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**IN THE ARBITRATION BETWEEN**

**THE SHEET METAL WORKERS'  
INTERNATIONAL ASSOCIATION**

**and**

**UNITED TRANSPORTATION UNION**

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**OPINION AND AWARD**

This arbitration arises out of a decision by the Hon. John D. Bates, U. S. District Judge for the District of Columbia, granting the motion of Sheet Metal Workers International Association (SMWIA) to compel arbitration of a dispute with United Transportation Union (UTU). *Sheet Metal Workers International Association v United Transportation Union*, 767 F.Supp 2d 161 (D.D.C. 2011). An arbitral hearing was held in June, 2011, with five days of testimony and the admission of 121 exhibits totaling thousands of pages. More than 200 pages of post-hearing briefs and reply briefs were filed. The arbitrator wishes to recognize at the outset of this opinion the truly exceptional quality of the performance of counsel on both sides, and the highly professional and cooperative manner in which they have navigated these proceedings.

The central issue in this case is whether a merger was consummated in 2007 between SMWIA and UTU to form a new union, International Association of Sheet, Metal, Air, Rail and Transportation Workers (SMART). If the answer to this question is yes, as this opinion holds it is, there are follow-on questions as to whether UTU breached the Merger Agreement, and, if so, what remedies are appropriate.<sup>1</sup>

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<sup>1</sup> Judge Bates ordered to arbitration not only the merger issues, but also tort and trademark issues advanced in UTU's counterclaims. At the outset of the arbitration hearing, the arbitrator inquired whether UTU wished to pursue those claims, and was advised that UTU did not and was waiving its tort and trademark claims (Tr. 5-6).

## I. INTRODUCTION AND OVERVIEW

Several issues in this case turn on a close examination of the facts and of the text of the Merger Agreement. That examination is deferred until the appropriate points in this opinion where those issues are addressed. Instead, this opinion begins with a broad overview of the events giving rise to this arbitration.

UTU has roughly 75,000 active members, most employed in the railroad industry. UTU was formed in 1969 by the merger of four previously separate unions, each representing a different craft of operating employees working on the railroads. With respect to one of these crafts – engineers -- there is a rival union, Brotherhood of Locomotive Engineers [BLE]. UTU competes with BLE to be the collective bargaining representative of employees in this craft. And even where UTU is the bargaining representative, a peculiar provision in the Railway Labor Act allows employees to satisfy the union shop provision by joining either of the two unions. So UTU also competes with BLE for members, regardless of who is the collective bargaining representative.

In 2000, efforts were made by the officers of UTU and BLE to merge the two unions. A proposed Unification Agreement was drafted, and put before the members of both unions for ratification. A majority within UTU voted in favor of the merger, but the effort failed because a majority of BLE's members voted against. So the competition between the two unions continued. In 2003, BLE entered into an affiliation with the International Brotherhood of Teamsters [IBT], a union that dwarfs UTU in size and resources.

In 2004, a vacancy in the position of President of UTU arose. The UTU Constitution provides that the Assistant President will succeed to the presidency in the event of a vacancy, and Paul Thompson thus became President. Thompson had been planning to retire in 2005, but decided to postpone his retirement until the end of 2007, so that he could fill the vacancy for the remainder of the term.

Thompson promptly began efforts to find a larger union with which UTU could merge. Thompson was eager to accomplish this, as he considered UTU under-resourced, both financially and in terms of the services it was able to provide, and thus unable to provide optimal representation to its members or to compete effectively against the BLE/Teamsters combine.

Thompson and some of his fellow officers met with the top officials of several large unions to discuss the possibility of merger, including Michael Sullivan, who was the

President of SMWIA. Thompson decided sometime in late 2005 that SMWIA represented the best of the candidates for merger. SMWIA's membership, which was roughly twice that of UTU, consisted principally of employees in the construction industry, but there were also between 2,500 and 3,000 shopmen employed by the railroads to repair railcars and locomotives.<sup>2</sup> Thompson saw SMWIA as a union with abundant financial resources, a strike fund twenty-five times that of UTU, many more organizers than UTU, and training programs dramatically superior to UTU's. And, despite the disparity in size of the two organizations, SMWIA was willing to grant UTU substantial autonomy in the merged organization (SMART), something most large unions are unwilling to provide when they combine with smaller unions. SMWIA offered that UTU could become the Transportation Division of SMART, with its own set of elected officers and the power to decide most matters affecting the former UTU membership. And UTU would get a number of seats on SMART's governing board, and a share of delegates to SMART's convention, commensurate with its relative share of the total membership of SMART. (For example, the Transportation Division would elect six of the seventeen members of SMART's General Executive Council.)

The top officers of UTU and SMWIA negotiated for a year and a half, seeking to flesh out the terms upon which a merger of the two organizations could be consummated. Thompson chose a handful of the top officers of UTU to assist him in these negotiations, along with UTU's General Counsel (Clinton Miller) and a couple of key staff employees. He did not include some other members of UTU's Board of Directors in the discussions, nor did he disclose the back-and-forth of the matters being discussed with those Board members or with the UTU's membership generally. Although UTU suggests that this non-disclosure is evidence of sinister motives, the arbitrator does not find it to be so. Negotiations looking toward the merger of two large institutions are delicate matters, involving sensitive information, and it is understandable that the leaders of the institutions would operate with secrecy until they had a plan that warranted consideration by their governing bodies.

In these 2005-07 negotiations, negotiators for UTU and SMWIA exchanged a number of drafts of a proposed merger agreement. They finally arrived, on May 17,

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<sup>2</sup> The shop crafts represented by SMWIA are distinct from the operating crafts represented by UTU, although both groups are employed by the same railroads.

2007, at a draft that was acceptable to both Presidents. The draft wasn't signed, but it is clear that the Presidents regarded it as a contract.

The precise nature of that contract is important, and worth noting here, as it informs the analysis of the issues presented for resolution. Most of the May 17 draft consists of provisions the two Presidents lacked the power to adopt. They did not have power, for example, to merge the two organizations, nor to approve a new constitution that would displace the constitutions of their respective organizations. The only provisions in the May 17 draft they had power to adopt were Article II, which prescribed a procedure for submitting the proposed merger to the bodies within their organizations that *did* have the power to adopt the rest of the draft, and Article XII, which provided for arbitration of disputes as to the application and interpretation of the agreement and perforce provided for arbitration of disputes as to Article II. The remainder of the draft constituted an *offer* which the two Presidents were presenting to the appropriate governing bodies within their unions. In effect, the two Presidents agreed that these were the terms they would offer for approval. Only if and when those governing bodies accepted the offer would the remainder of the draft become an agreement binding upon the two organizations.

Article II of the May 17 draft provided for approval by three bodies. Within SMWIA, approval had to come from only one body, the General Executive Council.<sup>3</sup> Within UTU, approval had to come first from UTU's Board of Directors, and if that were obtained, then from a majority of those voting in a membership referendum.<sup>4</sup> In both instances, the parties' constitutions authorized mergers if approved by these bodies, and the Presidents necessarily had to provide for these approvals in Article II if there was to be an effective merger.

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<sup>3</sup> The SMWIA Constitution provides that when there is a proposal for SMWIA to merge with a *larger* organization there must be a membership vote, but when there is a proposal for merger with a *smaller* organization, as UTU was, the General Executive Council has power to approve. The distinction is understandable. If SMWIA merges with a larger institution, its members will no longer have a voting majority in the merged institution; if with a smaller institution, they will retain majority voting control.

<sup>4</sup> The UTU Constitution provides, in Article 23:

The Board of Directors may consider and implement plans of ... merger with another labor union. Any such ... merger shall be subject to convention approval or ratification by the membership of the United Transportation Union.

The Presidents chose the option of ratification by the membership, which also had been the choice when UTU considered merger with BLE was in 2000.

The merger was approved by the General Executive Council of SMWIA, and unanimously by the UTU's Board of Directors. It was then submitted to a vote of the UTU membership. Some UTU members, including Dale Edward Michael and Jimmy Eubanks, campaigned against the merger and urged the members to vote it down, arguing that UTU would be better served by merging with BLE/Teamsters. (Michaels and Eubanks held dual membership in both UTU and BLE.) Despite this opposition, more than 70% of UTU members participating voted in favor of the merger with SMWIA. By the terms of the Merger Agreement, the merger was to become effective on January 1, 2008, roughly five months after the last needed approval, that of the UTU membership.

On August 8, 2007 – shortly after the vote of the UTU membership – Presidents Thompson and Sullivan formally signed the Merger Agreement. Assuming the merger was properly approved (the subject of this arbitration), there was now a Merger Agreement all of whose terms were binding on the two organizations.

The approval of the merger was widely broadcast, and was greeted with enthusiasm within both organizations. UTU held its convention later in August, attended by delegates from all of its constituent locals. SMWIA's President, Michael Sullivan was invited to speak at the UTU Convention, and spoke glowingly about the benefits that would ensue to both organizations from the merger. He received a standing ovation from the UTU delegates. Not a single delegate at the convention spoke disapprovingly of the merger, and there was not a single complaint about the procedures by which the merger had been approved.

Still later in August, Kim Thompson, who had been elected Secretary-Treasurer of UTU at the UTU Convention, attended a regional SMWIA Conference and declared how pleased UTU was that the merger had been accomplished. Numerous publications by UTU trumpeted the beneficial effects that were expected now that the merger had been consummated.

At the August UTU Convention, Malcolm (Mike) Futhey was elected the next President of UTU, to take office on January 1, 2008 (coincidentally the same date the merger was to become effective.)<sup>5</sup> Futhey defeated another candidate -- David

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<sup>5</sup> The delegates at the Convention were advised that in electing officers of "UTU," they were actually electing the persons who would assume designated officer positions within SMART. For example, the Merger Agreement provided that the Transportation Division of SMART "will be led by the UTU International President, whose title will be 'President, Transportation Division.'" As the officers elected in August were not to take office until January 1, 2008, the same date the merger would take effect, they would assume office under their new titles. As Futhey

Hakey -- who had been supported by Thompson. Futhey's election did not signal any discontent with the merger. Futhey had been on the UTU Board of Directors when it voted unanimously to approve the merger, and he had publicly endorsed the merger after the Board meeting. He testified that he voted for the merger in the membership referendum the week before the Convention, that he did not discuss the merger at the Convention, and that he was still enthusiastic about the merger at the time he was elected.

But Futhey's enthusiasm began to wane sometime thereafter. He testified that in September Thompson told him that Articles 80 and 85 of the UTU Constitution were in conflict with the SMWIA Constitution and thus would not survive under the SMART Constitution – something that was directly contrary to what Thompson had represented to the Board and the membership when the merger was up for approval by those bodies. Futhey also testified that he experienced “sticker shock” when he learned of housing prices in Washington, D.C., and that the increased cost of moving to Washington – as he would have to do, as the SMART headquarters would be in Washington -- was tantamount to suffering a significant pay cut. Futhey also heard a rumor from Frank Wilner, UTU's Director of Public Relations, that he (Futhey) “will be in a closet in Washington and David Hakey is going to be running the UTU in Cleveland.”<sup>6</sup> Hakey was the candidate Futhey had defeated for the presidency of UTU, and while he had told Sullivan he didn't mind Hakey having a job of some sort in SMART, he certainly didn't expect Hakey to be running things behind his back. Futhey raised this rumor with Sullivan, who assured him it wasn't true – indeed Sullivan sent Futhey a letter expressly reassuring him that he would be the leader of the Transportation Division of SMART “in action as well as in title.” Futhey remained unconvinced, although no evidence was introduced at the hearing suggesting there was any truth to the rumor.<sup>7</sup> Futhey was also miffed

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testified, he became “President, UTU” only because the merger was enjoined. Otherwise, he would have assumed his new office as “President, Transportation Division, SMART.”

<sup>6</sup> Under the terms of the Merger Agreement, the headquarters of the Transportation Division would remain in Cleveland until June 1, 2010, when its lease terminated.

<sup>7</sup> UTU introduced emails which showed that Sullivan was in communication with Hakey, in an effort to learn how matters were proceeding at UTU's headquarters in Cleveland. That is a far cry, however, from showing that Sullivan would have Hakey, rather than Futhey, running the Transportation Division. In any event, the Merger Agreement and the SMART Constitution did not empower Sullivan to confer such power on Hakey, as those documents clearly established that the President of UTU would be the chief executive officer of the Transportation Division..

when Sullivan pointed out that Futhey had a higher salary under the UTU Constitution than Sullivan's under the SMWIA Constitution, and that it would be incongruous for SMART's third-ranking officer to have a higher salary than its first. Sullivan recognized that the Merger Agreement meant that Futhey's income was not to be diminished, but Sullivan proposed to solve the problem by having Futhey receive a lower nominal salary but an expanded per diem allowance that would bridge the difference. For tax purposes, per diem is treated the same as salary, so the change was merely cosmetic, but it didn't sit well with Futhey.

Futhey was aware that Michael and Eubank, who had opposed the merger from the start, were planning to bring a lawsuit seeking to enjoin the merger. Futhey decided to cooperate with this effort. At some point in the late Fall, Futhey made contact with Arthur Fox, the lawyer for Michael and Eubanks, offering to provide affidavits and testimony in support of the effort to enjoin the merger. He also encouraged friends to provide financial support for the lawsuit, and even advised Fox where the lawsuit should be brought, as there was a judge friendly to Futhey on that court; indeed, Futhey's son had clerked for that judge.<sup>8</sup>

Michael and Eubanks filed their lawsuit in December, 2007, seeking a TRO to prevent the merger going into effect as scheduled on January 1, 2008. UTU, still under Thompson's leadership (Futhey was not to assume the presidency until January 1), vigorously opposed the TRO, filing affidavits and memoranda insisting that the merger was properly accomplished. The TRO was granted despite UTU's opposition, and Futhey assumed the office of President of UTU on January 1, 2008. He immediately directed UTU's lawyers to advise the court that UTU did not oppose the granting of a preliminary injunction, and to explore a settlement of the case that would undo the merger.<sup>9</sup> Futhey also continued to cooperate with Fox, the plaintiffs' lawyer, in communications that did not include counsel for UTU (although Futhey would report these conversations to UTU's lawyers after the fact.)

When they learned of this about-face in UTU's position, a majority of the members of the UTU Board of Directors (who had been elected at the August convention at

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<sup>8</sup> Fox did file the lawsuit in the jurisdiction Futhey recommended (S.D. Ill.), but to Futhey's consternation the judge transferred the case to N.D. Ohio on the ground of *forum non conveniens*.

<sup>9</sup> Futhey's proposal was to settle on the basis that the Merger Agreement in its extant form would not go into effect, but instead UTU and SMWIA would negotiate in an effort to arrive at a more satisfactory agreement which would be submitted for a new vote of the UTU membership. Because of the intervention next described in text, this "friendly" settlement between the plaintiffs and the Futhey-led UTU never was effectuated.

the same time as Futhey), moved to intervene to defend the merger and to oppose issuance of a preliminary injunction. Their motion to intervene was granted, but the judge issued a preliminary injunction despite their opposition.<sup>10</sup>

The intervenors appealed the issuance of the preliminary injunction to the Sixth Circuit. In July, 2009, while the appeal was pending, Futhey declared at a UTU regional meeting that the merger was “dead,” and added:

There will not be a merger today. There will not be a merger tomorrow. There will never be a merger with the Sheet Metal Workers.

Five months later, the Sixth Circuit issued its decision, which vacated the preliminary injunction and ordered that the lawsuit challenging the merger be

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<sup>10</sup> Within UTU, internal union charges were filed against these Board members, alleging that their intervention in the lawsuit to defend the merger constituted a punishable offense under the UTU Constitution, as the Constitution gave the UTU President, and not the Board of Directors, the power to decide upon the union’s position in litigation. Futhey testified in support of the charges. The charges were upheld, and the Board members were ordered removed from office. The Board members thereupon sued in federal court, seeking an injunction against enforcement of this order. The suit alleged that the removal of the Board members from office was a violation of their free speech rights and their right to sue – rights conferred upon union members by Section 101 of the Labor-Management Reporting and Disclosure Act (LMRDA). The district court ruled in their favor, and issued a preliminary injunction barring the removal of the intervenors from UTU’s Board of Directors. That ruling was affirmed by the Sixth Circuit, which declared the attempted removal a clear violation of the LMRDA. *Babler v Futhey*, 618 F.3d 514 (6<sup>th</sup> Cir. 2010).

dismissed. *Michael v Futhey*, 2009 WL 4981688 (6<sup>th</sup> Cir. 2009). At that point, there was no longer any legal inhibition to implementing the merger.

Sullivan attempted for several months to persuade the UTU to implement the merger. But the UTU Board of Directors voted on April 10, 2010, to cease all efforts to effectuate the merger.

SMWIA then sued, and the court (Judge Bates) granted SMWIA's motion to compel arbitration of its claims that the merger was properly adopted and that UTU was in breach of the Merger Agreement.

## II. THE ARBITRATOR'S JURISDICTION AND AUTHORITY

The merger agreement, in Article XII, provides in relevant part as follows with respect to the arbitrator's jurisdiction and authority:

In the event of any dispute or controversy arising out of or under this Agreement, such dispute or controversy ... may be submitted .... to arbitration by an arbitrator appointed by the President of the AFL-CIO. The arbitrator's power shall be limited to the application and interpretation of this Agreement. The arbitrator shall have no power or authority to rescind, alter, amend, or modify any of the provisions of this Agreement.

Arbitration under this agreement shall be the exclusive remedy for any dispute hereunder...

The laws of the District of Columbia shall be deemed to govern the interpretation and performance of this Agreement.

It is clear that the arbitrator does not have authority to adjudicate whether either party has violated external law. In particular, the arbitrator does not have authority to determine whether anything done in connection with this proposed merger violated the Labor Management Reporting and Disclosure Act [LMRDA], and no party is seeking such a ruling in this arbitration.<sup>11</sup>

But it does not follow that the arbitrator must ignore external law altogether. This is a contract dispute, and the parties have specified that "the laws of the District of

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<sup>11</sup> Indeed, in ordering this case to arbitration, Judge Bates retained the claims of individual UTU members that violations of Titles I and V of the LMRDA occurred in the merger approval process.

Columbia shall be deemed to govern the interpretation and performance of this Agreement.” As Judge Bates noted in his opinion ordering this case to arbitration, “the reference to the ‘laws of the District of Columbia’ confirms that the arbitrator has authority to consider and utilize external law when applying and interpreting the agreement.”

Thus traditional doctrines of the common law of contract apply in resolving this dispute. In effect, the arbitrator is performing the same function as would a trial court in the District of Columbia resolving this contract dispute had the parties not committed the dispute to arbitration. Each of the parties is invoking some traditional common law doctrines in support of its position that look beyond the express terms of the Merger Agreement. For example, UTU invokes the common law doctrine of misrepresentation as a ground to invalidate the merger; and SMWIA invokes the common law doctrines of equitable and judicial estoppel to preclude UTU’s assertion of its claims.<sup>12</sup>

Additionally, the arbitrator’s jurisdiction encompasses the provision of a remedy should it be determined that a breach of the Merger Agreement occurred. The agreement provides that arbitration “shall be the exclusive *remedy* for any dispute hereunder,” and it follows that the arbitrator must be able to fashion a remedy if a breach is found, else there would be no entity capable of providing a remedy. This remedial power is also implicit in the agreement’s recital that the arbitrator’s power shall be limited to “*the application* and interpretation of this Agreement.” Any remedy adopted must have as its sole function assuring that the agreement is implemented as the parties intended. As the steps toward implementing the merger were delayed four years by virtue of UTU’s breach, this includes a mechanism to enable the parties to reconstruct the merger in light of the delay.<sup>13</sup>

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<sup>12</sup> Neither party disputes the other’s right to invoke common law principles. For example, UTU’s reply brief, at p. 21. while contending that SMWIA’s estoppel arguments are without merit, states “the UTU takes no issue with the SMWIA’s assertion that the arbitrator may apply a common law principle like estoppel...”

<sup>13</sup> SMWIA’s opening brief discusses the remedies it deems appropriate if a breach is found. UTU, in its reply brief, contends that the particular remedies SMWIA is seeking are oppressive and inappropriate, and an intrusion on the parties’ autonomy in implementing the Merger Agreement, and indeed argues that the arbitrator would be exceeding his authority if he adopted *those* remedies. But UTU in its briefs does not dispute the arbitrator’s authority to order *appropriate* remedies. albeit it has elected not to identify what remedies it thinks would be appropriate if breach is found.

### III. THE MERGER WAS PROPERLY APPROVED

Despite the unanimous approval of the merger by UTU's Board of Directors, the lopsided vote in favor of the merger by UTU's members, and the radiant glow of happiness that followed, UTU, under new leadership, contends that the merger did not become effective. It advances two lines of argument in support of its position.

1. UTU contends that the two Presidents, Thompson and Sullivan, misrepresented to the UTU Board of Directors and membership what the effect of the merger would be on certain provisions of the UTU Constitution, and that these misrepresentations were material to the votes cast in favor of the merger. For this argument, UTU invokes the principle stated in Restatement (2d) Contracts § 164: an agreement secured through material misrepresentation of fact is voidable at the option of the party misled. This argument is addressed in Part A.

2. UTU argues that even if there was no misrepresentation, the merger was not effectuated because the process for securing approval specified in Article II of the Merger Agreement agreed to on May 17, 2007, was not followed with exactitude. This argument is addressed in Part B.

The parties are in agreement that UTU, as the party challenging the merger, bears the burden of proof on all of its claims.<sup>14</sup>

#### A. UTU's Misrepresentation Claim

UTU's claim of misrepresentation focuses principally on two provisions of the UTU Constitution, Article 80 (which deals with craft autonomy) and Article 85 (which deals with general committee autonomy). The Merger Agreement provides that the provisions of the UTU Constitution will become effective parts of the SMART Constitution "to the extent not in conflict with the current SMWIA Constitution or the terms of this Agreement."<sup>15</sup> The determination of what conflicts existed would

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<sup>14</sup> SMWIA, in addition to disputing the correctness of UTU's claims, contends that UTU is estopped, both equitably and judicially, from challenging the validity of the merger, because UTU treated the merger as effective for months after the referendum vote approving the merger, and initially insisted that the merger was valid in opposing the motion for TRO in the *Michael* case. In view of the arbitrator's ruling that the merger was properly approved, it is unnecessary to reach or decide SMWIA's estoppel claims. Had it been necessary to address these claims, SMWIA would have borne the burden of proof, as estoppel is an affirmative defense.

<sup>15</sup> Merger Agreement, Article XI.

be made by the presidents of the two unions (or, if the determination was made after the effective date of the merger, by the President of SMART and the President of the Transportation Division of SMART.)<sup>16</sup> UTU contends that Thompson and Sullivan secretly intended to declare Articles 80 and 85 “in conflict with” the SMWIA Constitution, and thus ineffective parts of the SMART Constitution, but that they falsely represented to the UTU Board of Directors and to the UTU membership that these provisions were not in conflict and thus would survive intact under the SMART Constitution.

UTU further argues that the preservation of these provisions was of great importance to UTU’s Board of Directors and members; that these bodies would not have voted to approve the merger had they known these provisions were to be rendered inoperative as “conflicts;” and thus that the representations by Thompson and Sullivan that the provisions would survive the merger were material misrepresentations that rendered the merger agreement voidable by UTU.<sup>17</sup>

This opinion begins the analysis of this issue with a description of Articles 80 and 85, and of the representations that were made by Thompson and Sullivan that Articles 80 and 85 would survive the merger. Then follows the evidence, pro and con, regarding UTU’s contention that Thompson and Sullivan were dishonest in making these representations. While the arbitrator concludes that UTU has not borne its burden of proof that Thompson and Sullivan harbored secret plans inconsistent with the representations they made, UTU’s claim founders on a more important point. For even if Thompson and Sullivan did have plans inconsistent with their representations, the representations nonetheless were true and thus not misrepresentations. For, as a matter of contract law, Articles 80 and 85 of the

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<sup>16</sup> *Id.*, Article III.

<sup>17</sup> Of course, even if UTU’s contentions were correct, the Merger Agreement would not be void, but only voidable. The party victimized by a misrepresentation is free to decide whether the contract is worth keeping nonetheless, and has the option either to keep the contract or to avoid it. The question would then arise: did UTU exercise its option to avoid the Merger Agreement? And the answer would turn on who within UTU would have power to do so. The agreement had been approved by the UTU Board of Directors and then by a vote of the UTU’s membership. UTU’s President, Futhey, manifested *his* desire to avoid the agreement when he instructed UTU’s lawyers not to oppose the preliminary injunction. But at that time, a majority of the UTU Board of Directors wanted to affirm the merger, as their intervention in the *Michael* lawsuit demonstrated. To be sure, two years later, the UTU Board of Directors voted to cease all efforts to effectuate the merger. Was such a belated vote of avoidance timely? See Restatement (2d) Contracts § 381. Assuming it was, did the membership, having voted to approve the agreement, have to vote on whether it should be avoided? These issues need not be addressed, in light of the arbitrator’s conclusion that the Merger Agreement was not voidable.

UTU Constitution *were* going to survive intact in the SMART Constitution. That is so for two independent reasons.

First, Articles 80 and 85 were not even arguably in conflict with the SMWIA Constitution. Accordingly, the Merger Agreement unequivocally required that they become an operative part of the SMWIA Constitution, and Thompson and Sullivan were powerless to prevent that.

Second, even if the question of conflict were arguable, the representations Thompson and Sullivan made to the UTU Board and members were self-fulfilling prophecies. Under the principle set forth in § 201(2)(a) of the Restatement (2d) Contracts (“Whose meaning prevails”), as Thompson and Sullivan knew the voting bodies would understand the merger agreement to mean that Articles 80 and 85 would survive (for they assured them this was so), while the voting members had no reason to know that Thompson and/or Sullivan harbored a contrary interpretation, the voting bodies’ understanding represents the proper interpretation of the agreement.

In the end, Thompson and Sullivan did not purport to declare that Articles 80 and 85 were in conflict with the SMWIA Constitution, and Sullivan reaffirmed in his testimony at the arbitration hearing that they would remain operative under the SMART Constitution. Thus, the voting bodies are getting exactly the contract they expected to get when they voted to approve the merger agreement.

***(1) A description of Articles 80 and 85 of the UTU Constitution, and the materiality of their survival to the votes of the UTU Board and UTU membership.***

*Article 80 (Craft Autonomy).* When the four craft unions merged to create UTU in 1969, they were jealous to preserve their autonomy with respect to approval of collective bargaining agreements. UTU would be negotiating with railroads on behalf of all four crafts for a single collective bargaining agreement [CBA]. Each craft was concerned that if its members disapproved the proposed CBA, they might be outvoted by the members of the other crafts, and the CBA would be adopted despite their opposition. To prevent that from happening, Article 80 was included in the first UTU Constitution, and remains to this date. It provides that a CBA will not become effective unless a majority *within each craft* votes in favor of the CBA. This principle has come to be known within UTU as “craft autonomy.”

The UTU Constitution provides, in Article 13, that the Constitution can be amended by a two-thirds vote of the delegates at a Convention. This might have allowed the removal of craft autonomy from Article 80, even if a majority in one or more of the crafts wanted to preserve it. To assure this could not happen, subsection (e) of Article 80 provided: “The provisions of this Article may not be changed by the International Union, except upon the approval of a majority vote of the members of each of the crafts represented by the [UTU].”

*Article 85 (General Committee Autonomy).* Article 85 of the UTU Constitution provides that negotiations for CBA’s will be conducted by General Committees of Adjustment, which consist of representatives from each local union whose members will be covered by the CBA. A general committee can decide to accept a CBA without having to secure the approval of the UTU President, unless, in the case of national negotiations, the general committee invites the national union to assist with the negotiations. The general committee’s right to accept a CBA without securing presidential approval has come to be known within UTU as “general committee autonomy.” And while the usual practice is to invite the President’s participation in negotiating national CBA’s, so that the autonomy is surrendered, there have been isolated instances in which the president’s help was not sought, and in any event the general committees retain autonomy in non-national negotiations.

By 2007, UTU President Thompson had come to believe that the craft autonomy provision (Article 80) had, by reason of changed circumstances, outlived its usefulness. As a result of changes over the years in crew composition on the railroads, there were only ten persons left in the firemen’s craft. If a majority of that small group voted to reject a CBA, the agreement would not become effective even though the vast majority of affected employees (in the other crafts) voted overwhelmingly to approve the agreement.

Thompson also thought it would be desirable to eliminate general committee autonomy (conferred in Article 85), as there had been a couple of instances in which Thompson believed general committees had approved CBAs that benefited the general committee members at the expense of the broader membership covered by these CBAs. He preferred that the President’s approval should be required for all CBAs.

But Thompson also knew that it would be impossible to remove Articles 80 or 85 from UTU’s Constitution through constitutional amendment. In the case of craft

autonomy, Article 80(e) enabled the few in a single small craft to block any amendment to Article 80. And the general committee members were a powerful voting bloc within UTU who would prevent amendments to Article 85 removing their autonomy.

During the negotiations over the terms of the merger agreement, it occurred to Thompson that he might accomplish the removal of craft autonomy and general committee autonomy by making their elimination one of the terms of the merger agreement. To that end, preliminary drafts of the merger agreement included, at the behest of UTU's negotiators, an express provision stating that the SMART Constitution would not contain these provisions.

But as the negotiations over the draft merger agreement approached finalization, Thompson instructed his General Counsel to request removal of the provision singling out Articles 80 and 85 for non-inclusion. SMWIA agreed to remove that language, and the unsigned merger agreement that Thompson and Sullivan approved on May 17, 2007, did not contain it.

Based on this evidence, the arbitrator is persuaded that UTU is correct in its contention that survival of Articles 80 and 85 was critical to securing approval of the merger by UTU's Board of Directors and membership. Thompson's views on the desirability of removing Articles 80 and 85 had not changed, so the inference is irresistible that the language was removed because Thompson believed this issue would jeopardize approval of the Merger Agreement. In contract terms, preservation of craft and general committee autonomy was a material factor in obtaining acceptance of the agreement.

***(2) Representations by Thompson and Sullivan to the UTU Board of Directors and UTU membership that Articles 80 and 85 would remain effective under the SMART Constitution***

Thompson and Sullivan unequivocally and repeatedly represented to UTU's Board of Directors and UTU's membership that Articles 80 and 85 were not in conflict with the SMWIA Constitution and thus would survive intact after the merger.

When the Board of Directors considered the proposed merger agreement at meetings on June 10-11, 2007, there was intense focus on what the "not in conflict with" language in Article XI of the Merger Agreement meant, and what provisions of the UTU Constitution might be affected by it. This was especially important to

the Board members, as they were not provided a copy of the SMWIA Constitution and thus did not know what it contained that might constitute a conflict.

Futhey, then a Vice-President of UTU and a member of its Board (he was soon to be elected UTU's President) was particularly insistent on knowing what conflicts there might be. Clinton Miller, UTU's General Counsel, described several conflicts, none of which are germane to this arbitration. He did not include either Article 80 or Article 85 on his list of conflicts. Thompson then said to the Board that apart from those mentioned by Miller, and the changes explicit on the face of the Merger Agreement, there were no conflicts and the UTU Constitution would survive "intact." He expressly said that craft autonomy and general committee autonomy were preserved.

Not yet satisfied, Futhey insisted that Sullivan, SMWIA's President, come before the Board so that the Board members could be assured that SMWIA agreed with this interpretation of the "not in conflict with" clause. When Sullivan arrived, Futhey posed the question whether there were any other conflicts, apart from those mentioned by Miller, and Sullivan responded: "We've been through this, and we know of no conflicts between the Sheet Metal Workers Constitution and the UTU Constitution." One of the topics the negotiators had "been through" was the survival of Articles 80 and 85, so this constituted an explicit representation by Sullivan that there was no conflict between those Articles and the SMWIA Constitution.

Futhey testified that the Board members relied on these assurances in voting to approve the merger, and I credit that testimony.

The Board was meeting in Kansas City, where a UTU Regional Conference was in progress. Following the Board's vote to approve the merger, Thompson announced the merger to the members assembled at the Regional Conference, and assured them that craft autonomy would be preserved under the merger. Assistant President Rick Marceau reiterated this pledge. A video of Thompson's and Marceau's speeches containing this assurance was shown at another regional meeting of UTU members in Pittsburgh the following month.

The membership vote on the proposed merger was to be via a telephonic electronic voting system administered by the American Arbitration Association. The voting period was to commence on July 17, 2007 and end on August 7, 2007. In advance of the voting period, a packet of voting information was mailed to each member of UTU. The first page contained instructions on how to phone in one's vote.

Beginning on page 2 was a letter from Thompson “to all UTU Members” in which he described the merger and its benefits. Of pertinence here, the letter contained a paragraph commencing “There are no downsides to this merger:” and the following appeared among the bullets below this heading.

-Our existing local and general committee structure is maintained

-Our craft autonomy is preserved.

Another item in the packet, “Info you need to know,” pledged that “Craft autonomy remains intact.” Finally, the package contained a DVD with a video of the speech given in Kansas City in which Thompson had said that craft and general committee autonomy would be preserved.

The packet ended with a declaration in bold coloring: “To stay current, go to [www.utu.org](http://www.utu.org).” On its website, UTU had a button “SMART merger info,” which, when clicked, would take the reader to a site containing extensive information about the merger. Among the items on the website was “Frequently Asked Questions.” Question No. 3 was “What happens to the UTU Constitution after the merger?” The answer was:

The UTU Constitution will be integrated into the SMART Constitution intact as Article 21(b), including the current autonomy provisions thereof.”

While the representations *to the members* concerning the preservation of craft and general committee autonomy came only from Thompson, the arbitrator concludes that the representations are chargeable to Sullivan as well. Thompson had been present when Sullivan told UTU’s Board of Directors that “we’ve been through this and we know of no conflicts....” This enabled Thompson to make his unqualified representation to the entire membership that the autonomy provisions “*will* be integrated into the SMART Constitution.”

The arbitrator agrees with UTU’s contentions that the members voted based on representations that the autonomy provisions would survive the merger, and, as earlier found, these representations were material to the vote of approval.

***(3) The evidence respecting UTU's claim that Thompson and Sullivan were misrepresenting when they told the UTU Board and the UTU membership that craft autonomy and general committee autonomy would survive the merger***

There is evidence pointing in both directions on this question.

*Evidence supporting UTU's claim.* After the membership ratification vote and the signing of the August 8, 2007 Merger Agreement, there was a five month interregnum before the merger was to become effective pursuant to Article II of the Merger Agreement. Thompson remained the President of UTU during that period, as Futhey's term was not to begin until January 1, 2008, coincidentally the same date the merger would become effective. In September, 2007, the lawyers for the two unions exchanged email memos attempting to identify conflicts that would be embraced by the "not in conflict with" clause in the merger agreement. A memo from SMWIA's in-house counsel, Patrick Riley, to UTU's General Counsel, Clinton Miller, included Article 80(e) on the list, saying that this "may" be a conflict and adding "let's discuss." Riley's memo also suggested that Article 85 – the Article that included general committee autonomy – "must be read consistent with Article 30, Section 3 (Strikes) and 4 (Strike Benefits) of the SMWIA Constitution."<sup>18</sup> SMWIA also sent Miller a mark-up of the UTU Constitution indicating the changes that would result were it decided that these items were indeed conflicts. UTU's General Counsel, Miller, responded, stating that the proposal to treat Article 80(e) as a conflict "requires discussion," and that the proposal respecting Article 85 also "require[s] discussion" and that requiring presidential approval of all CBA's would be a "big thing." But the record stops there; the contemplated discussions do not appear to have occurred (at least there is no evidence that they did), either between counsel or between the principals, Thompson and Sullivan.

In early September, 2007, Thompson met with Futhey, who was to become his successor, and stressed the desirability of abolishing craft autonomy and general committee autonomy. Thompson told Futhey that he hoped the merger would enable that to be accomplished. He did not expressly say that it could be accomplished by using the "not in conflict with" clause, but he did say that if Futhey agreed that these provisions ought to go, he [Thompson] was prepared to take the

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<sup>18</sup> These provisions in the SMWIA Constitution pertain only to whether a strike can be called and strike benefits paid. The UTU Constitution, like the SMWIA Constitution, places control over strikes and strike benefits in the President. (UTU Constitution, Articles 85, 92).

heat for accomplishing it. Futhey made clear that he was utterly opposed to the idea, and that it would be a betrayal of what had been promised to the Board and the membership during the merger approval process.

In early October, 2007, Thompson spoke at a conference of UTU general committee chairs, and in the course of his speech made this statement:

We have had merger and through that merger we're going to have to make some of those changes that we could never get through a convention. ... Craft autonomy served its purpose when the four organizations came together because there was large number of crafts. ... Yes, that was very important in the early days of UTU, but today that's not the same situation. ... So it had a purpose when it was put in there, but all these things are in there where we're trying to get them straightened out, that we know that it can't be accomplished at conventions. And I'm willing to take the hit on that. ...<sup>19</sup>

UTU, after citing this evidence, urges that events that preceded submission of the merger proposal to the Board and membership for approval should be seen as laying the groundwork for an ultimate betrayal on the autonomy issue. (Futhey in his testimony characterized this as “connecting the dots.”) The decision to remove the explicit language in the merger agreement providing for abolition of the two autonomies was not an abandonment of the idea, as SMWIA argues, but rather a means of hiding the plan from the bodies that had to approve the merger. Failing to complete an integrated SMART Constitution before putting the issue to the approving bodies was not for the reasons Thompson and Miller reported, but rather because an integrated Constitution would have conspicuously omitted Articles 80 and 85. The failure to provide the Board members with a copy of the SMWIA Constitution, and the decision to put the SMWIA Constitution on the website rather than in the voting package (and to invite members to visit the website without telling them they would find the SMWIA Constitution there), was to prevent the

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<sup>19</sup> UTU also cites, in support of its misrepresentation claim, the testimony of Futhey and Arthur Martin, the Assistant President-elect of UTU, that in a meeting with Sullivan in December, 2007, Sullivan said the autonomy provisions “would have to go.” Sullivan, in his testimony, flatly denied this, insisting that he had repeatedly told Futhey that he had no problem with retention of the autonomy provisions. I credit Sullivan. He testified persuasively that in his view the conflicts provision operated only with respect to provisions in the UTU Constitution that would impact on the SMWIA's membership. As Articles 80 and 85 affected only the UTU crafts, they were of no concern to him. Martin acknowledged on cross-examination that he thought Sullivan misunderstood what they were talking about when uttering the words Martin attributed to him.

approving bodies from seeing that there was language in the SMWIA Constitution with which Articles 80 and 85 conflict.<sup>20</sup>

*Evidence contra UTU's misrepresentation claim.* The most important contrary evidence is that (1) Articles 80 and 85 did not conflict with the SMWIA Constitution, and thus Thompson and Sullivan were without power to declare them conflicts (it is unlikely that they would harbor a secret plan to do that which they were powerless to do), and (2) in fact Thompson and Sullivan did not implement the conflicts clause to declare Articles 80 and 85 in conflict. They had the power to resolve conflicts while Thompson was still in office, for the Merger Agreement contemplated that resolution of conflicts issues could be done either before or after the merger became effective.<sup>21</sup> While Thompson's October speech is susceptible to an inference (though he did not explicitly say it) that he intended to use the conflicts clause to nullify Articles 80 and 85, that inference is greatly weakened by the fact that there is no evidence that Thompson and Sullivan ever even discussed the matter after that speech. Thompson testified that it was his intention to leave the decision on all matters of implementation of the Merger Agreement to Futhey, and that his discussions with Futhey in September were simply an effort to persuade Futhey that it would be desirable to achieve the elimination of these autonomies. Futhey was outspoken with both Thompson and Sullivan that abandoning Articles 80 and 85 was anathema to him, so if a conflict was to be declared it would have had to be while Thompson was still president. Yet that never occurred.

UTU's claim also is at war with what one would presume to be the motives of the two principals, Thompson and Sullivan. Thompson had no personal stake in achieving the abolition of Article 80 and 85. As Futhey acknowledged in his testimony, Thompson's interest in these issues was motivated solely by his belief that these provisions were not in the best interests of the membership. And Thompson was about to retire. It would take very convincing evidence to conclude that Thompson was so indifferent to his legacy that he would deliberately and repeatedly lie to the entire UTU membership about a matter he knew was material

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<sup>20</sup> As will be explained *infra*, at pp. 22-24, this last item is the least persuasive in UTU's arsenal, for there is in fact nothing in the SMWIA Constitution with which either Article 80 or 85 conflicts.

<sup>21</sup> Article III of the Merger Agreement provided that conflicts would be addressed "by the General President of SMWIA (and SMART) and the International President of UTU (SMART President, Transportation Division.)" The use of both pre- and post-merger titles reflects the parties' understanding that conflicts could be addressed before or after the effective date of the merger.

to their vote, intending to expose his lie as soon as their approval was obtained. Similarly, Sullivan was about to become the chief executive of a newly formed union one-third of whose members were former UTU members who had voted based on these representations, and would be dealing with a President of SMART's Transportation Division (Futhey) who was utterly opposed to the abolition of these provisions. It would take convincing evidence to conclude that Sullivan would launch the merger with a step that was of no importance whatever to the SMWIA members, but that would greatly antagonize the former UTU members. Sullivan testified convincingly that he had no interest in declaring Articles 80 and 85 to be conflicts, as they affected only the UTU members; SMWIA's interest in the conflicts clause was simply to assure that nothing in the UTU Constitution would adversely affect the SMWIA members.

UTU bears the burden of proving that Thompson and Sullivan lied in the representations they made to the Board and membership, and intended at that time to declare Articles 80 and 85 in conflict and inoperative once approval was obtained. For the reasons discussed, the arbitrator concludes that UTU has not carried that burden. But there is a more dispositive reason why the misrepresentation claim fails. For even if Thompson and Sullivan *had* harbored such secret intentions, their statements were not misrepresentations. Rather, they were true: Articles 80 and 85 did not conflict with the SMWIA Constitution, and without question they were going to survive under the SMART Constitution.

***(4) Thompson's and Sullivan's statements were not misrepresentations, because they were true.***

Restatement §164, and the principle it reflects (that contracts are voidable if induced by material misrepresentations), have a simple underlying purpose: one who enters into a contract expecting one state of affairs, and who is disappointed because misled by the other party, should have the opportunity to escape the contract. That principle has no application when, as here, the party is going to get exactly the state of affairs that was expected when entering into the contract. Thompson and Sullivan told the voters that Articles 80 and 85 would survive the merger intact. And so they will.

***(a) Nothing in Articles 80 and 85 of the UTU Constitution conflicts with the SMWIA Constitution.***

UTU cites nothing in the SMWIA Constitution that conflicts with the substantive component of Article 80, *viz*, that a majority within each craft would have to vote to

approve a collective bargaining agreement (CBA), else the CBA would not be adopted for any of them. UTU says that there was not a similar *practice* as between the two railroad shop crafts represented by SMWIA, but that hardly proves a conflict. The SMWIA Constitution does not *require* craft autonomy of the sort UTU has, but that hardly shows that the SMWIA Constitution *forbids* it. Craft autonomy within UTU originated as a *sine qua non* for attracting four separate craft unions to unite to form UTU. There was no evidence of a similar history respecting the SMWIA rail shop crafts. There is no conceivable basis for finding that the substantive component of Article 80 conflicts with the SMWIA Constitution.

UTU does point to a provision in the SMWIA Constitution with which it contends the *procedural* component of Article 80 -- 80(e) -- conflicts. Article 80(e) forbids amendment of the union's Constitution to remove the substance of Article 80 without an affirmative vote of each of the crafts. The SMWIA Constitution has a general provision that the Constitution can be amended by a two-thirds vote of the delegates, and UTU argues that Article 80(e) conflicts, because it prevents an amendment to Art 80 even if two-thirds of the delegates at a convention vote for it, so long as a majority in one of the crafts resists. But of course Art 80(e) is also inconsistent with Article 13 of UTU's own Constitution, which allows amendment of the Constitution by a two-thirds vote of delegates at a Convention. Article 80(e) thus is an exception to the UTU Constitution's general provision for amending the Constitution. And it will serve the same role in the SMART Constitution. It will be an exception, not "in conflict with," the more general provision. This is not only a linguistic conclusion, but also a reflection of the realities. The "not in conflict with" provision assures that SMWIA members will not suffer an alteration in their constitutional rights because some provision of the UTU Constitution is inconsistent with the SMWIA Coonstitution. Article 80 would affect only UTU members, and its preservation would not impact in any way on SMWIA members.<sup>22</sup>

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<sup>22</sup> UTU also suggests that even if Article 80(e) isn't in conflict with the SMWIA Constitution, it could be eliminated by majority vote of the SMART Executive Council, and as UTU would have only six of the 17 seats on that Council, it could not protect Article 80(e). For this proposition, UTU cites Article 33, Section 1(i) of the SMWIA Constitution: "the General Executive Council shall have the authority between Conventions to amend Article Twenty-One of this Constitution." But the "Article Twenty-One" referred to in this provision would become Article 21A in the SMART Constitution, and the UTU Constitution would be Article 21B. To read this provision as applicable to Article 21B would vitiate the entire Merger Agreement, for it would mean that UTU had no assurance that any provision of its Constitution would survive the merger. It is inconceivable that this is what the parties intended.

UTU contends that the general committee autonomy conferred by Article 85 of the UTU Constitution conflicts with Article 21, Section 5 of the SMWIA Constitution. Article 21 of the SMWIA Constitution covers the railroad employees already represented by SMWIA, i.e., the shop craft employees. It provides that District Councils “shall not participate in negotiations seeking modification or changes in existing collective bargaining agreements without prior consultation with the General President or a representative designated by him.” But Article 21 was to become Article 21A of the SMART Constitution, applicable only to the *shop craft* employees previously represented by SMWIA. The *operating crafts* previously represented by UTU were to be covered in Article 21B of the SMART Constitution, which was the former UTU Constitution. Nothing suggests that Article 21B was to be subordinated to Article 21A, and the central premise of the merger – that UTU would preserve its autonomy with respect to affairs affecting only its membership – clearly speaks to the contrary.<sup>23</sup>

The arbitrator’s independent conclusion that there is no conflict is corroborated by the testimony of Clinton Miller, who was General Counsel of UTU at the time the Merger Agreement was negotiated and remains so today. Miller was UTU’s principal drafter of the Merger Agreement, and he was a principal witness for UTU at the arbitration hearing. He testified:

I couldn’t, myself, get my arms around how there could be a conflict with respect to Article 80, or Article 85. (Tr. 708).

Sullivan, SMWIA’s President, testified to the same effect. (Tr. 1500-01).

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<sup>23</sup> UTU points to a letter Sullivan sent to the UTU officers in 2010, after the Sixth Circuit had vacated the injunction against the merger, instructing them not to make decisions respecting then-ongoing negotiations without his (Sullivan’s) approval. But general committee autonomy was not applicable to those negotiations, as the national union had already been invited to participate in those negotiations. Sullivan’s letter was addressing the relative powers of the SMART President and the President of the Transportation Division of SMART in circumstances where general committee autonomy did not apply. And the circumstances in which that letter was sent – UTU resisting implementation of the merger, and Sullivan seeking to compel implementation – would in any event mark this a special circumstance.

***(2) Even if it would otherwise have been arguable that Articles 80 and 85 were in conflict with the SMWIA Constitution, the representations made by Thompson and Sullivan resolved the interpretative issue in favor of “no conflict.”***

Even if the question whether Articles 80 and 85 were in conflict with the SMWIA Constitution were debatable (which, for reasons given, the arbitrator does not think it is), and even if Thompson and Sullivan secretly thought the provisions were in conflict, the representations they made to the UTU Board and membership conclusively resolved the interpretative question in favor of “no conflict.” As stated in Restatement (2d) Contracts , § 201(a):

§.201. Whose Meaning Prevails:

Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made

(a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party.

The Board and voting members of UTU did not know that Thompson and Sullivan attached a different meaning to the Merger Agreement as it applied to Articles 80 and 85; quite the contrary, they had every reason to rely on the meaning that was represented to them by Thompson and Sullivan. But Thompson and Sullivan knew full well that the voting bodies would attach the meaning that they communicated, *viz*, that Articles 80 and 85 were not in conflict with the SMWIA Constitution and thus would survive the merger. In these circumstances, the meaning attached by the voters is what prevails, and the voters thus adopted a Merger Agreement that means exactly what they expected it to mean: a merger in which Articles 80 and 85 survive intact in the SMART Constitution.

Of course, even if there was no conflict, the two Presidents might have harbored an intention to falsely claim a conflict and declare these protections inoperative. But if they were to do so, they would be in clear breach of the Merger Agreement, which provided that the provisions of the UTU Constitution were to be operative parts of the SMART Constitution if not in conflict with the SMWIA Constitution. The Presidents lacked power to amend the SMART Constitution. The members would likely have had resort to legal processes had the Presidents tried. But there is no need to resort to such speculation, for the simple fact is that Thompson and

Sullivan *did not* declare a conflict or otherwise declare these provisions inoperative.<sup>24</sup>

## **B. UTU's Claim that Preconditions to Merger Were Not Met**

Article II of the Merger Agreement specified the following procedures to secure approval of the merger, and also stated the consequences if the merger was not accomplished via these procedures:

Upon approval of his Merger Agreement and of the SMART Constitution (together the Merger Documents) by the General Executive Council of the SMWIA and the Board of Directors of UTU and by the membership of UTU prior to its regular convention to held in August 2007, and upon certification of those results by the respective International General Secretary Treasurers, the merger of SMWIA and UTU to form SMART shall be effective. ... If either SMWIA or UTU fails to approve the Merger Documents by the procedures stated above, they shall be deemed terminated and of no force and effect.

UTU concedes that the Merger Agreement was approved by the General Executive Council of SMWIA, the UTU Board of Directors, and the UTU membership – the only three procedural prerequisites that were specified in the unions' respective constitutions to accomplish a merger – but it contends that the Merger Agreement imposed additional procedural preconditions to merger that were not met in this instance. In particular, it makes the following claims of procedural default:

- (1) The votes of approval were not certified by the unions' Secretary Treasurers;
- (2) the approval bodies were only asked to approve the Merger Agreement, and were not asked to approve the SMART Constitution;

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<sup>24</sup> UTU suggests in a footnote in its brief that there may also have been a conflict between the two organizations respecting the amount of membership dues, and that Thompson's assurances to the members that the merger would not produce dues increases not authorized by the UTU Constitution therefore were misrepresentations. There was a gap between the amount of dues paid in the two organizations (SMWIA's dues were higher), but Sullivan had assured UTU that if it raised dues to the extent allowable under its own Constitution before the effective date of the merger, there would be no further dues increase before the first SMART Convention in 2011 (three years hence.) Of course, at that Convention any provision of the SMART Constitution could be amended, as the voting bodies surely understood. UTU did raise its dues by \$2 per month in late 2007, pursuant to its own Constitution. That dues increase remained in effect after Futher took office; he did not seek to rescind it.

(3) even if the vote to approve the Merger Agreement was a vote to approve the SMART Constitution, the SMART Constitution was not yet a “Document,” and thus a vote to approve the SMART Constitution was not a vote to approve a *document* called the SMART Constitution;

(4) the UTU Board could not conceivably have approved the SMART Constitution, as the Board members had never seen one of the pieces of that Constitution, *viz*, the SMWIA Constitution; and

(5) most of the UTU members likely had not seen the SMWIA Constitution, as it was posted only on the UTU website and not included in the voting package, and hence could not have voted to approve a SMART Constitution when they had not seen one of its three parts.<sup>25</sup>

UTU argues that each of these constituted an express precondition to merger, and that the failure to satisfy any one of them means that the merger was not accomplished. UTU acknowledges that preconditions can be waived if the parties agree to go forward with the contract despite the failure to satisfy preconditions, but it contends that Sullivan and Thompson never agreed to waive these preconditions and, in any event, they lacked power to do so once the members ratified the Merger Agreement (and perforce Article II thereof) as they no longer were the only parties to the agreement.

Assuming they had the power to do so, Sullivan and Thompson clearly *did* waive any unfulfilled preconditions when they signed the Merger Agreement on August 8, 2007, a point in time after all the alleged shortcomings cited by UTU had occurred. A waiver can be accomplished by deed as well as by word, and signing the agreement is surely the most compelling of all deeds signifying a waiver of any failure respecting preconditions. The question whether the two Presidents alone could waive is more difficult, although UTU would have the burden of sustaining at one and the same time the propositions that (1) the Merger Agreement was not

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<sup>25</sup> In the proceedings before Judge Bates, UTU raised yet an additional claim of procedural noncompliance: that the May 17, 2007 merger agreement contemplated signatures by both the Presidents and Secretary-Treasurers of the two organizations, but the agreement that was signed on August 8, 2007 bore only by the Presidents' signatures. UTU did not pursue that claim in the arbitration, presumably because it recognized the correctness of Judge Bates' decision that the signatures of the Presidents were sufficient to bind their respective organizations. In this regard, it should be noted that nothing in the text of the Merger Agreement dictated that its effectuation required the signatures of the Secretary-Treasurers. And the absence of their signatures does not even signal personal opposition to the merger. See n. 26, *infra*.

properly ratified (because the Secretary Treasurers didn't certify), and (2) the members nonetheless successfully wrested control from the two Presidents by ratifying. This interesting question need not be pursued further, however, because waivers were not needed: there was no failure to fulfill mandatory preconditions. UTU's contentions are considered *seriatim*.

### ***(1) The Absence of Certifications by the Secretary Treasurers***

UTU is correct that the votes of approval by UTU's Board and membership, and by SMWIA's General Executive Council, were not certified by the unions' respective secretary treasurers. But UTU's contention that this was an express precondition to merger whose absence would sink the merger will not survive close analysis. On UTU's theory, either union's Secretary Treasurer would have an absolute veto over the accomplishment of the merger, even though it had been approved by all the governing bodies of both organizations, simply by refusing to certify. It is inconceivable that the Merger Agreement was intended to vest this kind of absolute power in a subordinate officer whose constitutional duties do not remotely resemble any such responsibility.<sup>26</sup> Plainly, the provision for certification was meant to serve a ministerial function – to confirm that the requisite approvals had occurred – the sort of function that is the grist of the work of secretary treasurers. It is not a plausible interpretation of the Merger Agreement that it was meant to invalidate the merger – no matter how clear the evidence that the requisite approvals were accomplished – if either Secretary Treasurer failed to so certify.

In the instant case, there was independent confirmation that each of the three bodies had voted to approve the merger. The members of the UTU Board all appeared on a videotape made the same day they had voted, each announcing his approval of the merger; the American Arbitration Association, which conducted the UTU membership referendum, certified the affirmative vote; and the minutes of the meeting of the SMWIA General Executive Council show that it approved the merger. Thus, the purpose of this precondition was satisfied. And the parties surely intended no more.

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<sup>26</sup> There is no evidence that in the instant case either of the Secretary Treasurers disapproved the merger. Indeed, UTU's Secretary Treasurer voted for the merger as a member of UTU's Board, and urged the members to approve the merger. He was unavailable in August, 2007, when the membership ratification occurred, as he had announced his retirement effective September 1, 2007, and that he would be on vacation throughout the month of August. There is no evidence in the record as to the views of SMWIA's Secretary Treasurer.

## **(2) *The absence of a vote to approve the SMART Constitution***

As UTU notes, the Merger Agreement called for votes of approval of both the Merger Agreement and the SMART Constitution. But the ballot question in the UTU referendum asked the members to vote only on whether they approved or disapproved the Merger Agreement. UTU contends that therefore the merger never became effective, because one of its essential terms – a vote to approve the SMART Constitution – never occurred.

Of course, if no SMART Constitution was in existence at the time of the vote, the voters could not be approving it. But as Thompson, Futhey, Miller, and Sullivan all testified, there *was* a SMART Constitution in existence at the time of the votes to approve. As defined in Articles III and XI of the Merger Agreement, the SMART Constitution was the combination of three separate documents: the SMWIA Constitution *verbatim* (but with its Article 21 renumbered 21-A), the UTU Constitution inserted *verbatim* as Article 21-B, and the Merger Agreement itself. UTU does not contend otherwise, and as noted its current President and current General Counsel both testified that there was a SMWIA Constitution when the votes occurred.<sup>27</sup>

Thus, the SMART Constitution was created and defined in the Merger Agreement, and when the members voted to approve the Merger Agreement they were approving all of its provisions, including those that created and defined the SMART Constitution.

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<sup>27</sup> Reading certain passages of the Merger Agreement in isolation might lead one to conclude that there would not be a SMART Constitution until the conflicts between the three component pieces had been resolved. Thus, Article III says that the SMART Constitution shall be “the SMWIA Constitution amended to implement the provisions of this Agreement,” and Article XI states that “[t]he UTU Constitution will become Article 12B of the SMART Constitution to the extent not in conflict with the current SMWIA Constitution or the terms of this Agreement.” But it is plain when the Merger Agreement is read in its entirety that the parties did not intend that the existence of the SMART Constitution was dependent on first resolving these matters. As noted in text, all of the principals, including Futhey, confirmed that there was a SMART Constitution in existence when the approval votes were taken. Indeed, Article II of the Merger Agreement required that all three of the bodies that were to vote on the Merger Agreement must do so “prior to [UTU’s] regular convention to be held in August 2007.” As all parties recognized, the convention is the place where constitutions are amended. Thus, as they could not know what the UTU Constitution might contain, they could not create a document that resolved all differences. They elected instead to create a SMART Constitution with the provisions intact but with a formula for resolving how conflicts would be resolved as an interpretative matter.

UTU has a past history which confirms this analysis. In both the four-union merger that created the UTU in 1969, and the proposed merger with the BLE in 2000, the merger agreements called for membership approval of both the merger agreement and the constitution of the new organization formed by the merger. Yet in each instance, the ballot question asked only if the members approved the merger. A vote to approve the merger was treated as a vote to approve the constitution of the new organization, even though the ballot question did not ask expressly for such approval. Thus, UTU had an established practice of formulating ballot questions in this manner, and, indeed, UTU would not exist had a vote on that ballot question not been sufficient to consummate the merger of the four unions in 1969.<sup>28</sup>

### **(3) *The SMART Constitution was not a “document”***

UTU’s third claim focuses on the language in Article II of the Merger Agreement that the merger would become effective “upon approval of this Merger Agreement and of the SMART Constitution (together the Merger Documents).” UTU argues:

Given the plain language requirements of the Merger Agreement, ...[b]ecause the SMART Constitution did not exist in the requisite form, *i.e.*, as a document, one of the requirements for a merger simply could not have been met because there were not two “documents” to approve. [UTU Br. 14, n.14]

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<sup>28</sup> UTU argues that the prior merger processes are distinguishable, because there the question on the ballot was whether the members approved “the merger,” while here the question on the ballot was whether they approved the “Merger Agreement.” That is a distinction without a difference. In both the prior instances and in this one, the voters were not given an opportunity to approve one without the other. They could not say, “I want the merger, but not the provisions of the Constitution that is proposed for the merged entity.” And their votes were treated as appropriate even though the agreement had expressly called for approval of the new constitution and that question was not asked in terms on the ballot. In all three instances, by approving the merger the voters were approving the Constitution.

UTU also notes that in the prior instances the proposed Constitution was attached as an exhibit to the Merger Agreement, while here it was described in the Merger Agreement as the amalgam of the SMWIA Constitution, the UTU Constitution, and the modifications dictated by the Merger Agreement. Thompson and Sullivan) had originally contemplated attaching an integrated SMART Constitution to the Merger Agreement, but removed that from the final draft of the Merger Agreement they approved on May 17, 2007, because they realized that all conflicts between the UTU and SMWIA could not be resolved before the membership vote, and indeed could not even be *known* as the UTU delegates might amend the UTU Constitution after the ratification but before the effective date of the merger. Thus, the May 17 agreement plainly did not contemplate an attached SMART Constitution.

To be sure, there was not a single document in physical existence that constituted the SMART Constitution. To create the physical SMART Constitution would have required stapling together the three documents that did already exist in physical form and that together constituted the SMART Constitution -- *i.e.*, the Merger Agreement, the SMWIA Constitution, and the UTU Constitution. The proposition is thus that for want of a staple, a merger was lost.<sup>29</sup>

The argument fails for two separate reasons:

First, the Merger Agreement required approval of the SMART Constitution, not the SMART Constitution in document form. To be sure, a parenthetical *referred to* the Merger Agreement and the SMART Constitution as “the Merger Documents,” but the reference was to the SMART Constitution as defined in the Merger Agreement. Whether one would elect to characterize that as a “document” or not, the drafters apparently did. Presumably, they considered the existence of the three pieces in physical form as sufficient to warrant calling the SMART Constitution a document, knowing as they did that the pieces would be assembled once the voters approved.

Second, even if the Merger Agreement had stated explicitly that the voters had to approve a SMART Constitution that already existed as a document, the most natural interpretation of the term “document” would embrace the situation present here: physical existence of all three pieces that collectively would constitute the SMART Constitution without the need to change a word of their substantive provisions. A document is something in writing. We would describe a typed, three-page memo as a document even if the pages had not yet been stapled together. In like fashion, the SMART Constitution was a three-part document even if the parts were not yet stapled together.

To be sure, the document that emerges from the stapling contains inconsistencies. That is exactly what all the principals testified they intended: the three pieces would go into the SMART Constitution “intact.” The Merger Agreement contains language in Articles III and XI that dictates how these inconsistencies are to be

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<sup>29</sup> To be precise, assembly of the physical SMART Constitution required a bit more, but not much. The Merger Agreement would presumably be placed on top, as its terms trump anything inconsistent in the remainder of the document per Article III of the Merger Agreement. Then would come the SMWIA Constitution, with the UTU Constitution tucked into the middle of the SMWIA Constitution, right after the existing Article 21 of the SMWIA Constitution and before Article 22. Finally, the old Article 21 would have to be renumbered 21A, the label 21B would have to be affixed at the beginning of the UTU Constitution, and references elsewhere in the SMWIA Constitution to Article 21 would have to be changed to Article 21A..

resolved as an interpretative matter. The provisions of the Merger Agreement prevail over inconsistent provisions in either the SMWIA or UTU Constitution, and the provisions of the SMWIA Constitution prevail over provisions of the UTU Constitution that are in conflict with the SMWIA Constitution. It is not unusual for a governing document to contain inconsistent provisions and an expression of how inconsistencies are to be resolved. This often happens when texts generated at different times are assembled into an integrated document. The Constitution of the United States furnishes a good example. Someone picking up the U.S. Constitution and reading from the start would discover that fugitive slaves must be returned to their owners, that the Senate is chosen by the State legislatures, and that the federal government cannot impose an income tax unless it is apportioned based on the relative populations of the States. Further on, the reader would find amendments that are inconsistent with these earlier passages. Of course, there is no doubt which provision controls: the document recites that amendments override the provisions that were amended. The same is true here.

#### ***(4) UTU's Board voted without having seen the SMWIA Constitution***

UTU contends that its Board could not conceivably have voted to approve the SMART Constitution, as the Board members had not seen the SMWIA Constitution at the time they voted, and thus did not know the text of an important part of the SMART Constitution.<sup>30</sup>

Nothing requires that a party read the text before entering into a contract. In extreme cases, the doctrine of unconscionability might render a contract voidable, if one party extracted agreement from an unwitting party while withholding the text to which the latter was assenting. But here we are dealing with a Board composed of experienced, elected union officials whose responsibilities regularly included making decisions of considerable import.<sup>31</sup> While Thompson was urging them to vote quickly, they were not required to do so. Indeed, they refused to vote on the day Thompson urged them to, because they wanted to make further investigation

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<sup>30</sup> UTU also suggests it is possible that the SMWIA General Executive Council had not seen the UTU Constitution at the time it voted, and thus similarly voted without knowing the full text of the SMART Constitution. But UTU offered no evidence that this was so, and UTU had the burden of proof. In any event, the discussion in text would be equally applicable to this claim, if the facts were as UTU speculates.

<sup>31</sup> As an example, Futhey was one of the Board members. The arbitrator can attest from Futhey's extended testimony that he is a person of great intellect, comfortable with complex legal documents, and someone who is not shy about standing up for his rights and those of the members he represents.

before deciding how to vote. They asked to see the SMWIA Constitution, but were told it was not available in Kansas City, where they were meeting. They were not shrinking violets, and they could have refused to vote until they were provided copies of the SMWIA Constitution. Had they done so, no doubt copies could have been faxed from SMWIA's headquarters in Washington in a matter of hours (indeed they could have been obtained even more quickly by Sullivan downloading them from the SMWIA website.). Instead, they elected to closely examine Thompson, Miller (UTU's General Counsel) and Sullivan over a period of two days about the interrelationship between the UTU and SMWIA Constitutions, and at the end of that investigation they chose to vote unanimously to approve a Merger Agreement which defined the SMART Constitution as including the SMWIA Constitution. This scenario would pose problems if what they had been told about the interrelationship between the SMWIA and UTU Constitutions was a misrepresentation. But as earlier determined, that was not the case. As with any other contract, it is not a ground for escape that one has chosen to accept without reading the text.

***(5) The UTU's Membership Had Access to the Text of the SMWIA Constitution only on the UTU's Website***

UTU does not question that the UTU membership had physical possession of two of the three components of the SMART Constitution: the UTU Constitution, and the Merger Agreement (whose text was included in the voting package). But, UTU argues, the members did not receive the text of the SMWIA Constitution in the voting package, and the decision to put it on the UTU website, rather than in the voting package, created the likelihood that many or most UTU members would be voting without having read one part of the SMART Constitution. It follows, UTU contends, that the members could not be approving a SMART Constitution when they had not had reasonable access to one part of that Constitution.

In the preceding section, I have held that the failure to provide the Board members the text of the SMWIA Constitution was not inconsistent with their having voted to approve the SMART Constitution. That analysis would not suffice to uphold a similar failure to provide that text to the membership. Unlike the Board, the members did not have the option of deferring a vote until they received the SMWIA Constitution, as the voting period was prescribed and presumably unchangeable.

And at least many of the members would lack the sophistication and knowledge to search for the SMWIA Constitution in the public domain.

But UTU did provide the text to its members – on its website. Thompson testified that he decided to put the SMART Constitution on the UTU website, rather than in the voting package, for two reasons. First, it would have been very expensive to mail this 143-page document to each of the 75,000 members of UTU.<sup>32</sup> Second, Thompson testified, the SMWIA Constitution consisted of 143 pages of dense legal text, most of which related only to the SMWIA’s predominantly construction industry membership; it would have dwarfed all of the other items in the voting package; and it would have distracted members from the more accessible and important information in the voting package and caused more confusion than enlightenment.<sup>33</sup> Accordingly, he decided to put the SMWIA Constitution on the website, and to include in the voting package a boldly-colored directive to visit the UTU website.

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<sup>32</sup> UTU does not dispute that the cost of mailing the additional 143 pages to 75,000 addressees would have been substantial. But it argues that the text could have been placed at little cost on the DVD that was included in the voting package. That may be so, but it is questionable whether placing it on the DVD would have constituted better notice than placing it on the website. Assuming the UTU member had access to a DVD player, reading 143 pages of legalistic text on a screen would be a formidable challenge. On the website, the text could easily be printed out. The arbitrator is unaware, and no evidence was provided at the hearing, as to whether text on a DVD can be printed out so easily.

<sup>33</sup> One of UTU’s own witnesses provided compelling testimony as to the complexity of the SMWIA Constitution. Frank Wilner, UTU’s Director of Public Relations, who has both a bachelors and graduate degree, testified that he tried to read the SMWIA Constitution but found that he could not understand it as he lacked a legal degree. And he further testified that the reading level of the average UTU member was at an eighth-grade level. While the arbitrator normally would give little weight to such a generalization, Wilner authors most of the internal publications that are sent to the UTU members,, and thus must determine in authoring such materials the reading level of his audience.

One or more of the Board members suggested to Thompson that he color code the SMWIA Constitution on the website, highlighting those portions that would be relevant to the UTU members. Thompson initially instructed a staff member to do so, but then had second thoughts and ordered the effort to stop. UTU suggests that this is evidence that Thompson was hiding the portions that would have revealed the conflicts respecting Articles 80 and 85. But as noted earlier in this opinion, there were no such conflicts. It would not have been easy to make the decisions necessary to engage in such color-coding. As Timothy Secord, who was a member of the UTU Board when it voted to approve the merger and is now Executive Assistant to Futhey stated in an affidavit in the *Michael* case, “it is difficult to determine which portions [of the SMWIA Constitution] will apply to the UTU and its transportation members, and which will apply only to the Sheet Metal Workers craft.”

In the arbitrator's opinion, it would have been wiser to put the SMWIA Constitution in the voting package.<sup>34</sup> But the arbitrator's jurisdiction does not extend to dispensing personal wisdom. The question is whether placing it on the website rather than in the voting package, and including in the voting package extensive discussion of how the UTU Constitution intersects with the SMWIA Constitution, was insufficient to permit approval of the SMART Constitution in accordance with the procedures specified in the Merger Agreement.

While the Merger Agreement required, as a precondition to the merger being consummated, that the members vote to approve the SMART Constitution, it did not specify how the content of the SMART Constitution was to be disseminated to the members, nor is there evidence that Thompson and Sullivan, the partners to the draft Merger Agreement, had discussed or decided how notice would be provided. There is nothing in the UTU Constitution that required a particular form of notice. The question ultimately reduces to whether posting on an organization's website is sufficient to enable its members to make an informed vote.

In pursuit of this inquiry, the arbitrator has searched for analogues. Several have appeared, all of which point to posting on the website as a sufficient form of notice. Because the Merger Agreement specifies that the law of the District of Columbia will control, the arbitrator has looked first to how D.C. law treats analogous questions.

The District of Columbia, like many states, allows statutes to be enacted, repealed, or amended by vote of the citizens pursuant to a referendum petition. If the District of Columbia Board of Elections and Ethics determines that the number and validity of signatures on the petition meet the requisite qualification standards, it must include the issue on the ballot at the next regular election. DC ST §.1-2001.16(p)(1). The D.C. Code then specifies what notice the voters are to receive as to the text of the statute they will be voting upon:

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<sup>34</sup> Even if the DVD did not provide a better forum than the website, it would have been the better part of discretion to include the SMWIA Constitution in both places if there truly were little or no cost to doing so. And, while reasonable minds can differ as to whether too much information is a vice because it confuses the reader (this seems to be a concern taken quite seriously in the formulation of prescription drug and product warnings, but rejected as a ground for limiting debate in public elections), the arbitrator generally sides with the "more information" side of these debates. However, none of the legal contexts in which this issue has arisen applies here, and thus none constrained Thompson in deciding how to communicate the text of the SMWIA Constitution to the UTU membership.

The Board shall publish the established legislative text of an initiative or referendum measure in no less than 2 newspapers of general circulation in the District of Columbia within 30 calendar days after the date upon which the Board certifies ... that the measure has qualified for appearance on an election ballot. [DC ST § 1-2001.16(p)(2)]

It further provides that the ballot will contain only the statute's "short title [and a] summary statement" DC ST § 1-2001.16(q)(1), and specifies the question that will appear on the ballot:

Shall the registered voters of the District of Columbia approve or reject Act (insert Act number)? [DC ST § 1-2001.16(q)(2)(A).

The adoption of a statute that will govern the community is surely as portentous a decision as the one the UTU members were called upon to make in this case. The question asked on the D.C. ballot is almost identical to the one asked in the UTU election. And the form of notice of the actual text of the statute required by D.C. law is obviously less likely to reach voters than the one adopted by UTU in this instance. It would be pure happenstance that a voter would see the text that appears for one day in a newspaper. By contrast, the text of the SMWIA Constitution appeared on the UTU website continuously for an extended period both before and throughout the voting period. In addition, the extensive discussion in the UTU mailing of how the merger would impact on the members exceeded by far the "short summary" called for in the D.C. statute.

Other states that allow statutory change by referendum, such as California, provide that the text of the statute will be posted on a governmental website, exactly as was done here. The arbitrator is aware of no state in which the text must be mailed to the home of each voter, as UTU argues was required here.

Also informative is the decision in *Shelley v American Postal Workers Union*, 2011 WL 1334313 (D.D.C. 2011), in which the Court found that a union would not violate the LMRDA, in conducting a membership vote on ratification of a CBA, by posting the text of the CBA on its website.

There are similar decisions in securities cases. See, e.g., *Atlantic Coast Lines v Mesa Air Group*, 295 F. Supp. 2d 75, 86-87 (D.D.C. 2003) ("Given the widespread availability and use of the Internet today, there is no need for Mesa to attach paper copies of these documents to its definitive Consent Statement when interested

shareholders can simply view them on line”); *In re AIG Advisor Group Securities Litigation*, 309 Fed. Appx. 495, 498 (2d Cir. 2009).

UTU has not cited a single decision in any context holding that website posting does not constitute sufficient notice of the content of a document. Rather, it contends that “UTU members at that time generally did not access the internet.” (UTU Reply Br, 25). UTU provided little evidentiary basis for this unlikely proposition. Its Director of Public Relations testified that only a small percentage of UTU’s membership visited the UTU website in 2009 – the first time UTU gathered data on this issue. But 2009 was not a year in which anything as important as a merger or CBA was under consideration, so it is not especially informative of the volume of visits in 2007 when the merger was to be voted on and the voting package advised members in bold coloring; “To stay current, go to [www.utu.org](http://www.utu.org).” And that more members did not visit the website does not establish that they could not have done so had they chosen. Even members who did not have a computer or know how to operate one surely had friends or relatives who could have done so at their behalf.

UTU also points out that the voting package, while inviting members to visit the website to “stay current” with respect to the merger, did not expressly tell them they would find the SMWIA Constitution there. The arbitrator agrees that it would have been better to say that. But any member so disinterested as not to want to “stay current” before voting was surely unlikely to wade into the dense legal thicket of the 143-page SMWIA Constitution.

Ultimately, as neither the Merger Agreement nor the UTU Constitution mandated how notice was to be provided, the decision of how to provide notice of the SMWIA Constitution was one to be decided by the President of UTU, in whom Article 16 of the UTU Constitution vests the authority to “interpret all laws of the organization, decide all questions arising therefrom, and decide all other controversies not provided for under existing laws of the organization ... -- all in conformity with this Constitution.” While the arbitrator has noted some disagreement as a matter of policy with the choices Thompson made, the UTU Constitution vests the authority to make those policy decisions in its President, not this arbitrator. Thus, the arbitrator is obliged to accord deference to those choices unless they violated some law or agreement. As discussed above, they did not.

#### IV. UTU'S BREACH OF THE MERGER AGREEMENT

As this opinion establishes, the Merger Agreement and SMART Constitution were properly ratified, and by their terms the merger of the two unions into SMART became effective January 1, 2008. Since that date, UTU has been in continuous breach of the Merger Agreement.

Immediately upon taking office, Futhey directed UTU's counsel not to oppose the issuance of a preliminary injunction in the *Michael* litigation, and proposed to settle the case with the plaintiffs on terms that would undo the merger. These actions were clearly a breach of the Merger Agreement.<sup>35</sup> "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (2d) of Contracts § 205. "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party..." *Id.*, comment g. It was UTU's obligation to defend the merger so long as a valid defense could be offered, and the ultimately dismissal of the *Michael* case demonstrates that such a defense was possible. *A fortiori*, it was a breach of the implied obligation of good faith and fair dealing for UTU to act affirmatively in the *Michael* case to *subvert* the merger.

The breach was compounded when UTU's Executive Board upheld charges against the members of UTU's Board of Directors who had intervened in *Michael* to defend the Merger Agreement, and ordered those Board members removed from office.<sup>36</sup> The basis for upholding the charges was that Board members had no right to interfere with the President's efforts to undo the Merger Agreement, and Futhey testified at the internal union hearing in support of these charges

In July, 2009, while the appeal from the preliminary injunction in *Michaels* was pending, Futhey declared at a UTU regional meeting that the merger attempt was "dead," and added:

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<sup>35</sup> Futhey had been cooperating with the plaintiffs in *Michaels* even before the merger's effective date, strategizing with their lawyer, securing financial support for their lawsuit, and providing a declaration in support of their quest for a TRO. But until Futhey became UTU's President his actions were not chargeable to UTU and did not constitute a breach by UTU.

<sup>36</sup> See p. 8, n. 10, *supra*. UTU's Executive Board is a body distinct from the Board of Directors. Its principal function is to hear and decide internal union charges.

There will not be a merger today. There will not be a merger tomorrow. There will never be a merger with the Sheet Metal Workers.

The Sixth Circuit reversed the preliminary injunction and dismissed the *Michael* lawsuit in October, 2009. After several months in which Sullivan sought to persuade the UTU to implement the merger, the UTU Board of Directors voted on April 10, 2010, to cease all efforts to effectuate the merger. And thus it has remained to this day.

## V. REMEDIAL CONSIDERATIONS

SMWIA is entitled to remedies that will provide it what UTU promised but failed to deliver: a merger pursuant to the terms of the Merger Agreement. A simple order directing UTU to honor the Merger Agreement will not suffice, as the passage of four years greatly complicates the task of turning the promise of merger into a reality. These complications are addressed below.

### A. The Imminent Expiration of the Merger Agreement

Article III of the Merger Agreement states:

The Merger Agreement shall expire and have no further legal force and effect on September 1, 2011...

At the request of the arbitrator, the parties entered into a stipulation extending the life of the Agreement for a short period, to assure that the Agreement had not already expired when the award was issued. The stipulation provides, in relevant part:

The September 1, 2011 expiration date of the Merger Agreement provided in Article III thereof, shall be extended until the later of (a) the issuance of the award, (b) the time to move to vacate the award under the Federal Arbitration Act, ... or (c) if a motion to vacate the award is filed, ... final resolution of such motion.<sup>37</sup>

Even with this short extension, the Merger Agreement by its terms will have expired at the very outset of the steps to implement the merger. That is a far cry

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<sup>37</sup> The stipulation appears at Tr. 1724-25. Errors in transcription that appear in the transcript have been corrected in the passage quoted in text above.

from what was anticipated when the Merger Agreement was negotiated and approved. The merger was to take effect on January 1, 2008, and the Merger Agreement was to remain in effect until the merged organization had been functioning for more than 3 ½ years.<sup>38</sup>

Article III of the Merger Agreement provides the reason why the Agreement was to remain in effect for so long a period after the effective date of the merger: to “serve as a mechanism for integration of the two organizations.” For example, the following provisions of the Merger Agreement were important regulators of the affairs of the merged organization during its formative years:

-the provision in Article III that “any dispute” that arose during the life of the Merger Agreement would be resolved by the President of SMART and the President of the Transportation Division of SMART, with arbitration of any dispute they could not resolve, and the provisions in Article XII describing the arbitration process and declaring that the laws of the District of Columbia would govern.

-the provision in Article VI that “the first SMART general convention” would take place in 2011. As the convention is the forum in which constitutions can be amended, this meant that the SMART Constitution would continue unchanged for at least the first three years of the merger. The evident intent was to provide an extended period in which the effectiveness of the Constitution’s provisions could be observed, with an opportunity *at the end of that period* to make such amendments as experience had dictated were warranted.

-the provision in Article VI that the Transportation Division would hold its own convention in advance of the first SMART general convention in 2011.

-the provision in Article VII that the bylaws of the affiliates of SMWIA and UTU would remain in full force and effect for two years after the effective date, except to the extent they conflicted directly with the SMART Constitution, and that the affiliates must bring their bylaws into compliance within that two year period.

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<sup>38</sup> Article III provided that the Merger Agreement could expire sooner if “three fourths of the SMART General Executive Board vote to terminate it...” Presumably, this would have occurred only if the General Executive Council concluded that the purposes of the Merger Agreement had been fully achieved in a shorter time.

-the provision in Article VII that four officer positions in UTU would “attrite” in the fourth year of the merger.

-the employee protection guarantees in Article VII, e.g., that no former employee of either organization employed by SMART would experience any reduction in salary or allowances, and that all would be credited with service in the predecessor organization for all vacation and benefit purposes.

-the provision in Article VII that UTU’s headquarters in Cleveland would be discontinued as of June 1, 2010. i.e., 2½ years after the merger became effective.

-the identification in Articles V and VII of which UTU officers would become General Vice-Presidents of SMART.

-the provision in Article XIII specifying the procedures by which the Merger Agreement could be amended during its term.

The foregoing list is not exhaustive, but it reflects the important role the Merger Agreement was to play in regulating the affairs of SMART during its first 3½ years. The need for that platform is infinitely greater now than it was envisioned to be in 2007. For the parties were assuming SMART would begin with two parties both enthusiastically committed to working cooperatively to make the merger succeed. The merger that will result from this arbitration award will include one party whose President and Board of Directors have expressed unalterable opposition to the merger.

Accordingly, it is not sufficient simply to order that the parties implement the merger. It is important that they do so under the terms contemplated in the Merger Agreement. Of course, the literal terms included dates (such as 2011 for the first SMART Convention) that would not serve the same purpose when applied to a merger that will commence nearly four years later than originally contemplated. The award thus directs that the parties proceed under the terms of the Merger Agreement, but with all date references extended three years.<sup>39</sup>

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<sup>39</sup> The arbitrator has chosen three years, rather than four, because the next regularly scheduled SMWIA Convention is in 2014, and that is the logical time for the first SMART Convention. This may be a source of inconvenience to UTU, which as the Transportation Division of SMART is, according to the Merger Agreement, to have a convention preceding the SMART Convention. In the normal course, UTU’s next convention would not be until 2015. One union or the other necessarily will be inconvenienced by the choice between three and four years, and it seems just that UTU, as the party whose breach has necessitated this remedy, be the one

The arbitrator is mindful that Article XII of the Merger Agreement provides that the arbitrator has “no power or authority to rescind, alter, amend, or modify any of the provisions of [the Merger] Agreement.” It is important, therefore, to emphasize that the arbitrator is not rewriting the Merger Agreement. Rather, the arbitrator is determining what remedy is appropriate to achieve what UTU promised originally in the Merger Agreement, namely a merger that would be governed during its first 3 ½ years by the *terms* that appear in the Merger Agreement.<sup>40</sup> The remedy for UTU’s breach thus includes an order that *terms* identical to those that appeared in the Merger Agreement be applicable, with the date adjustments noted above. For ease of exposition, those terms are referenced in the award as “the terms that appeared in the Merger Agreement, with the following adjustments....”

Article XIII of the Merger Agreement contains a procedure for amending the Merger Agreement, and Article III declares that the expiration date can be amended pursuant to the Article III procedure. Thus, the parties will be free to alter the date prescribed herein if done in accordance with the terms of Article III of the Merger Agreement.

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inconvenienced. The Transportation Division can hold a convention in 2014 prior to the SMART Convention, or it can treat UTU’s 2011 Convention as satisfying that term of the Merger Agreement.

One possible exception to the “three years later” formula pertains to the date June 1, 2010, which appears in Articles IV-A and VIII of the Merger Agreement. Article VIII provided that the Cleveland headquarter operations of UTU would be discontinued effective June 1, 2010. That date was chosen because it was the date UTU’s lease in Cleveland would expire. Article IV-A correspondingly recited that “[c]ommencing on June 1, 2010, the International Headquarters of SMART shall be located in Washington, DC or its vicinity.” Unless coincidentally UTU’s current lease happens to expire on June 1, 2013, the award leaves the parties free to determine the appropriate date for these provisions, with disagreements as to the date subject to the dispute resolution provisions of the Agreement.

<sup>40</sup> It is arguable that when the parties used dates in the Merger Agreement such as that the Merger Agreement would expire on “September 1, 2011” they really *meant* “3 ½ years after the merger goes into effect.” After all, they did not anticipate that the merger would be delayed by breach. But the arbitrator has not relied on the assumption that this is what the Merger Agreement *means*. Rather, the arbitrator has decided that this is an appropriate remedy for UTU’s breach. Indeed, continuance of the terms of the Merger Agreement may inure to UTU’s benefit, as otherwise it would enter uncharted terrain as the junior partner without the protections the Merger Agreement affords.

## **B. Intervening Amendments to the Unions' Constitutions**

Both SMWIA and UTU have held conventions since January 1, 2008 – SMWIA in 2009, and UTU in August, 2011. The record does not show whether amendments to the constitutions of the two organizations were adopted at these conventions. If they were, this poses a problem of implementation. The SMART Constitution incorporates the SMWIA and UTU Constitutions as they existed on January 1, 2008. Had the merger gone forward as contemplated in the Merger Agreement, any subsequent amendments would have required the votes at a Convention consisting of delegates from both organizations. This arbitrator is in no position to address how these subsequent amendments should be treated. Accordingly, this issue is left for resolution by the parties in accordance with the terms of Article XII of the Merger Agreement, subject to a presumption that amendments that do not adversely affect the members of the other union should be treated as amendments to the SMART Constitution. The arbitrator notes only that the “not in conflict with” provision of Article XI was addressing the “current SMWIA Constitution,” i.e., the Constitution that existed in 2007-08. A conflict that arises only because the SMWIA Constitution was later amended would not be subject to that provision, but rather would be subject to resolution per Article XII.

## **C. What the Merger Agreement Means**

This arbitrator has been selected to resolve a particular dispute between the parties, and is not a permanent arbitrator to resolve all disputes that may arise and require arbitration under Article XII of the Merger Agreement. Nevertheless, in the course of deciding the issues in *this* case, it has been necessary to address whether certain provisions of the UTU Constitution conflict with provisions of the SMWIA Constitution, and the arbitrator’s conclusions respecting those provisions were essential to the ultimate conclusion that the merger was properly consummated. Accordingly, those conclusions will be binding on the parties as they implement the merger: More particularly:

1. The following provisions of the UTU Constitution are not in conflict with “the current SMWIA Constitution or the terms of this Agreement”:
  - a. Article 80 of the UTU Constitution
  - b. Article 85 of the UTU Constitution

2. The second sentence of Article Thirty-Three, Section 1(i) of the SMWIA Constitution, which authorizes the General Executive Council to amend “Article Twenty-One of this Constitution without the necessity of referendum vote,” applies only to Article 21A of the SMART Constitution, and not to Article 21B.

#### **D. SMWIA’s Remedy Requests**

In its brief, SMWIA asks the arbitrator to fashion an eleven-point remedial order that would effectively micromanage the implementation of the merger, complete with timelines and very detailed instructions for the behavior of UTU officials<sup>41</sup> SMWIA’s reason for requesting this is understandable: the current leadership of UTU has steadfastly opposed the merger for nearly four years, and is plainly unsympathetic to its implementation. Its President has declared the merger “dead,” and even as the Sixth Circuit was considering whether to vacate the preliminary injunction blocking the merger, vowed that UTU would “never” merge with SMWIA. SMWIA fears that UTU’s officers might act obstructively, rather than cooperatively, with respect to implementation of the merger.

UTU responds that it would be “arbitrary excess” for the arbitrator to adopt the remedies proposed by SMWIA, and suggests the arbitrator would be exceeding his jurisdiction were he to do so. The arbitrator does not think that correct. The arbitrator has the power to adopt whatever remedy is necessary to cure the breach, which means restoring the situation that would have prevailed had there been no breach. If it proves necessary to adopt remedies of the specificity requested by SMWIA, the arbitrator will not hesitate to do so.

But underlying UTU’s resistance is a point that has validity: it is far better that the parties decide how to implement the merger than to have an arbitrator do so. And that will be achievable if UTU acts cooperatively to implement this award. The arbitrator will not presume that, now that the merger has been ruled effective, the UTU officers – who are experienced professionals -- will act irresponsibly in performing their duties. Accordingly, the award simply

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<sup>41</sup> A typical example is provision “b” of SMWIA’s remedy request:

Fifteen days. UTU gives SMART general officers and their designees full and unfettered access to the UTU offices in Cleveland and to all books and records of UTU wherever located. This includes giving all keys, badges, passwords and whatever else is needed for access so that SMART officers and their designees may come and go as they please. [SMWIA Br. 105]

directs the Presidents of UTU and SMWIA (or their designees) to begin meeting not later than 15 days after the effective date of this award to discuss any and all issues pertinent to implementation of the merger (which shall include at a minimum all of the subjects mentioned at pages 105-108 of SMWIA's opening brief) and to continue meeting on a regular basis until all such matters have been resolved. I shall retain jurisdiction to entertain request for more specific prescriptions if either party believes that this general award is not proving sufficient to secure implementation of the merger according to the terms contemplated in the Merger Agreement. Such requests may be filed on or after the 45<sup>th</sup> day following the effective date of the award.

### **E. The Effective Date of the Arbitral Award**

Given the four year delay resulting from UTU's breach, the merger should be implemented on the earliest possible date. Assuming the award is valid, the ideal effective date would be the date of issuance of the award. The arbitrator recognizes, however, that under the Federal Arbitration Act either party may seek to vacate the award. Accordingly, the award states the effective date with recognition of this contingency.<sup>42</sup>

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<sup>42</sup> The arbitrator also recognizes that there are individual LMRDA claims pending before Judge Bates. As those are beyond the purview of the arbitrator, they have not been taken into account in setting the effective date of the award. The intersection of this award with the individual claims is a matter for the court, not the arbitrator.

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**IN THE ARBITRATION BETWEEN**

**THE SHEET METAL WORKERS'  
INTERNATIONAL ASSOCIATION**

**and**

**UNITED TRANSPORTATION UNION**

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**AWARD**

1. The Merger Agreement and SMART Constitution were adopted by both parties in accordance with the procedures specified in Article II of the Merger Agreement.
2. UTU has been in continuous breach of the Merger Agreement from January 1, 2008 to date.
3. The parties shall implement the merger pursuant to the terms that were specified in the Merger Agreement, with the following adjustments:
  - a. Three years shall be added to each of the dates specified in the Merger Agreement, with the exception of the date “June 1, 2010” that appears in Articles IV-A and VIII.
  - b. The appropriate date or dates to be substituted for “June 1, 2010” in Articles IV-A and VIII shall be determined by agreement of the President of SMART and the President of the Transportation Division of SMART [hereinafter, “the two Presidents”], subject to the procedures specified in Article XII if they cannot agree.
  - c. If either or both parties have amended their respective Constitutions since Jan. 1, 2008, the two Presidents shall address whether such amendments shall be treated as amendments to the SMART Constitution, with a presumption that amendments that do not adversely affect the members of the other union should be treated as amendments to the SMART

Constitution, Any failure of the two Presidents to agree shall be subject to the procedures specified in Article XII.

4. The two Presidents (or their designees) shall begin meeting to discuss implementation of the merger not later than fifteen days after the effective date of this Award, and shall continue to meet on an expedited basis for as long as necessary to resolve all issues needed to completely accomplish the purposes of the Merger Agreement. Their discussions shall include, at a minimum, all issues specified in the Merger Agreement for resolution, and all matters identified at pages 105-08 of SMWIA's brief in this arbitration proceeding.

5. The arbitrator retains jurisdiction for the limited purpose of entertaining motions that more specific requirements should be ordered because the general command of Par. 4 of this Award is not adequate to achieve full and effective implementation of the merger. Motions to that effect may be filed on or after the forty-fifth day after the effective date of this Award.

6. The following interpretations of the SMART Constitution shall be binding on the parties, unless and until the SMART Constitution is amended:

a. Article 80 of the UTU Constitution is not in conflict with the SMWIA Constitution, and thus is an operative part of the SMART Constitution..

b. Article 85 of the UTU Constitution is not in conflict with the SMWIA Constitution, and thus is an operative part of the SMART Constitution.

c. The second sentence of Article Thirty-Three, Section 1(i) of the SMWIA Constitution, which authorizes the General Executive Council to amend "Article Twenty-One of this Constitution without the necessity of referendum vote," applies only to Article 21A of the SMART Constitution, and not to Article 21B.

7. The "effective date of this Award," as that term is used in Pars. 4 and 5 of this Award, is the earliest of the following:

a. If both parties announce they will not seek to vacate this award pursuant to the Federal Arbitration Act [FAA], the date of the second such announcement.

b. In the absence of such announcements from both parties, the date upon which the time to file a motion to vacate under the FAA expires, unless by that date a motion to vacate has been filed.

c. If a motion to vacate is timely filed, the date upon which the motion is resolved.

Dated: October 10, 2011

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Michael H. Gottesman  
Professor of Law  
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Arbitrator