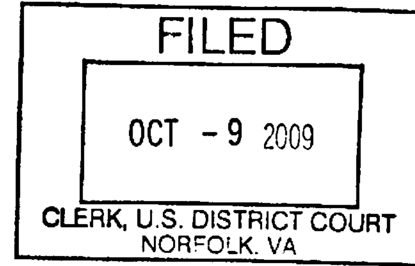
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division



BOARD OF TRUSTEES FOR THE HAMPTON ROADS SHIPPING ASSOCIATION - INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,

Plaintiff,

v. Civil Action No. 2:08cv229

DEBORAH MATHIS,

Defendant.

OPINION AND ORDER

Plaintiff, Board of Trustees for the Hampton Roads Shipping Association - International Longshoremen's Association ("Board of Trustees"), brings this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, against Defendant, Deborah Mathis ("Mathis"). As the fiduciary of the two employee benefit funds and pension plan at issue here, the Board of Trustees seeks to recover $91,979.29, plus interest, in payments Mathis received from the funds. Mathis has filed a counterclaim, seeking to enjoin the Board of Trustees from modifying her work credits under the pension plan.

The Court held a bench trial on February 4, 2009; closing arguments were held on April 30, 2009. For the reasons set forth herein, the Court FINDS that Plaintiff is not entitled to the relief requested in its Complaint and FINDS that Defendant is entitled to the relief requested in her Counterclaim.

I. FINDINGS OF FACT

The parties have stipulated many of the facts in this case in the final pretrial order. The Court has reviewed those stipulations and the exhibits entered into evidence at trial. Based upon that review, and based upon the credible evidence and the Court's assessment of the credibility of the witnesses, the Court FINDS the following facts:

A. The Collective Bargaining Agreements

The Hampton Roads Shipping Association ("HRSA") is an organization which represents the numerous employers in the longshore industry in the Port of Hampton Roads. The International Longshoremen's Association ("ILA") is a labor union with numerous local unions in the Port of Hampton Roads. From time to time, the HRSA and ILA meet to negotiate a number of collective bargaining agreements ("CBAs"). Employers and labor unions in the longshore industry first negotiate national CBAs, after which local employers and labor union locals negotiate local CBAs. The CBAs are in effect for a specified number of contract years. A contract year is from October 1 of one calendar year through September 30 of the next calendar year.

The HRSA and ILA negotiated a number of such local CBAs here. The relevant CBAs in effect during the contract years at issue in this case are:

1. The Hampton Roads *Freight Handlers' Agreement, Terminal Checkers' Agreement,*

Line Handlers' Agreement (October 3, 1996 through September 30, 2001).

2. The Hampton Roads *Clerks', Checkers', and Weighters' Agreement* and *Timekeepers' and Interchange Writers' Agreement* (October 3, 1996 through September 30, 2001 (extended by two years pursuant to an Extension Agreement executed October 21, 1993)).

3. The Hampton Roads *Clerks', Checkers' and Weighers' Agreement* and *Timekeepers' and Interchange Writers' Agreement* (October 1, 2004 through September 30, 2010).[1]

The CBAs create a "Contract Board." The Contract Board is made up of an equal number of ILA officials and HRSA member representatives. The Contract Board has the authority to "interpret" "all local contract provisions." The Contract Board "shall develop all necessary standards and policy with respect to the administration and implementation of the applicable contractual provisions." All decisions of the Contract Board are final and binding on all parties.

Section 24 of the local CBA provides for an Arbitration Committee to handle disputes arising out of or relating to the CBA. That section states that disputes should first be resolved at the job site, and if no resolution can be achieved within four hours, the dispute goes to the Arbitration Committee "automatically," and

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[1] Unless otherwise indicated, all further references to the CBAs refer to the Hampton Roads *Clerks', Checkers' and Weighers' Agreement* and *Timekeepers' and Interchange Writers' Agreement* (October 1, 2004 through September 30, 2010).

the Arbitration Committee must resolve the dispute within twenty-four hours. It is unclear, from the facts before the Court, whether the Arbitration Committee provided for in Section 24 actually exists.

The CBAs state that employees who receive temporary total or temporary permanent disability through workers' compensation shall receive pro-rata credit for purposes of determining eligibility for benefits. The pro-rata credit to be applied is determined by the terms of the CBA in effect during each calendar year.

During all of the years at issue in this case, the CBAs contained the following language in regard to the pro-rata credits to be applied to the work history of employees receiving workers' compensation benefits:

> [C]redit hours, as a result of an employee's receipt of Worker's Compensation, will be provided to qualify an individual for benefits equal to those qualified for in the immediate prior year. By mutual agreement of the parties, Compensation Units (CU's) will be generated from an employee's receipt of Worker's Compensation and allotted to individual employees for purposes of determining HRSA-ILA Benefit eligibility and for no other purpose. Weekly CU's will be applied, and will not exceed the duration of the period during which the employee receives Temporary Total or Temporary Partial Worker's Compensation Benefits. The application of CU's is restricted to eligibility for HRSA-ILA Fund benefits with the exception of the Annuity & Savings Plan as detailed below in such weekly amounts as are calculated to enable an individual receiving Temporary Total or Temporary Partial Worker's Compensation to qualify for the level of previous benefits

> while not exceeding the time on Worker's Compensation. The CU's apply to occupational disability for which the individual receives Worker's Compensation Benefits only and do not apply to any other form of disability or sickness. The Contract Board has appointed a committee to review the application of CU's on an annual basis and to make such CU allotments as are warranted.

Following negotiations between management and labor, Section Nos. 31, 32, and 33 of the local CBAs were amended and the following language was added to the new CBAs, which became effective on October 1, 2004 and continue through September 30, 2010:

> Notwithstanding the forgoing, the Trustees shall have the authority to review the substance of a settlement and their decision shall be final and binding.

B. The Funds and Pension Plan

Pursuant to the CBAs, a number of employee benefit plans and a pension plan have been created. Relevant to this case are the Container Royalty Fund No. 1 ("Container Fund"), the Vacation & Holiday Fund ("V&H Fund"), and the Pension Plan ("Pension Plan") (collectively, "the Funds").

ERISA requires all assets of each benefit plan to be held in trust by one or more trustees. 29 U.S.C. § 1103(a). The trustees must be named in the trust instrument or in the plan instrument. 29 U.S.C. § 1103(a). "[T]he trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan . . . ." 29 U.S.C. § 1103(a). Each of the agreements

creating the Funds provide for the establishment of a Board of Trustees. For each of the Funds, the Board of Trustees consists of fourteen members, seven appointed by the HRSA and seven appointed by the ILA. There is not a separate Board of Trustees for each of the Funds; rather, one Board of Trustees acts for all for the Funds. The Board of Trustees is a fiduciary of the Funds.

Each of the agreements creating the Funds allows the Board of Trustees to appoint an administrator to administer the Funds. Lewis Cobb ("Cobb") is the administrator of the Funds created by the HRSA and ILA and serves at the pleasure of the Board of Trustees. Cobb has been the administrator since 1988. His chief duties include collecting the contributions to the Funds and paying eligible employees benefits accrued under the Funds.

1. Container Fund

The Container Fund was established pursuant to a Memorandum of Agreement dated August 1, 1967 between labor and management in the longshore industry. The agreement has been supplemented and amended from time to time, including the most recent amendment dated September 26, 2001. The Container Fund is funded by contributions from shipping lines in an amount determined by the relevant CBA in effect between the HRSA and the ILA.

Eligibility to receive a Container Fund benefit depends upon whether or not an ILA or non-union employee qualified for such benefit by the preceding contract year ending on September 30th of

each year.

The Container Fund benefit may be earned by any ILA or non-union employee who, *inter alia*, receives temporary total or temporary partial workers' compensation.

The Container Fund Plan and Trust Agreement makes no reference to whether employees who receive temporary total or temporary partial workers' compensation benefits can receive Container Fund credits for those weeks during which they receive workers' compensation benefits.

The Container Fund Plan and Trust Agreement provides that "the [Board of] Trustees shall, on or before December 3 of each Contract Year, distribute the monies in the Fund on a pro-rata basis to the Eligible Employees; provided, however, that such distributions are subject to the Collective Bargaining Agreement and any limitation contained therein."

The Amended and Restated HRSA-ILA Container Royalty Fund No. 1 Plan and Trust Agreement, dated April 17, 2002, provides:

> In the event an Employee receives a payment from the Fund to which he is not entitled, he shall immediately repay the Fund such amount, plus interest (at the rate(s) determined by the Board [of Trustees]) from the date of receipt until such repayment.

The Container Fund Plan and Trust Agreement Section 4.4(a) grants the Board of Trustees the power to "determine in their sole discretion all questions of coverage and eligibility, methods or providing or arranging for provisions for benefits and all other

related matters."

The Container Fund Plan and Trust Agreement makes no mention of a Contract Board.

2. The V&H Fund

The V&H Fund provides to eligible members the holidays contained in the CBAs and vacation time. The V&H Fund is a welfare plan and an irrevocable trust as authorized by § 302(c) of the Labor Management Relations Act. It was established by Agreement dated December 1, 1982 between the HRSA and the ILA, pursuant to the terms of a CBA, to administer vacation and holiday benefits for eligible employees in the longshore industry.

Eligibility to receive V&H Fund benefits depends upon whether an ILA or nonunion employee qualified for such benefit by the preceding contract year ending on September 30th of each year.

The V&H Fund benefit may be earned by any ILA or non-union employee who, *inter alia*, receives temporary total or temporary partial workers' compensation credits. The V&H fund agreement states that employees who receive temporary total or temporary partial workers' compensation benefits will only receive V&H Fund benefits for those weeks during which they receive workers' compensation benefits. Specifically, section 3.4(b) of the Vacation & Holiday Fund Agreement provides:

> employees who are unable to work in all or part of the Eligibility Year by reason of sickness, injury or disability and who receive temporary total or temporary partial worker's

> compensation shall receive pro-rata credit for purposes of determining eligibility at the rate necessary to continue the Employee's benefits at the same level as in existence during the year immediately prior to the year in which the sickness, injury or disability occurs, in accordance with the schedule attached hereto as Appendix A. The compensation levels set forth in Appendix A may be modified from time to time pursuant to the Collective Bargaining Agreement.

Appendix A of the V&H Fund sets forth a Schedule showing that compensation or credit units are awarded based on the number of hours worked in the contract year immediately preceding the contract year for which the employee receives temporary total or temporary partial workers' compensation benefits. Neither section 3.4 nor "Schedule A" make reference to the dollar amounts of compensation received.

The V&H Fund agreement also provides, in section 4.5(a), that the Board of Trustees:

> shall have the sole and absolute discretionary authority:
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> (1) To take all actions and make all decisions with respect to the eligibility for, and the amount of, benefits payable under the Fund;
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> (2) To fomulate, interpret, and apply rules, regulations, and policies necessary to administer the Fund accordance [sic] with its terms;
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> (3) To decide questions, including legal or factual questions, relating to the determination and payment of benefits under the Fund;
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> (4) To resolve and/or clarify any ambiguities,

> inconsistencies, and omissions arising under this Agreement or other Fund documents; and
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> (5) Except as specifically provided to the contrary in Section 5.2, to process, approve or deny benefit claims and rule on any benefit exclusions.

The V&H Fund agreement makes no mention of a Contract Board.

3. The Pension Plan

The Pension Plan was established on January 1, 1950 and was amended and restated numerous times. The current Pension Plan was amended and restated effective October 1, 2001.

Article IV of the Pension Plan sets forth the requirements for vesting. Section 4.1(d)(2) is similar to the previously cited provisions in the V&H Fund in that it provides that employees who receive temporary total or temporary partial workers' compensation benefits "shall receive credit hours for the purpose of determining benefits under this Plan at the rate necessary to qualify the Employee for benefits equal to those for which the Employee qualified in the immediate prior year."

Section 6.11 of the Pension Plan contract sets forth the procedure for claims of benefits under the Pension Plan. The Plan Administrator makes the initial decision with respect to claims for benefits. If the administrator denies the claim, the claimant can appeal his decision to the Board of Trustees. If the Board of Trustees also denies the claim, the Pension Plan contract states that claimant may appeal again:

> If the Participant submits an appeal, his or her union representative must file the appeal with the Arbitration Committee established by the [HRSA-ILA], as provided for in the Collective Bargaining Agreement. The Arbitration Committee will consider the appeal and all decisions reached by the Arbitration Committee are final and binding on the Participant and all other parties.

Section 7.1 of the Pension Plan contract governs amendments to the Pension Plan:

> The Board [of Trustees] shall have authority to review all of the provisions of the Plan that are not specifically excluded herein from review, and to make such changes, modifications and amendments to the Plan as the Board shall deem desirable; provided that accrued benefits . . . shall not be reduced, eliminated or made subject to employer discretion except to the extent permitted by regulations under the Code [of Virginia] or ERISA.

Further, section 6.2(b)(1) of the Pension Plan contract grants the Board of Trustees the power to "make and enforce bylaws for its own governance and such rules and regulations as it shall deem necessary and proper for the efficient operation of the Plan, and to decide such questions as may arise in connection with the operation of the Plan." Additionally, section 6.2(a) provides that the Board of Trustees "shall have powers to construe the terms of the Plan and to determine all questions that may arise thereunder. It shall determine all questions relating to the eligibility of Employees to participate in the Plan and the amount of retirement allowance or other benefits to which any Participant, Beneficiary,

or annuitant may become entitled hereunder."

The Pension Plan contract makes no mention of a Contract Board.

B. Mathis's Injury and "Creative Compensation"

Mathis was a member of various ILA locals, including Local 1458 and Local 1624. As an employee in the industry and as provided by the relevant CBAs, she was and is a potential participant and potential beneficiary of the various employee benefit funds and plans established pursuant to agreements between management and labor in the longshore industry. Following injuries in 1997 and 1999 while working for her employer, Virginia International Terminals ("VIT"), Mathis entered into workers' compensation settlements and received temporary partial disability benefits from October 18, 1997 through September 30, 2007.

Mathis was injured twice, once on or about October 18, 1997, and once on or about October 22, 1999, while working for VIT.[2]

Following the 1997 injury, Mathis entered into a workers' compensation benefit settlement and received temporary partial disability benefits from October 18, 1997 through September 30, 2001.

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[2] There is some confusion regarding the dates of Mathis's injuries, as the dates indicated in the parties' stipulated facts contradict the dates in the exhibits admitted into evidence. Mathis further testified that her injuries were cumulative, so indicating a precise date may be futile. Regardless, the precise dates of Mathis's injuries are not material to the disposition of this case.

Following the 1999 injury, Mathis entered into a workers' compensation benefit settlement for temporary partial disability. Attorney Charles Montagna ("Montagna") represented Mathis in the settlement proceedings. An administrative law judge ("ALJ") issued an order approving the terms of the settlement on March 20, 2002. In his order, the ALJ ordered VIT to pay Mathis a lump sum of $81,500.20 in compensation and benefits.

Montagna, however, had structured the settlement agreement differently. Rather than have Mathis receive a lump sum payment for compensation, Montagna structured the compensation award of $81,500.20 to be spread out in small payments over a number of years. According to the settlement, Mathis was to receive $68.63 per week from roughly October 18, 1997 through September 30, 2001, and $195.89 per week from October 1, 2001 through September 30, 2007. These payments totaled $71,000.20 (which equals $81,500.20 less lump sums of $500 for medical benefits and $10,000 for Montagna's fees). Mathis became eligible for retirement benefits on September 30, 2007. This payment structure was later to be called "creative compensation."

Noting that the ALJ had ordered VIT to pay Mathis a lump sum, Montagna corresponded with the ALJ, with no objection from VIT, to have the order amended to correctly reflect the terms of the settlement agreement. The ALJ issued the final corrected order, reflecting the method of payment of compensation set forth in the

settlement agreement, on April 10, 2002.

Pursuant to that order, Mathis received temporary partial disability benefits in accordance with the terms of the settlement, receiving weekly payments through September 30, 2007.

Mathis testified to the effect that she was "temporarily" disabled rather than permanently disabled because she hoped she would be able to return to work. From the date of her injury through September 30, 2007, however, Mathis remained disabled and unable to work. She continued to be a member of her local union and pay her union dues. She also received benefits through her membership in the local union.

Following Mathis's injury and the award of workers' compensation benefits, VIT's workers' compensation insurance carrier, Abercrombie, Simmons & Gillette ("Abercrombie"), reported to the Board of Trustees that Mathis was receiving workers' compensation payments for her temporary partial disability. Ambercrombie sent such reports on a monthly basis throughout the time Mathis received workers' compensation payments. The reports indicated Mathis was receiving workers' compensation payments for temporary partial disability but did not indicate the dollar amount of the payments.

Pursuant to the funds in force at the time, Mathis received benefits from the Container Fund and the V&H Fund during her periods of disability based upon her receipt of temporary partial

workers' compensation benefits.

Mathis received Container Fund benefit payments in the following amounts:

1. $8,623.78 for the 2000 contract year.

2. $8,557.42 for the 2001 contract year.

3. $8,322.75 for the 2002 contract year.

4. $8,107.14 for the 2003 contract year.

5. $7,946.53 for the 2004 contract year.

6. $8,430.29 for the 2005 contract year.

7. $9,850.58 for the 2006 contract year.

Mathis received V&H Fund benefit payments in the following amounts:

1. $4,067.20 for the 2000 contract year.

2. $4,315.20 for the 2001 contract year.

3. $4,513.60 for the 2002 contract year.

4. $4,712.00 for the 2003 contract year.

5. $4,712.00 for the 2004 contract year.

6. $4,910.40 for the 2005 contract year.

7. $4,910.40 for the 2006 contract year.

There is no evidence in the record whatsoever regarding what Mathis did with these funds.[3]

C. Response to Creative Compensation

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[3] It was suggested at closing arguments that she deposited the funds into a local bank account. The Court, however, has no actual evidence of this.

Because employees who receive temporary total or temporary partial workers' compensation receive eligibility credits to qualify for benefits under the Funds, employers are supposed to send Cobb reports every so often notifying Cobb which of its employees are currently receiving workers' compensation and the type of workers' compensation being received. From Cobb's testimony, it appears that employers would either send Cobb monthly or quarterly reports containing that information. Until 2007, it was not Cobb's policy to require employers to state the average weekly wage being paid to the employee during the time the employee received workers' compensation. Some employers would nevertheless include that information on their reports, while some would not; Cobb testified he "was not particularly concerned."

When an employee's workers' compensation period ended, the employer would send Cobb a copy of the LS-208 form, entitled, "Notice of Final Payment or Suspension of Compensation Payments." The LS-208 indicates the weekly compensation for the employee and the total amount of workers' compensation paid.

At some point in late 2003 or early 2004, Cobb learned of the existence of a number of cases of what he would later call creative compensation settlements. That is, some workers' compensation settlements were being structured to extend the term of workers' compensation over a number of years at a very small weekly

compensation rate.[4] Such compensation settlements had the effect of depleting the Funds because the employee receives benefits and credits under the Funds while receiving workers' compensation but the employer does not make any contributions to the Funds during that time, as the employee is not working.

Cobb then advised the Board of Trustees of the issue, presenting a number of examples. In January 2004, the Board of Trustees referred the issue to the Contract Board for review.

The Contract Board held a meeting on March 16, 2004. At that meeting, the Contract Board ruled that the existing known cases of creative compensation would be honored according to their settlement agreements. There were thirteen known cases of creative compensation at that time. The Contract Board referred the issue of what action should be taken with respect to any future creative compensation settlements to the Worker's Compensation Committee.

The Worker's Compensation Committee submitted a report to the Contract Board, which the Contract Board discussed at its September 28, 2004 meeting. At that meeting, the Contract Board ruled: "For compensation settlements, credits shall be awarded on a dollar basis (rather than a time basis) based on the Average Weekly

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[4] By way of reference, 33 U.S.C. § 908 provides that employees receiving temporary partial or temporary total workers' compensation are to be paid at a compensation rate of two-thirds their average weekly wage during the period of workers' compensation.

Wage."[5]

At around the same time, HRSA and ILA representatives were negotiating new local CBAs. New language, giving the Board of Trustees the authority to review the substance of workers' compensation settlements, was added to the new CBAs, which became effective on October 1, 2004 and continue through September 30, 2010. Cobb testified that this change, to his knowledge, was prompted at least in part by the discovery of creative compensation settlements.

There is no evidence in the record that Cobb took any action to discover the existence of any other such settlements until 2007. Cobb knew that the reports from employers notifying Cobb about which employees were receiving workers' compensation often did not contain the amount of the workers' compensation payments. The payment amount was often only discovered by Cobb when the period of workers' compensation ended and Cobb received the LS-208 for the

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[5] For example, as the Court understands it, if the compensation rate pursuant to 33 U.S.C. § 908 would normally be $500 per week (if no settlement had been entered into), and the employee only received $250 per week (but for twice as long), that employee's credits would be reduced by half.

Furthermore, the Court notes that the only evidence before the Court of the Contract Board's ruling is a letter sent by a member of the Contract Board, Roger J. Giesinger, to Cobb, indicating as much. The Court neither has before it any minutes of the meeting in question nor any other documentation regarding the Contract Board's existence. As is clear from the facts before the Court, there is a stunning lack of recordkeeping concerning the Contract Board and its actions, the Board of Trustees and its actions, the so-called Arbitration Committee and its alleged actions, and Cobb's duties and actions as administrator of the Funds.

employee. Despite knowing of the existence of thirteen creative compensation settlements, Cobb did not create any policy requiring employers to include on their regular reports the amount of workers' compensation being paid until October 2007, when Cobb received Mathis's LS-208. That is, rather than prevent the Funds from becoming depleted further, for years Cobb did nothing to discover whether more creative compensation settlements existed, despite the substantial likelihood that he would discover such settlements if he chose to inquire. Instead, Cobb chose to wait until the period of workers' compensation ended - until he received LS-208s indicating whether the employee was receiving payments pursuant to a creative compensation settlement - and only then chose to attempt to collect the allegedly erroneously paid Fund benefits.

There is also no evidence that anyone told Mathis about the Contract Board's 2004 ruling until Cobb wrote Mathis a letter on October 2, 2007, demanding the return of the money Mathis received from the Container and V&H Funds pursuant to her settlement. Mathis's union representative, however, sits on the Contract Board.

D. Mathis's Work History is Amended and the Board of Trustees Demands Repayment

Meanwhile, Mathis continued to receive workers' compensation payments and was unable to return to work. Cobb knew Mathis was receiving workers' compensation during this time.

Nearly three full years after the Contract Board made its

ruling regarding creative compensation, Mathis applied to the Board of Trustees for disability pension by letter dated September 4, 2007. Upon receipt of the application, Cobb contacted VIT or its workers' compensation carrier to request documentation so he could compute Mathis's eligibility for disability pension payments.

In response, on or about October 2, 2007, Cobb received Mathis's LS-208 form, which indicated that Mathis received workers' compensation benefits, totaling $68.63 per week from October 18, 1997 through September 30, 2001 and $195.89 per week from October 1, 2001 through September 30, 2007.

Upon receipt of the LS-208, Mathis's work history was retroactively amended to remove certain workers' compensation credits for the 2000, 2001, 2002, 2003, 2004, 2005, and 2006 contract years. The amendments were made pursuant to the Contract Board's ruling.

Based on the adjustment of Mathis's workers' compensation credits, the Board of Trustees determined that Mathis was not eligible for Container Fund and V&H Fund benefits paid to her for the 2000, 2001, 2002, 2003, 2004, 2005, and 2006 contract years.

By letter dated October 2, 2007, the Board of Trustees provided notice and demanded from Mathis payment in the sum of $59,838.49 for overpaid Container Fund benefits and $32,140.80 for overpaid V&H Fund benefits, which amounts Mathis has not paid to the Board of Trustees.

Cobb also deemed Mathis ineligible for disability pension based upon the retroactive modification of her work history. Prior to such modification, Mathis had fifteen credits and would have been eligible for disability retirement. Following the retroactive modification of her work history, seven Pension credits were removed from her work history.

Mathis appealed the denial of her disability retirement to the Board of Trustees. The Board of Trustees denied her appeal.

Mathis was advised she could appeal the Board of Trustees' decision to the "Trustee Arbitration Committee" of the HRSA-ILA "as provided in the Collective Bargaining Agreement." The Pension Plan contract provides for such an appeal. The CBAs, however, do not speak of any "Trustee Arbitration Committee."

Apparently, however, some kind of arbitration committee exists. Cobb testified that the Contract Board created a "trustee arbitration committee" in 1999. It was originally called the "delinquency arbitration committee." At first, Cobb testified, it heard only "delinquencies" - "where employers or carriers were not paying assessments." The Contract Board later expanded it to hear appeals regarding medical benefits "and any other appeal beyond the Board of Trustees level." Cobb further testified that the Contract Board created the committee pursuant to the CBAs. Cobb is not a member of the Contract Board. There is no documentation of any such arbitration committee in the record in this case.

Neither Mathis nor her union representative has appealed the Board of Trustees' decision.

II. DISCUSSION

Ascertaining the true nature of the claims in the Complaint is determinative to the outcome of this case.

In its Complaint, the Board of Trustees sets forth three counts. All three counts seek the same relief: repayment of the money Mathis received from the Container Fund and the V&H Fund for the 2000 through 2006 contract years. Counts I and II are styled as breach of contract claims for the Container Fund and the V&H Fund, respectively. Count III is styled as an unjust enrichment and restitution claim for both the Container Fund and the V&H Fund.

The Court notes it has jurisdiction pursuant 29 U.S.C. § 1132(e), as the Board of Trustees brings this action in its capacity as a fiduciary of ERISA plans pursuant to 29 U.S.C. § 1132(a)(3).

A. Relief Available to the Board of Trustees

1. State Law Claims Preempted

"The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. To this end, ERISA includes expansive pre-emption provisions which are intended to ensure that employee benefit plan regulation would be exclusively a federal concern." Aetna Health, Inc. v. Davila, 542 U.S. 200, 208 (2004) (citations and quotations omitted). ERISA also contains an

explicit preemption provision: "[T]he provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a). Thus, "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." Davila, 542 U.S. at 209. See also Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) (noting that ERISA's civil enforcement scheme would be "completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA," and stating that the "deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive"), abrogated in part on other grounds by Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003); Gresham v. Lumbermen's Mut. Cas. Co., 404 F.3d 253, 258 (4th Cir. 2005) ("Generally, when a state law claim may fairly be viewed as an alternative means of recovering benefits allegedly due under ERISA, there will be preemption.").

In its Complaint, the Board of Trustees alleges two breach of contract claims and an unjust enrichment and restitution claim. To the extent that the Board of Trustees alleges unjust enrichment

under a state law cause of action, that claim is clearly preempted. Provident Life & Accident Ins. Co. v. Waller, 906 F.2d 985, 990 (4th Cir. 1990) ("The Supreme Court has interpreted [29 U.S.C. § 1144(a)] to preempt state common law contract and tort claims because they 'relate to' an employee benefit plan . . . and we cannot see how a different result could ensue from a claim for unjust enrichment.") (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987)). Further, to the extent that Plaintiff alleges breach of contract claims under state law, those claims are preempted as well. The contracts in question - the Container Fund and the V&H Fund - are contracts within the scope of ERISA, and thus "clearly relate to [an] employee benefit plan" under ERISA. 29 U.S.C. § 1144(a). See also Board of Trustees for the Hampton Roads Shipping Association-International Longshoremen's Ass'n v. Ransone-Gunnell, No. 2:09cv165, slip op. at 6-8 (E.D. Va. July 16, 2009) (holding that ERISA preempts state law causes of action for breach of contract); Board of Trustees for the Hampton Roads Shipping Association-International Longshoremen's Ass'n v. Stokley, 618 F. Supp. 2d 546. 552-53 (E.D. Va. 2009) (same).

2. The Board of Trustees May Not Assert a Cause of Action for Unjust Enrichment under Federal Common Law

Count III of the Complaint seeks relief upon a theory of unjust enrichment and restitution. Specifically, the Board of Trustees alleges that the payments to Mathis at issue in this case "constitute inappropriate overpayments under the plans for which

the Board [of Trustees] has a fiduciary obligation to recover," and that Mathis must repay the sums requested because she has been unjustly enriched by money that in good conscience belongs to the Board of Trustees. Compl. ¶ 49.

In Waller, the Fourth Circuit created a federal common law cause of action for unjust enrichment in certain ERISA cases. 906 F.2d at 993. In that case, the plaintiff, the administrator of an ERISA plan, asserted federal jurisdiction under ERISA's enforcement section, § 502(a)(1)(B), codified at 29 U.S.C. § 1132(a)(1)(B). Id. at 987. Because "§ 1132(a)(1)(B) does not provide a federal cause of action for plan administrators," the court held that the plaintiff could not seek relief under ERISA. Id. The court held that the plaintiff could nonetheless invoke federal jurisdiction, however, because the court created a federal common law cause of action of unjust enrichment. Id. at 988. This cause of action was grounded in 28 U.S.C. § 1331 - the basic federal question jurisdiction statute. Id. The court found that such a cause of action for unjust enrichment exists when (1) the remedy would further the contract between the parties and (2) the remedy would further the purposes of ERISA. See id. at 993. In Waller, the plan provided for repayment of the advanced monies to the beneficiary if they were advanced in error; thus, creating an unjust enrichment cause of action would further the terms of the contract between the parties. Waller, 906 F.2d at 993.

The case law since Waller was decided, however, raises serious doubts about whether Waller remains good law and whether there still exists a federal common law cause of action for unjust enrichment in the ERISA context.

The Fourth Circuit revisited Waller in the 2005 case of Provident Life & Accident Ins. Co. v. Cohen, 423 F.3d 413 (4th Cir. 2005). The court noted that, since Waller was decided, it became settled law that a plan administrator was a fiduciary under § 1132(a)(3) and could bring suit under that section. Id. at 424. The court also surveyed the case law since Waller and concluded that finding a federal common law cause of action for unjust enrichment would be inappropriate where Congress, by enacting ERISA, provided a comprehensive enforcement scheme. See id. at 424-25 ("Because ERISA affords [the plaintiff] an avenue of relief, this court cannot fashion some additional cause of action or avenue of relief under the federal common law."). Even though it suggested Waller was no longer good law, the court in Cohen declined to overrule Waller, as one panel cannot overrule another panel. Id. at 426 (citing United States v. Prince-Oyibo, 320 F.3d 494, 498 (4th Cir. 2003)). Instead, Cohen distinguished Waller on the facts. Whereas the plan in Waller provided for repayment of the advanced monies to the beneficiary if they were advanced in error, Waller, 906 F.2d at 993, in Cohen, the plan was silent regarding whether the plaintiff should be reimbursed if benefits

were paid erroneously; thus, the Cohen court found, allowing the plaintiff to proceed on a cause of action for unjust enrichment would not further the contract between the parties. Cohen, 423 F.3d at 426.

In addition to the Fourth Circuit's ruling in Cohen, the United States Supreme Court has "observed repeatedly that ERISA is a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209 (2002) (quotation marks omitted). "ERISA provides nine civil enforcement provisions, which specifically identify who may bring suit and what relief is available under benefits plans subject to the statute." Cohen, 423 F.3d at 424. These enforcement provisions "constitute an 'interlocking, interrelated, and interdependent remedial scheme.'" Id. (quoting Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985)). Accordingly, courts should be "reluctant to tamper with the enforcement scheme embodied in the statute by extending remedies not specifically authorized by its text." Knudson, 534 U.S. at 209 (quotation marks omitted).

In Knudson, the Supreme Court analyzed what type of relief may be sought by fiduciaries pursuant to § 502(a)(3) of ERISA. That section provides:

> A civil action may be brought . . . by a . . . fiduciary (A) to enjoin any act or practice

> which violates . . . the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of the plan.

29 U.S.C. § 1132(a)(3). In analyzing that section, the Supreme Court provided an in depth analysis of what constitutes "equitable relief" and held that fiduciaries suing under § 502(a)(3) of ERISA can only seek relief that is equitable in nature. Knudson, 534 U.S. at 221. In so finding, the Court noted:

> In the very same section of ERISA as § 502(a)(3), Congress authorized "a participant or beneficiary" to bring a civil action "to enforce his rights under the terms of the plan," without reference to whether the relief sought is legal or equitable. 29 U.S.C. § 1132(a)(1)(B) (1994 ed.). But Congress did not extend the same authorization to fiduciaries. Rather, § 502(a)(3), by its terms, only allows for equitable relief. We will not attempt to adjust the "carefully crafted and detailed enforcement scheme" embodied in the text that Congress has adopted.

Id. at 220-21 (citation omitted).

Given the facts here, the Court finds that even if Waller remains good law, no federal common law cause of action for unjust enrichment may be asserted by the Board of Trustees. The case law since Waller makes this clear. Waller created a federal common law cause of action for a plaintiff who, under the law as interpreted at the time, possibly had no cause of action to sue under § 502(a)(3) of ERISA, because there was doubt whether plan administrators were fiduciaries. See Waller, 906 F.2d at 988 n.6.

Because it is now clear that plan administrators are fiduciaries, see Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 379 (4th Cir 2001), there is no need to supplement the avenues of relief provided for fiduciaries, such as Plaintiff, that Congress provided in § 502(a)(3) of ERISA. Furthermore, "although the Supreme Court has approved of the development of a federal common law under ERISA . . . , the Court has carefully admonished that, in so doing, courts may not create remedies under the federal common law beyond those Congress has seen fit to enact." Cohen, 423 F.3d at 425 (citing Russell, 473 U.S. at 146); see also Rego v. Westvaco Corp., 319 F.3d 140 (4th Cir. 2003) (declining to recognize a federal common law cause of action by a beneficiary for breach of fiduciary duty and negligent misrepresentation when "Congress clearly contemplated plaintiffs like [the beneficiary] and explicitly created remedies for them within the text of the statute itself"); Pacificare Inc. v. Martin, 34 F.3d 834, 836 (9th Cir. 1994) ("The federal common law that the Court envisioned relates to rights and obligations under the ERISA plan and not to causes of action. . . . Claims relating to ERISA plans must therefore invoke the specific remedies of ERISA.") (citation, footnote, and internal quotations omitted).

Accordingly, Plaintiff may not seek recovery based upon a theory of unjust enrichment under federal common law because it is limited to seeking relief pursuant to the civil enforcement

provisions set forth in § 502(a)(3) of ERISA. Specifically, Plaintiff may seek "equitable relief" pursuant to that section. See Knudson, 534 U.S. at 221.

B. The Board of Trustees Do Not Seek Equitable Relief

Having found that the Board of Trustees may only seek relief available to it under ERISA's civil enforcement provision, the question remains whether the relief the Board of Trustees seeks here - return of monies paid to Mathis, allegedly in error, from the Container Fund and V&H Fund - can be sought under ERISA. For the following reasons, the Court holds that the Board of Trustees cannot seek such relief based upon the facts before the Court.

Section 502(a) of ERISA contains ERISA's comprehensive civil enforcement scheme. That section authorizes a civil action to be brought by a fiduciary to obtain "equitable relief." 29 U.S.C. § 1132(a)(3). The Board of Trustees is a fiduciary under the Funds and thus may seek relief pursuant to this section. The issue is whether the relief the Board of Trustees seeks is truly "equitable."

In Knudson, the Supreme Court, delineating with great precision what distinguishes equitable relief from legal relief, held that an ERISA plan fiduciary may only seek equitable relief under § 502(a)(3) of ERISA. In so doing, the Court noted that restitution is a remedy both at law and in equity. Knudson, 534 U.S. 213. "[F]or restitution to lie in equity, the action

generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." Id. at 214. Historically, "a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." Id. at 213 (citing Restatement of Restitution § 160 cmt. a (1936)) (first emphasis in original, second emphasis added). "But where the property sought to be recovered or its proceeds have been dissipated so that no product remains, the plaintiff's claim is only that of a general creditor, and the plaintiff cannot enforce a constructive trust or an equitable lien upon other property of the defendant." Id. (citing Restatement of Restitution § 215 cmt. a) (quotation marks omitted). "In such cases, the plaintiff's claim was considered legal because he sought to obtain a judgment imposing merely personal liability upon the defendant to pay a sum of money." Id. (citing Restatement of Restitution § 160 cmt. a) (quotation marks omitted).

Because equitable restitution seeks recovery of specifically identifiable property, the need to trace the property becomes apparent. See id. (stating that the property sought in relief must "clearly be traced to particular funds or property in the

defendant's possession"). The Supreme Court outlined the extent of the tracing requirements for § 502(a)(3) claims in Sereboff v. Mid Atlantic Medical Services, Inc., 547 U.S. 356 (2006), and intoned, generally, that strict tracing rules apply. See id. at 363-68. That is, where the plaintiff seeks an equitable lien as a matter of restitution, the property at issue must be able to be clearly traced from the plaintiff's possession to the defendant's current possession. The Court noted, however, that this strict tracing rule does not apply in the context of an "equitable lien by agreement." Id. at 366. The Court cited Barnes v. Alexander, 232 U.S. 117 (1914), for "the familiar rule of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing." Id. at 363-64. In Barnes, the Court held that when one attorney, Barnes, promised two other attorneys, Street and Alexander, "one-third of the contingent fee" he expected in a case in which Street and Alexander had performed work, an equitable lien by agreement arose over the one-third of the contingent fee in favor of Street and Alexander "as soon as [the fund] was identified." Barnes, 232 U.S. at 121, 123. In such cases, there is no need to trace the property from the original (non-plaintiff) source; rather, tracing is only required once the fund can be identified.[6]

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[6] Since Sereboff, courts have split over whether Sereboff eliminated all tracing requirements for equitable liens by agreement. For a thorough discussion, see this Court's opinion in

Accordingly, for the Board of Trustees to seek appropriate relief under § 502(a)(3) of ERISA, the Board of Trustees must (1) identify specific property, (2) currently in Mathis's possession, (3) that in good conscience belongs to the Board of Trustees , and (4) can be clearly traced from the Board of Trustees' possession to Mathis's current possession.

The Board of Trustees' claims fail because there is no evidence that the monies sought to be recovered - $59,838.49, plus interest, from the Container Fund, and $32,140.80, plus interest, from the V&H Fund - are still in Mathis's possession. There is no evidence in the record whatsoever regarding what Mathis did with the checks she received from these funds - whether she put them in a bank or cashed the checks and spent the money. The Board of

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Ransone-Gunnell, No. 2:09cv165, slip op. 15-16 n.10. As that opinion indicates, it is apparent that tracing is still required - not from the original source of the funds, but from when the funds become specifically identifiable. In that way, the plaintiff does not have the difficult task of tracing funds from a third-party source - a task not present where an equitable lien by restitution is asserted because the property sought in those situations originates from the plaintiff. Furthermore, not requiring tracing in the equitable lien by agreement context would destroy "the distinction between law and equity discussed at length in Knudson and Sereboff." Id. ("Without requiring forward tracing, a fiduciary would in essence be able to recover from a plan participant's assets generally simply because, at some point in the past, it possessed an equitable lien over specifically identifiable property.").

In any case, Plaintiff specifically stated in closing arguments that Plaintiff does not assert that an equitable lien by agreement exists here. The Court therefore considers any argument to the effect that an equitable lien by agreement exists in this case to be waived.

Trustees argued in closing arguments that the checks were deposited in a bank account under Mathis's name and that the Court should impose a lien upon that account. The record contains no evidence that Mathis deposited the checks into a specific bank account. Nor does the record indicate that any such money, if so deposited, remains in the account. For these reasons, the Board of Trustees cannot prove that Mathis still possesses the property sought to be recovered and cannot trace the checks at issue to any property now within Mathis's possession. Accordingly, it is quite clear to the Court that the Board of Trustees seeks "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money," because where, as here, "the property sought to be recovered or its proceeds have been dissipated so that no product remains, [the Board of Trustees'] claim is only that of a general creditor, and [the Board of Trustees] cannot enforce a constructive trust of or an equitable lien upon other property of" Mathis. Knudson, 534 U.S. at 213-14 (citations and quotation marks omitted).

Therefore, the Court FINDS for Mathis as to Counts I, II, and III of the Board of Trustees' Complaint, and DISMISSES the Board of Trustees' Complaint in its entirety.

C. Mathis's Counterclaim

Mathis has asserted a counterclaim against the Board of Trustees. In her counterclaim, Mathis pleads that the Contract

Board's ruling is legally void and that, even if it were valid, it would violate ERISA's anti-cutback provision. Mathis seeks to recover pension fund benefits due to her under the Pension Plan and to enjoin the Board of Trustees from taking any action that would violate ERISA or the terms of the Pension Plan.

1. Exhaustion of Administrative Remedies

A beneficiary of an ERISA-governed plan must first exhaust her administrative remedies before filing suit under § 502(a)(1)(B) of ERISA. LaRue v. DeWolff, Boberg & Associates, Inc., 128 U.S. 1020, 1027 (2008) (Roberts, C.J., concurring) ("Among these safeguards is the requirement, recognized by almost all the Courts of Appeals, . . . that a participant exhaust the administrative remedies mandated by ERISA § 503, 29 U.S.C. § 1133, before filing suit under § 502(a)(1)(B).") (citation omitted); 29 U.S.C. § 1133 ("In accordance with regulations of the Secretary, every employee benefit plan shall . . . (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.").

The Board of Trustees argues that Mathis did not exhaust her administrative remedies before filing her counterclaim because she did not appeal the Board of Trustees' decision against her to the arbitration committee. There is no merit to this argument.

The applicable ERISA provision requiring a review procedure,

and thus mandating exhaustion of administrative remedies, speaks of review <u>by the fiduciary</u> of the plan. 29 U.S.C. § 1133 ("In accordance with regulations of the Secretary, every employee benefit plan shall . . . (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a <u>full and fair review by the appropriate named fiduciary</u> of the decision denying the claim.") (emphasis added). Here, Mathis sought review of the initial decision denying her claim with the Board of Trustees. Mathis therefore complied with 29 U.S.C. § 1133, and her claim is therefore exhausted. Mathis additionally had no contractual duty to appeal the Board of Trustees' decision.

Section 6.11 of the Pension Plan agreement sets forth the procedure for claims of benefits under the Pension Plan. The Plan Administrator, Cobb, makes the initial decision with respect to claims for benefits. If Cobb denies the claim, the claimant can appeal Cobb's decision to the Board of Trustees. This appeal satisfies 29 U.S.C. § 1133. If the Board of Trustees also denies the claim, the Pension Plan agreement states that a claimant may appeal again:

> If the Participant submits an appeal, his or her union representative must file the appeal with the Arbitration Committee established by the [HRSA-ILA], as provided for in the Collective Bargaining Agreement. The Arbitration Committee will consider the appeal and all decisions reached by the Arbitration Committee are final and binding on the Participant and all other parties.

The CBAs, however, do not provide for any entity called an "Arbitration Committee" to handle such disputes.

Section 24 of the CBA provides for an "Arbitration Committee" to handle disputes arising out of or relating to the CBA. That section states that disputes should first attempt resolution at the job site, and if no resolution can be achieved within four hours, the dispute goes to the Arbitration Committee "automatically," and the Arbitration Committee must resolve the dispute within twenty-four hours. Section 24 is limited in scope to workplace disputes, as the procedure it sets forth relates to disputes that arise on job sites: the section notes, among other things, that until a dispute is resolved, "work must continue." Section 24's procedures do not contemplate the Arbitration Committee resolving disputes regarding a beneficiary's rights under the Pension Plan and do not contemplate hearing any appeals from the Board of Trustees. Section 24, therefore, is clearly inapplicable to this case. It is also unclear, from the facts before the Court, whether the Arbitration Committee provided for in Section 24 actually exists - there is no evidence that it does. Thus, the Pension Plan contract refers to an Arbitration Committee that does not legally exist, and may not actually exist, either.

The morass grows, however, because apparently some kind of arbitration committee exists, ungrounded in legal authority. Cobb testified that the Contract Board <u>created</u> a "trustee arbitration

committee" in 1999. It was originally called the "delinquency arbitration committee." At first, Cobb testified, it heard only "delinquencies" – "where employers or carriers were not paying assessments." The Contract Board later expanded it to hear appeals regarding medical benefits "and any other appeal beyond the Board of Trustees level." Cobb further testified that the Contract Board created the committee pursuant to the CBAs.

The CBAs, however, do not give the Contract Board any such authority. The Contract Board has the authority merely to "develop all necessary standards and policy with respect to the administration and implementation of the applicable contractual provisions." This language clearly does not give the Contract Board authority to create boards of review which can override the decision of the Board of Trustees. The Board of Trustees is a fiduciary of the Pension Plan beneficiaries; it is unclear whether the Contract Board owes any fiduciary duties. There is also no direct evidence that such an arbitration committee exists: the Court has before it no documents creating such a committee, no Contract Board member stating that the Contract Board created such a committee, no minutes of meetings of such a committee, no documentation of any ruling by such a committee, no list of members of such a committee, etc.

In sum, Mathis complied with ERISA's administrative review procedure by seeking review by the Board of Trustees.

Additionally, there was no requirement for Mathis to appeal the Board of Trustees' decision further. The CBAs do not provide for an Arbitration Committee to resolve such disputes. The Contract Board lacks the authority to create any such appeal procedure. And even if the Contract Board had such authority, ERISA only requires review be sought by the plan fiduciary for a claim to be exhausted. 29 U.S.C. § 1133.

2. Merits

Mathis argues that the retroactive modification to her work history is without legal justification or authorization and is in violation of ERISA's anti-cutback provision. The Court finds that the retroactive modification was without legal authorization and is therefore void, and in any event, even if the retroactive modification were legally authorized, it would nevertheless likely violate ERISA's anti-cutback provision.[7]

Before the Court wades into that analysis, however, the Court is compelled to note that the contractual regime that governs the Funds is a complete and utter mess.

On the one hand, the local CBA in effect establishes, in section 33, a Pension Plan, and states that eligible employees are entitled to benefits under that plan. That section provides:

[7] The Court notes that Plaintiff has not presented any arguments regarding the applicability of ERISA's anti-cutback provision. Plaintiff's arguments in response to Mathis's counterclaims focused solely upon whether Mathis has exhausted her administrative remedies.

> [C]redit hours, as a result of an employee's receipt of Worker's Compensation, will be provided to qualify an individual for benefits equal to those qualified for in the immediate prior year. By mutual agreement of the parties, Compensation Units (CU's) will be generated from an employee's receipt of Worker's Compensation and allotted to individual employees for purposes of determining HRSA-ILA Benefit eligibility and for no other purpose. Weekly CU's will be applied, and <u>will not exceed the duration of the period during which the employee receives Temporary Total or Temporary Partial Worker's Compensation Benefits</u>. The application of CU's is restricted to eligibility for HRSA-ILA Fund benefits with the exception of the Annuity & Savings Plan as detailed below <u>in such weekly amounts as are calculated to enable an individual receiving Temporary Total or Temporary Partial Worker's Compensation to qualify for the level of previous benefits while not exceeding the time on Worker's Compensation</u>. The CU's apply to occupational disability for which the individual receives Worker's Compensation Benefits only and do not apply to any other form of disability or sickness. The Contract Board has appointed a committee to review the application of CU's on an annual basis and to make such CU allotments as are warranted.
>
> Notwithstanding the foregoing, the Trustees shall have the authority to review the substance of a settlement and their decision shall be final and binding.

(emphasis added.) Section 25 of the CBA establishes a Contract Board, which has the authority to "administer" and "interpret" "all local contract provisions." Further, the Contract Board "shall develop all necessary standards and policy with respect to the administration and implementation of the applicable contractual provisions."

Whether "all local contract provisions" refers solely to the local CBAs, or whether it refers to both the local CBAs and to the local Fund agreements, including the Pension Plan agreement, is entirely unclear. It is clear that the Contract Board has the authority to interpret the local CBA provision above. Whether, in making its ruling at its September 2004 meeting, it "interpreted" the local CBA and not the Pension Plan agreement itself is also entirely unclear, for there are neither any minutes of the meeting before the Court nor any other record of what the Contract Board based its ruling upon. It is not disputed, however, that the Contract Board does not have the authority to amend the local CBA.

On the other hand, the Pension Plan agreement has its own provisions with respect to administering the plan. Section 4.1(d)(2) of the Pension Plan agreement provides in relevant part:

> Injury Incurred on the Job. Employees who are unable to work in all or part of the Plan Year by reason of any injury incurred on the job and who receive compensation for temporary total or temporary partial disability under any federal or state worker's compensation act shall receive credit hours for the purpose of determining benefits under this Plan at the rate necessary to qualify the Employee for benefits equal to those for which the Employee qualified in the immediate prior year. Such credits shall not exceed the duration of the period during which the Employee received workers' compensation benefits. No credits shall be computed for "lump sum" compensation settlements. . . .

This language essentially tracks the language regarding workers' compensation in the CBA, *supra*. In the Pension Plan agreement,

however, there is no mention of a Contract Board. Rather, it provides that the Board of Trustees has the authority to amend the Pension Plan:

> The Board [of Trustees] shall have authority to review all of the provisions of the Plan that are not specifically excluded herein from review, and to make such changes, modifications and amendments to the Plan as the Board shall deem desirable; provided that accrued benefits . . . shall not be reduced, eliminated or made subject to employer discretion except to the extent permitted by regulations under the Code [of Virginia] or ERISA.

Further, section 6.2(b)(1) of the Pension Plan contract grants the Board of Trustees the power to "make and enforce bylaws for its own governance and such rules and regulations as it shall deem necessary and proper for the efficient operation of the Plan, <u>and to decide such questions as may arise in connection with the operation of the Plan</u>." (emphasis added).

Quite simply, there are fundamental questions, which have not been fully addressed by counsel, regarding the extent of authority of the Contract Board and the Board of Trustees and their interaction. What the Court can determine, however, is that whatever other power the Contract Board may possess, it does not have the power to amend the CBA or the Pension Plan agreement. For that reason, the Contract Board's September 2007 ruling is legally void. Furthermore, even assuming the ruling was legal, the ruling would nevertheless almost certainly violate the anti-cutback

provision of ERISA.

i. The Contract Board Lacks Legal Authority to Amend the Pension Plan

The Court finds that the Contract Board did not amend the Pension Plan agreement or CBA because it lacked the legal authority to do so. Under the relevant CBAs in effect, the Contract Board had the authority to administer and "interpret" all local contractual provisions.

The applicable provisions of the Pension Plan agreement and the local CBA are reproduced *supra*. These provisions show that an employee on temporary partial or temporary total workers' compensation, who did not receive the workers' compensation payment in a lump sum, receives credit hours for purposes of determining benefits under the Pension Plan while she continues to receive workers' compensation payments. The clear purpose of this section is to protect injured employees from not accruing credits they otherwise would have accrued if they were not injured.

At its March 16, 2004 meeting, the Contract Board passed a motion stating that "[f]or compensation settlements, credits shall be awarded on a dollar basis (rather than a time basis) based on the Average Weekly Wage."

This ruling is in clear contradiction to the stated meaning of Section 4.1(d)(2) of the Pension Plan agreement and the stated meaning of the CBA. The Pension Plan agreement, as noted *supra*, allows credits to accrue while an employee is receiving temporary

workers' compensation benefits. No credits are accrued when the workers' compensation is paid in a lump sum, and no credits are awarded if the disability is permanent. Thus, credits are accrued based on the time during which the employee receives workers' compensation benefits for temporary disability.

The shortcomings of awarding credits based upon the time an employee receives workers' compensation are manifest, and, indeed, have indirectly led to the filing of this lawsuit. As is indicated on the LS-208 form, the maximum weekly rate that workers' compensation is normally paid is two-thirds the average weekly full wage that the employee earns. For example, in this case, Mathis's full average weekly wage was $915.28; her maximum workers' compensation rate was $610.19. The Court surmises that it was probably the assumption of the Board of Trustees in enacting the Pension Plan agreement, and the HRSA and ILA representatives in enacting the CBA, that workers' compensation payments, unless paid in a lump sum, would be paid at the maximum rate of two-thirds of the average weekly wage of the employee receiving benefits. Presumably, payments would continue at that rate until the employee recovered from her temporary disability. This was at least a reasonable assumption, as 33 U.S.C. § 908, which governs workers' compensation for the longshore industry, provides:

> Compensation for disability shall be paid to the employee as follows: . . .
>
> (b) Temporary total disability: In case of

> disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof. . . .
>
> (e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

However these subsections do not apply to settlements. It may be the case, as here, where the employer disputes that the employee is injured. Where there is such a dispute, the parties may enter into a settlement. Settlements for workers' compensation benefits must be approved by an ALJ. See 33 U.S.C. 908(i); 20 C.F.R. 702.241-243. The very fact that there is a settlement indicates that the employer need not pay the employee workers' compensation benefits in accordance with subsections (b) and (e) for temporary total or partial disability; rather, the amount and schedule of the payments to the employee are necessarily agreed upon by the employer and employee. Thus, a loophole existed. Once the amount of the settlement was agreed upon, the employee had an incentive to prolong the period of workers' compensation payments to accrue credits towards benefits in the various funds and plans, for so long as the employee received these payments, she would be entitled to accrue credits under the terms of the Pension Plan agreement and

CBA. Also, it would be unlikely for the employer to object to this extended manner of payment, as its primary interest would most likely be in the total amount of compensation for which it settled. Further, it may well be in the employer's interest to extend payments because of the time-value of money.

Such was the case here. VIT disputed whether Mathis was injured, and those two parties entered into a settlement agreement. Mathis was represented by a savvy attorney, Montagna, who understood the loophole, and required the terms of the settlement to extend Mathis's workers' compensation payments through the date when she would be eligible to retire. VIT saw no reason to object, and the ALJ entered the order approving the settlement. At least thirteen other employees took advantage of these creative compensation settlements.

Of course, these prolonged periods where employees such as Mathis received workers' compensation payments and nonetheless accrued credits towards Pension Plan eligibility and obtained benefits from the Container and V&H Funds helped drain the Funds because, by not working, their employers were not making contributions to the Funds. Hence, the Contract Board ruled in March 2004 that the way credits would be awarded would be recalculated. This loophole was also noted by the HRSA and ILA representatives, for, when the local CBA was amended in late 2004, the following language was added: "Notwithstanding the foregoing,

the Trustees shall have the authority to review the substance of a settlement and their decision shall be final and binding."

As this history and course of conduct indicates, it was clear to all parties involved that the CBA and Pension Plan agreement (and the Container Fund and V&H Fund) awarded credits based upon the time during which the employee was receiving workers' compensation for temporary disability. The Contract Board's ruling was no mere interpretation of the Pension Plan agreement or CBA - an interpretation the Contract Board would probably have authority to implement. Rather, the effect of the Contract Board's ruling was substantial: it significantly lowered employees' credits towards receiving Pension Plan benefits after those employees relied for years upon the previous method of calculating credits. The Contract Board's ruling contravened not only the plain meaning of the terms of the CBA and Pension Plan agreement, but also contravened and upended a lengthy course of conduct by all parties involved. Thus, in so ruling, the Contract Board clearly attempted to amend the Pension Plan agreement or the CBA. Because the Contract Board has no authority to amend the CBA or plans created pursuant to the CBA, the Court finds the Contract Board's decision to be legally void. Therefore, the Court FINDS for Mathis with respect to the Counterclaim.

ii. Anti-Cutback

The Court further notes, without holding, that even if the

Pension Plan agreement and/or the CBA were properly amended, that amendment would almost certainly violate the anti-cutback provisions of ERISA with respect to Mathis.

"With few exceptions, the 'anti-cutback' rule of [ERISA] prohibits any amendment of a pension plan that would reduce a participant's 'accrued benefit.' Central Laborer's Pension Fund v. Heinz, 541 U.S. 739, 741 (2004) (citing 29 U.S.C. § 1054(g)). ERISA's anti-cutback rule provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . . ." 29 U.S.C. § 1054(g)(1). "There is no doubt about the centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them." Heinz, 541 U.S. at 743; see also id. ("Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan. ERISA does, however, seek to ensure that employees will not be left emptyhanded once employers have guaranteed them certain benefits. . . . [W]hen Congress enacted ERISA, it 'wanted to . . . mak[e] sure that if a worker has been promised a defined pension benefit upon retirement-and if he has fulfilled whatever conditions are required to obtain a vested benefit-he actually will receive it.'") (quoting Lockheed Corp. v. Spink, 517 U.S. 882, 887 (1996)).

Therefore, a legally proper amendment to the Pension Plan

agreement or CBA akin to the action taken by the Contract Board would reduce Mathis's accrued benefits under the Pension Plan. As previously noted, Mathis's credits towards benefits under the Pension Plan would be reduced from fifteen to eight, causing her to be ineligible to receive disability retirement benefits. Such a reduction in benefits would plainly violate the anti-cutback provisions of 29 U.S.C. § 1054(g).

III. CONCLUSION

For the foregoing reasons, the Court FINDS in favor of Defendant on the Complaint and in favor of Defendant (Counterclaim Plaintiff) on the Counterclaim.

Specifically, it is hereby ORDERED that:

1. Plaintiff restore Mathis's pension credits to a total of fifteen (15) credits, the amount of credits Mathis would have acquired if her work history were not retroactively amended pursuant to the Contract Board's ruling;

2. Plaintiff retroactively reinstate Mathis's disability pension benefits as she otherwise would have received under the terms of the Pension Plan if her work history were not retroactively amended;

3. Plaintiff pay all pension benefits due to Mathis through the date of this Order with interest from the date of judgment; and

4. Plaintiff pay all future pension benefits due to Mathis under the terms of the Pension Plan.

The Clerk of the Court is DIRECTED to enter judgment for Mathis and to deliver a copy of this Opinion and Order to all counsel of record.

IT IS SO ORDERED.

UNITED STATES MAGISTRATE JUDGE

Norfolk, Virginia

October 9, 2009