Carrier Corporation *and* Local Union 527, Sheet Metal Workers International Association, AFL–CIO. Case 3–CA–17827

September 29, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On December 9, 1994, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent and the Charging Party filed exceptions and cross-exceptions, respectively, and supporting briefs; the General Counsel and the Charging Party filed answering briefs; the Respondent filed reply and answering briefs; and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The 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 and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Carrier Corporation, Syracuse, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[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 reviewed the record and find no basis for reversing the findings.

[2] We find no merit in the Respondent's contention that the remedy provided in the judge's decision, which we are adopting, may require the Respondent to engage in conduct that violates the provisions of ERISA. As explained in the judge's decision, although the Respondent may be required, as part of a status quo ante remedy, to reinstate a separate pension plan for the Respondent's represented employees, he rejected the Charging Party's request that this reinstated pension plan be ordered to be fully funded. The judge declined this request as part of a status quo ante remedy, relying on evidence that the prior pension plan had not been fully funded when it was last in existence. The limited nature of our remedy, however, is not designed to address the Respondent's obligations under other relevant laws or regulations. Thus, if the Respondent is required, as a result of our remedy, to reinstate the status quo, and if an agency of Government or a court will not permit the Respondent to do so at prior funding levels, the Respondent is free to show this in a supplementary proceeding.

If the Union opts for the new plan, bargaining will be required only if there are savings about which to bargain.

Michael Cooperman, Esq., for the General Counsel.

Louis P. DiLorenzo and *Peter A. Jones, Esqs. (Bond, Schoeneck & King)*, of Syracuse, New York, for the Respondent.

James R. Lavaute, Esq. (Blitman & King), of Syracuse, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges filed on May 3, 1993, by Local Union 527, Sheet Metal Workers' International Association, AFL–CIO (the Union or Charging Party), the Regional Director for Region 3, issued a complaint alleging that Carrier Corporation (Respondent) violated Section 8(a)(1) and (5) of the Act by eliminating the separate pension plan provided for in the parties' collective-bargaining agreement without the Union's consent.

Thereafter, Respondent filed an answer denying that it committed any unfair labor practices and raising various affirmative defenses, including Section 10(b) of the Act.

The hearing with respect to the allegations raised by the complaint was heard before me in Syracuse, New York, on January 10, 11, and 12, 1994. Excellent briefs have been received from all parties, which were well written, thoroughly and accurately prepared and researched, and which were helpful in assisting me in reaching my decision herein. Based on careful consideration of the briefs, as well as my observation of the demeanor of the witnesses, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a New York corporation with an office and place of business in Syracuse, New York, where it is engaged in the manufacture of air-conditioning units and related products. Annually, Respondent purchases and receives at its Syracuse facility goods and materials valued in excess of $50,000 from points outside the State of New York.

Respondent admits and I so find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

Respondent has recognized the Union as the collective-bargaining representative of its employees in a unit of production and maintenance employees, truck drivers, group leaders, and leadmen employed at its Syracuse, New York facility since 1962. The Union and Respondent have been parties to a series of collective-bargaining agreements since that time, including an agreement running from November 7, 1988, to November 3, 1991 (the 1988 agreement), and a con-

[1] Although every apparent or nonapparent conflict in the evidence may not have been specifically resolved herein, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony. Accordingly, any testimony which is inconsistent with or contrary to my findings is discredited.

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tract from November 4, 1991, to November 5, 1994 (the 1991 agreement).

All of the agreements between the parties have provided that Respondent maintain a pension plan. The relevant provisions with respect to the pension plan, which is referred to in the more recent agreements as Carrier Employees Security Plan B (Plan B), have been substantially the same in each agreement. These provisions as set forth in article XXVII of the 1988 agreement are as follows:

> Section 1. The terms, conditions and benefits currently in effect under the Pension Plan known as the Carrier Employees Security Plan-Plan B, as described in the booklet dated November 1, 1982, which has been established for the employees in the bargaining unit, shall be continued under such separate Plan except as they are specifically revised in accordance with this Article.
>
> Section 2(A). The administration of the separate Pension Plan for the employees in the bargaining unit shall be the responsibility of the Company.
>
> . . . .
>
> Section 5. For the purpose of supplying the pension benefits provided in this Agreement, the Company shall establish or cause to be established a separate pension trust or trusts.
>
> Section 6. The assets of Carrier Employee Security Plan attributable to the bargaining unit shall continue to be funded separately.
>
> Section 7. The Company shall be free to determine the manner and means for the funding and the payment of any pension benefits under this Agreement.

Both the 1988 and 1991 agreements also contain a management responsibility clause, which provides:

> Section 1. The parties recognize the responsibility of management to conduct the business of the Company in the balanced interest of employees, stockholders, customers, and the general public, and in the exercise thereof acknowledge it to be the responsibility of management alone without interference, restriction or recourse to Article XX by the Union or any employee to determine the following: the number of plants and their locations; the products to be manufactured; the manufacturing processes to be employed; methods, quality standards and schedules related to production; whether to contract or subcontract work services except as provided in Section 3 of this Article; the hiring of new employees; the improvement of facilities and the direction of the working forces.

No evidence was adduced by any party concerning the negotiation of these clauses, or what the parties intended when these clauses were first negotiated.

On or about May 8, 1978, the Union filed a charge with the Region in Case 3–CA–8484 against Respondent alleging a violation of Section 8(a)(1) and (5) of the Act by ''unilaterally altering the pension provisions of the contract with respect to the amount and method of computation of lump-sum benefits.'' The Regional Director on January 30, 1979, refused to issue complaint, concluding that Respondent's action therein, i.e., changes of the interest assumption rate for lump sum payments under its pension plan, ''were in accordance with its good faith interpretation of the collective-bargaining agreement and the pension plan.''

Thereafter, Charging Party appealed the Regional Director's action, which resulted in the following action by the General Counsel:

> Your appeal from the Regional Director's refusal to issue complaint in the above-captioned case has been duly considered.
>
> The appeal is denied. Contrary to your contention on appeal, the evidence was insufficient to establish that the Company was obligated under the Act to bargain with the Union about the ''interest assumption rate'' for lump sum payments under the pension benefit plan. Rather, it appeared that the Union waived its right to be consulted concerning an increase in the ''interest assumption rate'' based upon consideration of the express terms of Article XXIX—Pensions of the collective bargaining agreement presently in effect between the parties; bargaining history, and past inaction. It was noted in this regard that the Company unilaterally increased the ''interest assumption rate'' on five separate occasions between July, 1964 and January, 1976 without objection from the Union and during 1962 contract negotiations the Union disclaimed an interest in making decisions concerning the financial administration of the pension benefit plan and there was no evidence of a change in this position during subsequent contract negotiations. Furthermore, prior to the effective date of implementation of the 7% interest assumption rate the Company notified the Union of this change and discussed the reasons therefor. Accordingly, further proceedings herein were deemed unwarranted.

Apparently, in response to the issues involved with and the unfavorable disposition of the Union's charge, the Union made proposals in the ensuing negotiations for the 1979 agreement which seem to be an attempt by the Union to play a role in the funding and administration of the pension fund. These proposals which included the creation of a board of trustees having equal representation from the Union and Respondent to administer the pension fund, and the deletion of the clause which states that Respondent ''shall be free to determine the manner and means for funding and payment of any pension benefits,'' were not agreed to, and the 1979 agreement contained virtually the identical clauses as the 1988 and 1991 agreements with respect to these matters.

At some point, not clearly disclosed by this record, Respondent became a division of or a subsidiary of United Technologies Corp. (UTC), a conglomerate that had numerous other divisions or subsidiaries under its control. Shortly thereafter UTC replaced Respondent as the administrator of Plan B. Thus, retirement forms were initially processed at Respondent's Syracuse location and then sent for further processing to UTC's headquarters in Hartford, Connecticut. The plan's administrator (UTC) at some point undisclosed by the record, decided to invest the assets of Plan B in the UTC Master Retirement Trust (the UTC Trust). Thus, when Respondent made pension contributions to Plan B, these contributions were made to the UTC trust. The UTC Trust also invested pension assets from a number of other of its divi-

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sions or subsidiaries. Each pension plan invested in the UTC Trust, such as Plan B, constituted a portion of the Trust, and would have a percentage of the UTC Trust assigned to it, depending on the amount of contributions each plan makes. Each year, Plan B's assets and liabilities were calculated based on the contributions made and the investment results of the UTC Trust.

Each year, Plan B, which had its own employer identification number. (EIN) and its own three-digit plan number, would file appropriate forms with the IRS and other government agencies, particularly IRS form 5500 which lists the plan's assets, liabilities, contributions, and other items as required by law.

Plan B was a noncontributory plan, and the collective-bargaining agreement did not provide for any specific amounts to be contributed by Respondent. Rather, the agreement contains amounts for various provisions dealing with eligibility for benefits, as well as methods of computation of benefits.

One of the benefits which has long been included in the contract has been a lump sum benefit option which allows in certain circumstances a retiring employee the choice of receiving his pension entitlement as a lump sum distribution on retirement. This lump sum benefit resulted in significant funding difficulties for Respondent over the years, since trust principal, which is invested to pay benefits, is withdrawn from Plan B immediately upon retirement of the employee. Thus, due to this benefit, as well as other factors, Plan B had become chronically underfunded, despite Respondent having made contributions of between $4 to $6 million per year into the Plan B Fund. As of 1990, Plan B was just 35-percent funded, with assets of $14,209,000 to cover liabilities of $40,708,000.

In the fall of 1990, Thomas O'Connor, the director of retirement programs for UTC, made a proposal to UTC's management that UTC merge as many of the pension plans of its subsidiaries and divisions as possible. He originally proposed an ultimate goal of two plans, presumably one for represented employees, and one for salaried employees. O'Connor prepared various calculations and reports and submitted same to his superiors. One of these reports was submitted in evidence herein, which set forth the assets and liabilities of 27 different plans, including Respondent's Plan B. This document reveals that Plan B was by far the most underfunded of any of the plans contemplated for the merger.[2]

O'Connor recommended that the 27 plans be merged into one plan; the UTC Represented Employee Retirement Plan (the UTC Plan). The UTC Plan was already in existence, having been the subject of an earlier merger of UTC's aerospace companies pension plans. According to O'Connor's calculations, since Plan B was so underfunded, that plan would benefit most from a merger, since after the merger, the single UTC plan was then 134-percent funded.

O'Connor testified to three reasons for recommending the merger. The first was to improve the security of the underfunded plans, such as Plan B. Thus, by merging all the plans, UTC would wind up with one large overfunded fund.

[2] Thus, as noted above, Plan B was 35-percent funded. The next lowest percentage was 57 percent. Most of the plans were overfunded, i.e., over 100 percent, including the largest, UTC represented plan which was 144-percent funded.

Secondly, UTC would be able to cut down on some administrative expenses. For example, it would no longer be necessary to calculate separate actuarial assumptions for each plan, and only a single actuarial assumption for the merged plan would be necessary.

Thirdly, by merging the plans together, Respondent would be able to defer funding for a period of years, which O'Connor estimated to be at least 3 years. Indeed as set forth above, Respondent had been contributing from $4–$6 million into Plan B each year, and even so, the fund was still only 35-percent funded. As a result of the merger, neither Respondent nor any other company would have to make any contributions to the new merged plan for at least three years, according to O'Connor's prognostication.

UTC and Respondent approved O'Connor's recommendation, and the merger was effective as of December 1, 1990, although the merger consisted of 21 rather than the 27 plans originally contemplated by O'Connor. An amendment to Plan B was subsequently filed effective December 1, 1990, which read as follows:

> Subject to approval by the Internal Revenue Service, the Carrier Employees Security Plan, Plan B (the ''Carrier Plan B'') is hereby amended, effective December 1, 1990, in accordance with the following paragraphs:
>
> 1. The Carrier Plan B shall be merged into the United Technologies Corporation Represented Employee Retirement Plan (the ''UTC'' Represented Retirement Planing to create a single plan within the meaning of section 414(1) of the Internal Revenue Code of 1986 (the ''code'') and the regulations thereunder. The sole purpose of this merger is to merge the assets of the Carrier Plan B with the assets of the UTC represented Retirement Plan in order to create a single asset pool under the UTC Represented Retirement Plan from which to pay benefits to the participants, beneficiaries, and alternate payees, and to pay plan administrative expenses, under the Carrier Plan B and the UTC Represented Retirement Plan on an ongoing basis. As a result of this merger, all benefits provided in accordance with the Carrier Plan B document and the UTC Represented Retirement Plan document shall be paid from the single pool of assets held under the UTC Represented Retirement Plan. The single plan created by this merger shall be a plan with more than one plan document as described in Treasury Regulations section 1.414(1)-1(b)(1)(ii), and this merger shall not otherwise alter or affect the provisions of the Carrier Plan B document or the UTC Represented Retirement Plan document.

Additionally, Respondent filed its last 5500 form with the IRS, dated September 14, 1991, which makes references to the merger. Thus, the form and its amendments refer to the merger of Plan B with the pension plan of Hamilton Standards Electronic Systems, and describes the procedure for the merger. As explained therein, pursuant to IRS rules, the merger was actually 20 successive mergers, of one plan into another, until the resulting plan, the UTC plan with an EIN of 06-0570975 and a Plan 10 emerges.

At some point not clearly disclosed by the record, Respondent prepared a summary annual report for Plan B. This document, which was not distributed to employees until the fall of 1992, also describes the merger, and does so as follows:

> Summary Annual Report for the Carrier Employees' Security Plan B
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> This is a summary of the annual report for the Carrier Employees' Security Plan B, EIN 06-0991716, PN 006, for the plan year ending December 1, 1990. The annual report has been filed with the Internal Revenue Service, as required under the Employee Retirement Income Security Act of 1974 (ERISA).
>
> *Basic Financial Statement*
>
> Effective December 1, 1990 the Plan (Plan 006) was merged into Plan 010. The effect of the merger was to consolidate the assets and liabilities of 21 of the Corporation's represented retirement plans into a single plan, Plan 010. This consolidation of assets and liabilities has no effect on any participant's benefits. Existing accrued benefits and future benefits are calculated in the same manner as prior to the merger. This report will provide financial information for your plan for the period of 1990 prior to the merger (January 1, 1990 through November 30, 1990) and for the period of 1990 after the merger (December 1, 1990 through December 31, 1990) . . . .
>
> The value of plan assets, for PN 006, before the merger and after subtracting liabilities of the plan, was $8,871,832* as of December 1, 1990, compared to $13,241,123 as of December 31, 1989. As of December 1, 1990, Plan assets of $8,871,832 were transferred to Plan 006 pursuant to the merger. During the 11 month plan year Plan 006 experienced a net loss of $422,049 from investment earnings, and unrealized appreciation or depreciation in the value of plan assets within the master trust investment account; that is, the difference between the value of the plan's assets at the end of the plan year and the value of the assets at the beginning of the plan year or the cost of assets acquired during the plan year. There were no employer contributions for the year. The combined value of all 21 plans' assets in PN 010 after the merger was $1,273,416,796 as of December 31, 1990, compared to $1,265,397,597 as of December 1, 1990.
>
> Effective December 1, 1990, 21 represented defined benefit plans listed below were merged into a single plan. The mergers all occurred on December 1, 1990. Except for the final merged plan, these plans had a short plan year ending December 1, 1990.

The report then listed the 21 plans, including Plan B that were subject to the merger.

The Summary Annual Report (SAR) also states, ''Following the merger of the above-referenced plans, the surviving plan of the United Technologies Corporation Represented Employee Retirement Plan was assigned Plan No. 010.''

Finally, the SAR described the value of plan assets under the merged plans, after subtracting liabilities was $1,173,416,796 as of December 31, 1990, and indicated that no employer contributions were made for the year.

O'Connor characterized the merger as follows; ''From an asset standpoint, Carrier B doesn't really exist anymore.''

The IRS subsequently approved the merger as outlined in the various documents prepared by Respondent. The merger did not result in any changes in benefits for any retirees, nor any changes in the procedure for applying for retirement. Both before and after the merger, the administration of pension benefits for Respondent's employees remained the same. The same forms were used to apply for retirement, before and after the merger, and the procedure also remained the same. Employees continued to file their claims at Respondent's Syracuse office, where it is processed and sent to UTC's Hartford office for final approval.

Although the General Counsel presented several witnesses who testified concerning what they perceived as inordinate or increased delays in the processing of pension benefits, such testimony was far from sufficient to attribute any of the delays involved to the merger. Indeed, most of the instances complained of took place in 1992 or 1993, while the merger took place in December 1990. Moreover, in my view the delays were adequately and credibly explained by Respondent's witnesses to have been caused by corporate downsizing and/or by the abnormally high numbers of retirees due to a retirement program promulgated by Respondent in 1993. Accordingly, I conclude that the merger has not caused any significant changes in the administration or the benefits of Plan B.

Subsequent to the merger, however, no IRS form 5500 or any other relevant document was filed on behalf of Plan B. Both the 1991 form 5500 (filed on July 30, 1992), and the 1992 form 5500 (filed on June 23, 1993) list UTC as plan sponsor, UTC Plan as the name of plan, with an EIN of 060570975 and Plan 10. Assets and liabilities were listed only for the UTC plan. All record keeping as to the assets of Plan B ceased to be kept as a result of the merger. As predicted by O'Connor, Respondent made no contributions to Plan B in 1991 and has not made any since. Additionally, no contributions were made by Respondent or any of the Employers whose plans were merged into the UTC plan to the UTC plan, since the merger was effectuated.

The above-described facts are essentially undisputed. There is much dispute, however, as to the question of when and how Respondent notified the Union about the merger, which issue relates principally to the 10(b) defense raised by Respondent. In that connection, Respondent presented evidence, which it believes establishes the requisite notice, more than 6 months before the filing of the charge herein (May 3, 1993).

Paul Parisi, who was Respondent's director of industrial relations, during the events in question, testified as to an alleged conversation with Union President Robert Demmerle. According to Parisi, he was asked in the fall of 1990 by Ed Dempsey, industrial relations attorney for UTC, if, under Respondent's contract with the Union, it was permissable to merge Plan B with the UTC plan. After reviewing the contract, Parisi asserts then he informed Dempsey that Respondent could merge the assets of the plan, but the contract required that Plan B be maintained. In November, Dempsey informed Parisi that UTC agreed with Parisi's interpretation of the contract, and that they were going to merge the assets of Plan B with the UTC plan, but that Plan B would be maintained. Parisi asserts that he was not told, nor was he aware, that this action would result in Respondent not being forced to make contributions to the pension fund, as contemplated. Parisi also claims that he did not know that the ''merger'' would result in Plan B no longer filing any government forms or that Plan B was no longer in existence with respect to government reporting.

Parisi further testified that in November 1990 during the course of one of his frequent conversations with Demmerle, he said to Demmerle, ''by the way, I have some good news. The Carrier plan is now fully funded, because we are going to put the assets into the UTC plan, and we are keeping the Carrier plan per the contract.'' Parisi added that he was not sure if Demmerle made any response to his comments, but that Demmerle raised no objections to the proposed merger.

Demmerle didn't remember any such conversation with Parisi in late 1990 concerning a merger of pension fund assets Demmerle added that if he had the conversation as Parisi recounted, he would have raised a question, since he believed at the time that the Plan B was already fully funded, and that Respondent was not making any contributions to the fund.

Respondent also offered testimony by Robert Currier, its manager of Syracuse Industrial Relations, that prior to the negotiations for the 1991 agreement, Demmerle made an oral request of him for copies of the Plan B document as well as any 5500 forms filed by Respondent. Currier adds that he then requested these documents from Jim Nelson of the corporate benefits department. According to Currier, after he received documents from Nelson, he made copies,[3] and gave them personally to Demmerle in June 1991. Currier further testified that he placed copies of the documents in a separate file, labeled Plan B, and placed the file in a cabinet in his office.

Currier added that he left his position and that office in August 1992, and the file remained in the office under the control of his successor, Jim Damron. Currier conceded that someone could have either removed or added to the file after he left. Damron was not called as a witness nor anyone else from Respondent who had access to or control over the file since August 1992.

Currier testified that although he was made aware of the instant charge early on in the investigation and was fully aware that an issue was being raised as to when the Union was made aware of the merger, that he did not recall or didn't think of the documents that he gave to Demmerle as relevant to that issue. Currier contends that Parisi had previously informed him about his conversation with Demmerle, wherein Parisi allegedly informed Demmerle about the merger. Thus, when the charge was filed, Currier asserts that when he discussed the subject of union knowledge with Jim Damron, Currier suggested that Damron speak to Parisi about the matter. Currier also claims that he told Parisi in 1991 that he had given Demmerle these documents pursuant to an information request.

Currier identified the documents that he asserts he gave Demmerle. They included a series of documents, including the form 5500 for 1989, dated September 17, 1990, a document entitled ''Carrier Employees Security Plan Plan B,'' two documents together entitled ''Amendments to Carrier Employees Security Plan, Plan B,'' dated November 4 and June 25, 1986, a document labeled ''Amendment to Carrier Employees Security Plan, Plan B,'' dated December 21, 1990, which included a facsimile date of June 24, 1991, and a document labeled ''Amendment to the Carrier Employees Security Plan Plan B,'' which is not dated, but refers to amendments as of November 2, 1988, with a facsimile date of June 19, 1991. The only document in this packet of documents allegedly given by Currier to Demmerle in June 1991 which made reference to the merger, was the amendment dated December 21, 1990, the relevant portions of which were set forth above. The document as noted, refers to the merger into a ''single plan,'' in order to create a ''single asset pool'' under the UTC plan from which to pay benefits and expenses. The amendment makes clear that benefits will still be paid pursuant to the terms of Plan B, and that the merger shall not affect the provisions of the Plan B document. The amendment does not state whether or not any contributions would be made to the UTC Fund, nor whether Plan B would be filing any subsequent IRS forms, nor what EIN or plan numbers would subsequently be utilized by the UTC Plan.

Demmerle admitted that he received some pension information from Currier, but denies unequivocally that he received the document entitled ''Amendment'' which referred to the merger. He recalled receiving a document with ''1989'' appearing thereon, but did not recall receiving the form 5500 from Currier at that time. It is notable that the only document in the packet identified by Currier as having been turned over to Demmerle which contains 1989 on it, is the form 5500, that Demmerle asserts that he did not receive in 1991.

Demmerle also testified that his first knowledge of the merger was on November 3, 1992, when he received a document sent to employees at some earlier date.[4] According to Demmerle, on that date, ''After reading the document, I was like a madman. I couldn't believe that this had happened. The first thing I did was get on the phone and drag Jim (Jim Lavaute, the Union's attorney) out of a meeting.''

Demmerle also testified to a conversation with Currier in November 1992, immediately after he became aware of the merger. Demmerle claims that he called Currier on the phone and asked why the Union had not been notified about the merger. Currier responded that he had a conversation with Parisi and Parisi told him that he (Parisi) had notified Demmerle. Demmerle said to Currier that Parisi had not so notified him about the merger and the conversation concluded.

Currier did not according to Demmerle mention anything at the time about the fact that he had allegedly given Demmerle a packet of information prior to the 1991 negotiations, which included a detailed reference to the merger. Currier did not deny this conversation with Demmerle. Respondent also introduced into the record a series of written requests made and ULP charges filed by the Union or Demmerle to and against Respondent, dealing with information requests. This evidence demonstrates, what is confirmed by Demmerle, that the Union usually follows up unfulfilled oral requests for information, with written requests and/or charges. Since no written requests were made or charges

[3] Currier conceded, however, that he did not review all of the documents furnished to him by Nelson, but he noticed that they included plan B documents and a form 5500.

[4] This document will be discussed more fully below.

filed by the Union during the relevant period regarding pension material, Respondent argues that Currier's testimony that the Union received all pension information requested, including the materials testified to by Currier, should be credited.

During the 1991 negotiations, neither party made any proposals seeking to alter or modify the provisions concerning funding, administration, or the requirement for a separate pension plan or fund. The Union did make proposals concerning benefit levels, initially proposing that pension benefits be increased $3 per month for the last year of service for the first year of the 1991 agreement and $1 per month for each year of service for the second and third years of the agreement. The parties ultimately agreed to increases of $1 per month for each year of service for all 3 years of the 1991 agreement, which was the same agreement reached during the 1988 negotiations.

During the course of the parties bargaining over pensions, at the October 31, 1991 meeting, Jack Engel, Respondent's lead negotiator, indicated that the cost of the Union's proposal on pensions to Respondent was $7 million over the next 3 years. One of the union representatives, Richard Simone asked for clarification, wondering if the $7 million was an actual cost to Respondent, because it was his understanding that the plan (Plan B) was funding itself. Paul Parisi replied that he did not believe that this was correct, but told Simone he would check into it.

Later on during that session, Engel mentioned that the total cost of the Union's proposal was $27 million and that Respondent was not prepared to spend that much. Demmerle replied that he felt $27 million was a very cheap proposal, particularly since Respondent saved a lot of money in ''take-aways'' in 1985 and the 1988 contract.

In that connection, Demmerle testified that had he known during the negotiations for the 1991 agreement, that as a result of the merger, Respondent would not have been compelled to make contributions to Plan B, he certainly would have asked to share in that savings by making increased demands in other areas. For example, Demmerle made specific reference to the fact that employees had been forced to make increased contributions for health insurance, and suggested that this was one area where the Union would have requested that some of Respondent's savings on pension contributions be used to ''take away some of the hurt on the insurance.''

The parties also negotiated concerning the Union's proposal for a one-time retirement incentive benefit, which was initially $18,000 for each eligible employee. At the October 31, 1991 session, this demand was discussed, and Engel in response to a question from the Union, indicated that based on 350 employees deemed eligible, it would cost $6.3 million. Simone asked if Respondent had costed the benefit on the basis of paying out the $18,000 as a wage or paying it as a pension benefit. Engel replied that it was costed as a one-time lump sum payment. Simone stated that he would like to see the costing done as a pension benefit, because it then could be rolled over by the employee in order to decrease taxes. Engel agreed to look into the option. The parties eventually agreed to a one-time retirement payment of $10,000 to eligible employees who retire on or before December 31, 1993.

Respondent also proposed during the course of the negotiations, the elimination of the option for a lump sum benefit. This proposal was rejected by the Union, and the parties eventually compromised by eliminating the benefit for all employees hired on or after January 1, 1994.

It is undisputed by all witnesses that the subject of the pension plan merger[5] was not raised during the negotiations by either Respondent or the Union. The collective-bargaining agreement was signed on November 4, 1991.

In March 1992, Currier was informed by Rick Leurds, Respondent's director of compensation benefits, that Respondent would be able to make the $10,000 retirement incentive payment agreed to at negotiations, out of the UTC pension trust, as the Union had requested. Currier then informed Demmerle that he had good news and the $10,000 payment was going to be able to be made out of the UTC pension trust, and as a result there would be no adverse tax liability. Demmerle asked how ''that had come into play,'' and Currier responded that that went back to a discussion between Demmerle and Parisi. Demmerle stated that he would take that matter up with Parisi. At that point, they proceeded to discuss the logistics of notifying the employees about the decision. Subsequently, a letter was prepared by Currier, in consultation with Demmerle, which Currier asserts was posted and/or distributed to employees. The letter indicates that the one-time retirement enhancement of $10,000 was agreed to during negotiations, at which time the Union asked Respondent to consider making the payment from ''our pension trust'' rather than through our normal payroll procedures. The letter goes on to state that the benefit will be paid through the ''pension trust,'' which will enable the employee to pursue favorable tax treatment. Additionally, Currier testified that one of the benefits of the merger was that Respondent was able to pay the $10,000 out of the new merged pension plan.

On September 14, 1991, a form 5500 was filed with the IRS, for the year 1990, which listed Respondent as plan sponsor. This was the last such form filed, which listed Respondent as sponsor of the pension plan. Attached to this form were various other documents and forms which made specific references to the merger, including details of how the merger was to be effectuated. One of the forms reads as follows: ''The resulting plan's name will be changed to United Technologies Corporation Represented Employee Retirement Plan. The resulting plan's EIN and plan number are: EIN: 06-0570975 Plan Number: 010.'' There is no contention made by Respondent that the Union ever received copies of the 1990 form 5500 or any of the attached documents.

The 1991 and 1992 form 5500's were filed on July 30, 1992, and June 23, 1993, which list UTC as plan sponsor, UTC Plan as name of plan, with the UTC Plan's EIN and ID numbers. There is no reference to Plan B on either of these forms.

[5] While in Demmerle's testimony at p. 776 l. 20, the transcript reflects that he used the word merger during a discussion with Parisi concerning pension benefits, I agree with General Counsel that this portion of the transcript was erroneous. From the context of the conversation, as well as Demmerle's entire testimony, it is clear and I so find in accordance with General Counsel's motion to correct the transcript, that the word pension should be substituted for the word merger in that sentence. I note that Parisi does not allege that he had a conversation with Demmerle in 1991 wherein the merger was mentioned.

On December 21, 1990, UTC filed an amendment to the UTC Plan, which described the merger in language virtually identical to the language in the amendment to Plan B. The amendment states that each retirement plan identified on an attached schedule, (which included Plan B) shall be merged into the UTC plan within the meaning of Section 414(i) of the Internal Revenue Code. There's no indication that this document was ever submitted to the Union.

As noted above, the collective-bargaining agreement between the Union and Respondent provided for increases of $1 per year for each of 3 years for each year of service in calculating benefits, as well as a $10,000 retirement incentive payment for employees who retire during a 6-month period, and an elimination of the lump sum for all employees hired after December 31, 1993. At a meeting of the pension administration and investment committee meeting of UTC on May 8, 1992, the subject of amendments to the UTC Plan was discussed. These amendments included the above-described changes in the contract negotiated between Respondent and the Union, as well as closing agreements reached between two other facilities of UTC and their respective unions.

These agreements were adopted as amendments to the UTC plan. According to the agenda minute of the meeting, ''the impact of the increase in benefits resulting from the three above-described negotiations results in a $1.1 million increase in the long-term contribution and $1.25 million FAS 87 pension expense increase.'' No testimony was adduced as to what was meant by ''long term contribution'' or ''pension expense increase'' in the above sentence. However, testimony in the record does establish that no contributions were in fact made to the UTC Plan by either Respondent or UTC since the merger.

As noted above, Respondent filed an SAR on some undisclosed date in the fall of 1992, which described the merger. According to Currier, Respondent distributed the SAR to its hourly employees, along with a covering letter from Allen Johnson, Compensation of Benefits, dated September 15, 1992. The memo states that the SAR is required to be submitted by the Department of Labor and it summarizes the most recent annual return filed with the IRS. The letter adds that ''this report has no effect on your pension plan.'' Currier testified further that copies of the SAR were distributed internally to current employees (and mailed to retirees), because of employee feedback that it was more cost effective to distribute internally (as with paychecks) rather than through the mail. Currier was uncertain as to precisely when the documents were distributed to employees, and his best recollection was sometime in October or November.

Employees Simone and Cyz testified that they never received such documents from Respondent. Respondent produced no file document or any other evidence to establish when or even if the document was distributed to current employees.

As described above, Demmerle testified unequivocally that the first knowledge that he had of the merger was on November 3, 1992, when he received a copy from a retiree of the SAR sent to the retiree by Respondent. Demmerle immediately called his attorney about the matter (pulling him out of a meeting) and wrote down the date on the SAR that he had received from the retiree.

Employees Gary Galipeau and William Cyz, who are also pension and insurance specialists for the Union, and Richard Simone, an employee and a union shop steward, all corroborate Demmerle that they did not receive any knowledge of the merger, until after Demmerle received the SAR from the retiree, and Demmerle informed them about this development and showed them the document.

Galipeau and Cyz also furnished testimony concerning the preparation of a summary plan description (an SPD), which is a document prepared jointly by representatives of Respondent and the Union, which details information for employees and retirees concerning the benefits and administration of Plan B. The last SPD which had been prepared was effective November 1, 1988. On January 27, 1992, Respondent sent to the union representatives a copy of its proposed revisions for a new SPD to be effective November 1, 1991. This document reflects changes in the effective date, as well as changes resulting from the increases in the recent collective-bargaining agreement. However, it makes no reference to the merger. More specifically on page 26, entitled ''Additional Information,'' it continues to list the plan name as Plan B, with the old EIN and plan numbers.

Subsequently, after the Union proposed some additional revisions, the Union received from Respondent a further proposed revision, in late November or early December 1992. This draft for the first time made some changes which reflected the merger. For instance on page 21, entitled ''Your Rights Under the Plan,'' the prior SPD reads, '' as a participant in the Carrier Employees Security Plan (Plan B).'' The revised SPD submitted by Respondent read ''as a participant in the U-T-C ________.'' On page 26, the plan name was changed from Carrier Plan B to UTC Plan, and the EIN and plan numbers were changed to the UTC Plan's numbers. There is also handwriting on the document pointing to the changes which reads, ''these are no longer true due to the merger into UTC Rep.'' As of the date of the hearing herein, the new SPD has not been completed or agreed on.

III. ANALYSIS

A. *The 10(b) Issue*

The 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act; *Leach Corp*., 312 NLRB 990, 991 (1993); *A & L Underground*, 302 NLRB 467, 468 (1991); *NLRB v. Walker Construction Co*., 928 F.2d 695 (5th Cir. 1991); or where a party in the exercise of reasonable diligence should have become aware that the Act has been violated. *Moeller Bros. Body Shop*, 306 NLRB 191, 192–193 (1992); *Oregon Steel Mills*, 291 NLRB 185, 192 (1988). The burden of showing such clear and unequivocal notice or lack of diligence is on the party raising the affirmative defense of Section 10(b). *Leach*, supra; *Chinese American Planning Council, Inc*., 307 NLRB 410 (1992).

In applying the above principles to the facts herein, it is clear that Respondent has the burden of demonstrating that the Union had obtained clear and unequivocal notice (or constructive notice) that Respondent had violated the Act, prior to November 3, 1992, since the instant charge was filed on May 3, 1993. *C. Overaa & Co*., 291 NLRB 589, 590 (1988).

In my view, Respondent has failed to adduce sufficiently credible or probative evidence to meet its burden in this regard. Respondent alleges that the Union received such clear and unequivocal notice on four different occasions, outside the 10(b) period. I do not agree.

Initially, Respondent relies on Parisi's alleged conversation with Demmerle in November 1990, wherein Parisi asserts that he told Demmerle that Respondent intended to merge the assets into the UTC plan, which would now become fully funded, and it would be keeping Plan B as per the contract. While Demmerle denied having this conversation, I found his denial to be somewhat equivocal and unconvincing. Parisi, on the other hand, was fairly clear and certain about the conversation, and he is corroborated at least in part by Currier, who was made aware by Parisi about the conversation concerning the merger. I therefore credit Parisi's testimony as to his conversation with Demmerle in November 1990.

However, I do not believe that this conversation provided the clear and unequivocal notice necessary under Board and court precedent to warrant starting the 10(b) period at that time. Notice of an intent to commit an unlawful unilateral implementation, does not trigger the 10(b) period with respect to the unlawful act itself. *Howard Electrical & Mechanical, Inc*., 293 NLRB 472, 475 (1989); *American Distributing Co. v. NLRB*, 715 F.2d 444–452 (9th Cir. 1983). Here, the merger had not as yet been completed as of November 1990, when this conversation occurred. More importantly, the remarks of Parisi gave no indication to Demmerle that the merger might involve a violation of a contract, i.e., the requirements to retain Plan B as a separate plan. To the contrary, Parisi assured Demmerle that Respondent was keeping Plan B as per the contract. Therefore, Parisi's statements to Demmerle did not provide the Union with the facts necessary to support a present, ripe, unfair labor practice charge, *Esmark, Inc. v. NLRB*, 887 F.2d 739, 745 (1989); *Leach*, supra at 991; nor did it apprise the Union of any facts which would require it to make further inquiry in the exercise of reasonable diligence. *C. F. Moeller*, supra. Indeed, it is noteworthy that Parisi was unaware of the true facts and significance of the merger at the time of his November conversation. He did not know, for example, that the merger would result in no further government reporting of Plan B as a separate pension plan.

Thus, Parisi's remarks to Demmerle provided the Union only with notice of an intent to merge assets, *Howard Electrical*, supra, *Chinese American*, supra; which also did not notify the union in clear or unambiguous terms,[6] *Randolph Children's Home*, 309 NLRB 341, 345 (1991), that the action was or would be violative of the contract and consequently violative of the Act. *Esmark*, supra; *Leach*, supra. See also *NLRB v. Glover Bottled Gas Corp*., 905 F.2d 682, 684–685 (2d Cir. 1990).

Accordingly, I conclude that the November 1990 conversation between Parisi and Demmerle neither provided the Union with clear and unequivocal notice that it violated the Act, nor put the Union on notice that it should have inquired further and in the exercise of reasonable diligence would have uncovered sufficient facts to conclude that the Act had been violated.[7]

Respondent also alleges that the Union received clear and unequivocal notice by virtue of Demmerle's alleged receipt of documents from Currier in June 1991, in connection with upcoming negotiations. The document in question which Respondent asserts that Demmerle and consequently the Union received was the amendment to Plan B which sets forth details concerning the merger. While I believe that receipt of this document by the Union would likely be construed as clear and unequivocal notice of a violation, I am not persuaded that Respondent has adduced sufficiently probative or credible evidence that this document was received by the Union.

I note that Currier conceded that he had not reviewed the documents included in the file, before he submitted them to Demmerle. Moreover, he did not retain custody of this alleged ''file,'' since he changed jobs, and changed offices. Thus, it is quite possible that someone else could have placed the amendment in that file without Currier's knowledge. In that connection, it is also significant that Damron, who succeeded Currier as the custodian of this ''file'' was not called as witness to establish a proper chain of custody of the file.

Moreover, Currier's testimony concerning his alleged sudden recollection about this file is suspect. He asserted that he did not recollect having turned over the file to Demmerle until a week before the trial. However, Currier admitted that he was aware during the investigation of the charge that the question of the Union's notice of the merger was in issue, and that he mentioned the conversation between Parisi and Demmerle in that regard. I find it highly questionable that Currier would have forgotten at that time about the fact that he had provided the Union with clear notice of the merger by his alleged submission of the amendment to Plan B to Demmerle.

Similarly, when Demmerle complained to Currier in November of 1992 about the fact that the Union had not been notified of the merger, Currier replied only that Parisi had so informed Demmerle, which Demmerle denied. Currier did not say to Demmerle that Currier had provided him with notification of the merger when he allegedly furnished Demmerle the information prior to the negotiations, as Currier so testified.[8] I also note that Parisi, who according to Currier was informed about the turning over of the information to Demmerle, did not corroborate Currier in this respect.

On the other hand, in this instance I find Demmerle's denial that he received a copy of the amendment to be credible.

[6] I would also note in this regard that the remarks by Parisi were made in the midst of a conversation about other matters, and Parisi was unsure if Demmerle made any response at all to his statements. Thus, it is not even totally clear based on Parisi's testimony that Demmerle understood clearly what Parisi was telling him.

[7] It is again significant to note in this regard that Parisi, who assured Demmerle that Respondent was keeping Plan B as per the contract, was not himself aware of the true facts and ramifications of the merger.

[8] I credit Demmerle as to this conversation, particularly since it was undenied by Currier. Respondent argues that the conversation couldn't have taken place in November, as testified to by Demmerle, since Currier was no longer involved in labor relations at the time. I do not agree. Currier was still employed by Respondent in November 1992 and I do not find it inconceivable that Demmerle would have called Currier to complain about Respondent's lack of notification, since it was Currier who would have been responsible for notifying the Union when the merger occurred.

Based on his demeanor at trial, as well as record evidence, I found Demmerle to be an aggressive and outspoken union advocate, who certainly would have reacted had he been provided with such notice in June 1991. I note in this connection that when Demmerle did receive notice on November 3, 1992, by his receipt of the SAR sent to a retiree, which incidentally contains similar language to the amendment that Respondent contends that he received in 1991, he immediately called his attorney and had him ‘‘dragged out of a meeting’’ to notify the attorney about Respondent’s actions. Respondent suggests that perhaps Demmerle may have received the document, but not bothered to read it, in which case the Union would be chargeable with such neglect. However, in that regard, I note that other union representatives, including the shop steward and two pension and benefits specialists, all credibly denied that they were aware of the merger until after November 3, 1992. Thus, their testimony is corroborative of Demmerle, since I find it likely that had Demmerle received the amendment, it would have been shown to the union representatives involved with pension, which would have given them notice of the merger prior to November 1992.

Accordingly based on the above analysis, I find that Respondent has not met its burden of establishing to my satisfaction that the Union received the amendment to Plan B in June 1991, and that Currier’s testimony is insufficient to prove that the Union obtained clear and unequivocal notice of the alleged unfair labor practice at that time.

Respondent also argues that the Union received clear and unequivocal notice in April or May 1992 during Currier’s conversation with Demmerle about the $10,000 retirement enhancement. In that connection, Currier’s undenied and credited testimony establishes that Currier told Demmerle at that time that the $10,000 payment (which had been agreed to during negotiations) was going to be able to be made out of the UTC pension trust, and as a result there would be no adverse tax liability. Demmerle then asked, ‘‘How had that come into play?’’ and Currier referred Demmerle to a discussion between Demmerle and Parisi. Demmerle then replied that he would take the matter up with Parisi, and the discussion then turned to how employees would be notified of this decision. Subsequently, as a result of discussions between Demmerle and Currier, a letter was prepared and distributed to employees, which notified employees that the $10,000 retirement enhancement, agreed to during negotiations, would be paid through ‘‘our pension trust’’ or the ‘‘pension trust,’’ rather than through normal payroll procedures.

Respondent asserts that this sequence of events constituted further instances of clear and unequivocal notice, since Currier had according to Respondent, informed Demmerle that the ‘‘merger had made the tax deferred payment of the $10,000 retirement enhancement possible.’’ I cannot agree.

Contrary to Respondent’s assertion, there was no mention of the merger by Currier or Demmerle during this conversation. Currier’s announcement to Demmerle that the $10,000 payment could be made out of the UTC pension trust does not refer to the merger, nor does it suggest that Respondent might have violated the contractual provisions in regard to separate plans, trusts, or funding. The fact that Demmerle may have made a vague inquiry about ‘‘how this came into play,’’ and Currier referred Demmerle to his prior conversation with Parisi is at most an ambiguous exchange, and cannot be construed as clear and unequivocal notice that Respondent has violated the contract. I note particularly in this regard that the funds in Plan B were already invested together with funds from other UTC plans in the Master Trust, so that Currier’s statement that the enhancement could be paid out of the UTC Trust could easily have been interpreted that Respondent was able to find a way to pay the money from the UTC Master Trust, while retaining the separate Plan B as per contract. Indeed, these comments are even more ambiguous than Parisi’s statements to Demmerle in November 1990, which I have found above to have been insufficient to constitute clear and unequivocal notice to the Union that Respondent had violated the Act.

Respondent’s reliance on the letter sent to employees notifying them of the decision is even less persuasive. That letter not only makes no reference to a merger, but discusses the payment of the enhancement as coming from ‘‘our pension trust,’’ or the ‘‘pension trust.’’ This letter would only serve to assure the employees and the Union that Respondent was continuing to comply with its obligations to retain a separate pension plan, and certainly does not provide any notice whatsoever, much less clear and unequivocal notice, that Respondent was no longer complying with the contractual requirement to maintain a separate plan B.

Therefore, based on the above analysis, including the authorities cited in my prior discussion of the 1990 conversation between Parisi and Demmerle, I again conclude that the discussions about the retirement enhancement did not provide the Union with clear and unequivocal notice of Respondent’s violation of its contractual obligations, nor did it put the Union on notice that such a violation was likely so that reasonable diligence would have required further inquiry on the Union’s part. I note further in the latter connection, that the parties had recently completed negotiating a collective-bargaining agreement, wherein the retirement enhancement was agreed to, during which no mention of the merger was made by Respondent. Moreover, the parties negotiated for increases in pension benefits, during which Respondent indicated to the Union a cost factor of $7 million for the Union’s pension demands. Notably, these comments were made well after the merger was effectuated, which resulted in Respondent not being required to make any contributions to the pension plan to cover any increased benefits for a contemplated period of at least 3 years.

Additionally, the parties were engaged in the negotiation of the 1990 SPD, and the initial drafts submitted to the Union by Respondent’s representatives, made no mention of the merger, and continued to list Plan B as the name of the plan with its own EIN and plan number. Respondent did not make the appropriate changes in the proposed SPD until after November 1992, when the Union became aware of the letter sent to retirees, detailing the terms of the merger.

Thus, these factors clearly would and I find did lead the Union to believe that Respondent was still complying with its contractual obligations with respect to a separate pension plan, and therefore the Union was not required to make any further inquiries as a result of Currier’s ambiguous comments to Demmerle in May 1992 concerning the retirement enhancement.

Finally, Respondent relies on the SAR dated September 1992, which Currier asserts was distributed to active employees in October or November 1992. Respondent correctly recognizes the weakness of its argument with respect to this incident, since it alleges in its brief that the Union ''may have'' received this notice outside the 10(b) period, and ''it is probable'' that the Union received copies of the SAR prior to November 3, 1992. Probable and may have are not sufficient to meet Respondent's burden of proving clear and unequivocal notice, and even accepting Currier's testimony, it does not establish that such notice was received prior to November 3, 1992, since Currier could only estimate that the letter was distributed to hourly employees sometime in either October or November.

Moreover, in my view, Currier's testimony was not even sufficient to establish that the SAR was distributed at any time to hourly employees, since Currier was not personally involved in the alleged distribution, Respondent produced no other corroborating witnesses who either distributed or received the document, and it produced no internal memo or file record that it was in fact distributed to hourly employees. Additionally, three current employees and union officials testified credibly that they never received such a document from Respondent, and that their first knowledge of the merger was when they saw the SAR sent to retirees, which was forwarded to Demmerle.

Accordingly, I conclude that Currier's testimony concerning the alleged distribution of the SAR to employees in October or November 1992 is also insufficient to establish that the Union received clear and unequivocal notice of Respondent's violations of the Act prior to November 3, 1992.

Therefore, based on the foregoing, I find that Respondent has failed to adduce sufficient credible evidence that the Union prior to November 3, 1992, either received clear and unequivocal notice[9] of the alleged violations, or that it can be charged with constructive notice which would require it to make further inquiries and uncover such violations. Thus, I shall reject Respondent's affirmative 10(b) defense and proceed to an analysis of the case on the merits.

B. *Was the Merger a Material, Substantial, and Significant Change in Terms and Conditions of Employment*

It is clear that an employer violates Section 8(a)(1) and (5) of the Act by unilaterally implementing without notice to the union, changes in terms and conditions of employment of its employees *NLRB v. Katz*, 369 U.S. 736 (1962). Where such unilateral changes take place during the term of a collective-bargaining agreement, the employer must obtain consent of the Union before it makes such a midterm modification. *St. Agnes Medical Center*, 287 NLRB 242 (1987); *Wisconsin Southern Gas Co.*, 173 NLRB 480, 483 (1968), *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1964 (1973), enfd. 505 F.2d 1302 (5th Cir. 1977), cert. denied 423 U.S. 26 (1975). However, in order for such a midterm modification to violate the Act, it must involve a change that is material, substantial, and significant, affecting the terms and conditions of employment of bargaining unit employees *United Technologies Corp.*, 278 NLRB 306, 308 (1986); *Peerless Food Products*, 236 NLRB 162 (1978).

While conceding as it should that changes involving pension plans generally are considered mandatory subjects of bargaining, *Rapid Fur Pressing*, 278 NLRB 905, 906 (1986), and has such a significant effect on terms and conditions of employment, Respondent argues that in the instant case, since the merger did not result in any changes in pension coverage, benefit levels, or benefit administration, the changes herein are not material, substantial, and significant and are insufficient to constitute violations of the Act. *United Technologies*, supra; *Connecticut Light & Power*, 476 F.2d 1079, 1082 (2d Cir. 1973); *United States v. Western Electric Co.*, 569 F.Supp. 1057, 1093 (D.D.C. 1988), affd. 464 U.S. 542 (1988); *Admiral Retread Equipment Co.*, 114 LRRM 1277 (G.C. Advice Me. 8–CA–16577, 1983). I disagree.

Initially, it must be noted that a change need not have a negative impact on employees terms and conditions of employment to be considered substantial and significant, and that changes that improve such conditions are still subject to the same bargaining and midterm modification obligations as negative changes. *Wightman Center*, 301 NLRB 573, 575 (1991); *Antonio's Restaurant*, 246 NLRB 813 (1979).

Here, I agree with the General Counsel and the Charging Party that the merger of Plan B into the UTC Plan did result in significant, material and substantial changes in the terms and conditions of employment for Respondent's employees. The testimony of and exhibits submitted by Respondent's own witnesses, which effectively demonstrated the economic benefits of the merger acknowledged the substantiality of the change. *Rangaire Acquisition Corp.*, 309 NLRB 1043 (1992). Thus, Respondent established that Plan B which prior to the merger was significantly underfunded, had its ''deficit'' of $26 million (difference between assets and liabilities) completely absorbed by the assets of the other plans as a result of the merger, since the UTC Plan became 35-percent overfunded. This change clearly had a substantial effect on the viability of the fund and the fund's ability to pay or afford current or future benefits. Indeed, Respondent's own witnesses emphasized that the merger produced improved ''security'' and that Respondent's employees were better off in the UTC Plan than in Plan B ''from a safety standpoint.'' The Board with consistent court approval has long considered the viability of benefit funds to be a vital and significant aspect of employees' terms and conditions of employment, and concerning which employees have a clear economic stake. *Centra, Inc.*, 314 NLRB 814 fn. 3, 816–818 (1994); *Central Management Co.*, 314 NLRB 763, 780–781 (1994); *Lawrenceville Ready Mix Co.*, 305 NLRB 1010, 1011 fn. 4 (1991); *Aztec Bus*, 289 NLRB 1021, 1037 (1988); *Bastian-Blessing*, 194 NLRB 609, 613–614 (1971), 195 NLRB 1109 (1972) (supplemental decision); enfd. 474 F.2d 49 (6th Cir. 1973); *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983).

Moreover, Respondent argued in its brief on another issue, and testimony of Respondent's witness established, that as a result of the merger Respondent was able to arrange for pay-

[9] The Charging Party asserts that Respondent violated several provisions of ERISA by failing to notify participants in Plan B of the merger in a timely manner. Therefore, the Charging Party argues that since ERISA in effect ''preempts'' pension regulations, that ''clear and unequivocal notice'' of the merger must be equated with notice that complies with ERISA requirements. I do not agree. Whatever ERISA's requirements are with respect to notifying participants of plan changes, they are not binding on and are not relevant to the what kind of notice the NLRB requires to be given to unions or charging parties under 10(b) of the Act. I therefore make no findings with respect to ERISA and have not considered whether or not Respondent complied with ERISA requirements in making my findings herein.

ment to employees of the $10,000 retirement enhancement from the UTC Plan, rather than from Respondent's payroll, which afforded substantial tax benefits to employees who opted to receive this benefit. Thus, a clear significant and tangible benefit to employees of Respondent has already resulted from the merger, and more particularly from the overfunded status of the UTC Plan.

It is also pertinent that as a result of the merger, UTC has replaced Respondent as the sponsor of the pension plan that covers Respondent's employees. While the record is not totally clear as to the significance of this change, O'Connor's testimony indicated that the sponsor is responsible for the plan and responsible for the payments of the plan. This seems to further increase the viability of the fund and the safety of benefits for Respondent's employees, since UTC would now be responsible for the payment of benefits, even if the Plan would somehow be unable to do so.

I would also note that while the safety of the benefits for Respondent's employees has significantly increased as a result of the merger, this could change to a substantially negative impact on unit employees in the future. Thus, should benefit increases in the other affiliated plans or additional mergers with other affiliated companies, produce deficits, the UTC Fund could then become underfunded, which could result in these deficits being financed with assets which previously (before the merger) had been restricted to use for Plan B and to finance Plan B benefits.

Finally, I conclude that the merger has already had a substantial impact on the 1991 negotiations. Respondent conceded that it saved $4–$6 million as a result of the merger, once the merger relieved Respondent of its obligation to contribute such money to Plan B to keep it properly funded. Since I have found that Respondent failed to disclose this information to the Union prior to negotiations, the Union was unaware that Respondent had saved itself $4–$6 million, which moneys could have been available for payment of other benefits. Indeed, Demmerle credibly testified that had he known about this development, he would have asked on behalf of employees to ''share in the savings,'' giving an example the recently raised employees' contributions to the medical plan.

Respondent argues that no savings resulted, since the payments were only deferred, and any new benefits still must have a cost. However, the fact remains that Respondent still saved $4–$6 million that it did not have to contribute in 1990 to Plan B, which it certainly could have used for other expenses, including increases in benefits. Respondent could have of course argued to the Union that the ''savings'' were only deferred, and could not be used to pay other benefits, and the Union may have accepted this explanation. However, Respondent failed to notify the Union, as it was obligated to do about the merger, prior to negotiations, which prevented the Union from raising the issue, and potentially obtaining increased benefits for unit employees.[10]

Respondent also asserts in this regard that Demmerle and the Union believed erroneously that Plan B was already self-sufficient, and that therefore it would not have made any different demands even if it had known about the merger. This argument misses the point. Respondent was obligated to inform the Union about this matter before the merger and before the negotiations began, and if it had, the Union would likely have made further inquiries and discovered the true facts, including the significant fact that Respondent was saving itself $4–$6 million in 1990, and it was projected a similar amount for the next 3 years. In my view, once having been apprised of this situation, Demmerle would have as he testified, requested that additional benefits be paid to employees as a result of this savings. While I cannot conclude that the Union would necessarily have been successful in such demands, I can and do conclude that knowledge by the Union of the merger and its ramifications would likely have had a significant impact on the negotiations and the potential for increased benefits for employees. Thus, this is in my view another reason to conclude that the merger was a significant, substantial, and material change in terms of employment for Respondent's employees.

The Board has found in analogous situations, involving changes in benefit funds, that such changes were mandatory subjects of bargaining, wherein the changes had much less of an impact on employees than in the instant case. *Lawrenceville Ready Mix*, supra (change of carrier for health plan. Note that the Board permitted Respondent therein in the compliance stage of the proceeding to establish its contention that the parties had retroactively agreed to the new carrier, which would relieve it of its obligation to reimburse the old union-sponsored fund. However, while doing so, the Board in fn. 4 observed that the Union's plan was solely a health insurance plan rather than a pension plan, with less of a problem of protecting the stability of a fund in whose future viability employees have a clear economic stake). *Aztec*, supra (change of health insurance carrier. The Board adopted the administrative law judge's opinion which held that even where new plan is identical to old plan, bargaining is required. However, the record included some minor changes in administration and coverage, plus evidence that the new plan was in part a self-insurance plan, which could raise issues of viability. Note that there was no evidence in *Aztec*, as here of a demonstrable and significant effect on the viability of the fund). *Millard Processing*, 310 NLRB 421, 423, 425 (1993) (change in life insurance carrier with no change in terms or conditions of coverage); *J. P. Stevens & Co.*, 239 NLRB 739 fn. 3 (1978) (change of investment advisors for profit-sharing plan. The Board observed that issue of who controls investment is a mandatory subject of bargaining, noting the possible adverse impact of the change due to the loss of the investment expertise of the trustee). *Connecticut Light & Power Co.*, 196 NLRB 967 (1972), enf. denied 476 F.2d 1079 (2d Cir. 1973) (employer's refusal to bargain with union about a change in health insurance carriers, even where no change in benefits).

I find that the above authorities, plus the cases that I have previously cited which detail the Board's concerns with the viability of benefit funds, are far more persuasive and dispositive that the cases cited by Respondent with respect to this issue.

Indeed, the only Board opinion cited by Respondent as having significant precedential value on this matter is *United Technologies*, supra, 278 NLRB 306. That case dealt with the unilateral implementation of a ''Correct-A-Bill'' program, wherein employees who reported overcharges on hos-

[10] It is noteworthy that Respondent's negotiators specifically told the Union that the Union's pension demands would cost Respondent $7 million, which in view of the merger was not accurate.

pital and surgical bills to the carrier would receive 80 percent of the amount refunded to the carrier by the provider pursuant to the employee's report. The Board found that this action was not a material, significant, or substantial change in terms or conditions of employment, and Respondent focuses on the portion of the decision that observed that the program ''did not constitute a change in any health care service covered by the Respondent's health insurance plan, nor did it otherwise affect the terms of the plan.'' Id. at 308. However, Respondent conveniently ignores what was in my view the primary basis for the Board's decision, which is made very clear by the majority's response to the dissenting opinion by Member Dennis. Thus, the Board stressed that the program was of limited duration (1 year) and was likely and in fact did affect only a small number of employees in the unit. Moreover, there was no evidence in *United Technologies* as here that the change had a significant effect on the viability of the fund.

Respondent also relies on the Second Circuit's opinion in *Connecticut Light & Power*, supra. I note initially that I am of course bound by the Board's decision in that case, which the court reversed. However, particularly since this case arises in the Second Circuit, I find it appropriate to discuss it, and I conclude that the facts and the holding therein are clearly distinguishable from the instant matter. Thus, in *Connecticut Light*, supra, the employer had in fact bargained extensively with the union over numerous areas where the union expressed dissatisfaction with the current carrier, and in fact the employer secured some changes from the carrier as a result. Although the parties bargained in good faith over the coverage, benefits, and administration of the fund, the employer refused to bargain concerning the union's desire to change carriers back to a carrier previously used by the employer.

The court found, contrary to the Board, that since the employer had bargained about benefits, coverage, and administration, it was free to choose any carrier that would satisfy its agreement with the union, without bargaining with the union. The court emphasized the fact that the employer had in fact bargained extensively about significant matters involving the plan, and that the union had alleged only general ''dissatisfaction'' with the present carrier. Here, of course, Respondent engaged in no negotiations with the Union concerning the merger, and as I have found above failed to notify the Union as it should have, before taking such action.

More importantly, the court recognized the validity of and distinguished the Sixth Circuit's opinion in *Bastian-Blessing*, supra. It was emphasized that the *Bastian* court found a sufficient relationship between the identity of the carrier and vital interests of the employees which require bargaining, because of three factors, including ''a degree of uncertainty was created as to the funding of the new plan which the Board considered to have an adverse impact on the employees' previously negotiated benefits.'' 476 F.2d at 1082, 1083, quoting from 474 F.2d 51–52. The uncertainty involved in *Bastian Blessing*, supra, was the fact that the change was to a self-insured plan from using an outside carrier. The administrative law judge found that the employer had not answered the union's questions about the existence of adequate unencumbered funds to pay pending claims. Therefore, the judge concluded that the ''unilateral substitution of a group health program having questionable funding also tended to have an adverse impact on the employees' negotiated benefits.'' 194 NLRB at 614.

Therefore, I believe that the Second Circuit implicitly supported *Bastian-Blessing*'s conclusion that questions concerning the funding or viability of the fund do have a material and significant effect on terms and conditions of employment, and would find in the instant case that the demonstrable effect on the viability of the pension fund herein of the merger, was sufficient to conclude that such action was a mandatory subject of bargaining.

Respondent also cites *Admiral Retread*, supra, which is an Advice memo detailing a General Counsel's refusal to issue a complaint. Such an action is of course of no precedential value, since it is not a Board or court decision. Moreover, the facts therein are also significantly different from the case at hand. Thus, the case involved an employer's action in changing from a private health insurance plan to a self-insured plan. The General Counsel concluded that since the new plan contained the same benefit levels and the new management company agreed to administer the plan in the same way, that the change did not have a significant impact on terms and conditions of employment and was not a mandatory subject of bargaining.

However, once again Respondent conveniently ignores an equally significant factor therein, which the Advice memo relied on, and which is highly pertinent to the instant case. Thus, the employer there had provided for the security of the self-insured plan by creating a trust and for funding by an insurance company. The General Counsel relied on these facts to conclude that the change had no effect on the financial security of the coverage offered by the plan, citing among other cases *Bastian-Blessing*, supra, which as noted relied in part on questions about the financial security of the changed plan in finding a significant impact on employees' conditions of employment. Thus, once again the clear evidence of a substantial change in the financial security of the pension plan of Respondent's employees caused by the merger in the instant case, makes *Admiral Retread* not dispositive even if it did constitute significant authority.

Finally, Respondent relies on *U.S. v. Western Electrical*, supra, which is a U.S. District Court opinion approving a settlement of an antitrust lawsuit involving AT & T, over objections raised by various parties, include one of the Unions that represented some employees of AT & T and other related companies. Since this case is not a Board case, was not decided under Board law, and the Board was not a party therein, the District Court opinion has very little precedential value. Nonetheless, it is appropriate to briefly discuss it, since once again in my view the facts therein are significantly distinguishable from our case.

The case involved the breakup of a single pension plan to nine separate plans. Once again, Respondent selectively cites only portions of the opinion which did hold that the breakup ''was not inconsistent with Federal labor policy, for there will be no changes in coverage, levels, or administration of the plan,'' citing the Second Circuit *Connecticut Light*, supra, opinion. However, this quote was in the context of the court's overall opinion that the case did not involve unilateral action by an employer, but with a breakup of the employer company as part of a comprehensive settlement of a complex antitrust action. Id. at 1093.

More importantly, while the union therein raised the objection that each of the nine plans will be financially more risky than the existing plan, it produced no evidence to support its assertions in that regard. The court disposed of the union's objections by pointing out that the decree requires that the regional companies develop as soon as possible self-sufficient plans. Additionally, the court observed that the union offered nothing but speculation that financial performance of any of the funds would have an actual effect on the level of benefits, particularly since the fair market value of the individual trust complained of (the Bell System Plan) exceeded the fair market value of the accrued benefits (i.e., the plan was overfunded). Thus, in *Western Electric*, supra, there was no evidence of any significant effect on the viability of the fund which resulted from the merger. Here, however, as I have observed above, not only was a significant and substantial effect on the viability of the fund and the safety of employees benefits established, but was in fact the principal reason that the merger was effectuated.

Accordingly, based on the foregoing, I conclude that the merger of Plan B into the UTC vitally affected the terms and conditions of employment of Respondent's employees and was a mandatory subject of bargaining.

C. *Did Respondent Unlawfully Modify the Terms of the Contract*

As I have noted above, an employer violates Section 8(a)(5) of the Act when it uninlaterally modifies the terms of a collective-bargaining agreement, without the union's consent. Here there is no question that the Union did not consent to the merger, so the issue to be decided is whether or not the merger was in violation of any of the terms of the contract between the parties.

The General Counsel and the Charging Party contend that the merger was violative of the contractual requirements that Respondent maintain a separate pension plan, a separate pension trust, and separate funding for the pension plan. Respondent on the other hand argues that its actions were not proscribed by the contract, and even if the General Counsel and the Charging Party's interpretation of the agreement is found to be more appropriate, that since it acted pursuant to a plausible interpretation of the contract, and there is no evidence of union animus, bad faith, or an intent to undermine the Union, no violation of the Act has been established. *Westinghouse Electric Corp*., 313 NLRB 452 (1993); *Crest Litho Inc*., 308 NLRB 108, 110–111 (1992); *Atwood & Morrill Co*., 289 NLRB 794, 795 (1988); *Thermo Electron Co*., 287 NLRB 820 (1980); *NCR Corp*., 271 NLRB 1212, 1213 (1984).

The standard utilized by the Board in analyzing contract clauses is set forth in *Mining Specialists*, 314 NLRB 268–269 (1994).

> In contract interpretation matters like this, the parties' actual intent underlying the contractual language is always paramount and is given controlling weight. To determine the parties' intent, the Board normally looks to both the contract langauge itself and relevant entrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract in question, or the bargaining history of the provision itself. [Fns. omitted.]

Respondent argues that it has not violated the contract or alternatively that it acted under its plausible interpretation of the agreement, by focusing on the provision of the contract that provides that Respondent ''shall be free to determine the manner and means for the funding and the payment of any pension benefits under this Agreement.'' According to Respondent its action of merging the assets of Plan B into the UTC plan is nothing more than another instance of Respondent exercising its rights established under this clause and confirmed by past practice and bargaining history, to administer and fund pension benefits for its employees.

In that connection, Respondent relies on evidence of past practice and bargaining history, which in its view support its interpretation of the agreement. I find, however, such evidence to have little or no significance in assessing the parties intent in agreeing to the clauses alleged by the General Counsel and the Charging Party as having been violated by the merger.

Respondent cites the Board charge by the Union in 1978, protesting Respondent's action in changing the interest assumption rate for Plan B. The Regional Director dismissed the charge, which was affirmed by the Office of Appeals, finding, inter alia, that Respondent had acted ''in accordance with its good faith interpretation of the collective-bargaining agreement and the pension plan.'' Aside from the obvious fact that a refusal to issue complaint is of no precedential value, the facts therein are not remotely comparable to the instant matter. Thus, the General Counsel relied heavily in the 1978 case on past inaction by the Union, as well as bargaining history, neither of which are present with regard to either the merger of assets or to the clauses alleged as violative of the contract. Thus, the question of Respondent's obligation to maintain a separate pension plan, separate trust, and separate funding were not raised or considered. That case appeared to involve solely whether Respondent's right to administer the plan or to determine the manner and means of funding permitted the change in interest rate assumption, and absent consideration of the ''separate'' plan or separate trust issues, I find to have no affect on my interpretation of such provisions here.

Similarly, I also find no significance in the fact that after this decision the Union made unsuccessful attempts during the 1979 negotiations to eliminate Respondent's exclusive right to administer and fund Plan B by proposing union representation on a board of trustees to administer the fund, and the removal from the contract of the provision giving Respondent the right to determine the manner and means of funding. This evidence of bargaining history shows only that the Union was not happy about the clause giving Respondent the right to determine the manner and means of funding, and sought to play a role in these areas. It proves nothing whatsoever about what the parties meant by a separate plan, trust or funding, since no evidence was presented that these contractual clauses were ever raised in connection with the Board case or at the negotiations. It goes without saying that the subject of a merger of plans, of merger of assets was not raised or considered in either of these situations.

Respondent also contends that past practice between the parties conclusively demonstrates that Carrier has assumed exclusive responsibility for administering Plan B, and has exclusively determined the manner and means of funding of Plan B. In support of these assertions, Respondent points to the fact that UTC has been the plan administrator for Plan B since 1982, that Plan B benefits have been paid by Plan B Trustee-Citibank, and that Plan B assets have been invested along with assets of other UTC plans in the UTC Master Trust. While I agree with Respondent that these facts do demonstrate that Respondent has exercised its right under the contract to determine the manner and means for funding pension benefits, I do not agree with its further assertion that the merger was merely another instance of Respondent exercising these rights. In my view none of these facts nor any other evidence of bargaining history addresses the issue of Respondent's obligation to maintain a separate pension plan, trust or funding, or whether the merger was violative of these sections of the contract.

Since the record doesn't contain extrinsic evidence of the parties intent, I must determine such intent, in the light of the ordinary meaning of the crucial terms of the contract as appied to the instant facts. *Mining Specialities*, supra; *J.R.R. Realty Co*., 301 NLRB 473, 474–475 (1991), enfd. per curiam mem. 955 F.2d 764 (D.C. Cir. 1992).

The crucial word to be interpreted herein is separate, which is cited in four specific sections of the agreement, which the General Counsel and the Charging Party contend have been violated by Respondent's merger of Plan B into the UTC plan. The word separate is not particularly ambiguous, and is defined in this context by Webster's Dictionary as follows:

> [S]et apart or divided from the rest or others, not joined, connected or severed. Not associated or connected with others, having existence as an entity, distinct, individual.

I conclude in agreement with the General Counsel and the Charging Party, that the requirements of the contract to maintain a separate pension plan, trust, and funding have clearly have been violated by the merger.

Sections 1 and 2 of the contract require the maintenance by Respondent of a separate pension Plan B. Respondent asserts that these sections have not been violated inasmuch as Plan B still exists, notwithstanding the merger, which Respondent characterizes as merely a merger of assets. Thus Respondent argues that Plan B still exists, since it is still providiing benefits to employees and retirees under the terms of Plan B, and that the documents which describe these benefits, and the amendments thereto, constitute a still viable Plan B. I do not agree.

The merger amendment to Plan B provides that Plan B shall be merged into the UTC plan, ''to create a single plan within the meaning of section 414(i) of the Internal Revenue Code of 1986 the (Code) and the regulations thereunder.'' Further the amendment provides that ''the single plan created by this merger shall be a plan with more than one plan document as described in Treasury Regulation section 1.414(i)-(b)(i)(ii) and this plan shall not otherwise alter or affect the provisions of the Carrier Plan B document or the UTC-represented Retirement Plan document. Moreover, Treasury Regulation section 1.414(i) which is explicitly referred to in the merger amendment, provides that a ''merger or consolidation means the combining of two or more plans into a single plan ''and . . . a plan is a single plan if and only if, on an ongoing basis, all the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries . . . a plan will not fail to be a single plan merely because . . . the plan has several plan documents.'' (Sec. (b)(1) and (2).)

Additionally the SAR prepared for Plan B ending December 1, 1990, acknowleges that following the merger, the UTC Plan was the ''surviving plan.''

Finally Plan B no longer files separate forms with the IRS or other agencies, and the only EIN or plan numbers currently in existence are the numbers for the UTC Plan.

Accordingly based on the above facts, it is clear that the merger was more than a mere merger of assets, but that Plan B is effectively out of existence. While there may be plan documents which refer to Plan B benefits that are still in existence and are being followed, the single, surviving plan is the UTC plan, since all the assets of the UTC Plan are now available to pay benefits to employees and their beneficiaries. Thus, there is no longer a separate[11] Plan B in existence as a result of the merger, which the contract clearly and unambiguously requires. I conclude that Respondent's interpretation to the contrary is not plausible, and that it has unlawfully modified the agreement by such conduct.

Section 5 of the 1988 agreement provides that for the purpose of supplying pension benefits, Respondent ''shall establish or cause to be established a separate pension trust or trusts.'' Respondent argues simply that no violation of this section has been established, since Respondent is still funding benefits out of a ''separate'' trust, the UTC Plan, which is in fact now a more fully funded ''separate'' trust. I find this contention to be a strained and implausible interpretation of the agreement as well as the effects of the merger. There is no longer a ''separate'' trust for the purpose of supplying benefits to Plan B participants, since the previously ''separate'' Plan B trust has now been merged with pension trusts of the other merging plans. Indeed, Respondent's own witnesses admit that from an asset standpoint, Plan B no longer exists (O'Connor), and there is no longer a separate Carrier Plan B with respect to assets (Currier).

Therefore, as a result of the merger, the fiscal health of the pension fund and the viability of benefits for Respondent's employees, are no longer determined solely by the experience of Respondent's employees, but is impacted by the experience of all the other employees of other employers covered by all the previously unmerged or separate funds. The fact that the impact on the funding is positive is of no relevance to the question in issue. By requiring benefits be paid from a ''separate'' trust, the parties clearly contemplated that this ''separate'' trust be established, and that its assets and liabilities be separate and that fiscal viability of the ''separate'' fund be determined by the experience of Respondent's employees.

I conclude therefore that Respondent has violated this section of the contract by the merger and that Respondent's interpretation of the agreement is not plausible.

The final clause in the contract alleged to have been violated by Respondent is section 6, which provides that the assets of Plan B ''attributable to the bargaining unit shall continue to be funded separately.'' In my view, Respondent's violation of this clause is the clearest, and Respondent's pur-

[11] Because of the merger, Plan B is no longer set apart or divided from other plans, and has no existence as a distinct entity.

ported interpretation the least plausible of the three clauses in question. Prior to the merger Respondent has ''separately'' funded Plan B by making contribution of $4–$6 million per year into the separate Plan B fund, so that the assets of Plan B attributable to the unit would be used only to pay claims to Respondent's members. However, once the merger was effectuated, separate funding was eliminated and aggregate funding took over. Respondent's own witness O'Connor conceded that Plan B and the other plans that had ''their own funding status'' would as a result of the merger no longer have such status since each member of the UTC Plan would have access to the assets of the entire plan to pay for benefits. Indeed, Respondent was able to avoid making any contributions to the pension fund for the past several years, which was in fact one of the principal reasons why Respondent agreed to the merger.

Respondent asserts that the provisions are ambiguous, because there are no assets to Plan B attributable to the unit. Respondent argues that the unit doesn't contribute to the fund, but only Respondent contributes. Therefore it asserts that any Plan assets are atrributable to only Carrier. This contention is without merit. While it is true that Respondent contributes all the funds to the trust, there can be no doubt that these contributions were made on behalf of the employees, and that the parties contemplated in this section that other assets of Plan B attributable to the unit employees refers to the contributions made by Respondent in that regard. It is noteworthy in this respect, that Respodnent produced no witnesses or introduced any evidence that any of Respondent's representatives had any doubts about the meaning of this clause or believed that there was any ambiguity about these terms, as Respondent's attorney suggested in its brief.

Respondent also contends that the meaning of section 6 is further obscured by past practice involving Plan B assets, since historically Plan B assets have been invested in a Master Trust along with other plans, without objection from the Union. However, I find this past practice to be irrelevant to any assessment of the meaning of the word ''separate'' in the contract. The UTC Master Trust is as the record discloses, similar to a Mutual Fund. Plan B, the UTC Plan, and other plans have historically invested their assets in the UTC Master Trust, in order to pool assets and obtain a better return. However, as with any mutual fund investment, Plan B owned a specific amount of shares in the Master Trust, based on the specific amounts invested in the Master Trust.

As a result of the merger, Plan B no longer has a specific amount of shares in the Master Trust since there is no further specific record of Plan B's interest in either the Master Trust or in the UTC Plan. The merger has produced a situation where Plan B's assets are no longer segregated or ''separate'' nor is the separate funding ''attributable'' to the bargaining unit, since Respondent has not made any ''separate'' contributions as the contract requires: the fact that the UTC Plan has continued to invest its assets in the UTC Master Trust, therefore has no impact on whether Respondent has violated its contractual obligation to fund Plan B separately to produce assets ''attributable'' to the bargaining unit.

As noted above, in order to find that Respondent was acting pursuant to a plausible interpretation of the agreement, the evidence must also disclose no evidence of bad faith, union animus, or intent to undermine the Union. *Westinghouse*, supra; *Crest Litho*, supra; *N.C.R.*, supra; *Atwood & Meritt*, supra; *Thermo Electric*, supra. I conclude, however, that the evidence herein does disclose that Respondent has acted in bad faith with respect to its obligation to notify the Union about the merger, and that therefore even if I had found that Respondent acted pursuant to a plausible contractual interpretation, its conduct would still be unlawful.

Thus, regardless of whether Respondent's merger unlawfully modified the contract, since it was a mandatory subject of bargaining, Respondent was obligated to provide adequate notification in advance to the Union of its intended action, so that the Union would have sufficient time to request bargaining about the matter. *Champion Parts Rebuilders*, 260 NLRB 731, 734 (1982), *Furr's Cafeteria*, 251 NLRB 879 fn. 3 (1980). I find that Respondent failed to provide such notice to the Union. I have discussed in detail above with respect to the 10(b) issue, the facts concerning notification to the Union. The only allegation of notice to the Union, prior to the effectuation of the merger, was Parisi's conversation with Demmerle in November 1990. I have concluded above that this conversation did not constitute clear and unequivocal notice to the Union that it violated the contract to start the 10(b) period running. I also find that this conversation did not constitute sufficiently unambiguous notice to the Union to trigger an obligation to request bargaining. *Fountain Valley Regional Hospital*, 297 NLRB 549, 551–553 (1990); *Blue Grass Provision Co. v. NLRB*, 636 F.2d 1127, 1130 (6th Cir. 1980); *Randolph*, supra at 344. Thus as I have concluded infra the offhand remarks made by Parisi in the midst of the conversation about other matters, while mentioning an intention to merge assets into the UTC plan, was coupled with a statement that Respondent was keeping Plan B as per the contract. Noting particularly that Parisi was not fully informed about the ramifications of the merger, such as the elimination of government reporting for Plan B, I find that this conversation was misleading at worst, but too ambiguous at best, to trigger an obligation on Demmerle to request bargaining about the matter.

I need not and do not find that the failure to notify and bargain with the Union is an independent violation of Section 8(a)(5) of the Act, particularly since the complaint does not so allege.[12] However, I can and do conclude that the bad faith of Respondent in not notifying the Union before the merger does preclude Respondent's reliance on a ''plausible interpretation'' defense.

Further Respondent's bad faith was demonstrated not only in its failure to adequately notify the Union about the merger before its effectuation, but also by Respondent's continued failure to notify and conceal from the Union the facts about the merger until after negotiations were completed. Thus Respondent made no mention of the merger during the negotiations even though it was fully aware that it would be saving $4–$6 million, as a result of not being compelled to make contributions to Plan B. Moreover, when the question of costing of benefits was brought up, Respondent indicated that the cost to Respondent of the pension benefit increase re-

[12] However, I note that such a finding would be possible, even absent such an allegation, since the question of notice to the Union was fully litigated with respect to the 10(b) issue. However in view of my finding that the merger violated Sec. 8(a)(5) because it modified the contract, without consent of the Union, a finding of a refusal to notify the Union would be cumulative and not add significantly to the remedy.

quested by the Union was $7 million. This response to the Union was not accurate since as noted, Respondent would not have to make any payments for these benefits as a result of the merger's overfunded UTC Plan.

Respondent attempts to explain away these events, by arguing that liability for benefits is not the same as funding of liabilities, and that as explained by O'Connor, even if no money is paid, a cost for the funding of the benefit must be calculated, since payment will be made at some future time. I find this explanation unconvincing. The fact is that as a result of the merger, there is no immediate cost to Respondent to fund these benefits, and it is not clear when or if there will be any cost to Respondent to pay for these benefits.

Although the record is not clear, it does tend to show that whatever payments will eventually be made into the UTC Fund, they will be made by all of the employers in the fund, and will not be based upon the particular benefits agreed to by any particular employer.[13] Thus the $7 million cost figure allegedly attributable to the Union's pension demands cannot be accurate, insofar as it allegedly discloses a cost to Respondent either currently or deferred. Therefore, the facts of the merger clearly should have been disclosed to the Union, including especially the savings to Respondent.

Respondent also argues in this regard, as noted, that since the Union believed that Plan B was already fully funded and didn't believe that Respondent was making any contributions, the failure to notify had no effect on the Union's bargaining demands or the negotiations in general. I have already concluded above, and reiterate my finding that had the Union known of the true facts, i.e., that Respondent had saved $4–$6 million it would have argued, as Demmerle credibly testified, that the employees were entitled to share in these savings by obtaining improvements in other benefits.

Finally, the Respondent's concealment continued even to the extent that it failed to change the appropriate sections of the SPD that it was negotiating with the Union, which detailed the changes as a result of the merger.

Thus based on the foregoing, I conclude that Respondent's bad faith precludes any defense that it acted pursuant to a plausible interpretation of the agreement.

Respondent also contends that the merger of assets is consistent with its management responsibilities under the management responsibility clause of the agreement, which requires Respondent to ''conduct the business of the company in the balanced interest of the employees stockholders, customers and the general public.'' Thus Respondent argues that the improvement in the funding status of the fund was in the interest of the employees, and interests of stockholders were served by funding the trust without contributing $4–$6 million per year to the trust. I find Respondent's reliance on this clause to exonerate its conduct to be clearly misplaced. Whether or not the merger is in the interest of employees or stockholders, clearly has no relevance to Respondent's obligations to maintain a separate plan, trust or funding. In effect Respondent appears to be arguing that the management responsibility clause has waived the Union's rights with respect to other clauses. Such a waiver must be clear and unmistakable, *Southern California Edison Corp.*, 284 NLRB 1205 fn. 1 (1987); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 fn. 12 (1983), and by no stretch of the imagination can it even be suggested that the management responsibility clause meets this standard.

A similar conclusion is warranted with respect to Respondent's further implied contention that Section 7 of the agreement, Respondent's right to control spending and administration also constitutes such a waiver. Clearly that clause makes no reference either to a merger or to Respondent's obligations under the ''separate'' provisions and cannot be construed as a clear and unmistakable waiver of the Union's rights. Section 7 and the other provisions must be read together, *N.Y. Taxi Driver Local 3036 (EN Operating Co.)*, 204 NLRB 427, 429 fn. 17 (1973), and in the light of the ordinary or plain meaning of terms, *Mining Specialists*, supra; *Tel Plus Long Island*, 313 NLRB No. 47, slip op. at 17 (1993) (not reported in bound volumes). Thus, the only reasonable or plausible interpretation of the agreement, is that Respondent's right to determine the manner and means of funding must be exercised consistently with its obligations to maintain a separate plan and to make separate fund contributions attributable to the bargaining unit into a separate trust.

I conclude as I have detailed above, that Respondent's merger of Plan B with the UTC Plan has violated all three of its obligations with respect to the ''separate'' aspects of the plan,[14] and that therefore it has unilaterally modified the contract without the Union's consent in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent Carrier Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Union 527 Sheet Metal Workers' International Association, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By merging Plan B into the UTC Plan, effective December 21, 1990, without the consent of the Union, Respondent has modified mandatory subjects of a collective-bargaining agreement during its term 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.

4. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes of the Act.

While the normal remedy for an unlawful unilateral charge 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 agent. *House Calls*, 304 NLRB 311, 314 (1990); *Dura-Vent Corp.*, 257 NLRB 430, 433 (1981).

[13] I note that the UTC Plan specifies that contributions will be made by the Employer (defined as UTC plus other affiliates in the plan), sufficient to satisfy minimum standards of ERISA.

[14] I note that I need only find that Respondent has violated but one of these contractual provisions, in order to find a violation of the Act.

In order to allow the Union ample opportunity to consider whether to request the reinstatement of the separate Plan B pension plan, trust, and funding, while not leaving the matter open indefinitely, I shall recommend that the Union make its decision within 60 days of the date of the Board decision (or the Court of Appeals Decision enforcing this decision, should Respondent refuse to comply). If the Union does not request reinstatment of the separate Plan B pension plan, the merger of the plan into the UTC Plan shall remain in effect. Respondent will have 40 days after the receipt of the Union's written request to reinstate a separate Plan B as the pension plan for its employees. *Antonio's Restaurant*, 246 NLRB 832, 843–844 (1979), enfd. 648 F.2d 1206 (9th Cir. 1981). *Keystone Steel & Wire*, 237 NLRB 763, 767–768 (1978), enfd. but modified 606 F.2d 171, 180 (7th Cir. 1979).

The Charging Party requests with respect to the reinstatement order, that Respondent be ordered to (1) reestablish a separate Carrier Plan B that is fully funded without loss of benefits or rights for Plan B participants and beneficiaries; (2) place the assets of the separate Plan B in a separate trust or trusts, to be held in trust for the exclusive benefits of Plan B participants and benefiaciaries and to be inacessible to participants and beneficiaries of other merged plans; and (3) separately fund the separate Plan B.

I conclude that with one exception, all of these requests are appropriate, and shall be recommended, subject to the written request of the Union, as described above. However, I do not agree with the Charging Party that Respondent must be ordered to reestablish a separate Plan ''that is fully funded.'' The Charging Party cannot have it both ways. It is clear that Plan B prior to the merger was not ''fully funded.'' Indeed, the principal reason for approving the merger was to improve the funding status of the Fund. Thus if Respondent must reestablish Plan B, it must only restore the status quo, which includes the same funding status, as before the merger. While Respondent will be required to make the contributions to Plan B to keep it properly funded that it would have made, absent the unlawful change, that it is not the same as requiring that the fund immediately be ''fully funded,'' as the Charging Party requests.

The Charging Party also requests that Respondent be ordered to negotiate with the Union over the savings realized by the Respondent as a result of the merger through the date that the separate Plan B is reestablished, and otherwise make whole the unit employees. I do not know what the Charging Party is referring to by its request to otherwise make whole unit employees, since I can find no basis in this record for any conclusion that the employees have experienced any losses, that require a make-whole remedy, other than perhaps as I have noted the requirement to make contributions to Plan B, that Respondent would have made, absent the merger.

However, the request for an order requiring Respondent to bargain over savings realized by the merger, does warrant some discussion. As part of my findings above, I have concluded that Respondent acted in bad faith by failing to properly notify the Union in advance of the merger, and by negotiating a collective-bargaining agreement while continuing not only to fail to notify the Union about the merger, but also by misleading the Union about the cost of pension benefits to Respondent. In thse circumstances, a bargaining order concerning the savings that Respondent realized as a result of the merger is appropriate. Indeed such a remedy comes as close as possible to restoring the status quo. Thus had Respondent complied with its statutory obligations, it would have adequately notified the Union in advance of the merger and endeavored to obtain the Union's consent for the merger. As I have concluded, had the Union been so notified, it would have asked to share in the ''savings,'' and requested additional improvements in benefits in exchange for obtaining its consent for the merger. However, while I believe an order requiring bargaining over the savings is appropriate, the Union again cannot have it both ways. It would be punitive and inappropriate to require Respondent to reinstate the plan, make back payments, and then bargain over the savings. Thus, if Respondent is required to make back contributions to Plan B, there will be no savings for Respondent to bargain about.

Therefore to accommodate this problem and to place the parties as closely as possible where they would have been, absent the violation, I shall recommend that during the 60-day period that the Union is considering whether to request the reinstatement of the separate Plan B and back payments, that on request by the Union, and conditioned on the Union agreeing to bargain about the reinstatement of the Fund and the back payments, Respondent shall be ordered to bargain about any savings that resulted from the merger.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Carrier Corporation, Syracuse, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively in good faith with Local Union 527, Sheet Metal Workers International Association, AFL–CIO as the exclusive representative of its employees in the following appropriate unit:

> All production and maintenance employees at Respondent's existing Syracuse, New York plants including truck drivers, group leaders and leadmen; but excluding timekeepers, time study employees, nurses, draftsmen, research workers, cafeteria employees, all other clerical and salaried employees, guards and supervisors as defined in the Act.

(b) Unilaterally modifying the terms of the collective-bargaining agreement between it and the Union, by merging the separate Carrier Employees Security Pension Plan B (Plan B) into the United Technologies Corporation Retirement Plan (UTC Plan), without obtaining the consent of the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon written request by the Union, and in the manner set forth in the remedy section of this decision, reinstate a

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

separate Plan B, make contributions to Plan B that would have been made, absent the merger, or bargain with the Union concerning any savings that may have been realized as a result of the merger.

(b) Post at its Syracuse, New York facility copies of the attached notice marked ''Appendix.''[16] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively in good faith with Local Union 527, Sheet Metal Workers International Association, AFL–CIO as the exclusive representative of our employees in the following appropriate unit:

> All production and maintenance employees at our existing Syracuse, New York plants including truck drivers, group leaders and leadmen; but excluding timekeepers, time study employees, nurses, draftsmen, research workers, cafeterial employees, all other clerical and salaried employees, guards and supervisors as defnied in the Act.

WE WILL NOT unilaterally modify the terms of the collective-bargaining agreement between us and the Union, by merging the separate Carrier Employees Security Pension Plan B (Plan B) into the United Technologies Corporation Retirement Plan (UTC Plan), without obtaining the consent of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on written request by the Union, reinstate a separate Plan B, make contribtions to Plan B that we would have made, absent the merger, or bargain with the Union concerning any savings that may have been realized by us as a result of the merger.

CARRIER CORPORATION