Bath Iron Works Corporation *and* Local Lodge S-7, District Lodge 4, International Association of Machinists and Aerospace Workers, AFL-CIO *and* Local Lodge S-6, District Lodge 4, International Association of Machinists and Aerospace Workers, AFL-CIO *and* Bath Marine Draftsmen's Association. Cases 1–CA–36658, 1–CA–36659, and 1–CA–36799

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On March 15, 2000, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party Bath Marine Draftsmen's Association (BMDA) filed answering briefs. The Council on Labor Law Equality filed an amicus brief. The General Counsel and the Respondent filed separate response briefs to the amicus brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The central issue in this case is whether the Respondent violated the Act in 1998 by merging its Bath Iron Works Pension Plan (the Plan) into the larger pension plan of its corporate parent, General Dynamics, without the consent of the three Charging Party Unions (the Unions). The judge found that the merger was a mandatory subject of bargaining, that the Respondent modified the collective-bargaining agreements (CBAs) without the Unions' consent, that the Unions had not clearly and unmistakably waived their statutory right to bargain over the merger, and, thus, the merger of the plans violated Section 8(d) and Section 8(a)(5) of the Act.

The Respondent excepts, inter alia, to the judge's finding that it modified the contract, arguing, in relevant part, that under a reasonable interpretation of the CBAs and the Plan documents, the Respondent had the authority to implement the merger without the Unions' consent. We find merit to the Respondent's exceptions and dismiss the complaint.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

I. FACTS

The Respondent has CBAs with four different unions, three of which are the Charging Parties here: Local Lodge S-6, District Lodge 4, International Association of Machinists and Aerospace Workers, AFL–CIO (S-6); Local Lodge S-7, District Lodge 4, International Association of Machinists and Aerospace Workers, AFL–CIO (S-7); and BMDA. S-6 and S-7 negotiated new CBAs with the Respondent in 1997, and BMDA negotiated a new contract with the Respondent in March 1998. During negotiations with BMDA, the Respondent disclosed that it was contemplating merging the Respondent's Pension Plan with General Dynamics' pension plan. BMDA requested that the parties bargain over pension benefits based on the merged assets, but was told by the Respondent that the merger was too speculative at that point. In April 1998, the Respondent received permission from the Government and General Dynamics to merge the pension plans. The Respondent discussed the merger with the Unions, while maintaining that it did not need their consent in order to implement it. No agreement was reached on the merger, and the Respondent implemented the merger in October 1998 without the Unions' consent.

Each of the CBAs with the respective Unions refers to the Plan documents. S-6's agreement contained the following language in chapter 5, "Benefits," under "Employee Benefits Plan:"

> Plans that provide you financial security include pensions, 401(k), healthcare, accident and sickness (A&S) insurance, life insurance, and business travel accident insurance. BIW [the Respondent] pays the full cost of your pensions, A&S insurance, life insurance and business travel accident insurance, and pays most of the cost of your healthcare. These plans are ERISA Plans and *their terms and conditions are governed by Plan Documents* and/or Insurance Contracts. Therefore, the language contained in this Agreement for these Plans is intended to represent only highlights of the Plans. [Emphasis added.]

The CBA with S-7, in chapter 5, "Benefits," has similar language under "Employee Benefit Program," stating that "[t]he language contained in this Agreement is intended to represent only highlights of the BIW Employee Benefits Program. *All of the terms and conditions in their entirety are governed by Plan Documents* and summarized in a Summary Plan Description." (Emphasis added.)

The CBA reached with BMDA contains the following language in section 4(a)(1)(e), entitled "Basic Pension Plan: Retirement:"

> Except as the plan shall be modified as required by the foregoing provisions [which no party argues are applicable] and the following Sections of this Article, *said plan shall remain in full force and effect* in accordance with the provisions thereof, providing, however, that changes thereto may be made as provided in Article I of the plan entitled "Qualification Under The Internal Revenue Code."

(Emphasis added.) Thus, each CBA refers in some way to the Plan documents.

There are two articles in the Plan documents which the Respondent cites as the source of its authority to implement the merger. The first of these, article I of the Plan, is entitled "Qualification Under the Internal Revenue Code." It states, in relevant part, that the Respondent "reserves the right to make any changes . . . as it deems appropriate to the Plan" for tax reasons. The second article is article 12 of the Plan, as amended,[2] entitled "Amendment, Termination, and Merger." Section 12.1, "Amendment," states, in relevant part that "[t]he right is reserved at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." An amended section 12.2, "Right to Terminate," states that "the Board or the Chairman of General Dynamics Corporation may terminate the Plan or discontinue contributions at any time." Section 12.5 is entitled "Merger or Consolidation," but does not discuss the authority for a merger, only the consequences.

II. THE JUDGE'S DECISION

Citing *Carrier Corp.*, 319 NLRB 184 (1995) (change in identity of a pension plan was a mandatory subject of bargaining), the judge first found that the merger of the pension plans was a mandatory subject of bargaining because it was a material, substantial, and significant change affecting the terms and conditions of employment. Thus, the judge explained that if the merger was a modification of the CBAs, it would violate Section 8(a)(5) and (d) of the Act.

The judge then found that the merger did, in fact, modify the CBAs because those agreements did not confer upon the Respondent the right to effect the merger. The judge found that the Plan documents, with their corresponding language concerning the right to "modify or amend," were not part of the CBAs. The judge distinguished *Mary Thompson Hospital*, 296 NLRB 1245 (1989), enfd. 943 F.2d 741 (7th Cir. 1991), in which the Board found that the applicable benefit plan documents were part of the contract there because the contract expressly stated, "Plan . . . is incorporated in this agreement." The judge concluded that in order for the Respondent to show that the Plan documents were part of the CBAs, they had to expressly use the word "incorporate" or similar "clear" language. Such language would be necessary, the judge found, in order to indicate that the Unions had clearly and unmistakably waived their right to bargain over a mandatory subject of bargaining.

In support, the judge cited *Trojan Yacht*, 319 NLRB 741, 742 fn. 5 (1995). In that case, the Board found that the respondent had made a unilateral change in terms and conditions of employment by amending a pension plan and that the union had not clearly and unmistakably waived its right to bargain over the change. The judge found the instant circumstances similar to *Trojan Yacht*, which contained no 8(d) allegation, because the relevant language in the CBAs in this case did not show that the Unions had clearly and unmistakably waived their right to bargain over the merger. The judge also found that the Respondent's position during contract negotiations with BMDA—that it would not negotiate pension benefits on the basis of merged assets because the merger was too speculative—undercuts its position after the merger that the Unions had clearly and unmistakably waived their right to bargain over the merger.

The judge also found that, even if the Plan documents were part of the CBAs, the Plan documents did not clearly give the Respondent authority to implement the merger. In reviewing the portions of the Plan documents reproduced above, the judge found that these provisions did not show that the Unions had clearly and unmistakably waived their right to bargain over the merger. Lastly, the judge found that the Unions' prior acquiescence to other changes in the Plan did not constitute a waiver of their right to bargain over the merger.

In sum, the judge found that because the Unions did not clearly and unmistakably waive their right to bargain over the merger, the Respondent violated the Act by modifying the CBAs without the Unions' consent. As explained below, however, the clear and unmistakable standard is not the appropriate standard in an 8(d) contract modification case. Rather, the appropriate standard requires the consideration of whether the employer, in fact, modified a provision of the contract. *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973), enfd. mem. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975). Applying this standard, we find, for the

[2] The Plan was amended twice, most recently in 1995, before the relevant events here, and contained the language cited above. The Unions disputed that they received any amendment to the Plan or that they were aware of it. The judge assumed that the second amendment was part of the Plan, but found the language insufficient to show that the Unions had clearly and unmistakably waived their right to bargain over the merger. We need not decide between the versions, the original or the second amendment, because both allow the Respondent to modify or amend the Plan.

reasons stated below, that the General Counsel has failed to prove that the Respondent violated the Act as alleged.

III. ANALYSIS

A. The Appropriate Standard

In this case, the General Counsel contends that the Respondent modified the contracts within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act. Section 8(d) provides, in relevant part, that "where there is in effect a collective-bargaining contract . . . no party to such contract shall terminate or modify such contract." Thus, the General Counsel's theory of the case is that the Respondent violated the Act by modifying its contracts with the respective Unions without their consent.

However, in finding a violation, the judge erroneously used the standard appropriate to an allegation of an 8(a)(5) general unilateral change in the terms and conditions of employment, which is not the correct standard for an allegation of an 8(d) contract modification. In "unilateral change" cases, where all that is alleged is that a union had a statutory right to bargain before an employer's proposed change, the Board has considered whether the union has clearly and unmistakably waived its right to bargain over the change. See, e.g., *Regal Cinemas v. NLRB*, 317 F.3d 300, 314 (D.C. Cir. 2003), enfg. 334 NLRB 304 (2001) (finding that a unilateral transfer of work not countenanced by the contract; issue was appropriately analyzed under clear and unmistakable waiver standard).

The "unilateral change" case and the "contract modification" case are fundamentally different in terms of principle, possible defenses, and remedy. In terms of principle, the "unilateral change" case does not require the General Counsel to show the existence of a contract provision; he need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining*. The allegation is *a failure to bargain*. In the "contract modification" case, the General Counsel must show a contractual provision, and that the employer has modified the provision. The allegation is a failure to adhere to the contract. In terms of defenses, a defense to a unilateral change can be that the union has waived its right to bargain. A defense to the contract modification can be that the union has consented to the change. In terms of remedy, a remedy for a unilateral change is to bargain; the remedy for a contract modification is to honor the contract.

Thus, where, as here, the General Counsel's sole allegation is the allegation of unlawful modification of the contracts within the meaning of Section 8(d), the Board is limited to determining whether the employer has altered the terms of a contract without the consent of the other party. *Oak Cliff-Golman Baking Co.*, supra. Thus, the principal question in this case is not whether the Unions clearly and unmistakably waived their right to bargain over the merger, but whether the merger in fact modified the CBAs. See *Milwaukee Spring Division, (Milwaukee Spring II)*, 268 NLRB 601, 602 (1984), enfd. sub nom. *Auto Workers Local 547 v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985) (before finding an 8(d) violation "the Board first must identify a specific term 'contained in' the contract that the Company . . . modified").[3]

The Board and court cases are consistent with the traditional dichotomy between 8(d) contract modification cases, as discussed above, and 8(a)(5) unilateral change cases, as discussed below. *Trojan Yacht*, supra, was an 8(a)(5) unilateral change case, not an 8(d) contract modification case. The conclusion of law reached in *Trojan Yacht* was only that the employer had violated Section 8(a)(5), and the remedy was that the employer bargain (rather than adhere to a contract). The employer's defense in that case was that there was a "clear and unmistakable waiver" by virtue of a management rights clause in the contract or in other ways (e.g., a conscious yielding in bargaining). *NLRB v. C & C Plywood Corp.,* 385 U.S. 421 (1967), was also a unilateral change case. In that case, the Court made clear that the Board had the power to determine whether the union had contractually waived the right to bargain over an employee premium pay plan unilaterally instituted by the employer.

The issue that has divided the Board and several circuit courts in recent years arises in unilateral change cases[4] where the General Counsel alleges a unilateral change, and the employer defends on the basis of a contractual provision. The Board takes the position that the contractual provision must clearly and unmistakably waive the right to bargain; otherwise, a violation is found. On the other hand, various courts have taken the position that it is sufficient if the contract covers the subject matter. If it does, the court will determine, under ordinary contract interpretation principles, whether the employer was privileged to make the change without further bargaining. Whatever the ultimate outcome of that Board vs. court controversy in the context of 8(a)(5) unilateral

[3] We, therefore, find it unnecessary to pass on the judge's findings and the parties' arguments concerning the continuing viability of the clear and unmistakable waiver standard. Similarly, we find it unnecessary to pass on the judge's finding that the Respondent's position during contract negotiations with BMDA undercut its argument that the Unions had clearly and unmistakably waived their right to bargain.

[4] See, e.g., *Honeywell International v. NLRB,* 253 F.3d 119 (D.C. Cir. 2001), denying enforcement to *Allied Signal, Inc.,* 330 NLRB 1201 (2000).

change cases, we need not grapple with the issue here. The only issue presented is whether the Respondent modified the contract within the meaning of Section 8(d). Phrased differently, the issue here is whether the contract *forbade* the conduct. In the unilateral change cases, the issue is whether the contract *privileges* the conduct. Thus, contrary to the dissent, we do not view our decision here as a "missed opportunity" to address this controversy over the applicability of the clear and unmistakable waiver standard and the contract coverage theory. We simply note that the issue is not before us.

Having distinguished unilateral change cases and their "waiver" defense, we now turn to the issue of whether the contract has been modified. In the instant case, that issue turns on the resolution of two conflicting interpretations of the respective CBAs and the Plan documents. Where an employer has a "sound arguable basis" for its interpretation of a contract and is not "motivated by union animus or . . . acting in bad faith," the Board ordinarily will not find a violation. *NCR Corp.*, 271 NLRB 1212, 1213 (1984); *Thermo Electron Corp.*, 287 NLRB 820 (1987), affd. sub nom. mem. *Carpenters v. NLRB,* 884 F.2d 578 (6th Cir. 1989); *Crest Litho, Inc.*, 308 NLRB 108, 111 (1992); *Westinghouse Electric Corp.*, 313 NLRB 452 (1993), enfd. sub nom. mem. *Salaried Employees Assn. of Baltimore Division,* 46 F.3d 1126 (4th Cir. 1995), cert. denied 514 U.S. 1037 (1995).[5] In such cases, there is, at most, a contract breach, rather than a contract modification. *NCR*, supra at fn. 6.

In opposition to the "sound arguable basis" standard applied in *NCR* and its progeny, the dissent cites two cases, *Allied Signal, Inc*., supra, and *St. Vincent Hospital*, 320 NLRB 42 (1995). However, both cases are distinguishable. In *Allied Signal,* the issue before the Board was whether the employer unlawfully repudiated the contract in its entirety. Thus, *Allied Signal* clearly differs from the instant case because the issue there involved more than a mere contract dispute. Because *Allied Signal* raised "matters going to the heart of the collective-bargaining relationship," the Board did not apply a "sound arguable basis" standard, but rather found it appropriate to determine whether the employer "was not privileged to terminate the [contract] when it did." Id. at 1204.[6] Similarly, in St. *Vincent Hospital*, supra, the evidence clearly established that the employer, in fact, modified the contract by its discontinuation of a health insurance plan. In finding the violation of Section 8(a)(5) and (d), the Board in that case found that the employer's interpretation ran counter to the clear intention of the parties and that "there [was] absolutely no indication of a contrary intent." Id. at 44.[7] Thus, unlike the instant case, there was no "sound arguable basis" in support of the employer's position in *St. Vincent Hospital*.

Our colleague further contends that the "sound arguable basis" standard should be inapplicable as a defense to the 8(d) contract modification allegation in the instant case because "Section 8(d) does not itself create an unfair labor practice." While we do not disagree that Section 8(d) is not itself an unfair labor practice section of the Act, we disagree with our colleague's contention. Section 8(d) defines the 8(a)(5) duty to bargain. That is, Section 8(d) contains the various 8(a)(5) obligations, one of which is to meet and bargain in good faith about terms and conditions of employment. Obviously, a unilateral change is inconsistent with that duty. A separate obligation is the duty to continue in full force and effect the terms and conditions of the existing contract. A modification of the contract would be inconsistent with that obligation. Phrased differently, a unilateral change is a failure to bargain about the subject, while a contract modification is a failure to adhere to the contract. "It is well established that Section 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer that is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union (footnote omitted)." *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989).[8] Thus where, as here, the complaint alleges a contract modification within the meaning of Section 8(d), the "sound arguable basis" standard is necessarily implicated. As shown above, a contract modification violation does not exist if there is a good faith reliance on a sound and arguable interpretation of the contract.

The dissent also contends that, under our approach, a union is less protected against an 8(d) contract modification than against an 8(a)(5) unilateral change because in the former the less stringent "sound arguable basis" standard applies and in the latter the stricter waiver standard applies. Our colleague's argument has no merit. The remedy for a contract modification is the more substantial one of ordering adherence to the contract for its terms; the remedy for a unilateral change permits the

[5] This established line of precedent belies the dissent's suggestion that our approach taken in this case is not a "traditional" or "predominant" view of Board decisions in the 8(a)(5)/8(d) context.

[6] Because *Allied Signal* is distinguishable, Chairman Battista finds it unnecessary to pass on whether it was correctly decided.

[7] Without explicitly stating it, the Board's decision in *St. Vincent Hospital* makes clear that the employer's interpretation lacked a sound arguable basis.

[8] In that case, the Board found that the employer's failure to pay pension contributions in accordance with its collective-bargaining agreement constituted an unlawful refusal to bargain in violation of Sec. 8(a)(5) and (1) and Sec. 8(d).

restoration of the change after bargaining to an impasse. Since the remedy for a contract modification is more severe, it is reasonable to require greater proof. In addition, the victim of the alleged contract modification has the option of proceeding to arbitration and pursuing an action under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. Mere proof of breach of contract will permit the victim to prevail in those forums.

B. Application of the Standard

As discussed, this is a "contract modification" case, and the issue is whether the Respondent had a sound arguable basis for its actions. In support of its contention that the Respondent modified the contract, the General Counsel argues that the CBAs provide for the Plan and that the merger of the Plan with another plan modified the CBAs. The Respondent argues that it adhered to the contracts because the Plan documents (discussed, infra) permit the merger. In response, the General Counsel argues that the Plan documents are not themselves a part of the CBAs.

As noted above, the Respondent argues, contrary to the General Counsel, that the Plan documents are part of the CBAs and give the Respondent the right to merge the Plan. The Respondent contends that each CBA incorporates by reference the Plan documents, which allows the Respondent to "modify or amend" the Plan, and that the right to "modify or amend" includes the right to implement the merger. The Respondent specifically points to the fact that the CBAs with S-6 and S-7 both say that benefits "are governed by Plan documents." The Respondent further contends that section 12.2 of the Plan grants the Respondent the right to terminate the Plan, which necessarily includes the authority to merge the Plan as well.[9] Thus, under the Respondent's interpretation, there was no contract modification because it acted consistent with the authority given it by the CBAs and Plan documents.

In this case, the Plan documents are arguably a part of the CBAs and they arguably give the Respondent the authority to effect the merger. Thus, the Respondent's interpretation of the CBAs has a sound arguable basis. The General Counsel's interpretation, that the Plan documents are not part of the CBAs and do not contain a right to merge the Plan, is reasonable, but no more so than the Respondent's.[10] Because the General Counsel bears the burden of proof to show that the CBAs have been modified, he cannot prevail if all that is shown is that, as here, his interpretation of the contract is reasonable.

The dissent contends that the respective collective-bargaining agreements here do not even implicitly authorize the merger because the only reasonable meaning of "full force and effect" (BMDA agreement) and "governed by Plan documents" (S-6 and S-7[11] agreements) is that the Plan was to remain unchanged for the duration of the agreement. We disagree. The contract provided that the Plan was to remain in full force and effect. But the Plan itself provided that it could be terminated and amended. Concededly, the authority to terminate or amend was "subject to the applicable provision of any collective bargaining agreement." But, that simply makes the issue a circular one. For, as noted, the contract refers to the Plan, and the Plan gives the right to terminate or amend. As discussed, we do not resolve the merits of the contractual issue. We simply make the point that each side has a colorable argument.

In sum, we find that both the General Counsel and the Respondent have presented reasonable interpretations of the applicable contract language. We do not pass on which of these contract interpretations is the better view; the arbitration process and the courts are well equipped to deal with such matters if the parties choose those avenues of redress. Rather, we find that the General Counsel has failed to prove that the Respondent modified the contracts with the Unions, within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act, as alleged. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER LIEBMAN, dissenting.

The majority's decision not only reaches the wrong result, but also threatens to further complicate an area of the law in which competing analytical approaches, coupled with judicial disagreement, have made it difficult to determine when and how the Board will decide whether an employer's unilateral action violates the Act's duty to bargain, where the interpretation of a collective-bargaining agreement bears on the question (and where deferral to arbitration is not at issue). In this case, the

[9] The Respondent also asserts that art. I of the Plan, which gives the Respondent the right to amend the Plan for tax reasons, provides additional support for its right to implement the merger.

[10] Indeed, the BMDA in its brief admits that the relevant language in its CBA is "ambiguous" and susceptible to "conflicting interpretations."

[11] Contrary to the dissent, we find nothing dispositive about the fact that the S-7 agreement does not list "pension" among the list of other employee benefits (which are "governed by Plan documents"). The Plan was certainly an employee benefit. In the chapter detailing the employee benefit Plan, pensions are discussed along with the other employee benefits (see pp. 42 and 43 of the contract). Interestingly, the 401(k) program and prescription glasses benefit, although discussed in the same chapter (see p. 40 of the contract), are not listed as employee benefits either.

majority errs in rejecting the traditional approach, applied by the judge, which asks whether the contract language amounts to a clear and unmistakable waiver of the Unions' right to bargain. The majority's position is contrary to *Trojan Yacht*, 319 NLRB 741 (1995), among other Board decisions.

But even if the majority were right to focus instead on whether there was a "sound arguable basis" for the employer's contract interpretation——an approach that favors Board deferral to another forum—a statutory violation should still be found. Here, Respondent Bath Iron Works (Bath) was prohibited by each of the three applicable collective-bargaining agreements from unilaterally merging its pension plan into the larger plan of its corporate parent, General Dynamics, and acted in bad faith. Instead of carefully examining the contract provisions involved, the majority hastily finds a "sound arguable basis" for the employer's position and points the parties elsewhere. At the same time, the majority misses an opportunity to fully air the underlying policy considerations.

I.

A pension-plan merger is a mandatory subject of bargaining under the Act. See, e.g., *Carrier Corp.*, 319 NLRB 184, 193–196 (1995). Bath never bargained over the merger of the Bath Iron Works Corporation Pension Plan for Hourly Employees (the Plan) with any of the three unions involved in this case: Machinists Local Lodge S-6, Machinists Local Lodge S-7, and the Bath Marine Draftsmen's Association. Instead, Bath took the position that it had the right to act unilaterally.

The facts with respect to the Draftsmen are especially instructive. During contract negotiations, Bath disclosed that it was contemplating a merger of the pension plan. When the Draftsmen sought to bargain over pension benefits based on the assets of the merged plan, Bath refused, insisting that the merger was speculative. The Draftsmen and Bath then reached a new agreement. Section 4(a)(1)(e), "Basic Pension Plan: Retirement," recited in relevant part that:

> Except as the plan shall be modified as required by the foregoing provisions [which are immaterial here] and the following Sections of this Article, *said plan shall remain in full force and effect in accordance with the provisions thereof*, providing, however, that changes thereto may be made as provided in Article I of the plan entitled "Qualification Under The Internal Revenue Code." [Emphasis added.]

A few months later, Bath nevertheless merged the Plan, without the consent of the Draftsmen or the two Machinists unions. There is no contention that the merger was necessary to maintain the Plan's tax qualification under the Internal Revenue Code.

At the time, the Lodge S-7 agreement described benefits under the pension plan, but did not refer to the pension plan documents.[1] The Lodge S-6 agreement, in contrast to the S-7 agreement, did refer to "pensions" as part of the "Employees' Benefit Program," and did recite that the "terms and conditions" of the "plans" involved were "governed by Plan Documents."[2]

Bath's basic position is that it was privileged to act unilaterally by the language of the three collective-bargaining agreements involved here. On Bath's view, each agreement incorporated the pension plan documents in full, which, Bath argues, in turn authorized the unilateral merger of the Plan. Thus, the Unions each effectively agreed, in advance, to permit Bath to merge the plan unilaterally, despite their objections when the merger issue actually arose—and despite the Draftsmen's agreement, which required Bath to maintain the Plan "in full force and effect in accordance with the provisions thereof."

The language of the pension plan document (which, the Unions argue, Bath secretly amended to eliminate one reference to restrictions on Bath's authority imposed by collective-bargaining agreements) does refer to amendment authority and mentions merger (in art. 12).[3] But article I of the document makes Bath's reservation of the "right to make any changes . . . to the Plan" expressly "[s]ubject to the applicable provisions of any collective bargaining agreement."[4] And, of course, the Draftsmen's contract provided that the Plan would remain "in full force and effect in accordance with the provisions

[1] The agreement's separate description of an "Employee Benefit Program," which did recite that "[a]ll of the terms and conditions in their entirety are governed by Plan Documents," did *not* mention the pension plan as part of the program (in contrast to a health care program and various other types of insurance).

[2] As I will explain, the majority fails to see the sharp difference between the S-6 and S-7 agreements.

[3] The majority acknowledges that sec. 12.5 of the plan document ("Merger or Consolidation") "does not discuss the authority for a merger, only the consequences."

[4] Art. I ("Qualification Under the Internal Revenue Code") reads in relevant part:

> *Subject to the applicable provisions of any collective bargaining agreement,* the Corporation reserves the right to make any changes (including retroactive changes permitted by law) as it deems appropriate to the Plan and/or any trust agreement thereunder, including any changes necessary to maintain the qualification of the Plan, the tax-exempt status of the Trust Fund, and the deductibility of for income tax purposes of employer contributions thereto. [Emphasis added.]

The majority's opinion omits any reference to the phrase "subject to the applicable provisions of any collective bargaining agreement," which restricts Bath's ability to change the pension plan.

thereof," ruling out any changes for the duration of the agreement.

II.

This case highlights competing analytical approaches where an employer claims the right to act unilaterally with respect to a mandatory subject of bargaining, based on language in a collective-bargaining agreement.

The General Counsel's position is straightforward and consistent with the predominant approach of the Board's decisions: The pension plan was contained in each of the three Unions' collective-bargaining agreements, within the meaning of Section 8(d) of the Act, and thus could not be merged out of existence, during the life of the agreement, without the Unions' consent.[5] No contract language—whether in the collective-bargaining agreements themselves or in the pension plan documents, insofar as they were incorporated by reference into the agreements—clearly and unmistakably waived the Unions' right to insist on adherence to the agreement or authorized Bath to act unilaterally with respect to the Plan. The Board has previously decided similar cases applying this analytical framework to issues involving unilateral pension or benefit plan changes.[6] And the waiver standard has a strong legal foundation, as reflected in decisions of the Supreme Court.[7]

The majority rejects this analytical framework, and so manages to avoid addressing an issue that has divided the Board and certain appellate courts (most notably the District of Columbia Circuit): the soundness of the Board's "clear and unmistakable waiver" approach, as opposed to the "contract coverage" approach that these courts insist the Board must follow, consistent with its (limited) authority to interpret collective-bargaining agreements.[8] Adopting the "contract coverage" approach would mean overruling Board precedent: the Board has repeatedly rejected it.[9]

The analysis endorsed by the majority, the "sound arguable basis" approach, has, in contrast, sometimes been used by the Board,[10] although the Board has never addressed its relationship, if any, to the "clear and unmistakable waiver" approach. The majority's attempt to harmonize the two doctrines here fails.

The majority sets up a distinction between "unilateral change" cases and "contract modification" cases: Where only a unilateral change is alleged, and there is no alleged violation of a collective-bargaining agreement, the "clear and unmistakable waiver" standard governs. But in "contract modification" cases, the majority says, the "Board is limited to determining whether the employer has altered the terms of a contract without the consent of the other party." And, in that context, the "sound arguable basis" standard governs.

The short answer to the majority's argument is that it has already been rejected by the Board in *Trojan Yacht*, supra, a case very similar to this one. The issue there was whether the employer was entitled to make a unilat-

[5] Here, the complaint alleges that the Respondent:

- failed to continue in effect all the terms and conditions of the collective bargaining agreement by altering the identity of the Bath Iron Workers Hourly Pension Plan by merging it.
- that those terms and conditions of employment relate to wages, hours, and other terms and conditions of employment and are mandatory subjects for the purpose of collective bargaining.
- that the Respondent engaged in the conduct without the union's consent, or alternatively without affording the union an opportunity to bargain with respect to the conduct and its effects; and
- that by the conduct described, the Respondent has been failing and refusing to bargain collectively and in good faith with the respective unions within the meaning of Sec. 8(d), in violation of Sec. 8(a)(5).

As I will explain, I necessarily reject any suggestion by the majority that the correct legal standard here was determined by how the General Counsel pleaded the complaint. See generally *St. Vincent Hospital*, 320 NLRB 42, 42 (1995) (describing "interlocking legal principles of Section 8(a)(5) and 8(d), and the consent requirement of Section 8(d)"). Sec. 8(d) defines the obligation to bargain collectively. It does not create an unfair labor practice itself. *Yorkaire, Inc.*, 297 NLRB 401 fn. 1 (1989), enfd. mem. 922 F.2d 832 (3d Cir. 1990); *Accurate Die Casting, Inc.*, 292 NLRB 284 fn. 5 (1989).

[6] See, e.g., *Amoco Chemical Co.*, 328 NLRB 1220 (1999) (finding violation of Sec. 8(a)(5)), enf. denied sub nom. *BP Amco Corp. v. NLRB,* 217 F.3d 869 (D.C. Cir. 2000); *Trojan Yacht*, supra (violation); *Mary Thompson Hospital*, 296 NLRB 1245 (1989) (no violation).

[7] See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983) (endorsing "clear and unmistakable waiver" standard in context of interpretation of no-strike clause in collective-bargaining agreement); *NLRB v. C & C Plywood Corp.,* 385 U.S. 421 (1967) (upholding Board's authority to interpret collective-bargaining agreement, applying waiver standard, in course of determining whether employer's unilateral action violated Sec. 8(a)(5)).

[8] See, e.g., *Honeywell International, Inc. v. NLRB*, 253 F.3d 119 (D.C. Cir. 2001), denying enf. to *Allied Signal, Inc.*, 330 NLRB 1 (2000).

For a discussion of the Board's traditional approach and the disagreement of some courts, see Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law* § 20.16 at 631–635 (2d ed. 2004). Professor Gorman and Professor Finkin conclude that "[a]t a minimum, . . . it is arguable that the Board's "clear and unmistakable" test . . . is more consistent with the policy of the Act than is the test endorsed in the District of Columbia Circuit" and thus that the "Board's view is worthy of judicial deference." Id. at 634–635. See also Kenneth L. Wagner, *"No" Means "No" When a Party "Really" Says So: The NLRB's Continued Adherence to the Clear and Unmistakable Waiver Doctrine in Unilateral Change Cases*, 13 Lab. Law. 325 (1997). In light of the Supreme Court's decisions in *Metropolitan Edison,* supra, and *C & C Plywood,* supra, upholding application of the "clear and unmistakable waiver" standard, it is difficult to see how the Board can be held to lack the authority to apply the standard, as the District of Columbia Circuit insists.

[9] See, e.g., *Edgar B. Benjamin Healthcare Center*, 322 NLRB 750, 752 (1996) (rejecting contract-coverage standard, despite contrary appellate court decisions).

[10] The leading case is *NCR Corp.*, 271 NLRB 1212 (1984).

eral midterm modification in its pension plan, providing for the cessation of benefit accruals. The collective-bargaining agreement provided for maintenance of the pension plan; the pension plan documents, however, authorized amendments to the plan. The administrative law judge, rejecting application of the "clear and unmistakable waiver" standard, viewed the issue as a matter of contract interpretation and held that the plan documents authorized the employer's unilateral change. The Board reversed. Its explanation is worth quoting at some length:

> The judge found that the terms of the Plan authorized the amendment. In response to the contention of the General Counsel that the Unions had not waived their right to bargain over the change, the judge stated that the case was one of contract interpretation rather than waiver. According to the judge, it is not necessary that the Unions have clearly and unmistakably waived their right to bargain over the amendment under the standard set forth in *Metropolitan Edison* . . . because that standard is more appropriately brought to bear to resolve issues concerning matters on which the contract is silent.
>
> . . . .
>
> *Contrary to the judge, the Metropolitan Edison standard is not limited to matters on which a collective-bargaining agreement is silent.* In order to establish waiver of the statutory right to bargain over mandatory subjects of bargaining, such as those raised here, there must be a clear and unmistakable relinquishment of that right. . . . To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter.

319 NLRB at 742 (emphasis added; citations and footnote omitted).

Moreover, *Trojan Yacht* would seem to rule out use of the "sound arguable basis" approach in this case. The Board pointed out that because the employer "point[ed] principally to language in the Plan, rather than in the collective-bargaining agreement, to justify its unilateral decision, it cannot fairly rely on cases such as *NCR Corp.*, . . . to assert that this case is solely one of contract interpretation, and thus inappropriate for resolution by the Board." 319 NLRB at 743 fn. 5.

The majority cites no Board decision directly supporting its rigid distinction between "unilateral change" and "contract modification" cases, and certainly no authority contrary to *Trojan Yacht*. As an attempt to rationalize and harmonize the Board's decisions, moreover, the majority's distinction is untenable. Board precedent is simply not consistent with that distinction.[11] If the majority's theory were correct, then the Board's running disagreement with certain courts over the "contract coverage" theory would never have arisen. As deployed by the majority, the "sound arguable basis" approach is hard to distinguish from the District of Columbia Circuit's "contract coverage" theory. See *Honeywell International, Inc. v. NLRB*, supra, 253 F.3d at 122–123 (criticizing Board's failure to apply "sound arguable basis" approach).

The conflict between the "sound arguable basis" approach and the Board's traditional approach is highlighted by the Supreme Court's decision in *C & C Plywood*, supra. There, the Court upheld the Board's authority to interpret collective-bargaining agreements in the course of redressing a statutory unfair labor practice, and it specifically rejected the employer's argument

> that since the contract contained a provision which *might* have allowed the [employer] to [act unilaterally] . . . the Board was powerless to determine whether that provision *did* authorize the [employer's] action, because the question was one for a state or federal court. . . .

385 U.S. at 425–426 (emphasis in original). The Board itself had applied the waiver standard in finding that the employer violated Section 8(a)(5) by acting unilaterally in changing wage rates reflected in the collective-bargaining agreement, despite the employer's contention that it was privileged to do so by a contractual provision. *C & C Plywood Corp.,* 148 NLRB 414 (1964), enf. denied 351 F.2d 224 (9th Cir. 1965), revd. 385 U.S. 421 (1967).

The majority fails to distinguish *Trojan Yacht* and *C & C Plywood* simply by categorizing them as Section 8(a)(5) "unilateral change" cases, as opposed to Section 8(d) "contract modification" cases.

In each case, the issue was whether the employer's unilateral change in an employment term was inconsis-

[11] See, e.g., *Amoco Chemical Co.*, supra, 328 NLRB at 1221–1222 (finding no waiver with respect to employer's unilateral changes where collective-bargaining agreement, which covered medical expense benefit plan, did not incorporate reservation-of-rights language in summary plan description); *Mary Thompson Hospital*, supra, 296 NLRB at 1249 (interpreting collective-bargaining agreement provision that incorporated pension plan, including plan documents, by reference, as "clear and unambiguous waiver of [Union's] right to be consulted or to object, during the contract term, to a termination of employer contributions to the pension plan").

On the majority's view, *Amoco Chemical* and *Mary Thompson Hospital* presumably should have been decided applying a "sound arguable basis" approach, but they were not. There are other, similar cases that would seem to be wrongly decided by the majority's lights. See, e.g., *Flatbush Manor Care Center*, 315 NLRB 15, 15 fn. 1 (1994).

tent with a contractual provision governing that term or, conversely, whether another contractual provision affirmatively authorized the change. Insofar as the employer's *defense* to the 8(a)(5) allegation was predicated on a contractual provision supposedly authorizing unilateral action, the "clear and unmistakable waiver" standard applied.

In contrast to Section 8(a)(5), Section 8(d) does not itself create an unfair labor practice. Instead, it defines the duty to bargain in good faith, which includes the duty to abide by (and not to modify) a collective-bargaining agreement. See, e.g., *Bonnell/Tredegar Industries*, 313 NLRB 789, 790 (1994), enfd. 46 F.3d 339 (4th Cir. 1995). The majority's classification scheme, then, errs in focusing on the alleged basis for the 8(a)(5) violation, and on the remedy sought, rather than on the employer's defense to the violation. Whenever that defense is based on a contractual provision supposedly authorizing unilateral action, the waiver standard governs—as the Board's case law demonstrates.

The majority's approach, in turn, leads to an anomalous result: Where an employment term is contained in a contract, and the union's consent is required before it can be changed, an employer need only show a "sound arguable basis" for its assertion that the contract authorized unilateral action. But where the union has not been able to secure a contractual promise, and so only bargaining (not consent) is required before the employer can act unilaterally, the stricter waiver standard applies. Thus, the union is in some ways *less* protected against unilateral employer action when the employer is bound to a contractual provision.

Finally, the Board decisions cited by the majority dismissing 8(a)(5) allegations under the "sound arguable basis" approach do not address the "clear and unmistakable" waiver doctrine at all. Surely this is because the cases do not involve contract provisions that purport to give the employer a broad right to act unilaterally with respect to a mandatory subject of bargaining—and thus do not obviously implicate the policy concerns that inform the Board's waiver doctrine.[12] (In contrast, the Plan documents in this case, which Bath argues were incorporated in the collective-bargaining agreements, amount to such a provision, as Bath characterizes them.) As language in the "sound arguable basis" decisions strongly suggests, these cases are best understood as instances in which the Board effectively defers to another forum (i.e., the Federal courts, pursuant to their jurisdiction over disputes arising under collective-bargaining agreements[13]), even though deferral to arbitration was not, or could not be, raised as a defense in the case.[14] Such deferral may be within the Board's discretion, but it is certainly not compelled. Section 10(a) of the Act provides that the Board's power to redress unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C. §160(a). If and when the Board revisits the waiver versus "contract coverage" debate, it surely will have to explain its position on policy grounds, and do so more transparently than the Board's "sound arguable basis" cases do. The majority's decision here does not further the discussion, unfortunately.

III.

As explained, *Trojan Yacht* establishes that because Bath's position rests on language in the pension plan document, the "sound arguable basis" approach cannot be applied here and instead that the waiver standard controls. But the result here does *not* turn on which analytical approach is applied. The contract and plan provisions involved in this case were obviously not a "clear and unmistakable" waiver of the Unions' right to bargain; thus, the Unions were entitled to compel Bath to adhere to the collective-bargaining agreements, which required maintenance of the pension plan and, thus, prohibited the merger. In any case, as careful examination of the agreements and the plan document demonstrates, Bath lacked a "sound arguable basis" for its contract interpretation.[15] Even on its own terms, then, the majority errs in refusing to find an 8(a)(5) violation. The majority's analysis of the contract language is cursory, at best. And it is worth emphasizing that the merger here was unlaw-

[12] See *NCR*, supra (contract provisions involving employee transfers and employer reorganizations); *Thermo Electron Corp.,* 287 NLRB 820 (1987), affd. mem.884 F.2d 578 (6th Cir. 1989) (arguable inconsistency between collective-bargaining agreement and pension plan document with respect to benefits payable to laid-off employees on termination of plan); *Crest Litho*, 308 NLRB 108 (1992) (layoff provision requiring notice to union); *Westinghouse Electric Corp.*, 313 NLRB 452 (1993), enfd. mem. 46 F.3d 1126 (4th Cir. 1995) (layoff provision and bumping procedure).

[13] Sec. 301 of the Labor-Management Relations Act, 29 U.S.C. § 185.

[14] See, e.g., *NCR Corp.*, supra, 271 NLRB at 1213 ("[W]hen 'an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it,' the Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct"). Once the Board adopted a broad policy of deferral to arbitration, of course, it had far fewer occasions to interpret collective-bargaining agreements. See 1 American Bar Association, Section of Labor & Employment Law, *The Developing Labor Law* 1359 (4th ed., Patrick Hardin & John E. Higgins Jr. eds. 2001).

[15] Even if the District of Columbia Circuit's "contract coverage" were controlling, I would find a violation, essentially for the reasons offered in connection with my analysis under the "sound arguable basis" approach.

ful if it was inconsistent with even *one* of the three collective-bargaining agreements involved, each of which was different.

A.

I apply the "sound arguable basis" approach first, examining each of the three collective-bargaining agreements independently. If Bath's interpretation of the contract and plan language lacks even a "sound arguable basis," then the language obviously cannot amount to a "clear and unmistakable waiver" by the Union.[16]

The "sound arguable basis" approach requires (1) that the employer have a "'sound arguable basis for ascribing a particular meaning to his contract'" and take "'action . . . in accordance with the terms of the contract as he construes it,'" and (2) that the employer was not "motivated by union animus, . . . acting in bad faith, or in any way sought to undermine the Union's status as collective-bargaining representative." *NCR Corp.*, supra, 271 NLRB at 1213, quoting *Vickers, Inc.*, 153 NLRB 561, 570 (1965). Under this standard, the 8(a)(5) allegation here cannot be dismissed.

1. The Draftsmen's agreement

The facts related to the Draftsmen's collective-bargaining agreement, already described, most clearly show why. No language in the agreement even implicitly authorizes Bath to act unilaterally with respect to the pension plan. Indeed, the Draftsmen's contract provided that the pension plan would remain "in full force and effect in accordance with the provisions thereof." The plan document, in article I, made Bath's authority to amend the plan "[s]ubject to the applicable provisions of any collective bargaining agreement." Read together, then, the agreement and the plan document plainly foreclose any change in the plan, including the merger, for the duration of the agreement.

But even if Bath somehow could be deemed to have a reasonable contract interpretation, its course of conduct would still preclude it from satisfying the other requirements of the "sound arguable basis" standard. See *Carrier Corp.*, supra, 319 NLRB at 198 (employer's failure to notify union of pension plan merger and bargain was bad faith under standard, even in absence of 8(a)(5) allegation). Bath's refusal to discuss ramifications of a possible plan merger during contract negotiations with the Draftsmen (Bath insisted that a merger was merely speculative[17]), coupled with its unilateral implementation of the merger, despite the agreement to maintain the plan "in full force and effect" demonstrates bad faith.

2. The Lodge S-7 agreement

No language in the Lodge S-7 agreement even arguably authorizes Bath to act unilaterally with respect to the pension plan. Nor does the agreement refer to the *pension* plan documents, in contrast to the governing documents of *other* benefit plans. The majority simply ignores this distinction. Had the agreement referred to the pension plan documents, and reflected an intention to incorporate them, in their entirety, into the agreement, Bath would still lack a "sound arguable basis" for its contract interpretation, given the language of plan article I, which makes Bath's right to change the plan subject to the collective-bargaining agreement. Inasmuch as the Lodge S-7 agreement refers to the Plan, the agreement and the Plan document necessarily must be read together to preclude any change in the Plan during the term of the agreement, even without the additional "full force and effect" language found in the Draftsmen's agreement. A contrary reading would mean that the Union effectively agreed to give Bath carte blanche to change the Plan. On that view, in other words, covering the plan in the collective-bargaining agreement gave the Union *less* protection against unilateral changes than it would have enjoyed if the agreement had never referred to the plan. As the *C & C Plywood* Board observed in a comparable situation, "[s]uch an intent is so contrary to labor relations experience that it should not be inferred unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact." 148 NLRB at 417. Neither the language nor the negotiating history here arguably supports the inference that Bath's interpretation requires.

3. The Lodge S-6 agreement

Bath's position is slightly stronger—but still not reasonable—with respect to the Lodge S-6 agreement. That contract did refer to "pensions" as part of the "Employees' Benefit Program" and did recite that the "terms and conditions" of the "plans" involved were "governed by Plan Documents," a correct statement of the law. But the agreement did not say that, despite the fact that the pen-

[16] Cf. *Exxon Research & Engineering Co.*, 317 NLRB 675, 675 (1995) (if contract language "falls short of establishing 'contract coverage' . . . [a] fortiori, the contract language fails to establish a clear and unmistakable waiver"), enf. denied 89 F.3d 228 (5th Cir. 1996).

[17] Bath's lack of candor presumably was advantageous. As the judge explained, Bath's plan was underfunded, the General Dynamics plan was overfunded, and in the Unions' view, a merger would have enabled Bath to increase pension benefits. The judge found that "[d]uring contract negotiations, increasing pension benefits was one of the major economic issues in the [Draftsmen's] proposals" and that "had the current contracts been negotiated with the merger in mind, all three unions may well have bargained for additional benefits due to the fact that Respondent was deferring the annual payment of $3.6 million into the BIW [Bath] pension fund."

sion plan was embodied in the agreement, Bath reserved a right to act unilaterally with respect to the plan. That position, as I have shown, is inconsistent with article I of the plan document. The only reasonable reading of the Lodge S-6 agreement is that the parties intended to fix the "terms and conditions" of the pension plan for the duration of the agreement.

B.

Contrary to the majority, then, applying the "sound arguable basis" approach here should lead to finding a violation. The correct result is just as clear applying the correct test: the Board's traditional waiver analysis. In describing the General Counsel's interpretation of the collective-bargaining agreements and the plan documents as "reasonable," the majority effectively concedes that there was no "clear and unmistakable waiver" here.[18] The Board's precedent, in any case, demonstrates as much.

None of the three collective-bargaining agreements involved here contained any language that, by its express terms, authorized Bath to act unilaterally with respect to the pension plan during the life of the agreements, much less to merge it out of existence. The Lodge S-7 agreement never refers to the pension plan documents at all, so there surely can be no waiver there. See *Midwest Power Systems,* 335 NLRB 237, 237–238 (2001); *Trojan Yacht*, supra.

The Plan documents were never the subject of collective-bargaining negotiations and, thus, cannot effect a waiver, except insofar as union agreement to their provisions is reflected in a collective-bargaining agreement. See *Georgia Power Co.,* 325 NLRB 420, 421 (1998). None of the three agreements refer to any specific provision of the plan documents or to Bath's authority under the plan documents. To the extent that the plan documents are referred to in the Draftsmen's contract and the Lodge S-6 agreement, the reference is made simply in the course of describing benefits available to employees. Such a reference is not a predicate for finding specific incorporation of the plan documents and a waiver with respect to the employer's unilateral action. See *Amoco Chemical Co.*, supra, 328 NLRB at 1222. In any case, in light of the article I language subjecting Bath's authority to change the plan to existing collective-bargaining agreements, the plan documents cannot be read to clearly and unmistakably demonstrate a waiver—just the opposite.[19]

IV.

The majority's decision is notable in its failure to acknowledge controlling Board precedent and in its clear eagerness to shunt the parties' dispute off to another forum, instead of enforcing the Act, despite a clear violation of the statutory duty to bargain. In the wake of the Board's recent decision in *Smurfit-Stone Container Corp.*, 344 NLRB No. 82 (2005), where the Board wrongly deferred to an arbitration decision applying an "inherent management rights" theory absolutely contrary to the Act, a trend seems to be taking shape. Accordingly, I dissent.

Michael T. Fitzsimmons, Esq., for the General Counsel.
William J. Kilberg, Eugene Scalia, Lauren Goodman, Esqs. (Gibson, Dunn & Crutcher, LLP), of Washington, D.C., for the Respondent.
William Rudis, Grand Lodge Representative, of Cincinnati, Ohio, for the Charging Parties, IAM Local Lodges S-6 and S-7.
Aaron D. Krakow, Esq. (Krakow, Souris & Birmingham), of Boston, Massachusetts, for the Charging Party, Bath Marine Draftsmen's Association.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Bath, Maine, on November 29–December 1, 1999. Charges were filed by IAM Locals S-6 and S-7 on October 7, 1998. The Bath Marine Draftsmen's Association (BMDA) filed a charge on November 27, 1998. A consolidated complaint was issued July 29, 1999.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Parties I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, constructs surface warships for the United States Navy at its facility in Bath, Maine, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Maine. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent, Bath Iron Works (BIW), is one of two companies that produces surface warships for the United States Navy. In 1963, it established the BIW pension plan for hourly em-

[18] See, e.g., *Exxon Research & Engineering Co.*, supra, 317 NLRB at 675 (ambiguous contract language cannot satisfy waiver standard).

[19] This is not a case like *Mary Thompson Hospital*, supra, in which the Board found that (1) the plan documents clearly and unmistakably permitted unilateral action, and (2) the bargaining agreement clearly and unmistakably incorporated the plan documents in their entirety—in other words, that the union had agreed to be bound by the language of the plan documents. Here, neither element is satisfied. That said, I have doubts whether *Mary Thompson Hospital* was correctly decided.

ployees. For many years, these employees have been represented by four unions; Local Lodge S-6 of the IAM, Local Lodge S-7 of the IAM, the Bath Marine Draftmen's Association, and the Independent Guards Association. On September 1, 1994, benefits ceased accruing for members of Locals S-6 and S-7 under the BIW pension plan. After that date, their pension benefits have been accruing under the IAM multiemployer pension plan. Benefits for service prior to September 1, 1994, are paid under the BIW plan. This matter involves charges filed by all the Unions, except the Guards Association, alleging that Respondent violated Section 8(a)(1) and (5) and 8(d) of the Act, in October 1998, when it merged the Bath Pension Fund into the General Dynamics Pension Fund.

General Dynamics Corporation acquired BIW in 1995. Almost immediately after the acquisition and without notice to the unions, General Dynamics replaced BIW as administrator and sponsor of the BIW pension fund. The General Dynamics investment committee also became the investment managers for the BIW fund. Since 1995, Respondent has made a number of other changes to the plan without negotiating with its Unions. In 1997, the actuaries for the plan changed. The next year the trustees of the plan changed. None of the unions has objected to any of these changes or requested bargaining over them.

The most recent collective-bargaining agreement between Respondent and Local S-6 is effective between August 25, 1997, and August 27, 2000. The BIW pension plan is addressed at pages 31 and 38 of that agreement (Jt. Exh. 24). At page 31, the contract states that:

> Plans that provide you financial security include pensions, 401(k), healthcare, accident sickness (A & S) insurance, life insurance and business travel accident insurance…*These Plans are ERISA Plans and their terms and conditions are governed by Plan Documents and/or Insurance Contracts.* Therefore, the language contained in this Agreement for these Plans is intended to represent only highlights of the Plans. . . . [Emphasis added.]

The most recent collective-bargaining agreement between Respondent and Local S-7 is effective from September 28, 1997, until October 1, 2000 (Jt. Exh 25). At page 33 of the contract there is a general discussion of the BIW "Employee Benefit Program":

> The Employee Benefit Program consists of a Health Care Program, Weekly Accident and Sickness Insurance, Life Insurance, and Wellness and Business Travel Accident Insurance, each subject to any change or modification therein by the insurers. . . . All terms and conditions in their entirety are governed by Plan Documents and summarized in a Summary Plan Description.

This discussion does not mention the hourly pension plan. The BIW pension plan for hourly employees is discussed at page 42 of the collective-bargaining agreement. There is no mention of the plan documents in that discussion.

The most recent collective-bargaining agreement between Respondent and BMDA runs from March 16, 1998, through March 18, 2001 (Jt. Exh. 26). During the negotiations leading to this agreement, Respondent informed the BMDA that it was considering merging the BIW pension plan with the General Dynamics plan. The BMDA suggested that the parties negotiate on the assumption that the plans would be merged. Respondent declined to do so on the grounds that the merger was too speculative because it needed the approval of General Dynamics and the Navy prior to accomplishing the merger. During contract negotiations, increasing pension benefits was one of the major economic issues in the BMDA's proposals.

The 1998 contract with the BMDA was concluded on March 16, 1998, without negotiations which considered the possibility that the BIW plan would be merged with the General Dynamics plan.[1] The BIW pension plan is discussed in article 19, page 38 of the agreement (Jt. Exh. 26). After discussing certain amendments to the plan, section 4 of article 19 provides in subsection e:

> Except as the plan shall be modified as required by the foregoing provisions and the following Sections of this Article, *said plan shall remain in full force and effect in accordance with the provisions thereof, providing, however, that changes thereto may be made as provided in Article I of the plan, entitled "Qualification Under The Internal Revenue Code."* [Emphasis added.]

> 2. In the event any changes made pursuant to Section 4.(a).1.e above require changes in the benefit structure of the plan as applicable to employees included thereunder, *or would change the amount of the contributions made or to be made by BIW thereunder,* such changes shall, at the request in writing of either BIW or the BMDA, be subject to negotiation. If within sixty (60) days following the date of any such request, BIW and BMDA cannot agree upon the changes, this Article of this Agreement shall be void and the plan shall be terminated as provided in Article IX, Section 9.2, of the plan [emphasis added].

In late April 1998, Respondent informed all four Unions that it was going to merge its plan with the General Dynamics plan. It asked the Unions to agree to the merger but told them that BIW had the right to merge the plans unilaterally and that it was not required to bargain with the Unions over the merger. None of the Charging Party Unions agreed to the merger. BIW had had a number of discussions with union representatives regarding the merger between April and October 1998. The IAM locals initially requested a 25-cent-per-hour increase in BIW's contribution to the IAM multiemployer pension fund in exchange for their approval of the merger. Later, the IAM requested that BIW merge its plan with the IAM plan rather than with the General Dynamics plan. The BMDA asked for information and documentation regarding the merger and eventually asked for a share of the deferred pension payments.

The merger is the brainchild of Dan Roet, BIW's director of compensation and benefits. Roet initiated the merger in late December 1997 or early January 1998. Its objective was to

[1] Where there is conflict between the testimony of BMDA President Mary Cunningham and that of Respondent's witnesses regarding their discussions, I credit Cunningham, particularly where her testimony is supported by contemporaneous notes taken by BMDA's secretary.

defer BIW's contributions to the hourly pension plan. Prior to the merger, Respondent was contributing approximately $3.6 million annually to the plan.

Before the merger, the BIW plan was significantly underfunded; the General Dynamics pension plan was significantly overfunded. Due to the fact that the General Dynamics plan was much larger, the merged plan is significantly overfunded. Given these circumstances, BIW is prohibited under the Employee Retirement Income Security Act (ERISA) from making contributions to the merged plan so long as that plan remains overfunded. On the other hand, pursuant to Federal Government procurement regulations (the cost accounting standards), when the General Dynamics plan ceases to be overfunded, BIW will be required to pay off these deferred contributions with interest.

Analysis and Conclusions

1. A change in the terms and conditions of employment during the term of a collective-bargaining unit generally requires the consent of the union

An employer may not generally make a unilateral change in the terms and conditions of employment during the term of a collective-bargaining agreement without obtaining the consent of the union, *Carrier Corp.,* 319 NLRB 184 (1995), and cases cited therein. If the change is material, substantial, and significant, affecting the terms and conditions of employment of bargaining unit employees, such a change constitutes an unfair labor practice within the meaning of Section 8(a)(1) and (5) and Section 8(d) of the Act.

2. The merger of the BIW and General Dynamics pensions plans was a material, substantial, and significant change, affecting the terms and conditions of employment of BIW bargaining unit employees

With regard to whether the merger of the BIW plan was a material, substantial and significant change, affecting the terms and conditions of employment, all the parties recognize the importance of the Board's decision in *Carrier Corp,* supra. Respondent argues that the case is distinguishable from the instant matter; I see no material distinction. Carrier made many of the same arguments that BIW makes herein and the Board rejected them.

Carrier, like BIW, merged its underfunded pension plan with the overfunded plan of its parent company. It did so for many of the same reasons that BIW merged its plan with the General Dynamics plan; to increase plan security, to reduce administrative costs and most significantly, to defer funding of its plan for a period of years.

In *Carrier,* supra, the Board concluded that the merger resulted in significant, material and substantial changes in the terms and conditions of Carrier employees. The Board held that a change need not have a negative impact of employees to be considered substantial and significant, and that changes that improve employees' working conditions are still subject to the same bargaining and midterm modification obligations as negative changes. Thus, the Board found it irrelevant that the merger did not result in any changes in pension coverage, benefit levels, or benefit administration. It noted that, as in the instant case, the change had a substantial effect on the viability of the fund and the fund's ability to pay or afford current and future benefits.

In the instant case, had the current contracts been negotiated with the merger in mind, all three Unions may well have bargained for additional benefits due to the fact that Respondent was deferring the annual payment of $3.6 million into the BIW pension fund. BIW takes the position that there is no money for additional benefits because it will eventually have to pay all the contributions plus interest.

This argument cuts both ways. The obligation to eventually repay the deferred contributions has obvious potential for a detriment to employees in the future as the result of the merger. If repayment is required when Respondent's economic situation is less favorable than at present, this additional financial burden could adversely affect the benefits that Respondent is willing and/or able to negotiate with the unions.

3. The relevant collective-bargaining agreements do not confer upon BIW the right to unilaterally merge its pension plan with that of General Dynamics

Respondent contends, based on the Board's decision in *Mary Thompson Hospital,* 296 NLRB 1245 (1989), that its collective-bargaining agreements with the charging parties incorporated the plan documents, which in turn authorize BIW to unilaterally merge its plan. The Board in *Mary Thompson* adopted an administrative law judge's decision, which found that the union affirmatively agreed in its collective-bargaining agreement that the employer could terminate its pension plan at any time. The judge concluded that the union unambiguously waived its right to be consulted or to object, during the contract term, to a termination of employer contributions to the pension plan. He did so on the basis of the following provision in the collective-bargaining agreement:

> The Connecticut General Life Insurance Accumulator Plan, which provides pension benefits for employees upon retirement is incorporated in this Agreement for all eligible employees.

The judge found that all provisions of the plan became part of the collective-bargaining agreement, including a sentence in the pension plan booklet stating that the employer "may modify, suspend, or terminate the plan should circumstances force us to do so."

With regard to IAM Local S-7, Respondent's argument overlooks that fact that there is no language in its collective-bargaining agreement incorporating the plan documents (see statement of facts herein). Respondent has a somewhat better argument on this issue with regard to Local S-6 and the BMDA. Nevertheless, on the basis of the Board's decisions in *Trojan Yacht,* 319 NLRB 741, 742 fn. 5 (1995), and *Amoco Chemical Co.,* 328 NLRB 1123, 1125 fn. 5 (1999), I conclude that *Mary Thompson* is to be applied very narrowly, i.e., only in those cases in which a provision of the collective-bargaining agreement specifically incorporates the entire benefit plan into the contract.

As the Board held in *Trojan Yacht,* supra "[i]n order to establish waiver of the statutory right to bargain over mandatory subjects of bargaining . . . there must be clear and unmistakable relinquishment of that right. . . . To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter." In *Trojan Yacht*, the parties' collective-bargaining agreement contained a provision stating that the employer's pension plan:

> will be maintained in the same manner and to the same extent such plans are generally made available and administered on a corporate basis.

The Board concluded that this clause did not give the employer the unilateral right to make changes in the pension provisions for unit employees whenever it decided to make pension changes for nonunit employees. From *Trojan Yacht* and *Amoco* I conclude that in order to make provisions of plan documents part of the collective-bargaining agreement, the contract must use the word "incorporate" or some other term that clearly indicates the parties' intent to be bound by all provisions of the plan documents. That is not the case with regard to the instant matter.

Respondent contends that the phrase in the Local S-6 contract, stating that BIW financial security plans, including pension plans, "are governed by Plan Documents" is the equivalent of a clause incorporating all provisions of the plan documents into the contract. In light of the Board's inclination to require a clear and unmistakable relinquishment of the right to bargain, I find that this clause does not incorporate all provisions of the plan documents into the contract.

The provision relied upon by Respondent with regard to the BMDA is even more ambiguous. That provision states that the plan "shall remain in full force and effect." This phrase does not convey a intentional relinquishment of the Union's right to bargain over the merger of the BIW plan with other plans. This is all the more true since it has not been established that the BMDA, when agreeing to this language, had been made aware of the second amendment to the plan documents, purporting to give Respondent the authority to unilaterally merge its hourly pension plan.

BIW's interpretation of this language is also inconsistent with the BMDA's specific request, during contract negotiations, for bargaining over the merger. In contract interpretation matters, the parties' intent underlying the language of the contract is always paramount, *Lear Siegler, Inc.,* 293 NLRB 446, 447 (1989). Respondent, in essence, is asking the Board to interpret the "full force and effect" language to constitute a waiver by the BMDA of its right to bargain over the merger of BIW pension plan. To do so in light of the fact that the BMDA requested bargaining over the merger days before the contract was signed, would do violence to the parties' intent. I decline to so interpret this language.

Additionally, the plan documents do not clearly give Respondent unilateral authority to merge its plan. Article I of the plan document as amended and restated on January 1, 1994, provided:

> Subject to the applicable provisions of any collective bargaining agreement, the Corporation reserves the right to make any changes . . . as it deems appropriate to the Plan and/or any trust agreement thereunder . . . .

Article 12, section 12.1 of the plan also limited BIW's authority to amend, modify or suspend the plan by the term "subject to the applicable provisions of the collective-bargaining agreement." Section 12.5 of the 1994 document provided:

> In the case of any merger or consolidation of the Plan with, or transfer in whole or in part of the assets and liabilities of the plan to, any other plan of deferred compensation maintained or to be established for the benefit or some or all of the Participants in this Plan, the assets of the Plan applicable to such Participants shall be transferred to the other plan only if each Participant in the Plan would (if either this Plan or the other plan then terminated), receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the Plan had then terminated). Notwithstanding the preceding to the contrary, this Section shall not apply in the event that the other plan is a multiemployer plan.

It is therefore clear that nothing in the plan documents, as they existed on January 1, 1994, gave BIW any authority to unilaterally merge its hourly pension plan with another plan.

On October 17, 1995, the plan document was amended by General Dynamics. At some later point in time, a second amendment to the BIW pension plan was issued, retroactively effective to September 13, 1995. This amendment is signed only by the president of BIW. This second amendment replaced articles 12, sections 12.1 and 12.2 of the 1994 plan document in their entirety.

The new section 12.1 states that: The right is reserved at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan with such right to be exercised:

> (i) By the Board of Directors of General Dynamics Corporation if it shall be with respect to the increasing of benefits provided under the plan covering salaried employees whose benefits are not subject to collective bargaining or if it shall be with respect to this Section 12.1, or
>
> (ii) By the Chairman of the Board of Directors of General Dynamics Corporation . . . if it shall be with respect to any Plan covering employees whose benefits are subject to collective bargaining, any other Plan covering salaried employees whose benefits are not subject to collective bargaining, provided that it pertains to any issue other than the increasing of benefits thereunder and shall specifically include the authority to extend coverage to additional entities or to authorize withdrawal from the Plan of existing participating entities; or
>
> (iii) By the Chairman to the extent found necessary or advisable by the Chairman in his discretion, to comply with the requirements of ERISA, the Internal [Revenue] Code or any other applicable law or governmental regulation.

The new section 12.2 states that "[I]n accordance with the procedures set forth in this Section 12.2 and consistent with the intent of Section 12.1, the Board or the Chairman of General Dynamics Corporation may terminate the Plan or discontinue contributions at any time."

These provisions do not make it clear that Respondent is claiming the unilateral authority to merge the Bath plan with the General Dynamics plan. The second amendment does not use the word "merger." Authority to merge the BIW plan with the General Dynamics plan can be gleaned only by inference. Thus, assuming that the second amendment to the plan is part of Respondent's contract with Local S-6 and the BMDA, I conclude that it does not clearly and unmistakably waive the unions' right to bargain over a merger.

4. The Charging Parties did not waive their right to bargain over the merger by their acquiescence to prior unilateral changes in the plan

The fact that the charging parties did not protest or demand to bargain over previous unilateral changes in the pension plan does not constitute a waiver of their right to bargain over the merger of the BIW hourly pension plan with the General Dynamics pension plan. The Board has consistently held that a union that acquiesces in an employer's unilateral changes in terms and conditions of employment does not irrevocably waive its right to bargain over such changes in the future, *Georgia Power Co.,* 325 NLRB 420, 421 fn. 9 (1998); *Exxon Research & Engineering Co.,* 317 NLRB 675, 685–686 (1995).

Even if acquiescence to prior unilateral changes constitutes a waiver of a union's right to bargain in some instances, it does not do so here. The merger is a change that differs significantly from prior changes which were unopposed by the unions. While, the change of plan administrators or actuaries, for example, could have an positive or negative effects on unit employees, the merger resulted in Respondent's immediate access to an additional $3.5 million a year—regardless of whether it would ultimately have to make these contributions to the pension fund. It does not logically follow from the unions' failure to object to the change in actuaries, for example, that they would not have any interest in bargaining for a share of this precise amount in deferred pension contributions.

CONCLUSION OF LAW

By merging its pension plan for hourly employees into the General Dynamics pension plan, on October 14, 1998, without the consent of the Charging Party Unions, Respondent has materially, substantially and significantly modified terms and conditions of employment and thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 8(d) of the Act.[2]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

While the normal remedy for an unlawful unilateral change is the restoration of the change, plus a make whole remedy, where the change may involve a benefit to employees, it is appropriate to issue a restoration order conditioned on the affirmative desires of the affected employees as expressed through their bargaining agents, *Carrier Corp.,* supra.

In order to allow the Unions ample opportunity to consider whether to request the reinstatement of the independent BIW hourly pension plan, I shall recommend that the Unions make their decision within 60 days of the date of the Board decision (or the court of appeals decision enforcing the Board decision, should Respondent refuse to comply). If the Unions do not request reinstatement of the separate BIW plan, the merger of the plan into the General Dynamics plan shall remain in effect. Respondent will have 40 days after receipt of the Unions' written request to reinstate the separate BIW plan as the pension plan for its employees.

If one or more of the Unions requests the reinstatement of the BIW hourly pension plan, Respondent shall restore the status quo ante as set forth in *Carrier Corp,* supra at 200.

I shall recommend further that during the 60-day period that the unions are considering whether to request the reinstatement of the separate BIW plan and back payments to it, that on request by one or more of the unions, conditioned on the Union(s) agreeing to bargain about the reinstatement of the BIW pension plan, that Respondent be ordered to bargain about the amount of any contributions to its plan that have been and will be deferred as the result of the merger.

[Recommended Order omitted from publication.]

[2] I find it unnecessary to decide the issue of whether or not Respondent bargained in good faith with the unions—given the fact that I conclude that the merger could not have been effected legally without the Unions' consent.