

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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Nos. 05-2623, 05-2793

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BATH MARINE DRAFTSMEN’S ASSOCIATION;  
LOCAL LODGES S-6 & S-7, DISTRICT LODGE 4, INTERNATIONAL  
ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

BATH IRON WORKS CORPORATION

Intervenor

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ON PETITIONS FOR REVIEW OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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## STATEMENT OF JURISDICTION

This case is before the Court on the petitions of Bath Marine Draftsmen’s Association (“BMDA”), Local Lodge S-6, District Lodge 4, International Association of Machinists and Aerospace Workers, AFL-CIO (“S-6”), and Local Lodge S-7, District Lodge 4, International Association of Machinists and Aerospace Workers, AFL-CIO (“S-7”) (collectively, “the Unions”) to review a Board order dismissing a complaint against Bath Iron Works Corporation (“the Company”). The Board had jurisdiction over the unfair-labor-practice proceedings below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”).<sup>1</sup> The Decision and Order, issued on August 27, 2005, and reported at 345 NLRB No. 33 (Add. 1-16),<sup>2</sup> is a final order with respect to all parties under Section 10(f) of the Act.<sup>3</sup>

BMDA filed a petition for review of the Board’s order on October 26, 2005, and S-6 and S-7 filed a petition for review on December 1. On November 21, 2005, the Company (the Respondent before the Board) moved to intervene on the

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<sup>1</sup> 29 U.S.C. §§ 151, 160(a).

<sup>2</sup> “Add.” cites are to the addendum to the Unions’ Brief. “A.” refers to the joint appendix, which the Unions filed with their brief on February 28, 2006. Where applicable, references preceding a semicolon are to the Board’s findings; those following, to the supporting evidence.

<sup>3</sup> 29 U.S.C. § 160(f).

side of the Board, and the Court granted the motion on December 21. On December 23, the Court granted the Board's unopposed motion to consolidate the two cases for briefing and oral argument. The Court has jurisdiction over the Unions' petitions pursuant to Section 10(f) of the Act because the alleged unfair labor practices at issue occurred in Bath, Maine.<sup>4</sup> Both were timely filed, as the Act imposes no time limit for such filings.

### **STATEMENT OF THE ISSUES PRESENTED**

An employer commits an unfair labor practice if it modifies a term or condition of a collective-bargaining agreement, during the effective period of that agreement, without the contracting union's consent. The General Counsel alleged in this case that the Company's merger of one pension plan into another modified the relevant contracts and constituted such an unfair labor practice. The issues in this case are:

- (1) whether the Board's application here of its longstanding *NCR* standard for evaluating contract-modification allegations is rational and consistent with the Act; and
- (2) whether the Board erred in finding that the contracts arguably incorporated the plan documents, which could reasonably be construed to permit the disputed merger, and, therefore, that no unfair labor practice occurred.

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<sup>4</sup> *Id.*

## STATEMENT OF THE CASE

This unfair-labor-practice case came before the Board on a consolidated complaint issued by the Board's General Counsel on July 29, 1999, pursuant to charges filed by the Unions. (Add. 12; A. 8-16.) Following a hearing, an administrative law judge issued a decision on March 15, 2000, finding that the Company had violated Section 8(a)(5) and (1) of the Act by merging its pension plan into the pension plan of its parent company, General Dynamics. (Add. 15.) The Company excepted to the judge's decision and the Board (Chairman Battista and Member Schaumber; Member Liebman dissenting) reversed, finding merit to the Company's exceptions and dismissing the complaint. (Add. 1.)

## STATEMENT OF THE FACTS

### I. THE BOARD'S FINDINGS OF FACT

#### A. Background

The Company, which builds surface ships for the Navy, has collective-bargaining agreements with four unions, including the three petitioners in this case. It signed new contracts with S-6 and S-7 in 1997, and with BMDA in 1998. (Add. 1; A. 46, 55, 65.) Since December 1963, the Company has provided a Pension Plan for Hourly Employees ("Plan"), amended and restated effective January 1994, and amended on October 17, 1995 and September 13, 1995. (Add. 12; A. 20-43.) The Plan covers employees represented by each of the

Unions. (A. 53, 63, 67.) Since September 1, 1994, however, there have been no accruals under the Plan for employees in both the S-6 and S-7 units, who have been accruing pension benefits under the Machinists' pension plan. (A. 53, 63, 101.)

### **B. Disputed Contract Provisions**

All three of the Unions' contracts refer to the Plan. In the S-6 and S-7 contracts, sections describing employee benefit programs specifically identify the Plan as one of those providing covered employees' pension benefits, note that descriptions of the benefit plans in the collective-bargaining agreements are "intended to represent only highlights" of them, and separately state that the "terms and conditions" of the various benefit-program plans are "governed by Plan Documents." (Add. 1-2, 5 n.11; A. 49, 53, 58, 63.) In the BMDA contract, the "Basic Pension Plan" section identifies the Plan, sets forth a few amendments to the Plan (not relevant here), and provides that the 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 'Qualifications Under The Internal Revenue Code.'" (Add. 2; A. 67.)

### **C. Disputed Plan Provisions**

In turn, the Plan itself contains language reserving to the Company certain rights with respect to the Plan's operation and existence. Section 12.1, entitled "Amendment," states:

Subject to the applicable provisions of any collective bargaining agreement, the Company shall have the right to amend, modify, or suspend the Plan, provided that such action shall not cause any part of the Plan assets to be used for, or diverted to, any purpose other than the exclusive benefit of the Participants or their beneficiaries or to revert to any Company . . . .

(Add. 2; A. 30.) And section 12.2, entitled "Termination or Partial Termination," provides:

The Company intends to continue the Plan indefinitely, but reserves the right to terminate the Plan and Trust and to liquidate the assets of the Trust. . . .

(Add. 2; A. 31.)<sup>5</sup>

### **D. The Merger**

In 1998, while negotiating with BMDA, the Company revealed that it was contemplating a merger of its Plan into the pension plan of its parent company, General Dynamics Corporation, but declared the possible merger too speculative to warrant negotiations. (Add. 1; A. 29, 102, 106, 159-60, 171-73.) Shortly after

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<sup>5</sup> On September 13, 1995, both section 12.1 and section 12.2 were modified by amendment to the Plan, further strengthening the Plan's reservation to the Company of modification and termination rights. (A. 41-43.) The Board declined to decide whether the amendment was valid because it found that the original language was sufficient to support the Company's claim of right to merge the Plan. (Add. 2 n.2.)

concluding the BMDA negotiations, the Company received permission for the merger from both the government and General Dynamics. (Add. 1; A. 108, 111.) It then discussed its merger plan with the Unions but did not reach any agreement with them. (Add. 1; A. 111-12, 128-29.) In October 1998, the Company implemented the merger of its Plan into the General Dynamics plan, without the Unions' consent. (A 1; A. 44, 92.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Battista, Member Schaumber; Member Liebman, dissenting) dismissed the complaint in this case, reversing the administrative law judge.<sup>6</sup> More specifically, the Board determined that this case presented only a contract-modification allegation, then found that the Company acted in good faith and had a "sound arguable basis" for interpreting its collective-bargaining agreements and the Plan documents as allowing the merger. The Board declined to adjudicate which interpretation of the contracts at issue – the Company's or the General Counsel's and Unions' – was correct, as such determinations are more appropriately left to arbitrators and the courts. (Add. 4-5.) In sum, the Board concluded that, because the Company had a sound, arguable basis for interpreting its collective-bargaining agreements as permitting the plan

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<sup>6</sup> Member Liebman disagreed with both the standard the Board used and with the Board's application of that standard to the facts of this case. (Add. 6-11.)

merger, the merger did not violate the Company's "duty to continue in full force and effect the terms and conditions of the existing contract[s]." (Add. 4.)

### **STANDARD OF REVIEW**

The Board has "considerable authority" to interpret the Act, and its legal determinations are thus entitled to deference from the courts as long as they are "rational and consistent with the Act."<sup>7</sup> Its contract interpretation, however, is not entitled to deference.<sup>8</sup>

### **SUMMARY OF ARGUMENT**

In contract-modification cases, the Board must determine whether a challenged employer action altered, without the relevant union's consent, a particular term or condition of an applicable collective-bargaining agreement. Because the Board is not generally charged with contract interpretation and enforcement, however, an alteration must be fairly egregious to rise to the level of an unfair labor practice. An action that may change the terms of the contract as reasonably interpreted by the union will not violate the Act if the employer also

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<sup>7</sup> *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987). *See also Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) ("Courts . . . must respect the judgment of the agency empowered to apply the law to varying fact patterns, even if the issue with nearly equal reason might be resolved one way rather than another.") (quotations and citations omitted).

<sup>8</sup> *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 202-03 (1991).

had a “sound arguable basis” for its contrary interpretation and acted in good faith pursuant to that interpretation.

In this case, the Company unilaterally merged its pension plan pursuant to a reasonable interpretation of plan documents, which plainly reserve modification and termination rights to the Company, and collective-bargaining agreements that appear to incorporate the terms and conditions of those plan documents. The Unions contend that the contracts and plan documents, read together, actually bar the merger. Faced with contrasting plausible contract interpretations by the contracting parties in this case, the Board reasonably declined to enter the fray of contract construction and refused to find an unfair labor practice by elevating one contracting party’s reasonable interpretation over another’s, a task more suited to arbitrators and the courts.

## **ARGUMENT**

### **I. THE PLAN MERGER DID NOT UNLAWFULLY MODIFY THE COMPANY’S CONTRACTS WITH THE UNIONS**

#### **A. To Prove Unlawful Contract Modification, the General Counsel Must Demonstrate that an Employer Modified a Specific Term of Its Contract without Union Consent**

Sections 8(a)(5) and 8(d) establish an employer’s bargaining obligations under the Act. Among other things, those sections make it an unfair labor practice for an employer to modify a term or condition contained in a collective-bargaining

agreement without obtaining the consent of the contracting union. The union, moreover, has every right to withhold consent.<sup>9</sup>

To prove that an employer has committed unlawful contract modification, the General Counsel must identify a specific term of the bargaining agreement that the employer's unilateral action modified.<sup>10</sup> In other words, the General Counsel must, as the Board explained (Add. 4), demonstrate that the contract contained terms that forbade the employer's action. An employer's unilateral action may still violate Section 8(a)(5) and 8(d) without contravening a particular provision of a collective-bargaining agreement.<sup>11</sup> But the unfair labor practice in such a case

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<sup>9</sup> 29 U.S.C. § 158(a)(5), 158(d). See *Milwaukee Spring Div. of Illinois Coil Spring Co.*, 268 NLRB 601, 602 (1984) (when contract in effect, employer must obtain union consent before modifying terms), *aff'd sub nom. Auto Workers v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985); *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973) (Section 8(d) unambiguously forbids employer's midterm modification of contract provisions without union's consent and privileges union to withhold consent), *enf'd mem.*, 505 F.2d 1302 (5th Cir. 1974). A Section 8(a)(5) violation results in a "derivative violation" of Section 8(a)(1). See *Allied Chem. & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6 (1971).

<sup>10</sup> See *Milwaukee Spring*, 268 NLRB at 602-04 & n.13.

<sup>11</sup> See *Crest Litho, Inc.*, 308 NLRB 108, 111 n.11 (1992) (noting that complaint had charged a failure to bargain "apart from the contractual issue," but dismissing the additional allegation for insufficient evidence after the General Counsel failed effectively to pursue it); *Milwaukee Spring*, 268 NLRB at 602 ("If the employment conditions the employer seeks to change are not 'contained in' the contract, . . . the employer's obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change.").

would not be unlawful contract modification, the unfair labor practice alleged in this case. Instead, it would constitute an unlawful unilateral change in working conditions.<sup>12</sup>

In cases involving allegations of contract modification, contract interpretation is often a central issue. Generally, of course, the Board is not charged with interpreting collective-bargaining agreements, though it may do so if necessary to the adjudication of an unfair labor practice.<sup>13</sup> It will not, however, assume the role of an arbitrator and choose between the conflicting plausible interpretations of the contracting parties. Parties with such conflicting constructions of their agreement have recourse, as the Board noted (Add. 5), to arbitrators (often empowered to interpret contracts by the contracts themselves) and the federal courts (under Section 301 of the Act, 29 U.S.C. § 185), to obtain an adjudication of their differences and a definitive interpretation of their contract.

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<sup>12</sup> See, e.g., *Trojan Yacht*, 319 NLRB 741 (1995) (finding, in a unilateral-change case, that employer violated Act by modifying its pension plan without giving the union notice and an opportunity to bargain, where union had not clearly and unmistakably waived its right to bargain over that change); *Milwaukee Spring*, 268 NLRB at 603-04 (finding no contract-modification violation where no specific clause of contract violated by employer's action and, separately, no unilateral-change violation "in view of the parties' stipulation that [the employer] satisfied its obligation to bargain over [its] decision").

<sup>13</sup> See *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 427-28 (1967).

In other words, given that other avenues exist for resolving contract-interpretation disputes, the Board will not reach out to find an unfair labor practice of unlawful contract modification when the violation would turn on one of multiple reasonable readings of the contract. If the Board, therefore, finds that an employer charged with unlawful contract modification “has a sound arguable basis for ascribing a particular meaning to his contract,” that “his action [wa]s in accordance with the terms of the contract as he construes it,” and that he acted in good faith without anti-union animus, the Board will dismiss the allegation of contract modification.<sup>14</sup> That is precisely what the Board found, and did, here.

**B. The General Counsel Failed to Show that the Plan Merger Did Not Conform to a Plausible Reading of the Company’s Contracts with the Unions**

The General Counsel alleged that the Company modified its contracts with the Unions by merging the Plan into its parent company’s pension plan. In its

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<sup>14</sup> *NCR Corp.*, 271 NLRB 1212, 1213 (1984). *See also Westinghouse Elec. Corp.*, 313 NLRB 452, 452, 456-57 (1993) (longstanding disagreement about whether employer can prevent more senior employee from bumping less senior employee under contractual seniority clause when less senior employee has particular security clearance), *enf’d mem.*, 46 F.3d 1126 (4th Cir. 1995); *Crest Litho*, 308 NLRB at 110-11 (dispute over whether advance-layoff-notice requirement in contract mandated individual notices or whether general notice was sufficient); *Atwood & Morrill Co.*, 289 NLRB 794, 795 (1988) (rejecting judge’s determination that employer unlawfully modified contract by adhering to a “colorable” but less “appropriate” interpretation of the contract); *Thermo Electron Corp.*, 287 NLRB 820, 820 (1987) (dispute over proper method, under provisions of pension plan document, for determining participant benefits upon plan termination), *aff’d mem.*, 884 F.2d 578 (6th Cir. 1989).

defense, the Company asserted that the merger conformed to the terms of the Plan documents, as incorporated into the contracts. The Board acknowledged (Add. 5) that the General Counsel's (and Unions') interpretation of the contracts was reasonable, but found (Add. 5) that the Company also offered a sound, arguable basis for its interpretation.

With respect to the Company's contract construction, the Board first held (Add. 2, 5 & n.11) that the contracts can each plausibly be read as incorporating the plan documents. Then, it found (Add. 2 & n.2, 5) that the plan documents themselves can reasonably be interpreted as permitting the disputed merger. There was, of course, no question in this case of anti-union animus or other bad faith on the part of the Company. Because this case involved just the sort of contractual-construction issue more appropriately resolved by an arbitrator or a court, the Board declined to find an unlawful contract modification. That decision was reasonable and should be affirmed by the Court.

**1. The merger did not modify the S-6 or S-7 collective-bargaining agreements**

The incorporation rationales for the S-6 and S-7 contracts are very similar and are based both on the agreements' language and on their organization. Moreover, as the Unions concede by omission, the plan language controls completely with respect to S-6 and S-7: nothing in either contract even arguably restricts the effect of the Plan's provisions if they are incorporated into the

agreements. Finally, the Plan also indisputably provides an arguable reservation of right to the Company to merge the Plan. In other words, as the following discussion demonstrates, the Company had a sound, arguable basis, both in the S-6 and S-7 collective-bargaining agreements and in plan documents, for its claim of a right to merge the Plan unilaterally.

With respect to incorporation, each of the agreements contains a chapter entitled “Benefits.” Near the beginning of the Benefits chapter, after delineating policies relating to different sorts of paid time off (*e.g.*, vacation, holidays, bereavement) (A. 47-49, 56-58), both the S-6 and S-7 contracts contain a general paragraph discussing the Company’s employee benefit program. Those paragraphs read, in relevant part:

these Plans[’] . . . terms and conditions are governed by Plan Documents . . . Therefore, the language contained in this Agreement for these Plans is intended to represent only highlights of the Plans.

and:

The 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 . . . .

(A. 49 (S-6), 58 (S-7).) The remainder of the benefits chapter of each contract consists of several sections, each of which describes in more detail one of the component plans or benefits that, considered together, constitute the benefit program described generally in the above-quoted language (*e.g.*, health care

program, life insurance, 401(k), prescription glasses policy). (A. 49-54, 59-45.)

The final such descriptive section in each contract's benefit chapter describes the employees' pension plan (A. 53, 63), identifying the Plan by its full name as one of the pension plans providing employee benefits under the agreement.

In sum, both the S-6 and the S-7 contracts cite the Plan by its full name as part of an employee-benefit program, explicitly state that the terms and conditions of the Plan (like those of other plans in the employee-benefit program) will be "governed by Plan Documents," and alert the reader that the contracts' language merely represents "highlights" of the plans. The Board thus reasonably found (Add. 5) that the company interpretation of those collective-bargaining agreements as incorporating the Plan's documents was plausible.

The Unions argue (Br. 25) that the "mere mention" of a pension plan in a contract is insufficient to construe the contract as incorporating the plan. In the Unions' case, *Printing Specialties & Paper Products Union Local 680 v. Nabisco Brands*,<sup>15</sup> however, the only mention of the pension plan in the collective-bargaining agreement was a statement that "[t]he Company agrees to continue its present Pension Plan in full force and effect for the term of this agreement." That

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<sup>15</sup> 833 F.2d 102, 103 (7th Cir. 1987). The bargaining history in *Printing Specialties* also evidenced the parties' intent to exclude the plan from arbitration, the particular issue in that case. See 833 F.2d at 105.

contract, unlike the S-6 and S-7 contracts, did not specifically name the precise plan, nor did it refer in any way to the plan's documents.

Although the Unions point out (Br. 25-26) that the specific “pension plan” sections of the S-6 and S-7 agreements make no mention of plan documents, that argument ignores the organization of the agreements. In fact, both the S-6 and S-7 contracts first explicitly note that all benefits are subject to applicable plan documents, and then subsequently describe each of those benefits, including (in the pension-plan section cited by the Unions) the Plan.<sup>16</sup> Because the pension plans are part of the employee benefits program in each contract, the general benefit-program language could reasonably be interpreted as referencing the Plan. The fact that the Machinists’ pension plan is described in greater detail, another fact cited by the Unions, may simply be a product of the fact that the Machinists’ was the active pension plan whereas the Plan was only residual – employees were no longer accruing benefits under the Plan. Certainly, as the Board found (Add. 5),

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<sup>16</sup> Contrary to the Unions’ assertion (Br. 26), the Board did not ignore the pension-plan sections of the S-6 and S-7 contracts in its analysis. In explaining why the general benefit paragraph in the S-7 contract applied to the Plan despite its failure specifically to list pension plans as one of those benefits, the Board explained how the organization of both contracts lent support to the Company’s interpretation of them. *See* Add. 5 n.11.

the Unions' interpretation of the contracts is not unreasonable. But they fail to demonstrate that the Company's is.<sup>17</sup>

Assuming the plan documents are incorporated into the S-6 and S-7 collective-bargaining agreements as detailed above, the Company finds ample support for its claim to a merger right in the provisions of the Plan itself. Specifically, Plan Article XII provides that, “[s]ubject to the applicable provisions of any collective bargaining agreement, the Company shall have the right to amend, modify, or suspend the Plan” (A. 30 (art. 12.1)), and “reserves [to the Company] the right to terminate the Plan” (A. 31 (art. 12.2)). The Board reasonably found (Add. 2 n.2, 5) that those provisions' plain language arguably empowers the Company to modify or terminate the Plan, and therefore also gives the Company the lesser power to merge the Plan.

Before the Court, the Unions do not challenge that finding. Rather, their arguments regarding the plan documents' clear reservation of certain rights to the Company address only the BMDA contract, discussed below. Therefore, if the Court finds that the S-6 and S-7 contracts arguably incorporate the plan documents,

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<sup>17</sup> The Unions note (Br. 27 n.6) that incorporation of the Plan into the contracts may have arbitrability implications. They do not explain why those implications render an incorporation interpretation implausible, however. Nor do they explain why arbitrability would not be a concern with respect to the BMDA contract, whose incorporation of the Plan they concede.

as outlined above, it must find the Company's overall understanding of its right to merge the Plan reasonable, in the absence of any argument to the contrary.

**2. The merger did not modify the BMDA collective-bargaining agreement**

In claiming that the merger modified the BMDA contract, the Unions focus their arguments on the intersection of the Plan and the BMDA contract, asserting that the two documents bar the plan merger when read together. While the Unions' interpretation may be plausible, it is equally reasonable to interpret the BMDA as incorporating the Plan – indeed the Unions concede (Br. 30-31) that it does so, at least in part – and the plan documents as permitting the merger.

Several facts support the Board's essentially uncontested finding that, as the Company asserts, the BMDA collective-bargaining agreement arguably incorporates the plan documents. Specifically, the agreement cites the Plan by name, lists some amendments to the Plan (not relevant here), and refers to the plan documents by stating that the Plan "shall remain in full force and effect *in accordance with the provisions thereof. . . .*" (A. 67.) (emphasis added). As to the question of whether the plan documents allowed the merger, the plan language is, as noted above (*see* p. 17), relatively clear. The Board thus reasonably found (Add. 2 n.2, 5) that, even read in conjunction with the BMDA agreement, the Plan documents arguably reserved to the Company the right to merge the Plan.

First, the Board first acknowledged (Add. 5) that the original language of Article 12.1, regarding the Company's right to modify or amend the Plan, made such powers contingent on relevant collective-bargaining agreements. But the Board further noted that the relevant collective-bargaining agreement (BMDA) also provides that the Plan will "remain in full force and effect." Given that, when in full force and effect, the Plan reserves to the Company the rights to amend and terminate the Plan, the Board understandably found plausible the Company's reading of the contract and plan documents as jointly permitting the merger.

The Unions, of course, propose a different interpretation of that potentially limiting language with respect to the BMDA contract. In response to the Board's analysis of the circularity of the BMDA contract and Plan terms, the Unions assert (Br. 32) that many collective-bargaining agreements and pension plans have similarly interlocking terms,<sup>18</sup> and suggest (Br. 32-33) that the reservations of

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<sup>18</sup> The discussion that the Union references, by the dissenting Board member in *T.T.P. Corp.*, 190 NLRB 240, 240-41 (1971), however, refers to the fact that pension plans regularly reserve amendment rights to employers, and notes that unions know that and can negotiate limits of those rights. As an example of such a limit, the dissent then cites a plan provision allowing amendment or termination "provided, however, that no such action shall alter the Plan or its operation . . . in respect of employees who are represented under a collective bargaining agreement in contravention of the provisions of any such agreement pertaining to pension benefits and supplemental allowances as long as any such agreement is in effect." The limit in plan Article 12.1 here is less clear, and the contracts' provisions do not clearly limit the Company's ability to change the Plan's identity, a change that had no effect whatsoever on the benefits employees received under the Plan.

rights in the plan documents serve only to preserve the parties' collective right, under trust law, to modify the Plan should they agree to do so. The Unions' interpretation of "full force and effect," however, renders ineffectual only those plan provisions they find inconvenient, most notably section 12.2, which reserves an unrestricted right of termination to the Company.<sup>19</sup> The Board, of course, acknowledged (Add. 5) that the Unions' interpretation of the plan documents and BMDA agreement as barring the merger without union consent was plausible, but found that it was not the only reasonable reading of the relevant provisions.

In sum, the Board outlined why the Company's reading of the BMDA contract as incorporating the plan documents, and of the plan documents as permitting the plan merger, was reasonable. And nothing in the Unions' brief demonstrates that the Company's interpretation does not, as found by the Board, present a plausible reading of the documents and thus provide arguable support for the merger, as required by applicable case law.

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<sup>19</sup> The Unions cite *Bonnell/Tredegear Indus., Inc. v. NLRB*, 46 F.3d 339, 343-44 (4th Cir. 1995) for the proposition that "full force and effect" requires the Company to continue the Plan exactly as it was when the contracts were signed. In that case, the contract required the maintenance in full force and effect of a Christmas bonus. Unlike the Plan here, however, there was no written provision reserving to the employer the right to amend its bonus policy.

## **II. THE BOARD DID NOT ERR IN FAILING TO APPLY THE CLEAR-AND-UNMISTAKABLE-WAIVER STANDARD IN THIS CASE**

### **A. The General Counsel Alleged Only Contract Modification**

As explained above, the issue presented in the case, and the one the Board adjudicated, is whether the Company's merger of the Plan constituted an unlawful contract modification in violation of the Act. The Unions assert (Br. 19) that the General Counsel actually pled, in the alternative, that the merger also violated the Act as a unilateral change. Consequently, they argue, the Board should have applied the clear-and-unmistakable-waiver standard, which the Board purportedly conceded was applicable to unilateral-change allegations. That union argument is procedurally barred, and fails in any event on the facts of the Complaint.

As an initial matter, Section 10(e) of the Act bars the Unions from arguing to this Court that the Board misinterpreted its General Counsel's Complaint. That Section precludes parties from raising arguments before the Court that they failed to raise before the Board.<sup>20</sup> Indeed, even when a party's contention relates to an issue decided *sua sponte* by the Board, the Supreme Court has held that the party must raise the new issue in a motion to the Board for reconsideration in order to

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<sup>20</sup> 29 U.S.C. § 160(e). See *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); accord *NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 459 (1st Cir. 2005).

preserve it.<sup>21</sup> In this case, the Board clarified in its decision that the only unfair labor practice at issue in this case was unlawful contract modification. The Unions did not file a motion with the Board requesting that it reconsider its reading of the Complaint, but now contend that the Board erred and that the Court should remand the case to the Board based on a different reading. That is precisely the type of argument barred under Section 10(e) of the Act.

In any event, the Board reasonably read the Complaint as presenting only a contract-modification allegation. Generally, the thrust of the complaint allegations is that the Company, by merging the Plan, failed to adhere to the terms of its collective-bargaining agreements with the Unions. While the final factual allegation relating to each union states that, “alternatively,” the Company failed to accord the union an opportunity to bargain, even those allegations tie back to the contract by referencing earlier allegations within the same paragraphs.<sup>22</sup> Perhaps

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<sup>21</sup> See *Woelke*, 456 U.S. at 665-66 (holding court had no jurisdiction to consider whether the Board erred in finding that certain picketing was lawful because no party had raised the issue to the Board, either during initial proceedings or in a motion for reconsideration); *Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (holding court had no jurisdiction to consider employer’s argument, not presented to the Board in a motion for reconsideration, that the Board had decided case based on theory of liability not litigated by the parties).

<sup>22</sup> Specifically, the Complaint sets forth five factual paragraphs as the predicate to the allegation to be charged regarding each union. (A. 13-14 (¶¶10-12).) Paragraph (a) of each set describes the union’s collective-bargaining agreement with the Company. Paragraph (b) asserts that the Company “failed to continue in effect all the terms and conditions of the collective-bargaining agreement . . .” by

the Board could have read the Complaint as alleging two separate unfair labor practices, as the Unions urge this Court to do in the first instance. But the Board's reading is also reasonable and, of course, the Unions did not suggest to the Board that it had misread the Complaint when the Board could have reconsidered its decision.

Even a close textual reading of the Complaint does not support the Unions' claim. Before this Court, the Unions quote (Br. 19) portions of the Complaint's final factual allegation, paragraph (e), and contend that it constitutes an allegation of unilateral change. First, paragraph (e) merely states the factual predicate that no bargaining took place, and does not itself actively state an allegation. Second, although the General Counsel started paragraph (e) with the word "alternatively," the substantive portions of paragraph (e) refer back to paragraph (b) for a description of the Company's action – and paragraph (b), of course, describes the Company's failure "to continue in effect all the terms and conditions of the

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implementing the merger. Paragraphs (c) and (d) explain that the terms and conditions thereby altered were mandatory subjects of bargaining and that the Company undertook the alterations without the union's consent. Finally, paragraph (e) contends that, "[a]lternatively, [the Company] engaged in the conduct described above in paragraph [(b)] without affording [the union] an opportunity to bargain with respect to this conduct and the effects of this conduct." After reciting the above-described factual sequence for each of the Unions, the Complaint alleges that the conduct described in paragraphs (a)-(e) for each union constitutes a violation of Section 8(a)(5) and (1) of the Act, within the meaning of Section 8(d). (A. 14-15 (¶13).)

collective-bargaining agreement.” In other words, while the beginning of paragraph (e) may lead the reader to expect an alternative allegation, the body of the paragraph restates a factual predicate for unlawful contract modification. Paragraphs 13(a)-(c), which actually allege the unfair labor practices, do nothing to clarify which 8(a)(5) violation the General Counsel seeks to charge, though their mention of Section 8(d) suggests a contract-modification violation.<sup>23</sup>

Finally, the Unions request that, should the Court find that the Board erred in failing to adjudicate a unilateral-change allegation in this case, the Court should remand the case to the Board to apply the waiver standard to that allegation. With respect, the Unions overstate the Board’s position regarding the applicable standard. While the Board does indeed acknowledge (Add. 3) that the waiver standard is “appropriate” for unilateral-change cases, it does so in the context of contrasting such cases with cases like this one, where the issue is one of contract modification and a different standard applies. There is presently an ongoing labor-law debate regarding the propriety of the waiver standard, however, and the Board here deliberately declined to address (Add. 3-4 & n.3) that debate because it was

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<sup>23</sup> While Section 8(d) of the Act defines the bargaining duties at issue in both unilateral-change and contract-modification violations, the Board tends to cite 8(d) more regularly when describing contract-modification violations which, as the Unions note (Br. 15 n.4), it sometimes refers to as “8(d)” violations. *See, e.g., Milwaukee Spring*, 268 NLRB at 603-04 (finding that employer did not unlawfully modify contract in violation of Section 8(d) and did not unlawfully fail to bargain in violation of Section 8(a)(5)).

not squarely presented. Should the Court decide to remand the case to the Board for consideration of a unilateral-change violation, therefore, it should leave to the Board the initial determination of the appropriate standard for adjudicating such a violation.

**B. The Clear-and-Unmistakable-Waiver Standard Does Not Apply Where, As Here, the Issue Is One of a Contract Bar, Not a Contract Privilege**

Finally, arguing that the Board should have applied the clear-and-unmistakable-waiver standard, the Unions assert (Br. 21-23) both that the Company is effectively arguing waiver of their right to bargain over the merger and that, in any event, the arguable-basis standard used by the Board actually encompasses the waiver standard. As described above, however, the sole allegation in this case is one of unlawful contract modification, not unilateral change of terms or conditions of employment. A contract-modification allegation requires the Board to examine not what the contract (or bargaining history or anything else) *privileged* the employer to do – that inquiry might entail an analysis of whether the union waived its right to bargain over the employer’s planned action. Rather, an allegation that an employer unlawfully modified a contract without the union’s consent requires the Board to determine whether the contract in question *barred* the employer from taking the challenged action. That analysis focuses on contract interpretation because the question is simply whether the terms

of the contract have in fact been modified. Because the sole allegation here is contract modification, the waiver question is not implicated.

The Unions cite two cases in an unsuccessful effort to confound the waiver and arguable-basis standards. In each case, an employer cited broad contractual clauses as privileging it to act without bargaining. The employer in *Southern California Edison Company* changed policies relating to disabled employees based on management-rights and wage provisions, despite – and contrary to – a separately negotiated benefit plan specifically covering such employees.<sup>24</sup> Similarly, in *Johnson-Bateman Company*, the employer contended that a management-rights clause privileged it to implement a drug testing program unilaterally.<sup>25</sup> Unlawful contract modification, the violation at issue here, was not alleged in either case.

In other words, faced with allegations of unlawful unilateral change, the employers in *Southern California* and *Johnson-Bateman* each claimed that a union had waived its right to bargain by agreeing to certain contractual clauses. Applying the waiver standard, the Board rejected the employers' claim of privilege. Unlike in those cases, the question here is whether the S-6, S-7, and

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<sup>24</sup> 284 NLRB 1205, 1205 n.1 (1987), *enf'd mem.*, 852 F.2d 572 (9th Cir. 1988).

<sup>25</sup> 295 NLRB 180, 184-85 (1989) (explaining that “the Board has repeatedly held that generally worded management rights clauses or ‘zipper’ clauses will not be construed as waivers of statutory bargaining rights.”).

BMDA contracts barred the employer from merging the Plan, or whether the merger modified the contracts. As the Board found (Add. 5), the Company could plausibly read specific contractual and plan language plainly related to the Plan as failing to create such a bar, whereas the Unions plausibly argue the contrary, implicating the *NCR* arguable-basis standard.

**CONCLUSION**

For the foregoing reasons, the Board respectfully requests that this Court deny the Unions' petitions for review of the Board's order in this matter.

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