the Coal Industry Retiree Health Benefit Act of 1992.

I would like to briefly outline why I believe these companies in general, and Berwind in particular, should be totally exempt from the Coal Act:

A. History and Purpose of the Coal Act.

1. The purpose of the Coal Act was to work a "bail out" of two health benefit plans for UMWA retirees. The two plans were created in 1974 by the UMWA and the coal companies that were BCOA members at that time.

2. The Coal Act in effect merged the two benefit plans created in 1974 into a new Combined Benefit Fund and then required not just the signatories to the 1974 and later contracts with the UMWA, but any company which had signed a contract since 1950 to make contributions to the Combined Fund.

3. Because the 1974 plans were perceived to be in dire and immediate financial distress, portions of the Coal Act were hastily drafted and adopted without a hearing and with scarcely any discussion.

4. As a result, the Coal Act imposed, almost inadvertently, substantial liabilities on "super reachback" companies such as Berwind -- i.e., companies which ended their relationship with the UMWA and the BCOA before the 1974 benefit plans were even created.

B. Including the "Super Reachbacks" was Almost Unintentional.

The Coal Act's "super reachback" to companies that had gone out of the coal mining business prior to the 1974 NBCWA was all but unintentional.

1. The Coal Commission's recommendation was that, at most, only 1978 and later signatories should be held responsible for the solvency of the plans established in 1974.

2. No one seems to know why, or at who's behest, the "super reachbacks" were included in the Coal Act. They were stuck in just before the Act was passed and without any sort of notice or hearing.

C. The Plight of the "Super Reachbacks"

1. The plight of Berwind Corporation of Philadelphia typifies the Coal Act's egregiously unfair applicability to the pre-1974 "super reachback" companies.

a. Berwind ceased mining coal and employed its last UMWA miner in 1962 -- 30 years before the Coal Act was passed. At that time, Berwind was signatory to the 1950 NBCWA which required Berwind to make a defined contribution of 30 cents per ton of coal produced to the UMWA Welfare and Retirement Fund of 1950, but only during the life of that Agreement. That Fund's Trustees had sole power to decide what benefits would be paid and to whom. Berwind fully satisfied its obligations to the 1950 Fund by contributing over $8 million to it between 1950 and 1962, a period during which Berwind had net operating losses from its coal operations of almost $10 million. The 1950 Fund was solvent at the time Berwind ceased participating in it. It was also solvent in 1974 when its assets were delivered over to the newly created 1950 Pension Plan.

b. Beginning in 1974 -- 12 years after Berwind ceased mining coal, ceased employing UMWA-represented miners, and ceased participating in, or benefiting from, UMWA/BCOA contract negotiations -- the BCOA operators and UMWA voluntarily agreed to significant changes in the provision of health benefits to UMWA retirees. The 1950 Fund, a "defined contribution" plan, was eliminated, and it was replaced with two "defined-benefit" plans. Thereafter, changes were intentionally made in the funding mechanism for the benefit plans created in 1974 to reduce premiums paid by the large, more labor-efficient and highly profitable operators who were, and still are, in control of the BCOA. Changes were also made in 1974 to the plans' benefits and beneficiaries which predictably increased the newly created plans' operating costs. As a result of those changes, (and notoriously lax claims administration by the Trustees), and to no one's surprise, the plans created in 1974 became financially weak. The UMWA and the BCOA convinced Senator Rockefeller that the Coal Act was the solution to that problem.

2. The extreme retroactive "super reachback" liabilities created by the Coal Act are substantial. Berwind must pay over $2 million per year to the Combined Benefit Fund. Berwind's total premiums are expected to reach $25 million or more by the time all the Combined Benefit Fund's beneficiaries die. A significant portion of Berwind's $25 million premiums will be attributable to persons who never worked for Berwind at all and, in at least one instance, to a miner who worked for Berwind in 1949 only long enough to earn a grand total of $7.75 in pay.

3. Moreover, all of the funding and benefits changes made to the benefit plans in 1974 and thereafter were, of course, the result of trade-offs inherent in the collective bargaining process. The trade-offs were presumptively beneficial for, and advantageous to, the members of the BCOA at the time, but they were of no benefit to strangers to the 1974 and later UMWA contracts, such as Berwind and the other "super reachbacks".

D. The Combined Benefit Fund Doesn't Need the "Super Reachbacks".

1. All the "super reachback" companies together now contribute an estimated 2.9 percent of the Fund's premiums. That amount could either be paid from the Combined Benefit Fund's ever-growing surplus or it could easily and automatically be picked up by the

remaining contributors to the Combined Benefit Fund -- i.e., the BCOA members who should have made those payments in the **first** place.

2. By and large, the present BCOA members are financially well able to pay for the benefits they created. More than 80% of the tons produced by BCOA companies are produced by two very large, highly profitable, foreign-controlled coal operators. They are the companies reaping the benefit from the Coal Act. They have bragged that the Coal Act is saving them *millions* of dollars *per month* because other companies such as the "super reachbacks" are being forced to pick up their obligations. THAT IS JUST NOT RIGHT!

E. "Super Reachbacks" Should be Totally Exempt.

In conclusion, let me state that the only fair and equitable solution to this situation is to grant relief to all companies which have been required to make payments for which they should not be obligated, as is called for in H.R. 1370. In the case of "Super Reachback" companies, that requires a total exemption from the Coal Act.

Richard D. Rivers
Vice President
Berwind Corporation

STATEMENT OF
CLEVELAND-CLIFFS INC

to the
SUBCOMMITTEE ON OVERSIGHT
COMMITTEE ON WAYS AND MEANS

HEARING ON COAL INDUSTRY RETIREE HEALTH BENEFIT ACT OF 1992
June 22, 1995

This written statement for the printed record of the public hearing on the subject Act is being submitted on behalf of Cleveland-Cliffs Inc and its consolidated subsidiaries ("Cleveland-Cliffs") by M. Thomas Moore, who is Chairman and Chief Executive Officer of the parent company.

Cleveland-Cliffs is an Ohio-based natural resource Company that manages five iron ore mines and pellet plants located in Michigan and Minnesota with 4,900 employees and an annual production capacity of 34 million tons. It does not manage or have an ownership interest in any coal mine or coal-related operation.

The Act affects Cleveland-Cliffs, solely as a so-called "reachback" company, and as such we are paying assessments of approximately $1 million per year. Our exposure is brought about by prior activities and transactions of a company which was acquired by Cleveland-Cliffs in 1986 for its iron ore businesses. It is our view that all health benefit obligations of this acquired subsidiary to coal retirees and their beneficiaries have previously been fulfilled.

Our assessments are flowing into the so-called "Combined Fund" which is used to pay coal industry retiree health benefits. The benefits and their original contemplated funding were provided by multi-employer collective bargaining between the United Mine Workers (UMW) and Bituminous Coal Operators Association (BCOA) member companies. However, substantially-reduced employer contributions commenced with the 1988 agreement, as did the financial problems that led to the Act's reachback provision. We contend that the reachback assessments are essentially an indirect subsidy to present member companies of the BCOA, which should be held solely responsible for the health benefits of BCOA beneficiaries.

Not only do we question federal mandates to solve financial problems arising from private contracts, but we believe that forcing prior signatory operators no longer in the coal business to subsidize the cost of benefits inadequately funded by signatories to subsequent coal wage agreements sets a bad legislative precedent and is grossly unfair to reachback companies.

While in prior years we have expressed in considerable detail our rationale for strongly opposing the reachback provision's enactment, we are not now seeking its repeal. We are merely asking for conditional relief because of the growing surplus status of the Combined Fund, and we are prepared to resume payments in the event the Fund resources are not sufficient in the future to assure payment of approved health benefits to beneficiaries.

H.R. 1370 is the answer regardless of differing points of view about the original requirements of the Act, the present surplus condition of the Combined Fund, or the adequacy of the Combined Fund to meet future health benefits. This is especially true in light of the nationwide trend toward declining health benefit costs. H.R. 1370 merely suspends the reachback assessments on the condition that an adequate Combined Fund surplus continues to exist; and it requires the resumption of reachback assessments if the Combined Fund surplus falls below a reasonable "safety cushion" amount.

The Combined Fund's surplus is now approaching $150 million. With the safety cushion feature in place to automatically resume reachback contributions if additional funds are needed in the future to satisfy health benefit claims, there is no sound reason to oppose H.R. 1370.

It is perplexing, however, that BCOA member companies and others have found a way to attack the bill based on a controversial projection of future costs. An actuarial report has recently been produced which projects a Combined Fund

deficit in 2003 as its base case estimate. This estimate and its health care trend rate assumptions are vastly in conflict with other studies that project a huge, constantly growing surplus; and serious questions have been raised about its assumptions by a well-recognized actuarial organization.

Suffice it to say that this recent report is too dependent on questionable assumptions concerning estimated cost trends to justify denial of equitable relief to reachback companies. In any event, should there be valid doubt about the surplus condition of the Combined Fund in years to come, the safety cushion feature of H.R. 1370 provides a safeguard that ensures appropriate restoration of cash resources.

Approval of H.R. 1370 is urgently requested.

FLORENCE MINING COMPANY

July 5, 1995

Phillip D. Moseley, Chief of Staff
Committee on Ways and Means
U. S. House of Representatives
1102 Longworth House Office Building
Washington, DC 20515

Date of Hearing: June 22, 1995

The Florence Mining Company is a 1988 last signatory operator as defined in the Coal Industry Retiree Health Benefit Act of 1992, and as such maintains an individual employer plan for its pensioners. Additionally, Florence is liable for payment of per beneficiary premiums for any pensioner assigned to it in the 1992 Benefit Plan. We recently received notice from the UMWA 1992 Benefit Plan that the Trustees of the Plan were preparing to implement the security provisions of the Act. Based upon the annual per beneficiary cost set by the Trustees for 1995, this action will require us to post security of approximately $1.5 million. It must be noted that the 1995 annual cost of $3,077 set by the Trustees represents a 31% increase over the previous year's cost.

Section 9712(C) of the Coal Industry Retiree Health Benefit Act of 1992 mandates the development of managed care and cost containment rules by the UMWA 1992 Benefit Plan, which may then be utilized by 1988 last signatory employers to assist in controlling costs in their individual employer pensioner plans. To date, no such managed care and cost containment rules have been forthcoming from the 1992 Benefit Plan.

The Bituminous Coal Operators Association and the United Mine Workers of America have reached agreement on certain cost control measures for the BCOA company plans mandated by the Act. These controls are not available to 1988 last signatory operators. However, the implementation of the BCOA/UMWA cost controls serves to verify the need for them, a need which has not been met by the Trustees of the UMWA 1992 Benefit Plan.

The UMWA 1992 Benefit Plan is preparing to impose substantial security requirements upon 1988 last signatory operators under the terms of the Act. At the same time, the UMWA 1992 Benefit Plan has failed to develop and make available to the 1988 last signatory operators the managed care and cost containment rules mandated by the Act. This imposes a double penalty on the operator in that increasing costs, as evidenced by the Plan's set 31% increase for 1995, requires that higher security be posted and in that the operator is unable to implement cost-saving measures in its individual employer plan.

Unless and until the Trustees of the UMWA 1992 Benefit Plan have fulfilled their cost control obligations under the Act, no security requirements should be added to the already heavy burden placed on the 1988 last signatory operators by the Act. Additionally, legislation should be considered to force cost controls on the Trustees because of the excessive cost increases in the premiums.

Very truly yours,

Ralph Woods
President

cc: Rep. John P. Murtha
Sen. Rick Santorum
Sen. Arlen Specter

RECORD STATEMENT BY
LINDSEY COAL MINING COMPANY LIQUIDATING TRUST
TO THE OVERSIGHT SUB-COMMITTEE OF THE HOUSE WAYS AND MEANS COMMITTEE
CONCERNING THE 1992 COAL ACT

More than fifty years ago, between August of 1946 and August of 1952, a small Western Pennsylvania mining company, Lindsey Coal Mining Company, Inc., (Lindsey), employed less than 20 men on a full or part-time basis, many for less than a two year period. With the nationalization of the mines, Lindsey was required to pay into the "welfare and retirement fund" on a per ton basis, although Lindsey itself had never signed any BCOA agreement concerning these benefits.[1] In 1952 Lindsey stopped mining, entirely and thereafter employed no miners, engaged in no mining activity, its only employee being one part-time clerk. In the 1970s, Lindsey went into complete liquidation (forming Lindsey Coal Mining Company Liquidating Trust) with all of its assets held in trust. The only income of Lindsey Liquidating Trust was passive in nature - royalty payments from gas leases, infrequent coal royalties and occasional sales of real estate. Monthly income now averages less than $10,000.

In 1993, Lindsey Liquidating Trust was notified by the Combined Fund and the Social Security Administration that it was an Assigned Operator required to make payments to the Combined Fund or be subject to severe penalties. Lindsey Liquidating Trust has paid into the Combined

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[1] There is current litigation in the United States District Court of the Western District of Pennsylvania at Docket No. 94-1043 concerning numerous challenges to the 1992 Coal Act. Court action involving this litigation has been pending January 1995 awaiting a decision on Motions for Summary Judgment. Copies of Briefs are available upon request.

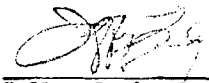
Fund in excess of $100,000 but has recently given notice that it may no longer be capable of making such payments after this summer due to drastically reduced income.

Although there is current legislation concerning relief for former mining operators designated as "Reachback companies", such proposed legislation is simply a moratorium upon payments because of the economic hardship caused those companies. We urgently request that Members of the Sub-Committee consider the drastic economic impact on Reachback companies. Remedial legislation should be implemented, not only in fairness to those entities caught in this oppressive web, but because the original legislation was fundamentally flawed and improper as applied to Lindsey and other companies in similar circumstances. The original intention of the 1992 Coal Act was to encompass only those companies which promised lifetime benefits to United Mine Workers. However, when the 1992 Coal Act was enacted, Congress incorrectly included within its purview, all companies that at anytime were affiliated with coal mining activity even though they never promised lifetime benefits.

The only argument that has been presented by the UMW Combined Fund in an attempt to justify inclusion of Reachback companies within the Coal Act, is that prior mine operators created "an atmosphere that promised lifetime benefits to those who would retire from the industry." However, even union mining companies did not promise lifetime benefits until 1978 when Lindsey Coal Mining Company was already of of business and in the process of liquidation. Therefore, how could a company such as Lindsey create an atmosphere of lifetime benefits when it was not even operating in the industry at that time?

Lindsey Liquidating Trust realizes the Committee will hear testimony from other Reachback companies as to the draconian effect of the 1992 Coal Act. We would hope Members of the Committee will correct the Act from the beginning and enact retroactive relief.[2] Even by the broadest application of Constitutional principles, no free enterprise system can possibly survive if subjected to this form of intrusion by its government. There is much more at stake than "Reachback Relief." It is a question of Congress correcting a dangerous and confiscatory precedent.

Respectfully submitted,



Jeffrey Lundy, Esquire
Attorney for Lindsey Coal Mining
Company Liquidating Trust

219 East Union Street
P.O. Box 74
Punxsutawney, PA 15767
(814) 938-8110

[2]We suggest the Committee examine analogous situations and decide whether Congress would ever conceivably apply such broad reaching legislation to other citizens. For example, in contemplating national healthcare reform would Congress even remotely consider legislation that required an employer of a worker forty years ago, to pay premiums today for lifetime benefits of that former employee? Surely not.

STATEMENT FOR THE RECORD

Maxus Energy Corporation

Subcommittee on Oversight
Committee on Ways and Means
U.S. House of Representatives
Hearing on the Coal Industry Retiree Health Benefit Act
June 22, 1995

Maxus Energy Corporation is an independent oil and gas exploration and production company headquartered in Dallas, Texas. Maxus once owned and operated through its subsidiary, Gateway Coal Company, the Gateway Mine located in Green County, Pennsylvania. One of Maxus' predecessor companies acquired Gateway from two steel companies, both of which became bankrupt and defaulted on coal purchase agreements.

As a result of these bankruptcies, Maxus' predecessor lost over $50 million on its brief ownership of the mine, which was closed in May of 1990. During the time the mine was active, United Mine Workers of America (UMWA) health benefits were provided as specified by the labor contract to which Gateway was a party. Currently, Gateway retirees receive health care benefits which are more comprehensive than those received by the retirees or employees of Maxus Energy Corporation. There is no charge for premiums, but these retirees provide about $150 per year in copayments, according to the union's specifications.

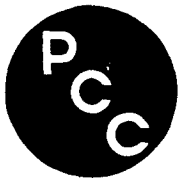
In 1988, Gateway was an operator of a bituminous coal mine at which it employed hourly employees who were represented by the UMWA for bargaining purposes. Gateway became bound by the National Bituminous Coal Wage Agreement of 1988 (NBCWA) as a "me too"

signatory company, thereby accepting terms and conditions established in the 1988 NBCWA. The 1988 Agreement added a new wrinkle to the treatment of coal miner retirees by requiring, for the first time, that an employer ceasing operations must pay withdrawal liability to the multi-employer plans. Gateway was assessed and paid withdrawal liability of $3,940,370.17.

As a result of the Coal Act of 1992, Gateway was assessed an additional $5,180,526.95, and it is also currently paying premiums of $115,107.54 every month. The combined Fund now holds Gateway's $3.9 million withdrawal liability (as well as all of its other contributions), but will never accept any of Gateway's retirees. Instead, Gateway is required to maintain its individual employer plan for retirees perpetually and at its own expense.

H.R. 1370, the subject of the hearing, would amend the Internal Revenue Code to reduce the mandatory premiums to the UMWA Combined Benefit Fund by certain surplus amounts in the Fund. Maxus requests that we receive a credit against the cost of future premiums for the withdrawal liability payments previously made. Such a credit would put Maxus on the same financial footing as all other 1988 Agreement operators, i.e., we would be required to pay for the lifetime benefits of our retirees -- we just would not be required to pay twice.

Thank you for your consideration of our request for equitable treatment in this legislation.



PALMER COKING COAL COMPANY

June 29, 1995

Phillip D. Moseley, Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington D.C. 20515

RE: Coal Industry Retiree Health Benefit Act of 1992

Hearing on Thursday, June 22, 1995 before Congresswoman Nancy L. Johnson's Subcommittee on Oversight of Ways and Means

Dear Mr. Moseley:

Our company is one of hundreds of victims of the Coal Industry Retiree Health Benefit Act of 1992, passed as a little-debated rider to the National Energy Policy Act. Our company left the coal industry nearly fifteen years ago and terminated our agreements with the United Mine Workers of America (UMWA). Upon termination in 1981 we paid the UMWA $157,738.36 as part of our withdrawal liability. In addition, we ended up paying our attorney more than $30,000.00 when we had to successfully litigate the UMWA's original miscalculation of our withdrawal liability.

In November, 1993 we received a letter from the UMWA and subsequently from the Social Security Administration informing us that we owed the UMWA another $186,000.00. And each succeeding year our company has been billed a similar amount by the UMWA Health Fund. For a small company like ours, these kinds of liabilities are crippling. We left the coal industry fifteen years ago and now operate in business as a sand and gravel mining firm. Yet, thanks to the 1992 Act we face continuing liabilities for a situation which we did not create.

The 1992 law basically enacts an *ex post facto* tax to be paid by any company who was ever a signatory to a UMWA contract between 1950 and 1988. The tax is assessed by the Social Security Administration but paid directly to the United Mine Workers of America. A company who was signatory to a UMWA agreement is responsible for the health benefits of all retirees who last worked for that company. In the case of Palmer Coking Coal Company (Palmer), we were the last underground coal mine to operate in the state of Washington. As coal mines closed in Roslyn, Cle Elum, Wilkeson, Newcastle and Carbonado, miners from these communities came to our company in Black Diamond seeking employment during their last years of work. It was quite common for Palmer to hire 50

year old, 55 year old, and even 60 year old coal miners seeking employment in the twilight years of their work life. These older coal miners came to Palmer several years away from retirement and usually worked to about age 65. Palmer, as a signatory to the UMWA contracts, assisted these elderly miners by giving them several years of employment during the period our company was phasing out our coal mines.

This accommodation of proud men in a declining industry has now come back to haunt Palmer. Though a miner may have worked thirty years for a different coal company in Roslyn, Palmer's employment of this man for the final two or three years before his retirement results in Palmer being liable for all of his (and his dependent's) health needs in retirement. As Palmer was the last coal mining company in Washington we now find ourselves responsible for scores of miners who spent most of their working years employed by other coal companies which went out of business and laid off their workers.

Palmer left the coal mining industry in the early 1980's but we did it honorably. All of our elderly UMWA coal miners were allowed to reach their retirement age before Palmer ended it's contract with the union. The 4 or 5 young men who were still employed in coal mining were transferred to new work in our gravel extraction business. All of our employees were treated honorably and with respect as we tried to meet their retirement needs. However, the UMWA, the large coal companies, and their friends in Congress chose to target innocent companies like us to bail out a mismanaged union health fund. And until the last of these retired miners (and their dependents) die, our company will be making monthly payments of $15,000.00 to a union which we legally and financially left fifteen years ago.

An added injustice is the fact that as the "last signatory operator", Palmer Coking Coal Company is the "assigned operator" who is responsible for paying retired miners' health benefits. What this means is that although a coal miner may have worked twenty years for another coal operator, if he worked for Palmer Coking Coal Company during the last few years of his employment, Palmer is totally responsible.

Our company has requested from the Social Security Administration, the work histories of the list of miners assigned to us. We have been shocked to find that many of the assigned miners worked for Palmer for only 2 or 3 years out of a 30-40 year coal industry employment history. Yet under the "Coal Industry Retiree Health Benefit Act of 1992", Palmer is paying approximately $3500 per miner or beneficiary, *per year*, to provide health benefits. In one particularly egregious case, a now-deceased miner worked for Palmer sporadically and part time over a period of four years. During this time period, Palmer paid about 5% of this man's total earnings. His total four year earnings from Palmer were a mere $867 (1955-1958). Yet now, some 36 years later, Palmer is being

assessed $3500 per year in health benefits to this man's widow, a 57 year old, gainfully employed woman.

In another shocking example, Palmer Coking Coal Company, Inc. employed Waino Wakkuri in 1959 for a few weeks and he earned $367.81. Now, some 36 years later, Palmer Coking Coal Company, a family partnership long out of the business of mining coal, must pay all of Mr. Wakkuri's widow's health and death benefits as administered by the UMWA Benefits Fund. Our cost this year for supplying said benefits will equal about $3,500.00. And, we face continuing payments to the UMWA for future years.

The Coal Industry Retiree Health Benefit Act of 1992 is a cruel joke which has been visited upon hundreds of small companies like ourselves. This cruelty comes with a crippling price tag. This crippling price tag comes in the form of an unfair tax on small companies who have left the coal industry. The purpose of this unfair tax is to subsidize the big coal companies who comprise the Bituminous Coal Operators Association (B.C.O.A.) and their accomplices in the UMWA. We urge you to repeal this tax or at the very least exempt small coal companies from this pernicious "reachback" tax.

Very truly yours,

William Kombol, Manager
Palmer Coking Coal Company

cc: Washington Congressional Delegation

Private Benefits Alliance

**SUBMISSION OF THE PRIVATE BENEFITS ALLIANCE
TO THE WAYS AND MEANS COMMITTEE
OVERSIGHT SUBCOMMITTEE ON
THE COAL INDUSTRY RETIREE HEALTH BENEFIT ACT OF 1992**

The PBA (herein "the non-signatory companies") is a coalition of coal producers which never have participated in the United Mine Workers of America ("UMWA") Retiree Health Benefit program. PBA was formed in 1990 for the limited purpose of opposing legislative action to require non-signatory coal companies to finance other companies' UMWA retiree health care benefits. PBA's members are located in all coal mining regions of the United States, with their greatest production in the West. Some PBA members have collective bargaining agreements with unions other than the UMWA; others operate without a union.

The PBA companies participated in the legislative process which led to passage of the Coal Industry Retiree Health Benefit Act of 1992 ("The Coal Act"). This Act is the product of extensive negotiations and compromise. As the Committee recognized on page 3 of its July 22, 1995, Committee Print, notwithstanding their neutrality in the dispute and the economic disadvantage to them, the non-signatory companies agreed to the compromise under which up to $70 million per year could be transferred from the Abandoned Mine Lands fund to supplement UMWA retiree health care benefits. This compromise was an alternative to proposals made by certain factions to levy a new tax on the entire coal industry. A large part of the burden of any such new tax would fall on non-signatory companies.

As an effort is undertaken to modify The Coal Act, PBA asks that the Committee be mindful of the entire history of legislative negotiations leading to The Act's passage and, particularly, that the non-signatory companies never have been a part of the UMWA retiree health care plans and had no role in contributing to their funding problems. While to date, we have heard nothing to suggest that changes under consideration could result in a tax assessment on an industry-wide basis or an increase in the amount of moneys now appropriated from the AML Funds to supplement the provision of benefits under The Coal Act, PBA writes this letter to record that it would strongly oppose any such proposal.

Now, as in the past, PBA objects to changes which would, or could, have the result, directly or indirectly, of imposing any obligation to finance the UMWA's welfare programs on the hundreds of non-UMWA coal industry employers who have managed their own benefit programs judiciously. At the June 22, 1995, hearing on this issue, several Committee members expressed their concern about the unfairness of assessing the super-reachback companies since they did not make the promises which are resolved by The Coal Act. This argument applies to an even greater degree to the non-signatory companies. PBA takes the position that the AML monies allocated to the Combined Fund should be eliminated and turned back to their originally intended purpose before any consideration is given to exemptions of any companies.

In any event, if changes are to be made, such legislation must also provide language guaranteeing that the non-signatory companies are exempt from The Coal Act and any new burdens to finance benefits for their competitors' employees.

STATEMENT OF PAUL W. MACAVOY
ON BEHALF OF THE REACHBACK TAX COALITION

I. Introduction

A. Professional Background

My name is Paul W. MacAvoy and I am the Williams Brothers Professor of Management Studies at the Yale School of Management. My professional work has centered on regulation and strategic decision making by firms in the energy, transportation, and communications industries. I have authored numerous journal articles and sixteen books, including most recently *Industry Regulation and the Performance of the American Economy* (W.W. Norton 1992). I have served as a member of the President's Council of Economic Advisers. I have also served as a member of the board of directors for several corporations, including (currently) Alumax Corporation, American Cyanamid Company, the Chase Manhattan Bank Corporation, and LaFarge Corporation. My previous directorships include AMAX Corporation, a major American coal producer, on whose board I served for fifteen years up to this year. AMAX subsequently merged with Cyprus to form the Cyprus AMAX Corporation, and I have no current affiliation with Cyprus AMAX.

B. The Reachback Tax Issue

This statement is presented on behalf of the Reachback Tax Coalition, a group of companies mandated by the Coal Act of 1992 to contribute to a health benefit plan (the "Combined Fund") for retirees of the United Mine Workers Association ("UMWA"). The Coal Act has two major aspects: the first requires contributions from sources other than signatories to the 1988 National Bituminous Coal Wage Agreement ("NBCWA") to the UMWA Combined Health Care Fund, and the second is a Reachback provision which provides that companies that had signed a NBCWA contract at any time since 1950, but not the 1988 NBCWA contract (the "Reachback" companies), are now required to contribute to the Combined Fund as well. The primary purposes of my statement are to analyze the economic justification for the Coal Act's requirement that Reachback companies make contributions to the Combined Fund and to assess the overall consequences of the Act. In preparing this statement, I have reviewed a number of materials, including the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act", or "Rockefeller Act"); Congressional hearings on UMWA health benefits; the Dole Commission Report on the Coal Industry; testimony of witnesses appearing before this Committee; and court decisions relating to the Coal Act and UMWA retiree benefits.

II. The Appropriate Role for Federal Intervention in the Operation of an Industry

In passing the Coal Act, Congress imposed a new federal tax policy mandating which companies would contribute to the Combined Fund to provide lifetime health benefits to retirees of the UMWA. Before considering the details of how the Coal Act has operated, it is important to step back and ask whether such intervention by the federal government can be justified.

From an economic policy perspective, government intervention in the operation of an industry is justifiable only when it serves to solve a market failure or rectify a circumstance of incomplete contracts. Prime examples of market failures include the market's inability to take account of externalities, such as air pollution caused by a manufacturing plant, or a market's inability to prevent monopoly prices. In such instances, federal intervention can potentially rectify the market failures, through such mechanisms as the imposition of taxes in the form of effluent charges and antitrust actions to prevent the exclusionary use of market power by monopolies.

Federal intervention in an industry can also help to ameliorate problems between private parties in circumstances in which contracts fail to specify the actions that should be taken given certain outcomes. In the current context, two rationalizations of this type were offered to justify federal intervention in the form of the Reachback provisions of the 1992 Coal Act. First, the health benefit plans were allegedly so deficit-ridden as a result of unforeseen circumstances that only federal intervention could prevent their financial collapse. Second, so-called "orphan" workers were allegedly in danger of not being covered or, alternatively, of having the costs of their coverage bestowed unfairly on the companies still part of the agreement, thereby threatening its continuation or renewal.

Both of these rationalizations were factually without foundation at the time Congress passed the Coal Act in 1992. There was no justification for this type of dramatic federal intervention in the coal industry.

In 1992 the extant collective bargaining agreements between coal companies and the UMWA reflected their efforts over time to reach equitable divisions of wage and benefits compensation to workers. Since companies and employees historically and predictably exited from the bituminous coal industry over time, these wage and benefit negotiations necessarily involved both past and future generations of firms and workers in the industry. Since the 1930s, labor relations in this industry have been tumultuous and, at times, violent. They have involved intense struggles over health and pension benefits just as much as wages. However, negotiations were always internalized just to those companies and workers who benefitted from NBCWA contracts.

Being a part of the bargaining process leading to a contract was essential for a unionized producer of bituminous coal. For parties to that process to go outside of the terms of a voluntarily negotiated wage and benefits contract to tap other, unrelated sources of funds to either decrease the cost obligation of signatories to the contract or increase the negotiated wage and benefits package is not any more justifiable for the coal industry than it would be for any other industry. If this were to become a general practice, it would lead to large and serious misallocations of resources across the national economy.

It might be argued that orphans "dumped" by exiting companies on remaining firms constitute an example of an incomplete contract for which federal intervention in the market is required. This argument also is factually incorrect. The voluntarily negotiated NBCWA contracts explicitly took into consideration the possibility that firms would exit the industry. Before the mid-1970s, the UMWA pension and health benefit programs were both combined in one union-run "pay-as-you-go" plan financed by multi-employer contributions assessed on a per unit of production basis. An employer's obligation to contribute stopped when it exited the industry or otherwise ceased to be a signatory to the contract. In 1978 when each employer prospectively took on the responsibility of providing health benefits to its current employees and future retirees, a multi-employer plan was set up specifically to cover the cost of providing health benefits to workers "orphaned" when their former employers left the industry. Thus, there was no incompleteness to the contracts along these lines. Government intervention to provide for such "orphans" in the form of taxing firms who previously exited the industry was, therefore, completely unjustified.

Some analysts have cited prior actions by the federal government in the coal industry and argued that those actions in some way justify federal intervention in matters regarding health care benefit agreements between coal companies and the UMWA. For example, in his September 1993 statement before the Ways and Means Committee, Richard Trumka, President of the UMWA, noted that the Truman Administration ended a coal strike by seizing the coal mines for a year and argued that this intervention began "a continuing government commitment to improved health care in the nation's coal fields." Mr. Trumka was correct that the federal government has from time to time attempted to prevent or control the economic disruption resulting from coal strikes even to the extent of President Truman's seizure of the mines. The government has, also at times, in an arbitration role assisted in negotiation of health care agreements between coal companies and the UMWA. However, in the immediate aftermath of the seizure of the mines and during the five decades until the Rockefeller Act, the government has explicitly made clear that questions of wages and benefits were subject to the process of collective bargaining. The actions on the part of the federal government in helping to settle strikes have never involved the imposition of specific contract terms and in no way create a precedent for the type of federal intervention such as that undertaken in the 1992 Coal Act. Indeed, there was no strike in 1992. Mandating that Reachback companies contribute to the Combined Fund was not part of a strike settlement process; rather it resulted from skillful political use of the legislative process to root out and supplant the results of more than forty years of collective bargaining in a manner never undertaken before in the coal industry, much less any other industry.

Mr. Trumka's justification for federal intervention taking the form of the Reachback mandate was that "every company still in existence with assets to provide for the promised health care was justly asked to step forward and pay for the cost of providing health care to its retirees." Since this would necessarily involve asking Reachback companies with no continuing financial obligations to fund the proposed health care plan, Mr. Trumka correctly, albeit ironically, noted: "Obviously, there was no way for private parties to achieve these ends. We needed congressional intervention." The obvious reason was that government compulsion was necessary to extract payments from firms

that had already complied with all of their legal liabilities before exiting the bituminous coal business. The need for legal force to achieve a desired economic result is hardly an adequate reason for federal intervention in private sector industry.

III. The Specific Rationale for the Coal Act in 1992

In the absence of a principled justification for federal intervention, special reasons were advanced by the Act's supporters at the time of its passage in 1992. They, too, are entirely specious. Advocates stated that there was a funding crisis and that unacceptable levels of "orphan" retirees threatened the collapse of the UMWA funds. Both of these reasons were factually wrong.

A. The Alleged Crisis in Funding Retiree Health Benefits

At the time the Congress was urged to pass the Coal Act it was told that there was a large and growing deficit in the UMWA Health Benefit Funds which jeopardized the continuation of retiree health benefits. The source for this proposition, the Dole Commission, reported that there would be a $300 million deficit in the health benefit funds by the end of 1993. In response, the Coal Act contained a provision requiring the 1988 signatories to pay off the deficits before the statutory Combined Fund took over the funds.

This provision was never used, however, because the deficit ($114.3 million at the end of 1991 according to the General Accounting Office) was reduced to $58.4 million by the end of 1992. Thereafter, through collections and expenditure adjustments, the trustees retrospectively found in November 1994 that by January 1993 the fund had in fact moved to a $16.7 million surplus. This result had been achieved as a result of a comprehensive injunction issued by Judge Glenn Williams in federal court in Abingdon, Virginia which required: (1) the Bituminous Coal Operators Association ("BCOA") to increase their rate of funding of the 1950 and 1974 health benefit trusts as provided for in the "guarantee" clause in the 1988 contract; (2) the trustees to require all eligible beneficiaries to sign up for Medicare; (3) the trustees to stop paying more than Medicare contract rates to reimburse Medicare providers; and (4) the trustees to provide health benefits for the remainder of the 1988 agreement until February 1993.

Judge Williams also wryly observed that the BCOA had argued against the injunction on the grounds that dire consequences would flow from it -- "the Rockefeller bill would be defeated and the BCOA because of its small size would be eliminated." The cynical nature of this argument is readily apparent. Indeed, it appears that in fact the alleged fund deficit was wholly akin to numerous political myths, e.g., the Kennedy missile gap of 1960, in that it simply never existed. This conclusion is supported by a recent study of the expected future balances of the Combined Fund performed by Towers Perrin, a prominent international benefits and compensation firm, which finds that the fund will have a cumulative surplus by September 2004 of approximately $289 million.

B. The Alleged Dumping of Orphan Retirees as Creating an Insuperable Financial Burden on the BCOA

The allegation that certain companies had created a financial crisis for the funds by dumping their orphan retirees on the BCOA companies was accepted uncritically by some interested in the passage and subsequent defense of the Coal Act. This allegation has been used to mask the reality of a clear exercise of political and legislative power by the BCOA in cooperation with the UMWA to transfer to others a large amount (approximately $123 million annually, consisting of $53 million from Reachback companies and $70 million from the federal Abandoned Mine Lands trust) of its costs for retiree health care established under prior collective bargaining agreements.

The claim that dumping of orphans endangered the financial stability or the continuation of health benefit funds cannot withstand scrutiny. The 1950 Health Benefits Trust which covered all pre-1976 retirees was a multi-employer plan which by definition never had "orphans." All retirees received their health benefits from the fund directly and any retiree's benefits were not related to any particular employer. This fund was always financed on a current production basis by current signatories to the most recent NBCWA. The Rockefeller bill by its assignment of 1950 fund beneficiaries to prior employers accomplished a wealth transfer to the BCOA companies from the Reachback companies without any orphan dumping justification. The 1950 Health Benefits fund was simply where most of the beneficiaries -- some 80% and thus most of the expense -- were located.

The question of orphans only arose with respect to the 1974 Health Benefits Fund. In 1974, the ERISA statute was passed and was in 1980 definitively extended to multi-employer agreements. As this statute applied only to pensions, it dictated the separation of the health and benefit funds into separate trusts for the first time. In the same time frame, while negotiating the 1978 NBCWA, the BCOA insisted in taking back the management of health benefits from the Funds because of its belief that control of benefits administration by each signatory company would end two decades of waste and abuse by the Funds.

Under the 1978 NBCWA, each signatory company was henceforth responsible for providing the contractually agreed level of benefits to each of its own active employees and retirees. At the insistence of the UMWA, the 1974 Health Benefits Fund was retained to provide benefits for all "orphan" retirees and their beneficiaries who retired after the 1950 Fund closed in January 1976 from companies who left the industry. In 1976, for the first time, at the insistence of the BCOA, individual companies became responsible for the health care of their active employees and their retirees who were not covered by the 1950 Fund. Thus, it is only with respect to the retirees in the 1974 Fund, a relative handful, that the concept of orphan had any relevance.

But the Rockefeller Coal Act not only addressed the problem of the 1974 Fund orphans but undertook a massive restructuring of liabilities for the 1950 Fund as well. The numbers of retirees in the 1974 orphan category was relatively modest -- approximately 16,000 -- as compared with the 100,000 in the 1950 Fund, and was financially manageable by the BCOA signatories under then current contractual arrangements. In addition, the anticipation that the number of "orphans" would greatly increase if other firms with large numbers of retirees were to leave the industry was in fact addressed in the 1988 agreement by imposition of contractual withdrawal liability upon signatory firms later exiting the industry. Thus, the Combined Fund and the Reachback taxation process instituted by the Rockefeller Act was in no way necessitated by the problem of future withdrawals by BCOA signatories.

In his 1993 testimony, Mr. Trumka repeated the claim that dumping of orphans "on a dwindling number of signatory companies" led to a crisis necessitating government intervention. But in fact production by signatory companies in the 1979 to 1989 period leading up to the Coal Act was quite stable, so that total payments into the fund were stable. Indeed, a significant number of BCOA firms were simply acquired by the BCOA firms remaining in the industry. Thus while it was the case that the absolute number of BCOA firms had declined, the remaining firms produced, on average, enough additional coal to make fund payments to replace those of the exiting firms. There was no reason to expect that remaining firms would fail to carry out the contractually agreed upon provision of health care benefits for workers orphaned by the exit of firms from the industry.

IV. Adverse Consequences of the Coal Act

A. Reachback Firms Are Unjustifiably Required to Contribute Large Sums of Money

The first adverse effect of the Reachback provision of the Coal Act is the direct one that Reachback companies are taxed at the rate of approximately $53 million per year. Table One presents data for several publicly traded Reachback companies on their lines of business and revenues, while Table Two describes these lines of business in more detail. As is clear from the tables, the firms currently produce many different products, most having nothing to do with bituminous coal production. For example, Allied Signal's business lines are in the automotive, aerospace, and engineered materials industries. Their production of such items as anti-submarine warfare systems is leagues away from the bituminous coal industry. Likewise, Union Carbide's chemicals and plastics operations, encompassing the production of such items as materials and systems for printed wiring and circuit boards, in no way relates to coal mining.

The annual financial obligations under the Coal Act of these Reachback companies are also shown in Table One. These payments range from six hundred thousand dollars for Union Carbide to over twelve million dollars for LTV. While these payments are not so large as to threaten the financial stability of these companies, they make no economic sense. Effectively, a tax for coal retirees' health benefits is being levied on sales of cockpit data recorders and automatic coffeemakers.

TABLE ONE

REVENUES, LINES OF BUSINESS, AND ANNUAL LIABILITIES

FOR SELECTED REACHBACK COMPANIES, 1994

Company Name	Total Revenue ($000,000s)	Lines of Business	Revenue by Lines of Business ($000,000s)	Annual Reachback Liability
Allied Signal, Inc.	$12,817	Automotive	$4,922	
		Aerospace	$4,623	$2,100,000
		Engineered Materials	$3,272	
Cleveland Cliffs, Inc.	$379	Iron Ore and Other	$379	$840,256
LTV Corp.	$4,529	Steel	$4,230	$12,100,000
		Energy Products	$299	
Lone Star Technologies	$357	Oilfield Products and Services	$215	$834,732
		Industrial Products	$142	
Maxus Energy Corp.	$682	On and Offshore Oil and Gas	$682	N.A.
NACCO Industries, Inc.	$1,865	Material Handling Equipment	$1,179	$2,868,600
		Small Electrical Appliances	$377	
		Lignite Mining	$250	
		Retail Kitchenware and Appliances	$64	
		Other Operations	$1	
Union Carbide	$4,865	Chemicals and Plastics	$4,865	$594,269

TABLE TWO

DETAILED LINES OF BUSINESS OF SELECTED REACHBACK COMPANIES

Company Name	Detailed Lines of Business
Allied Signal, Inc.	Designs, develops, manufactures, markets and services aerospace products including aircraft engines, environmental control systems, cockpit data recorders, space-pointing devices and control systems for spacecraft and anti-submarine warfare systems; designs, engineers and manufactures automotive products such as braking systems, engine components and safety restraint systems; develops, produces, and markets specialty engineered materials including nylon, fluorine products, coatings, resins, specialty films and circuit board laminates.
Cleveland Cliffs, Inc.	Controls, develops and leases iron ore and coal reserves; manages and owns interest in mines; owns interests in a railroad providing services to the mines; and produces and sells coal and iron ore pellets.
LTV Corp.	Produces and sells steel and related steel items; manufactures and distributes drilling and production equipment; distributes seamless steel tubular products and oilfield supplies.
Lone Star Technologies	Holding company with subsidiary which manufactures and markets oilfield casting, tubing, line pipe, specialty tubing and flat rolled steel.
Maxus Energy Corp.	Holding company with subsidiaries which explore for and produce oil and gas; purchase, gather and process natural gas; and produce natural gas liquids.
NAACO Industries, Inc.	Holding company with subsidiaries which design, manufacture, and market forklift trucks and related service parts; manufacture and market small electrical appliances such as blenders and food processors; mine and market lignite coal for use by electric utilities; and operate specialty retail stores offering kitchenware, small appliances, and related accessories.
Union Carbide	Holding company with subsidiaries which produce ethylene oxide/glycol; manufacture broad range of derivatives of ethylene oxide/glycol; supply solvents, resins, intermediates, emulsions and additives to a broad variety of markets; manufacture and supply specialty chemicals; provide materials and systems for printed wiring and circuit boards; supply process technology, catalysts, molecular sieve absorbents, process plants and technical services to the petrochemical and gas processing industries.

The Coal Act's effects on smaller companies has in many instances been more direct and more severe. Table Three contains brief descriptions of some of the more egregious examples of the arbitrary nature of the tax. The Act requires Princeton Mining Co., for example, to contribute even though it ceased coal mining operations in 1966 and currently produces and distributes

popcorn. Another payer under the Act is 41 Liquors, a liquor store owned by the widow of a man who ran a construction business that worked on union mines. Ohio Mining Co., another Reachback firm, is the a real estate developer that ceased mining operations in 1951. Ohio Mining was assigned five retired mine workers, only one of whom actually worked for the company, as well as fifteen dependents.

TABLE THREE
SELECTED REACHBACK CASE STUDIES

Company	Case Summary
Carpentertown Coal & Coke Co. Tucson, AZ	Carpentertown filed for bankruptcy protection in June 1989. It was assigned 225 beneficiaries at a cost of $760,229 per year.
Bear Coal Co. Inc. Somerset, CO	Bear Coal is a family-owned, union-operated coal mining business that was assigned 29 beneficiaries despite a 1984 collective bargaining agreement, and a $1.1 million withdrawal penalty, which removed its obligation to the benefit trusts. Its assigned premium of $91,896 per year translates into a liability over the next ten years equal to approximately 25 percent of its net worth.
Bollmeier Construction Co. Marissa, IL	Mine-related construction and maintenance accounts for 80 percent of this family-run company's business. Bollmeier's assigned premium is approximately $38,000 per year.
CB&I Industries Oak Brook, IL	CB&I Industries is a Fortune 500 construction business that was assigned beneficiaries who were employed as painters, laborers, and boilermakers for several weeks during the period 1950 to 1980. Its assigned premium is $24,000 per year.
Princeton Mining Co. Terre Haute, IN	Princeton Mining ceased mining coal in 1966. Its primary business is now growing, processing, and wholesale distribution of popcorn. It was assigned 41 beneficiaries at a cost of $419,325 per year.
41 Liquors Madisonville, KY	This liquor store belongs to the widow of a man who once ran a construction business that performed work for union mines. 41 Liquors' assigned premium is approximately $9,600 per year.
Charbon Bridge Madisonville, KY	Charbon Bridge is a highway construction firm that was assigned five beneficiaries at a cost of $18,000 per year. One of the assigned beneficiaries worked for the firm for 48 hours.
The Ohio Mining Co. The Plains, OH	Ohio Mining is a real estate development business that ceased mining operations in 1951. It was assigned five retired miners, only one of whom worked for the company, and 15 dependents at an annual cost of $67,326.
Barnes & Tucker Co. Edensburg, PA	Barnes & Tucker was assigned a premium of $2.6 million annually, approximately twice its annual gross revenues.
Dantella Brothers Kittanning, PA	Dantella Brothers previously operated a coal-stripping business, but withdrew from the union in 1962. It is now a small earth-moving and construction company. It was assigned two beneficiaries, one of whom operated a truck the company rented to a union coal operator in 1948, at an annual premium of $6,957 per year.
GAL Construction Inc. Belle Vernon, PA	GAL has recently come out of bankruptcy and was assigned a premium of $27,829 per year.
Lanzendorfer Trucking Co. Inc. Twin Rocks, PA	Lanzendorfer Trucking is a family trucking business that formerly hauled union coal. In 1987, it withdrew from the union and paid a withdrawal penalty. Lanzendorfer's assigned premium of $24,350 per year equals approximately twenty percent of its payroll, which forced the company to file for bankruptcy.

TABLE THREE (CONTINUED)
SELECTED REACHBACK CASE STUDIES

Company	Case Summary
Morris Run Coal Mining Co. Wilkes-Barre, PA	Morris Run Coal Mining terminated deep mining more than 40 years ago, then produced coal under contract with a strip-mining operator until 1983. It is responsible for one retired miner, who worked for them for approximately five months in 1952, as well as his five dependents.
New Shamut Mining Co. Clearfield, PA	New Shamut Mining exited the coal business and currently has no employees. It was assigned 106 retired miners and 84 dependents at an annual cost of $461,642 per year.
Sager Coal Co. Belle Vernon, PA	Sager Coal is a sole proprietorship construction business that was assigned 14 beneficiaries, with an assigned premium approximately double the firm's annual gross income. Sager Coal stopped mining in 1967 and signed its last UMWA contract in 1964. When Mr. Jeff Sager bought the business from his father in 1989, its assets consisted of the firm name and two pieces of real estate.
TASA Corp. Pittsburgh, PA	TASA was assigned seven beneficiaries at a cost of $24,000 annually, or approximately 25 percent of its income. TASA last mined coal more than 30 years ago.
Unity Real Estate Co. Greensburg, PA	Unity has exited the coal industry. Its annual assigned premium was $266,000, which compares with its annual gross income of $54,000.
Clinchfield Coal, Jewell Ridge Coal Lebanon, VA	Clinchfield Coal and Jewell Ridge Coal are subsidiaries of Pittston, whose total Reachback liability is $12 million annually.
DO&W Coal Co., Inc. Clinchco, VA	DO&W conducts contract coal mining for the Pittston Coal Group. DO&W emerged from Chapter 11 reorganization in November 1993, and was assigned an annual premium of $111,315.
Elk Horn Coal Corp. Richmond, VA	Elk Horn Coal last mined coal with union labor in 1955 and now primarily leases coal mining rights. It was assigned 210 beneficiaries at a yearly premium of $708,048.
KWC, Inc. Whitewood, VA	KWC is a small trucking and hauling business. It was assigned beneficiaries as a result of operations in the 1970s when it hauled refuse from a union mine. Its annual premium is $6,957.
Mary Helen Coal Corp. Blackstone, VA	Mary Helen Coal last mined coal in 1962. It was assigned 84 beneficiaries at an annual cost of $294,660 per year, which exceeds its annual royalty income by a factor of twelve.
Milburn Collieries Lynchburg, VA	Milburn Collieries stopped mining coal approximately ten years ago. Its Reachback tax assessment is $212,000 annually. The company anticipates filing for bankruptcy within two years.
Palmer Coking Coal Co. Black Diamond, WA	Palmer Coking was the last underground mine to operate in the state of Washington, so under the "last employer" provision of the Coal Act, it was assigned many beneficiaries who spent most of their working years employed by other coal companies. The company ceased mining in 1981 and paid a withdrawal penalty to UMWA. It is now a sand and gravel concern with an annual Reachback bill of $185,599.
Mountain Laurel Resources Mount Hope, WV	Mountain Laurel Resources filed for bankruptcy after being assigned more than 1,500 beneficiaries at an annual cost of $5,217,378.

Several of these companies have either been forced into bankruptcy or face that outcome as an imminent prospect. These companies include: (1) Carpentertown Coal and Coke, which was actually in bankruptcy at the time it incurred an annual health care bill of approximately $750,000; (2) Barnes & Tucker Co. which was assessed $2.6 million annually, approximately twice its total annual revenues; (3) Lanzendorfer Trucking Co., a trucking company that formerly hauled union coal, whose annual assessment equals approximately twenty percent of its payroll; (4) S&D Coal Co., which formerly hauled union coal; (5) Sager Coal Co., a construction company that ceased coal mining in 1967 but whose Reachback assessments are approximately twice its gross income; and (6) Mountain Laurel Resources, which filed for bankruptcy after being assigned more than 1,500 beneficiaries. In sum, as the examples from Table Three demonstrate, the effects of the Reachback tax have been both devastating in their effects and bizarre in their circumstances.

B. Precedent for Future Congressionally Mandated Takings

The Reachback tax is a classic example of a government taking. The precedent set here is that in alleged future instances of market failure or incomplete contracts, any company that ever produced anything related to the product in question will be subject to takings. In the extreme, a Congressional effort to clean up nuclear weapons sites would tap a firm like Colt Industries, which produced repeater firearms in 1915, because Colt was involved in the weapons industry and was a previous signatory to a labor agreement that later covered nuclear plant technicians. An even closer analogy would be if the Social Security Trust Fund were facing an underfunding crisis and Congress tapped companies and retired individuals who had previously made payments, using the justification that they now should contribute because they once had done so. The disincentives provided to existing firms by the *ex post* adverse consequences of other actions consistent with this precedent are difficult to quantify but are obviously major and substantial.

A second adverse incentive provided by the Reachback provision is that firms active in an industry will be induced to underfund private benefit plans. The Reachback provision signals these firms that by causing funding crises, they can encourage Congress to tax unrelated entities to bail out the plans. Firms active in an industry can thereby transfer financial obligations to third-party entities having no legal or economic responsibilities for the artificially created funding crisis.

Indeed, it was recently proposed to finance health and pension costs for the auto industry through an excise tax on each car sold in the United States. The funds generated by this tax would establish an auto industry health and pension stabilization fund whose proceeds would be allocated by the fund administrators in such a way as to equalize these costs among domestic, U.S., and foreign auto manufacturers (Economic Strategic Institute. The Future of the Industry: It Can Compete, Can It Survive, 1992). This is a first step; but with the extension of the Reachback precedent, given a funding crisis deliberately induced by current members of the industry, past car manufacturers such as American Motors, International Harvester, or any discoverable corporate descendants could be required to pay for health benefits of past retirees.

The clear nature of the Reachback tax as a taking was confirmed in a January 1995 decision by the U.S. District Court (W.D. Penn, *Unity Real Estate Company v. Marty D. Hudson, et al.*) when it granted an injunction to restrain enforcement of the Coal Act against Unity Real Estate Company ("Unity"). Unity is a small family-owned business, whose predecessors included coal mining companies, notably South Union (West Virginia) and South Union (Pennsylvania). Their coal-mining predecessors operated during the period from 1922-1981, and were signatories to NBCWA contracts from 1950 through 1981. Unity was forced by the Coal Act to cover the health care of 78 beneficiaries in 1993, and 76 more in 1994. These beneficiaries were former employees (or survivors of former employees) of South Union (West Virginia) and South Union (Pennsylvania). The Reachback taxes imposed by the Coal Act for a single year ($266,000) were so large as to eclipse Unity's total net worth ($85,000). In fact, Unity did not even have sufficient cash on hand to be able to meet the first month's mandated premiums.

Facing certain bankruptcy, Unity brought suit against the Trustees of both the UMWA Combined Benefit Fund and the 1992 UMWA Benefit Plan in U.S. District Court. The Court concluded "that the Coal Act violates the Takings Clause of the constitution." Further, the Court found that "the Coal Act as applied to Unity is so palpably unconstitutional that a preliminary injunction should issue against the enforcement of the Act against it."
The Court was especially aggrieved that the Reachback provision of the Coal Act was able to stretch so far back into the past. Although defendants argued that Unity could have reasonably foreseen its future obligations to their predecessor's employers, the Court responded that if "the

possibility of a decade-later legislative solution to a crisis makes the imposition of liability on Unity on some basis chosen by Congress constitutionally foreseeable, then the expectations prong of the Takings Clause analysis ceases to exist, because legislation can always be foreseen." Specifically, "[t]o expand that reach to a period in excess of a decade goes far beyond any constitutional power of Congress."

To determine whether a taking has occurred is in the domain of the court system and not part of my expertise. Yet in the case of takings, the relevant issues at hand are fundamentally economic ones, and economic analysis can prove enlightening. Although some would argue that a taking impacts only the entity against whom regulations are promulgated, the effects of a taking clearly extend beyond the corporation itself. In the opinion of Baumol and Sidak, the confiscation of property without adequate compensation in the case of a corporation must be viewed in economic terms as the taking of the property of the stockholders (*Harvard Journal of Law & Public Policy*, Vol. 18). Thus, one method of economic analysis to determine whether an action constitutes a "taking" is to examine the stock prices of companies. Again, according to Baumol and Sidak:

> If the price of the regulated firm's stocks had been moving for some considerable period in a manner that seems in line with the stock prices of fairly comparable enterprises, then a sharp drop in the relative price of the securities of the regulated firm in the wake of a substantial change in regulatory policy creates a strong presumption that the regulatory charge is confiscatory. In other words, if the securities price is driven out of line with the prices of similar securities of comparable firms, it is the market's verdict that confiscation has occurred.

Certainly, the imposition of a Reachback tax that forces a company such as Unity into bankruptcy is clear proof that the market believes that a taking has occurred. A burden as weighty as the Reachback tax is not likely to have been shouldered by Unity's competitors, who will now operate in a less competitive marketplace due to the loss of a rival. Society becomes the loser, because, as stated by Baumol and Sidak, "[w]hatever the means by which such regulatory restrictions on investor compensation are imposed, they confiscate from consumers and investors alike what is legitimately theirs -- the benefits that they can expect in any competitive market, and which they are denied only by the caprice of the regulatory process."

C. Reachback Taxes Distort Prices in Non-Coal Markets

Mandatory contributions on Reachback firms are taxes on the operations of companies throughout the economy. Some of these companies currently mine other types of coal, e.g. lignite, while other firms have exited the coal industry altogether. These taxes distort prices in unrelated markets and reduce the ability of Reachback firms to compete in those markets against firms not subject to the Reachback provision. Some Reachback firms have been more than just competitively disadvantaged -- they have been forced into bankruptcy as a result of the Act. Thus, in some instances the Reachback provision has resulted in taxes so confiscatory in nature that firms have been forced to disband their operations despite the fact that they were surviving in their respective marketplaces by providing valuable products at competitive prices. This means these now bankrupt firms were employing scarce factors of production in their highest-valued uses, thereby increasing the welfare of society, but the Reachback provision imposed such severe competitive disadvantages on them that they could not survive. This is an undesirable outcome: Efficient firms were effectively destroyed by the Reachback provision, resulting in a diminution of society's welfare.

D. Reachback Companies Had No Expectation They Were Liable for Future Contributions to Health Care Benefit Plans

Reachback companies had no expectation that they would be liable for future contributions to health benefit plans when they were no longer signatories to an NBCWA contract. If the companies believed they had such financial obligations, they would have disclosed those obligations in their 10K reports so as to prevent lawsuits by shareholders claiming the companies had not fully disclosed relevant information that could affect their future earnings. I have examined the 10K reports of all publicly traded, Reachback companies that no longer had an NBCWA contract in 1988 and found that none of these companies stated they had a continuing financial obligation to fund health benefit plans of UMWA workers. The decision by Congress in 1992 to impose contribution requirements on Reachback companies was a confiscatory tax which neither the companies nor the capital market had expected.

Despite the fact that none of the publicly traded, Reachback companies show any evidence of recognizing a continuing financial obligation to fund heath care benefit plans under the terms of their (prior to 1988) NBCWA contracts, Mr. Trumka in his 1993 statement concluded in no uncertain terms that the Reachback companies did have such continuing financial obligations. Mr. Trumka noted that Chairman Rostenkowski and others had suggested that "it might not be fair to impose retiree health care liabilities on former coal industry employers." However Mr. Trumka dismissed this opinion with the comment that Reachback companies, as well as signatories to the 1988 NBCWA, "made the commitment to provide lifetime health care benefits to [their] employees [and so] would be liable for premiums under the [1992 Coal] Act." Mr. Trumka's statement is contradicted by two basic facts. First, the explicit terms of the 1988 NBCWA contract specified, under the guarantee clause, that health care benefit plans were in existence for the life of the contract -- not the lifetime of the employees. Second, the 1988 NBCWA contract could not place health care liabilities on Reachback companies who, by definition, were not signatories to the contract. If it could have, obviously the Rockefeller Act would not have been required.

V. Conclusion

Federal intervention in the coal industry in the form of the 1992 Coal Act has no economic rationale. The Reachback provision was, and continues to be, an unjustifiable tax on other firms that lowers the cost of health care payments by coal companies that signed the 1988 NBCWA contract. The tax is unjustifiable because it solves neither a market failure nor a contractual incompleteness problem. The Act was passed to solve an alleged funding crisis which never existed and to fund the benefits of orphan retirees whose health care benefits were already contractually provided for in existing health benefit funds. In sum, Reachback provision of the Coal Act deserves no place on the rolls of required government interventions in the marketplace. Its potential for surviving as a model for arbitrary and confiscatory taxation throughout the economy is substantial. It should be repealed.

STATEMENT OF JONATHAN C. ROSE
OF JONES, DAY, REAVIS AND POGUE
ON BEHALF OF THE REACHBACK TAX RELIEF COALITION

WHO PROMISED WHAT TO WHOM WHEN?

AN ANALYSIS OF THE ACTUAL CONTRACTUAL OBLIGATIONS OF CURRENT AND FORMER SIGNATORIES UNDER THE COAL WAGE AGREEMENTS

The Coal Act of 1992, according to those who would preserve it from any amendment, is founded on the premise that "all companies which employed the retirees should not be allowed to escape paying for *the promised retirement health benefits and dump their responsibilities* on their competitors."[1] The BCOA and other supporters of the Coal Act have remained necessarily vague and ambiguous, however, about the source of those claimed promises and responsibilities. To the extent they have not simply manufactured the claimed responsibilities, the supporters of the Act rely on several clauses inserted in the National Bituminous Coal Wage Agreement (NBCWA or Wage Agreement) and the UMWA plan documents in 1978. Clearly, whatever is contained in those clauses can have *no* application to those 158 Reachback companies that did not sign the 1978 NBCWA or a later agreement,[2] as they never passed on, much less agreed to, those provisions. As set forth below, those clauses provide no greater warrant for concluding that the reachback signatories of the 1978 and later Wage Agreements made any promises that support the liability imposed by the Coal Act.

For more than forty years, health benefits in the unionized sector of the bituminous coal industry were provided through a multi-employer plan and funded on a pay-as-you-go basis through contributions from all current signatories of the Wage Agreement. Each employer contributed from day one, regardless of how many (or whether any) of the retirees drawing benefits had worked for it. The duty of any specific employer to contribute to the plan was always expressly limited to the term of the current agreement and ceased when that employer ceased to be a signatory. The promise[3] to pay benefits to retirees in 1950 Plan was always the promise of the industry-wide plan, not of any individual employer. Even after the creation, prospectively, of single employer benefit plans in 1978 for current employees and post-1975 retirees, a multi-employer plan was retained to pay the benefits for those beneficiaries who otherwise would cease to receive benefits.

Sponsors of the Coal Act simply tore up the collective bargaining agreements underlying the multi-employer benefits system that had served the industry well since 1950 and reallocated the employers' and former employers' obligations by legislative fiat. Pre-1976 retirees and their beneficiaries, who had always been the responsibility of the 1950 UMWA Benefit Fund, funded by the signatories of the current NBCWA, were arbitrarily reassigned to former signatories, most of whom had been out of the bituminous coal business for years. Post-1975 retirees and their beneficiaries, whom the courts had unanimously determined to be the responsibility of the 1974 UMWA Benefit Fund, were similarly reassigned to their former employers, although the collective bargaining agreements those employers had signed clearly retained the 1974 Fund funded by current NBCWA signatories to provide their benefits. Through this mechanism, the BCOA managed to shift the liability for more than 25,000 beneficiaries onto companies that had legally and legitimately left the multi-employer system, and in

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[1] Source: Peabody Coal Co., "Why the Coal Industry Retiree Health Benefit Act Should Not Be Amended." (Emphasis supplied.)

[2] As of March 31, 1995, the Coal Act had imposed liability for retiree health benefit premiums on a total of 257 signatories of NCBWAs prior to 1988 (the "Reachback companies"). Of these, 99 were signatories to the 1978 or later NBCWA, and 158 were signatories only to 1974 or earlier NBCWAs.

[3] The temporal extent of the promise to pay benefits has been the subject of considerable confusion as the NBCWA plan documents contain contradictory references to "Health Services card for life" in some places and benefits granted only for "the term of the Agreement" in others.

most cases, the bituminous coal industry altogether, having paid all liabilities for which they were legally responsible.

The only companies that sought to escape their responsibilities under the NBCWAs are the members of the BCOA, who refused to fulfill their express, contractual guarantee of the health benefits of retired miners and their families, and sought relief from Congress when the guarantee clause was enforced against them in court.[4] Unlike the phantom responsibilities and moral obligations the BCOA seeks to pin on former signatories of the NBCWAs who have long since left the bituminous coal industry, the BCOA's commitments to the retired miners were legally enforceable and were in fact legally *enforced* by the courts, until the BCOA succeeded in enacting the Coal Act to vitiate their previous contractual commitments.

A. Former Signatories Have No Obligation to Provide or Pay For Benefits After the Expiration of the Wage Agreement

The BCOA and other supporters of the Coal Act have suggested that former signatories promised lifetime benefits to their employees and dependents and have somehow sought to avoid that responsibility now. To the extent that they identify any source at all, they claim that responsibility derives from several clauses in the 1978 and later NBCWAs and the plan documents. Each is analyzed below.

1. The Former Signatories Made No Promise of Lifetime Health Benefits

Proponents of the Coal Act have asserted that former signatories promised their employees lifetime benefits. That simply is not true. The only references to lifetime benefits in the Wage Agreements, first inserted in 1974, are found in a "General Description of the Health and Retirement Benefits," included in Article XX of the NBCWA. Several provisions state that a pensioner fitting in one of several categories "will be entitled to retain his Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage." Of course, this language at most indicates participation in the health benefits program, but does not require any particular level of benefits. Equally clearly, it imposes no obligation on individual companies. Any promise made is simply that of the coal producers as a whole to ensure pensioners' participation in the health benefits program.

The contractual obligation of any particular employer to provide benefits, however, is clearly limited to the life of the Wage Agreement. Article XX, § (c)(3)(i) states that the benefits provided by the single-employer benefit plans "***shall be guaranteed during the term of this Agreement*** by each Employer at levels set forth in such plans." (Emphasis supplied.) A separate provision -- the guarantee clause, discussed in more detail below -- similarly provides that the signatory employers guarantee the level of benefits paid by both the UMWA plans and the single-employer plans only "***during the term of this Agreement.***" Art. XX, § (h) (emphasis supplied). Similarly, the General Description expressly states that each employer guarantees benefits at the level of those provided by the UMWA plans only "***during the term of this Agreement.***" (Emphasis supplied).

These provisions demonstrate that the parties were bound by the Wage Agreement only as long as they were effective signatories to it. Indeed, the courts have uniformly so held. Based on these contractual provisions, "***it uniformly has been held that an employer is not legally responsible for the provision of retiree health benefits after the expiration of a wage agreement.***" *In re Chateaugay Corp.*, 945 F.2d 1205, 1210 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 1167 (1992) (emphasis supplied) (citing *District 29, UMWA v. Royal Coal Co.*, 768 F.2d 588, 592 (4th Cir. 1985); *District 29, UMWA v. United Mine Workers Benefit Plan & Trust*, 826 F.2d 280, 282-83 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988); *UMWA by Rabbit v. Nobel*, 720 F.Supp. 1169, 1176-78 (W.D. Pa. 1989), *aff'd*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 111 S.Ct. 1102 (1991); *Schifano v. UMWA 1974*

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[4] See *Doe v. Connors*, 796 F.Supp. 21 (W.D. Va. 1985); *UMWA 1950 Benefit Plan & Trust et al. v. Bituminous Coal Operators' Ass'n*, 898 F.2d 177 (D.C. Cir. 1990).

Benefit Plan & Trust, 655 F.Supp. 200 (N.D. W.Va. 1987)). See also *Box v. Coalite*, 643 F.Supp. 709 (N.D. Ala. 1986). Indeed, the Wage Agreements contain "no intimation that the parties intended [a former signatory's] obligation to continue beyond the life of the Wage Agreement." *In re Chateaugay Corp.*, 945 F.2d at 1208.

Because former signatories are not bound by expired Wage Agreements, they cannot be required to provide the benefits established under them. The courts have nevertheless accepted the proposition that the Wage Agreements do promise lifetime benefits to retired miners. The entity on which that promise is binding, however, is the 1974 UMWA Benefit Plan, supported by the contributions from current signatories as required by the Wage Agreement. "Without exception," the courts have interpreted the Wage Agreements and plan documents to impose the obligation, after expiration of the Wage Agreement, upon the 1974 UMWA Benefit Plan, rather than upon the former signatory company, to pay the promised "lifetime" retiree health benefits. *Nobel*, 720 F.Supp. at 1179-80.[5] The courts placed liability on the 1974 Benefit Plan rather than the former signatories because "*[f]rom its beginning this trust was intended as the safety net for 'orphaned' retired miners.*" *District 29, UMWA*, 826 F.2d at 283 (emphasis supplied).

The most recent decision on this issue also took note of the fact that the parties to the NBCWA made no changes to the relevant portions of the NBCWA after these cases were decided. The readoption in the 1988 agreement of the same language therefore serves to "confirm[] that the judicial interpretations correctly represented the intent of the parties." *Nobel*, 720 F.Supp. at 1180.

2. The Guarantee Clause Places the Responsibility on Current Rather than Former Signatories to Ensure Adequate Funding for Current Health Benefits

Much is made by supporters of the Coal Act that the coal companies guaranteed the payment of benefits, which, they suggest, means that former signatories are continually liable. Examination of the guarantee clause demonstrates, however, that it is binding on individual employers only during the life of the Wage Agreement they signed.

The guarantee clause, Art. XX, § (h), first inserted in the 1978 NBCWA, provides:

> Notwithstanding any other provisions of this Agreement the Employers hereby agree to fully guarantee the pension and health benefits provided by the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX *during the term of this Agreement.* [Emphasis supplied.]

Moreover, the clause went on to explain that the guarantee would be satisfied by increased contributions, if necessary, that "shall be made by all Employers signatory hereto *during the term of this Agreement.*" (Emphasis supplied.) Clearly, this provision not only imposes no perpetual obligation on former signatories, but in fact affirmatively limits their obligations to contribute to the plans.

The multi-employer system, reinforced by the guarantee of benefits by the current signatories, was the result of vigorous collective bargaining. The courts have, at the instance of the Trustees, specifically enforced the guarantee clause against current signatories. In several cases brought against the BCOA, courts granted injunctions requiring the signatories to increase their contributions to make up a shortfall in the

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[5] To be sure, during the life of a particular agreement the 1974 Benefit Plan is to provide benefits only for beneficiaries of signatory employers that are "no longer in business." See 1978 NBCWA, Art. XX, § (c)(3)(iii). That provision thus defines the respective obligations of the Fund and the employer during the life of the agreement. See *Nobel*, 720 F.Supp. at 1179. After the agreement has expired, however, it imposes no legal obligation on the employer. See *id.*; *District 29, UMWA*, 826 F.2d at 283. Thus, it is irrelevant whether the former signatories are still "in business" or not.

UMWA funds, as required by the Wage Agreement. See *McGlothlin v. Connors*, 142 F.R.D. 626 (W.D. Va. 1992); *Doe v. Connors*, 796 F.Supp. 21 (W.D. Va. 1985); see also *UMWA 1950 Benefit Plan & Trust et al. v. Bituminous Coal Operators' Ass'n*, 898 F.2d 177 (D.C. Cir. 1990). In contrast, as discussed above the courts have repeatedly rebuffed the Trustees' attempt to force the Reachback companies to provide benefits for "their" retirees beyond the life of the Wage Agreements they signed. Thus the benefits system established by the collective bargaining process wound up in difficulty only when the BCOA, after drastically cutting its contributions in the 1988 NBCWA over the UMWA's objection,[6] refused to increase the contributions to the needed level, as required by the guarantee clause in the 1988 NBCWA.

3. The So-Called "Evergreen Clause" Imposed No Perpetual Obligation to Contribute on Former Signatories

Most recently, the BCOA and the UMWA have sought to pin liability on former signatories through the so-called "evergreen clause," which was inserted in the pension and benefit plan documents shortly after the 1978 NBCWA was signed and ratified. Neither the language of the clause, past practice or other indicia of the intentions of the parties support the novel idea that the clause imposes any perpetual obligation. Even if it did, however, the obligation imposed would by its terms merely require contributions based on bituminous coal production, and so the clause, even if it is "evergreen," would -- unlike the Coal Act -- require no contribution from the overwhelming majority of Reachback companies which no longer mine bituminous coal.

The "evergreen clause" is found not in the Wage Agreements but in the pension and benefit plan documents. When the clause was added to the pension and benefit trusts in 1978, it was perceived as doing nothing to change the traditional allocation of responsibility for retiree benefits, under which signatory companies to the NBCWA jointly shared the current costs of providing health benefits to retirees and their dependents. The clause merely required employers whose employees participated in the pension or benefit plans to comply with the terms of the trusts, including "making the contributions required under the National Bituminous Coal Wage Agreement of 1978 [or the current NBCWA[7]], as amended from time to time, and any successor agreements thereto."

Because the clause merely refers to the "contributions required under" the NBCWA, it of course imposes no independent obligation to contribute beyond that set forth in the relevant section of the NBCWA. Section (d) of Article XX of the NBCWA specifies signatory employers' obligations to contribute. It contains several key limitations that are squarely contrary to any theory of "evergreen" or perpetual liability. First, Section (d) specifically requires contributions only by "each *signatory* Employer." (Emphasis supplied.) It makes no reference to former signatories. Second, by its terms the contribution requirement applies only "*[d]uring the life of this Agreement.*" NBCWA Article XX, § (d)(1) (emphasis supplied).[8] Third, the Wage Agreement later describes the contribution requirement in similar terms: "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.*" *Id.*, § (d)(7) (emphasis supplied). The Wage Agreement contains not the slightest hint that any of these obligations continued after the life of the agreement.

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[6] Although the UMWA recognized at the time that the specified contributions would be inadequate, it agreed to the reduced level only because it anticipated that the guarantee clause would assure the necessary level of funding.

[7] The precise wording varied slightly among the various trust documents, and reflected revisions from time to time to refer explicitly to the current NBCWA. agreement.

[8] Certain contributions were required for a shorter period of time, see, *e.g.*, Section(d)(1)(i) - (iv), but none extended beyond the NBCWA's termination date, specified in Article XXIX.

Moreover, the Wage Agreement's termination clause clearly indicates that the contribution obligation does not survive the expiration of the agreement. Article XXIX, governing termination of the Wage Agreement, makes a specific exception -- but only one -- for the continuation of health benefits. The termination clause specifies that in the event of an economic strike, employers must continue benefits for 30 days, after which time they must be paid for by the employees. See Art. XXIX. It is inconceivable that the termination provision would not also make an exception for former signatories who must still contribute to the benefit plans, if there were such an obligation. Instead, the "strike" provision states only that "[t]his paragraph shall survive the ***termination of the remainder of this Agreement*** and shall continue in effect until the purpose for which it was established is satisfied." (Emphasis supplied.)

In addition, the most reliable extrinsic evidence of the parties' intentions -- their conduct for most of the time since the birth of the "evergreen clause" in 1978 -- demonstrates that no one understood the "evergreen clause" or any part of the NBCWA itself to impose a perpetual obligation beyond the particular NBCWA to which an employer was signatory. In 1981, the Trustees of the UMWA benefit plans ruled that an employer's contribution obligation ends when it ceases to be a signatory to the NBCWA. Indeed, the Trustees refused to accept any contributions from employers until they submitted proof that they had signed the current NBCWA or a "me-too" agreement that adopted its terms. Absent such proof, the Trustees returned all contributions for any period after the previous NBCWA had expired. If those companies continued to be liable for contributions based solely on the evergreen clause, refusing to accept the money would have been a blatant breach of the Trustees' fiduciary duty to retirees and their dependents. In fact, however, the Trustees correctly determined that the contributions were not required by the Wage Agreement or the benefit trust documents. Only much later, amid greater labor strife over health and pension benefits, did the Trustees formulate their novel evergreen theory, as a way to broaden their contribution base.[9]

Because former signatories' obligations expired with expiration of the Wage Agreement to which they had been a signatory, no contributions would be required of them under succeeding Wage Agreements, regardless of the meaning of the "evergreen clause."

Even if the "evergreen clause" did impose an obligation to contribute to the funds in perpetuity, the Coal Act went far beyond that obligation by transforming a production-based contribution supporting a multi-employer system into one based on assignment of former employees to individual former employers. Under every NBCWA, contributions to the pension and benefit funds were based on bituminous coal production, measured either in tons produced or hours worked in production and related activities. There was no minimum or fixed contribution. As the federal government explained in a brief filed

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[9] The only decision upholding "evergreen" liability, *UMWA 1974 Pension v. Pittston Company*, 782 F. Supp. 658 (D.D.C. 1992), *aff'd*, 984 F. 2d 469 (D.C. Cir. 1993), did so against three companies still engaged in bituminous coal mining. Due to anomalous procedural circumstances in that case, the court initially decided it on cross motions for summary judgment with "virtually *no* evidence" from the defendants as to the meaning of the evergreen clause. Thus, for example, the court did not have before it the letters and policy statements showing the Trustees' longstanding practice of refusing to accept, let alone require, contributions from former signatories. The court also lacked affidavits which have now been submitted to it from the members of the BCOA Executive Committee, who reviewed and approved the terms of the 1978 NBCWA, which state that they never discussed, much less agreed to, an "evergreen" clause or any other perpetual obligation to contribute. This new evidence has now been submitted to the same district court in a number of subsequent "evergreen" liability cases consolidated before it. It is very questionable that the court can or will impose "evergreen" liability in these cases in the presence of a much more complete factual record on the history of the clause itself. In any event, all of the pending "evergreen" cases including the *Pittston* case have been referred by the court to mediation before a senior district judge.

against various former bituminous coal producers who were challenging the Coal Act Reachback:

> The evergreen clauses did not create any obligation to contribute for companies—such as plaintiffs—that left the coal mining industry because the Wage Agreements generally required contributions to the benefit plans on a per-ton-of-coal-mined and coal-miner-hours-worked basis. Any party who had ceased coal mining operations, such as plaintiffs, thus would no longer be obligated to make contributions.

Brief for the Secretary of Health and Human Services at 6-7, n.*, *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, ___ F.3d ___ (2nd Cir. 1995) (No. 94-6024) (citations omitted). Thus, if the Coal Act merely applied the NBCWA contribution formula to all past signatories, virtually none would owe any contributions.[10] Unfortunately, the Coal Act retroactively extended benefits liability to hundreds of companies that had left the bituminous coal industry.

B. The 1992 Coal Act Dramatically Rewrote the Obligations of Former Signatories, to the Direct Benefit of the BCOA Companies

As the preceding discussion makes clear, the Coal Act retroactively imposed obligations on the Reachback companies to finance the health benefits of tens of thousands of retired miners and their dependents. The contracts those former signatories had agreed to afforded no basis for the sweeping liability the Coal Act imposed.

As noted above, due to the unique nature of the coal industry retiree benefits were traditionally provided under a multi-employer system. As the federal court of appeals explained:

> The continual discovery of new coal mines and exhaustion of old ones leads to a very high turnover of employers in the coal industry. Because of this and the mobility of employees, labor and management in the industry have since 1950 worked out a means for assuring worker retirement benefits ***without linking specific workers to specific employers.*** They have done this through national, multi-employer agreements between the [UMWA] and a multi-employer association of coal producers, [the BCOA]. All coal companies that join the agreements pay into the same health and benefit funds at a specified rate per ton of coal produced, and all eligible employees receive benefits from those funds ***without reference to the employers they happen to be working for at the time of their retirement.***

Connors v. Link Coal Co., 970 F.2d 902, 903 (D.C. Cir. 1992) (emphasis supplied). In 1978, at the behest of the BCOA, the industry prospectively converted to a single-employer-plan system. Post-1975 retirees would be covered by benefit plans established by individual employers.[11] The pre-1976 retirees, however, remained on the multi-employer system under the 1950 Benefit Plan. Even after 1978, therefore, the pre-1976 retirees were not assigned to any particular employer.

In fiscal year 1992, the beneficiaries under the 1950 Benefit Plan, who were the collective responsibility solely of the companies that had joined the 1988 Wage Agreement, comprised more than 85% of the total beneficiaries of the UMWA plans

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[10] The Trustees of the UMWA funds do not appear to dispute this position. They have pressed evergreen claims only against companies that still mine bituminous coal, such as Pittston and Massey.

[11] Notwithstanding the BCOA's current posturing as protector of "orphan" retirees' benefits, in 1978 the BCOA wanted to rely exclusively on such plans for post-1975 retirees and leave "orphan" retirees entirely unprotected. The UMWA wisely insisted, however, that the 1974 Benefit Plan be retained to cover retirees of companies that left the bituminous coal business.

and accounted for 86% of the health benefit expenses. According to the June 22, 1995, Committee Print on the Coal Act, for fiscal 1992 the 1950 Fund had 97,599 beneficiaries and expenses of $208.8 million, whereas the 1974 Fund had 16,021 beneficiaries and $33.3 million in expenses. Because the beneficiaries of the 1950 Benefit Plan were not attributable to any particular employer, there could be no claim that any former signatory had "dumped" them on the 1950 Benefit Plan. Rather, they were, under the collective bargaining agreements since 1950, understood to be the responsibility of current signatories -- until, that is, the Coal Act arbitrarily assigned tens of thousands of them to the Reachback companies.

With respect to those beneficiaries, Reachback companies that signed the 1978 or later NBCWA are in no different position than companies that did not. As demonstrated above, nothing in any of the NBCWAs or plan documents assigned any responsibility to individual employers for those beneficiaries. Their only obligation was to contribute the necessary amount to fund the benefits during the life of the Wage Agreement or Agreements that they had signed. Once they ceased to be signatory, their obligations came to an end.

Only with respect to the post-1975 retirees and their dependents is there any argument that the beneficiaries are attributable to specific employers, based on the switch to a single-employer system in 1978. Yet even in that case, as demonstrated above, the former employers had no legal obligation after termination of the last Wage Agreement they had signed. The collective bargaining process had created the 1974 Benefit Fund as a multi-employer plan specifically to ensure that orphaned miners did not lose their benefits. The Coal Act, of course, changed that entirely by placing liability for those beneficiaries back on the Reachback companies.

The relatively small proportion of beneficiaries of the 1974 Benefit Fund also demonstrates that the problem beneficiaries being "dumped" on the 1974 plan, to the extent there was any problem at all, could have been easily resolved -- and in fact was -- through collective bargaining without any need for legislation. By the time of the Coal Act, the BCOA and the UMWA had adopted the 1988 NBCWA, which for the first time imposed withdrawal liability for health benefits on companies that sought to withdraw from the NBCWA system. See Art. XX, § (i). That provision would eliminate any concern that the 1974 Benefit Plan would be placed in a disadvantageous position through some companies' departure from the bituminous coal industry and therefore the multi-employer system.

Reflecting the BCOA's confidence that the problem had been solved, at the same time that the withdrawal provision was adopted, the BCOA again voluntarily agreed to guarantee the specified health benefits, including those for the relatively few post-1975 retirees and dependents attributable to companies that had not signed the 1988 NBCWA. Of course, this contractual resolution of the withdrawal liability issue did not deter the BCOA from seeking millions of dollars in additional savings through retroactive imposition of the single-employer assignment and funding mechanism mandated by the Coal Act.

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The most prevalent myth surrounding the 1992 Coal Act is that it did little more than hold former signatories of the national coal wage agreements to promises they made in the past. In fact, all of the Reachback companies complied with every contractual obligation with respect to health benefits when they chose not to sign further coal wage agreements. The Coal Act, however, dramatically rewrote those agreements retroactively to transfer the responsibility for tens of thousands of retirees from the current signatories to the NBCWA, especially the largest companies mining bituminous coal today, such as Peabody, Consolidation, and Cyprus Amax, to the Reachback companies. No act has shown less respect for freedom of contract and the collective bargaining process. These circumstances provide a compelling case for the complete repeal of the Reachback provisions of the 1992 Coal Act. At the very least, to the extent that a surplus exists in the Combined Fund, the Reachback companies should, as H.R. 1370 provides, be released from the legislative mandate of the Coal Act to subsidize the BCOA.

STATEMENT OF DAVID JAMISON
PRESIDENT OF UNITY REAL ESTATE CO.

My name is David Jamison. I am President of Unity Real Estate Company ("Unity"). Unity is a small Pennsylvania corporation that leases office space in a small building and operates a parking lot, both of which it owns. Unity employs two people: an officer (me) and a janitor.

In the Fall of 1993, the UMWA Combined Benefit Fund notified Unity that it was obligated to pay certain annual premiums as a consequence of the newly enacted Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"). The total premium, $266,839.92, was to be paid in twelve monthly installments of $22,236.66 each, with any delinquency subjecting Unity to penalty of over $7,000.00 per day.

Unity could not possibly pay this astounding new liability. Unity's average annual gross revenue is only approximately $55,000.00 per year. As a going concern, Unity's value would not exceed $85,000.00. Thus, Unity did not have sufficient cash to pay the initial $22,000.00 payment.

If it is enforced, the Coal Act will bankrupt Unity. There is no way Unity can pay the amounts assessed against it, and the Coal Act, as presently structured, permits no exception, even where, as here, it will destroy a Company.

This impact is particularly egregious given that Unity never engaged in the mining business, and the liability is premised solely on its affiliation with entities that legitimately ended their involvement in the mining industry decades ago.

Unity has two connections with the coal industry. In 1969, Unity merged with three inactive coal companies, one of which was South Union Coal Company, a Pennsylvania corporation incorporated in 1922 ("South Union-PA"). South Union-PA had operated coal mines in Pennsylvania between 1922 and 1940; and in West Virginia from 1943 to 1960. By 1961, however, all such operations were permanently terminated. Unity's only other contact with the coal industry was that in 1974, it incorporated a wholly owned subsidiary in West Virginia, also named South Union Coal Company ("South Union-WV"), to operate the mine formerly operated by South Union-PA. South Union-WV operated the mine until it filed for bankruptcy on June 26, 1981.

South Union-PA and South Union-WV were signatory to various National Bituminous Coal Wage Agreements while they were in operation. Ultimately, however, the Bankruptcy Court authorized South Union-WV to reject the last Agreement it signed (the 1981 Agreement) as of its effective date, approved an unrelated third-party's assumption of all of South Union-WV's assets and obligations.

Having had no contact with the coal industry since 1981, I was shocked to discover that the Coal Act, which was passed in 1992, required Unity to pay any amounts at all, let alone more than five times its annual gross revenue. Fortunately, the United States District Court for the Western District of Pennsylvania believes that the Coal Act is unconstitutional as applied to Unity, and issued a preliminary injunction restraining its enforcement.

Separate and apart from the legal arguments set forth in that decision, simple principles of fairness, equity, and justice demand some modification of the Coal Act by which Unity is relieved of these unbearable obligations. Even though entities that were affiliated with Unity formerly employed some UMWA miners that are continuing to receive health benefits, the undisputable fact of the matter is that the provision of such health benefits always has been, and still should be, part of the consideration for which a coal industry employer receives productive work from his employees. In that context, the cost of such health benefits reasonably can be passed on to the employer's customers, or otherwise accounted for in the trade-offs that go along with collective bargaining.

Unfortunately, Unity has no such options for dealing with these Coal Act obligations. Even assuming Unity could pay the initial payment, it could not pass these costs on to anyone else. Unity's office tenants and parking lot customers cannot reasonably be charged the exorbitant rates which would be required to pay for these Coal Act obligations. Likewise, Unity cannot reasonably reduce the wages and benefits of its two employees so as to enable it to pay these Coal Act obligations. Instead, the only option the Coal Act leaves Unity is to file for bankruptcy.

Fortunately, the District Court for the Western District of Pennsylvania has seen fit to prevent this from occurring. Hopefully, you too will recognize the injustice that is being done and modify the Coal Act in some way so as to allow Unity to remain a viable entity.

