

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF OHIO
3 EASTERN DIVISION

4 DALE EDWARD MICHAEL, et al.,

5 Plaintiffs,

6 vs.

7 PAUL THOMPSON, et al.,

8 Defendants.

Case No. 1:07CV3818

Akron, Ohio

Wednesday, May 28, 2008

9:00 a.m.

9 TRANSCRIPT OF EVIDENTIARY HEARING ON MOTION TO INTERVENE
10 BEFORE THE HONORABLE JOHN R. ADAMS
11 UNITED STATES DISTRICT JUDGE

12 APPEARANCES:

13 For the Plaintiffs: Arthur L. Fox, II
14 Lobel, Novins & Lamont
15 888 17th Street, NW, Suite 810
16 Washington, DC 20006
17 (202) 371-6626

18 For the Defendants: Joseph Guerrieri, Jr.
19 Guerrieri, Edmond, Clayman & Bartos
20 1625 Massachusetts Avenue, NW,
21 Suite 700
22 Washington, DC 20036
23 (202) 624-7400

24 For the Intervenors: Joyce Goldstein
25 Law Offices of Joyce Goldstein
1040 Leader Building,
526 Superior Avenue, NE
Cleveland, OH 44114
(216) 771-6633

Court Reporter: Caroline Mahnke, RMR, CRR
Federal Building & U.S. Courthouse
2 South Main Street, Suite 568
Akron, Ohio 44308
(330) 252-6021

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

1 Wednesday, May 28, 2008, 9:00 a.m.

2 THE COURT: For purposes of the record the Court
3 has before it today Case Number 1:07CV3818. The case is
4 captioned Dale Edward Michael, et al., plaintiffs, versus
5 Paul Thompson, et al., defendants.

6 We're here today for purposes of a hearing with regard
7 to the motion to intervene on the side of the defendants
8 filed by the named intervenors. I'll defer reading their
9 names into the record at this time. Their names are
10 certainly part of the record in the case.

11 Counsel for the proposed intervenors, it's your
12 motion. At this time you may make any opening comments you
13 wish and then proceed with the testimony.

14 MS. GOLDSTEIN: Thank you, your Honor.

15 My name is Joyce Goldstein, and I'm here for the
16 proposed intervenors in the case.

17 Your Honor, I don't know if you have a preference with
18 respect to the seating. I have my files and documents, but
19 not a table. So I don't know -- I mean, I can certainly try
20 to share, unless there is some way that we can organize
21 things. And my clients are out here, but they're actually
22 sitting behind the bar.

23 THE COURT: Well, counsel, I apologize, but given
24 the logistics and the number of the parties, the only
25 proposed solution I would have is, if you wish, you may use

1 one of the tables at the side of the room. Of course, I
2 have an ongoing trial and, unfortunately, numerous documents
3 and boxes of documents there. And you're certainly free to
4 share a table with one side or other.

5 Otherwise, I apologize. I'm not sure how otherwise I
6 can address the problem. Your clients, of course, are
7 seated in the front row. I think that's as close in
8 proximity to the courtroom as we are able to accommodate
9 them at this point in time.

10 So counsel at one of the trial tables, if you have
11 room, you wish to allow Ms. Goldstein use of the table, you
12 may. Or as I, again, I apologize, the other table at the
13 side of the courtroom is also available to you, if you wish.

14 And, of course, you have the podium before you for
15 your materials as you make your presentation.

16 MS. GOLDSTEIN: Can I just have a minute, please.

17 THE COURT: You may.

18 MS. GOLDSTEIN: Thank you, your Honor. We are
19 ready to proceed.

20 Inasmuch as we've already fully briefed this issue,
21 what I would like to do is, instead of repeating any of the
22 legal arguments that we've already set forth, I would like
23 to just go forward and start calling our witnesses.

24 I understand that we're limited on time, and so I
25 don't want to use any of it to repeat what you already are

1 aware of, your Honor.

2 So I would like to call my first witness, is Paul
3 Thompson.

4 THE COURT: You may.

5 PAUL THOMPSON,
6 of lawful age, a witness called by the Proposed
7 Intervenors, being first duly sworn, was examined
8 and testified as follows:

9 THE COURT: Be seated in the witness stand, sir.
10 Adjust the microphone, if you would. You may be seated,
11 please. Adjust the microphone, if you would, so your
12 testimony can be heard.

13 Counsel, you may proceed.

14 MS. GOLDSTEIN: Thank you, your Honor.

15 DIRECT EXAMINATION OF PAUL THOMPSON

16 BY MS. GOLDSTEIN:

17 Q. Mr. Thompson, where do you live?

18 A. I live at 202 Biwater Drive, Cape Fair, Missouri.

19 Q. Are you a member of the union?

20 A. Yes, I am.

21 Q. What union is that?

22 A. United Transportation Union.

23 Q. Since when have you been a member of the UTU?

24 A. I've been a member since its creation in 1969. Prior
25 to that I was a member of both the B of RT, the Brotherhood

1 of Railroad and Trains, and the BLF&E, Brotherhood of
2 Firemen and Engineers.

3 Q. And those were predecessor unions to the UTU?

4 A. Yes, both of those helped form the UTU formation.

5 Q. What positions have you held within the UTU?

6 A. I have held the position of local president, local
7 chairperson, general chairperson, vice president, general
8 secretary and treasurer, assistant president, and
9 international president.

10 Q. Do you currently hold a position in the UTU?

11 A. My current position is that of president emeritus of
12 the United Transportation Union.

13 Q. And you are retired from the position of international
14 president?

15 A. Yes.

16 Q. And when did you retire?

17 A. Effective the first of January, 2008.

18 Q. What were the circumstances that led to you becoming
19 president of the UTU?

20 A. There was a criminal investigation as a result of a
21 Grand Jury established in Houston, Texas, that investigated
22 the two previous preceding presidents. And they were found
23 to be guilty of RICO charges, obstructing justice, and
24 others, as related to their dealings with attorneys that
25 represent Federal Employee Liability Act.

1 Q. And attorneys that are designated legal counsel within
2 the UTU?

3 A. Yes.

4 Q. So when those people were removed from office, then
5 you ascended to the presidency?

6 A. Charlie Little, one of the presidents, had retired.
7 And the president that I -- or that I followed was Byron
8 Boyd. And both of them pled guilty to the charges and were
9 sentenced to two years in prison.

10 Q. And what year was that?

11 A. 2004.

12 Q. Did you ever stand for election as president of the
13 UTU?

14 A. No. When I was elevated to that of president, I
15 automatically was elevated as a result of being assistant
16 president. And at the time when I was elevated, I seen the
17 situation that existed and realized that there was a lot of
18 work to be done that couldn't be done if I tried to seek
19 reelection because of the political ramifications, and I
20 agreed and announced at the day I was elevated that I would
21 not seek another term.

22 Q. And can you identify for the Court what positions
23 you've held within the rail industry, not as a union
24 official but as a worker?

25 A. As a worker, I have held numerous positions. My

1 residence at the time was Kansas City, and there was a lot
2 of railroads in that area. And as a result of being
3 furloughed various times, I hired out on the Santa Fe
4 Railroad as a locomotive fireman. I held that seniority. I
5 held -- I was promoted to locomotive engineer. I worked for
6 as a brakeman, I worked as a switchman, and I also worked as
7 a clerk.

8 Q. And for what railroads did you work?

9 A. Well, the Santa Fe, the Burlington Northern, the Union
10 Pacific, the Rock Island, the Kansas City Southern, the
11 Kansas City Terminal.

12 Q. Now, directing your attention back to the time that
13 you were international union president, did you determine at
14 some point that the UTU should investigate merging with
15 another international union?

16 A. Yes, I did.

17 Q. And why did you reach that conclusion?

18 A. Because of what was happening within the industry, the
19 fact that technology had taken its toll. I was a big
20 supporter of the United Transportation Union when it was
21 formed in 1969. And at the time we had 280 thousand
22 members. And as are result of the technology changes that
23 had taken place since 1969, our membership had dropped down
24 to approximately 70 thousand members.

25 Q. And how did that affect your decision, your

1 determination, to want to merge with another international
2 union?

3 A. Well, I recognized that there were additional
4 technical changes on the horizon, and that if we didn't do
5 something to seek a partner, that financially we were going
6 to have problems maintaining the United Transportation
7 Union, and we couldn't give the membership the
8 representation that they needed as our numbers dwindled.

9 Q. And how did you believe that a merger with another
10 international union would affect the representation of the
11 membership?

12 A. Well, I watched firsthand the many accomplishments as
13 a result of the merger that brought the United
14 Transportation into effect. And they were all positive.

15 But as the numbers dwindled down, the carriers started
16 taking advantage of our membership by asking for additional
17 givebacks and such, and I realized a stronger union would
18 stop that.

19 Q. In the time that the UTU existed, were there changes
20 in the administrative structure over a period of time from
21 when it was first created to the time that you were
22 investigating a merger?

23 A. Yes. When I first started talking with other unions,
24 they indicated to me that we're not interested, you're top
25 heavy. You've got too many officers and you need to reduce

1 your rank -- your officers, because we just can't take on a
2 situation that would cost us a tremendous amount of money.

3 As a result of that, I appointed what they call the
4 Blue Ribbon Panel to investigate whether we were top heavy
5 and make recommendations that would be submitted to the
6 delegates for reducing our ranks. And as a result,
7 effective January 1 of this year, the recommendations were
8 approved by the delegates and they attrited out six
9 positions.

10 Now, over the years, we have also attrited out other
11 positions. But it was a contingent deal. We were having to
12 take away representation that we can provide because we
13 didn't have the money to continue with that large of an
14 officer force.

15 Q. Once you decided to investigate merger possibilities,
16 how did you proceed internally within the UTU?

17 A. Well, under the United Transportation Union's
18 constitution it requires that before any discussions take
19 place you must have the approval of the board of directors.
20 So I went to the board of directors and explained the
21 serious situation we were facing, the financial condition we
22 were in, and I asked for their consideration, what did they
23 want to do about this. And I got a unanimous vote from the
24 board of directors to go out and talk with other labor
25 unions to see if there was a chance we could consummate a

1 merger.

2 They didn't give me any indication of any particular
3 unions to talk to. They just gave me a blanket, to go out
4 and discuss it. But before I could ever consummate it, I
5 had to come back to the board of directors for their
6 approval.

7 Q. When was it that you sought the approval of the board
8 of directors to investigate merger possibilities?

9 A. Shortly after I was elevated in March of 2004. I
10 think sometime between March of 2004 and August I got the
11 approval because the first meeting I had was in August of
12 2004.

13 Q. After you obtained the approval from the board of
14 directors, what did you do to explore merger possibilities?

15 A. Well, I started meeting with other mainly rail unions.
16 Over the period of the next two and a half years, I met with
17 approximately ten different unions, and including the BLE,
18 to see if there was a chance of putting a merger together
19 outside of the Teamsters organization.

20 Q. And what is the BLE?

21 A. Brotherhood of Locomotive Engineers.

22 Q. And you said you met with a total of how many unions?

23 A. Including the BLE, ten unions.

24 Q. And did you report back to anyone within the UTU
25 regarding your merger investigation?

1 A. Every time that I would have a meeting, I would report
2 back to the board of directors, either at their board of
3 directors meetings that we held or by conference telephone.

4 Q. At some point did you decide that it was in the best
5 interest of the UTU membership to merge with the Sheet Metal
6 Workers International Association?

7 A. Yes, I did.

8 Q. Why did you make that determination?

9 A. The Sheet Metal Workers, first of all, I was very
10 impressed with the general president, Mike Sullivan, at the
11 time. His first question to me, knowing that serious
12 situation we had faced with my two predecessors, the first
13 question he asked, are you clean? And I said, most
14 certainly we are. We went through some very difficult
15 times. I inherited the union. It was on the verge of
16 bankruptcy. There was a lot of graft that had gone on.
17 Other labor unions were opposed to UTU because of the
18 attitudes we had displayed to them.

19 And Mike Sullivan came forth and offered to help us
20 get back into the AFL-CIO. And he was very concerned that
21 we were a clean organization. And I assured him that we
22 were. And the benefits that they provided, the Sheet Metal
23 Workers Union were outstanding as far as UTU was concerned.

24 Q. How did the two match up, the UTU and the Sheet Metal
25 Workers?

1 A. The Sheet Metal Workers Union started out as a
2 railroad union originally back in the 1800s.

3 And as technology changes came through in their
4 industry, or in their crafts, they expanded out into the
5 building trades division. Today the building trades
6 department of the Sheet Metal Workers is the largest. They
7 still have a transportation department, but it has dwindled
8 down to just a few thousand. And so there was a
9 relationship there that it was originally a rail union.

10 The other issues that were of great benefit to us was
11 the fact that Mike Sullivan, the general president, was a
12 strong advocate of Eugene V. Debs, who was an individual
13 that advocated single unions representing railroad workers,
14 and he worked and carried that philosophy forward.

15 He also had numerous training centers all over the
16 United States, elaborate training centers, that would give
17 us the opportunity to train our people, conductors and
18 engineers, through their facilities, because the railroads
19 were contracting this out to junior colleges and this sort
20 of thing. And we would derive training from these
21 facilities that would cut down on the expenses because it
22 would eliminate a lot of duplication. It would give our
23 membership additional benefits by these training facilities
24 and being able to use those for local meetings.

25 But there was one other thing that was a great benefit

1 to us. The United Transportation Union is an expert on the
2 Railway Labor Act. We understand it thoroughly. But we
3 have thousands of bus drivers that do not come under the
4 Railway Labor Act. They come under the National Labor
5 Relations Act. And that we're not that expert in. The
6 Sheet Metal Workers Union are really experts in that field,
7 and that would have helped our bus membership. And it would
8 have helped the entire UTU membership.

9 Q. Once you focused on the Sheet Metal Workers as a
10 merger partner, what did you do to accomplish the merger?

11 A. I appointed committees, similar to what had been
12 appointed when we were discussing mergers with the
13 Brotherhood of Locomotive Engineers. I appointed various
14 committees of individuals of officers to serve on these
15 committees.

16 Q. And did the parties then negotiate a merger agreement?

17 A. We met on a number of occasions, yes.

18 Q. And ultimately there was a merger agreement that was
19 negotiated?

20 A. Yes.

21 Q. On the UTU side, who was responsible for negotiating
22 the merger agreement?

23 A. Well, at various times -- I was always present; Rick
24 Marseau, the assistant president, was always present; Clint
25 Miller, the general counsel for UTU, was always present;

1 John Fink, my executive assistant, was always present; and
2 then at various times we had different international
3 officers that attended these meetings.

4 Each time we would hold a meeting, I would report this
5 back to the board of directors of the accomplishments or the
6 problems we were facing.

7 Q. What did the parties agree to name the new union?

8 A. SMART.

9 Q. And when was the tentative agreement reached on the
10 merger?

11 A. I believe it was -- I think it was around May the
12 16th, or thereabouts, of 2007.

13 Q. After that agreement was negotiated, or the tentative
14 agreement, how was it presented to the UTU leadership?

15 A. Well, after we had the documents printed up and
16 basically reviewed as what we had agreed upon on May the
17 16th, we had a regional meeting for the UTU that all of the
18 international officers attended as well as the board of
19 directors scheduled for June the 10th in Kansas City.

20 And so on the day before the regional meetings, which
21 were June the 10th, I convened the board of directors. And
22 I had Mike Sullivan, general president of the Sheet Metal
23 Workers, fly into Kansas City to be present at this meeting
24 so the board of directors could ask him any type of
25 questions that they had.

1 We met for several hours in the afternoon of June the
2 10th. And the board of director members all asked questions
3 of Mike Sullivan, discussions of the salary, the fringe
4 benefits, the way it would operate. The entire issues were
5 discussed.

6 We had a reception that evening, and the board of
7 directors asked to recess so we could go to the reception.
8 And we reconvened probably around 9:00 or so after the
9 reception, and we met again for several hours.

10 The board of directors still had some concerns, and
11 they requested that we again recess and reconvene on the
12 morning of June the 11th, at which time we met and had
13 breakfast and further questions and interrogation of Mike
14 Sullivan continued by the board of directors.

15 And finally, at that breakfast meeting, the board of
16 directors voted unanimously to submit the merger proposal to
17 the membership for their consideration and ratification
18 process.

19 Q. And then was it submitted -- prior to being submitted
20 for ratification while you were still in Kansas City, was
21 there any additional presentation of the merger agreement to
22 those who were attending that meeting?

23 A. Yes. As soon as the board of directors gave the
24 unanimous approval to submit the proposal to the membership,
25 we then convened all of the international officers and

1 explained and went over -- and Mike Sullivan was present
2 there, and they had a chance to ask questions and such.

3 After the meeting with all the international officers,
4 we started the regional meeting. And all of the
5 international officers, including myself and General
6 President Mike Sullivan, appeared on stage and made the
7 announcement to the entire membership that was present at
8 this meeting, the issue that we were putting this merger out
9 for a vote.

10 Later on during that same regional meeting we had a
11 question and answer session that lasted about two hours,
12 that the membership was free to get up and ask any question
13 of any international officer they desired. And most of the
14 questions at that time then pertained to the proposed merger
15 with the -- between the UTU and the SMWIA.

16 Q. And approximately how many people attended that
17 meeting?

18 A. I'm going to say somewhere between eight hundred and a
19 thousand people were present. We had another one that we
20 did the same thing with it a month or two later prior to the
21 vote in Pittsburgh.

22 Q. And who attended the meeting in Pittsburgh?

23 A. Again, people from all over the country. And it was,
24 again, about a thousand people present at that regional
25 meeting.

1 Q. And the people who were there had an opportunity to
2 ask questions?

3 A. We had, again, a question and answer session that was
4 giving the opportunity to everybody present to ask any
5 questions.

6 I believe at the Kansas City meeting somebody asked
7 that all of the questions that we had be put on the Internet
8 for the people to review. And we did that. And then we had
9 a number of questions coming in from individuals from
10 locals, from general committees all over the country. And
11 every time we would get those, I would review them and send
12 them to Mike Sullivan, and we would prepare and make sure
13 that we were both on the same track before we posted any of
14 these answers.

15 And every one of these answers was posted on our
16 Internet, and our entire membership had a chance to review
17 these questions and answers. And this was all prior to the
18 vote.

19 Q. Now, when you say on the Internet, the UTU maintains a
20 Web site?

21 A. Yes, it was on the utu.org Web site.

22 We also mailed it out to numerous people, the question
23 and answers, so they were circulated all over the country.

24 Q. And how was the membership at large initially informed
25 about the possibility of the merger?

1 A. I believe prior to the -- prior to mailing the
2 information on the voting procedure, I mailed a letter to
3 every member dated June the 10th, if I remember correctly.
4 After I received the approval of the board of directors, we
5 immediately shot a letter out to the entire membership
6 giving the advantages of the merger, giving them all the
7 information we possibly could, the reasons for the merger.
8 And that went over to every membership.

9 Then, later on, a few -- I'm going to say a week or so
10 later, the ballots were sent out -- or the, the ballots,
11 not -- the instructions on voting were sent out. We didn't
12 have the ballots.

13 Q. Could you describe what the voting procedure was?

14 A. We hired Triple A, Academy of Arbitrators, to handle
15 this. This is the way we've handled all of our voting
16 process on national agreements and such. We had our
17 technical department send them all of the current addresses
18 we had on every member.

19 And then they then sent out to every member that was
20 eligible to vote this information on the merger. We had all
21 the information, explanation and things, and then they had a
22 telephone number that they would call, and they had a pin
23 number. And they would put that pin number in. Each
24 individual member had a different pin number. And once they
25 called that number, they put that pin number in, and then

1 they had a choice to vote yes or no.

2 And if during the process they made a mistake and
3 voted yes when they meant no, they had the right to change
4 it as long as they were still on that phone. But once they
5 submitted the vote, then it was over with and they could
6 never vote again.

7 Q. And what was the outcome of the vote?

8 A. 71 percent of the membership that voted, voted in
9 favor of the merger.

10 Q. Now, what did the parties agree to regarding a
11 constitution for SMART?

12 A. During the two-and-a-half years that we were meeting
13 with the Sheet Metal Workers, the main stumbling block was
14 an issue over the selection of officers. Under the Sheet
15 Metal Workers Union, they, the delegates, elect the top two
16 or three officers. I think it's the general president, G S
17 and T, and maybe one other.

18 Q. G S and T is?

19 A. General secretary and treasurer. Then the president,
20 under the Sheet Metal Workers, then appoints the other
21 officers in that organization. And that was completely
22 opposite of the way the UTU historically handled their
23 selection of officers. We have always elected our officers
24 at a convention by the delegates. And this was the number
25 one stumbling block.

1 And early on we realized that we weren't going to get
2 over that hump the way we were headed. We also realized at
3 that time that we could not rewrite the entire constitution
4 as we had done under the Brotherhood of Locomotive Engineers
5 and UTU proposed merger for the simple reason that 90
6 percent of the Sheet Metal Workers constitution had no
7 bearing or application whatsoever on the transportation
8 department. It strictly had bearing on buildings trade
9 division.

10 So these were major problems.

11 Finally, in the spring of 2007, General Counsel Clint
12 Miller came up with the idea of submitting the UTU
13 constitution into the Sheet Metal Workers constitution,
14 except where it was in conflict. And it became Article 21-B
15 of the Sheet Metal Workers constitution.

16 And so Clint was the architect of putting that into
17 the select -- or the constitution to make sure that we
18 protected the voting rights of the UTU membership, and it
19 also reserved the Sheet Metal's manner in which they
20 selected their officers.

21 And so we would have a convention prior to the SMART
22 convention of nothing but the transportation department,
23 which would be the former UTU organization, and they at that
24 time would elect their officers just as they had
25 historically done in the past.

1 Then the six senior officers would then be picked and
2 put on the executive council of the Sheet Metal Workers
3 Union, and that satisfied us electing our officers and
4 allowed the general president of the Sheet Metal Workers to
5 pick and appoint those same officers, the six senior, to
6 their executive council.

7 Now, that's exactly the way we do our board of
8 directors. It's the senior officers that end up on the
9 board of directors.

10 Q. So Article 21 of -- Article 21 of the Sheet Metal
11 Workers constitution already exists?

12 A. Yes.

13 Q. And it deals with their current transportation?

14 A. Absolutely. When we moved our constitution intact,
15 except where it was in conflict -- and that's language that
16 was right out of the merger agreement -- and it moved intact
17 into the Sheet Metal Workers constitution, and that became
18 the SMART constitution. And that's explained in Article 1
19 of the merger agreement.

20 Q. Now, by simply combining the two constitutions, did
21 you consider that there might be conflicts between them?

22 A. Yes. Yes. As with any national agreement we
23 negotiated in the railroad industry, there is always
24 provisions that if there is disputes they can be submitted
25 to arbitration. And if you will look closely at Article 11

1 of the Sheet Metal Workers and UTU merger, it clearly sets
2 forth in there that the existing constitutions and the
3 existing board of directors and executive council will be
4 maintained after the effective date in order to put the
5 constitution and put the issues to bed.

6 And there was -- we knew of one or two conflicts.
7 One, we knew the board of directors for UTU, after the SMART
8 merger was adopted, would no longer be in existence, and
9 that was basically set forth in the merger agreement.

10 Q. So if conflicts arose into the future, how did the
11 parties intend to address them?

12 A. If there was issues that were in conflict, they would
13 be addressed by the two parties, by the president of the
14 Sheet Metal Workers, the general president, and the
15 president of the UTU, or if the -- after the first of
16 January, the president of the transportation division of
17 SMART, would sit down and try to work it out.

18 If they couldn't work the issue out, then it would be
19 presented to an arbitrator that would be picked through the
20 AFL-CIO that would look at the two issues that supposedly
21 were being disputed, and that arbitrator could only pick one
22 or the other. Yes, this is in conflict -- this does
23 conflict, or no, it doesn't.

24 So he could not rewrite the agreement or the
25 provisions in the constitution.

1 Q. Now, why didn't the parties resolve all possible
2 constitutional conflicts and create a brand new document
3 prior to presenting it to the membership?

4 A. We didn't know of any disputes, and we couldn't do
5 that for the fact that we had a convention coming up in
6 August of 2007 subsequent to the merger being approved. And
7 at this convention, the delegates submitted proposals to
8 change existing provisions within the UTU constitution. And
9 until that convention was completed and we seen if any were
10 changed that were possibility in conflict, we could not put
11 out the -- rewrite any constitutional changes until after
12 our convention.

13 The SMART constitution was there. It was the existing
14 UTU document plus the Sheet Metal Workers, except where it
15 was in conflict.

16 As a result of our convention in August of 2007, after
17 the vote, there were two items that I know right off the bat
18 that were adopted that were in conflict with the Sheet Metal
19 Workers Union constitution.

20 Q. That were new provisions that were passed at the 2007
21 convention?

22 A. Yes.

23 Q. So the UTU constitution that was in effect at the time
24 the merger agreement was negotiated was different than the
25 UTU constitution that would have been in effect when the

1 merger itself would have happened at the end of the year, or
2 the first of January?

3 A. Yes. Ten days after the approval of the merger we
4 met, and the constitution was completely -- or I say
5 completely -- provisions were changed in it. So the
6 existing document would change, and it does every four
7 years.

8 Q. So would the SMART constitution change again at the
9 next scheduled convention in 2011?

10 A. Yes. The same procedure for changing the existing UTU
11 constitution, which is identified as Article 21-B of the
12 SMART constitution, the delegates will again have the same
13 opportunity to make recommendations for changes. Just like
14 they had at all UTU conventions prior to the merger.

15 MR. FOX: Your Honor.

16 THE COURT: Yes.

17 MR. FOX: I don't want to tell intervenors'
18 counsel how to best present her case for invention, but I
19 didn't realize that this morning was going to be an
20 evidentiary hearing on the merits of the case.

21 THE COURT: Counsel, yes, I agree. This is not a
22 hearing on the merits of the case. This is strictly as to
23 the motion to intervene. And so most of what you're
24 presenting to me is not related to your motion but to the
25 underlying merits. So I would encourage you to address only

1 the issue before the Court, and that is the motion to
2 intervene.

3 MS. GOLDSTEIN: Thank you, your Honor.

4 By way of explanation, the reason why I went through
5 the background was so that Mr. Thompson could explain why it
6 is that he has an interest in this litigation and an ongoing
7 interest for purposes of intervening.

8 So it really was by way of background, but I will
9 certainly move on.

10 THE COURT: I would strongly suggest so, counsel.

11 MS. GOLDSTEIN: Thank you.

12 Q. Up until the time that the Court enjoined the merger
13 on December 27 in this case, was the merger agreement
14 implemented according to its terms?

15 A. Yes, it was.

16 Q. Prior to the expiration of your term on December 31,
17 2007 as president, were you brought up on internal union
18 charges?

19 A. Yes, I was.

20 Q. Could you very briefly describe what those charges
21 were?

22 A. Rumors were circulated that were untrue. Issues was
23 put out that I had lied to the membership in regards to the
24 merger by those individuals that were opposed to it, and as
25 a result, charges were brought against not only myself, but

1 the assistant president, Rick Marseau.

2 Q. And what did those charges seek to do?

3 A. Seek to remove my membership and Rick Marseau's
4 membership and throw us out of office so the new
5 administration could immediately take over.

6 Q. And when were those charges filed, approximately?

7 A. Late November, early December of 2007, just days
8 before we were to retire, both of us.

9 Q. Did you file a lawsuit to try to stop the hearing on
10 those internal union charges?

11 A. Both Rick Marseau and myself did file a lawsuit, yes.

12 Q. Did you engage a lawyer to represent you in that
13 lawsuit?

14 A. Yes, we did.

15 Q. Who was the lawyer who represented you?

16 A. Joyce Goldstein.

17 Q. What were the circumstances that led you to engage me
18 as your attorney in that case?

19 A. In meeting with General Counsel Clint Miller, the UTU
20 general counsel, he explained a great concern about these
21 charges because he knew they were frivolous, too. And he
22 suggested that we hire an attorney, and he suggested you.
23 And somehow that's how we ended up hiring you.

24 Q. And do you know who paid my attorney's fees in that
25 case?

1 A. At the time we were hired, I wasn't sure, but I
2 understood that Clint Miller had handled the issue with the
3 Sheet Metal Workers organization, and I understood that they
4 were going to pick up the cost of the attorney fees.

5 Q. Who made the arrangements?

6 A. General Counsel Clint Miller.

7 Q. Was that lawsuit resolved prior to the end of your
8 term as president?

9 A. Yes, it was resolved.

10 Q. And what was the resolution of that case?

11 A. They voluntarily dismissed it.

12 Q. Do you recall the date?

13 A. December 20. 10 days -- 11 days before we retired.

14 Q. And then after you retired, who became the president
15 of the UTU?

16 A. Mike Fruthey was elected at the convention to be
17 president of the transportation department of SMART, and he
18 succeeded me.

19 Q. Because of the injunction?

20 A. As a result of injunction, yes, he continued on as UTU
21 president.

22 Q. Now, you were originally named as a defendant in this
23 case?

24 A. Yes, I was.

25 Q. Did you attend the December 27 TRO hearing in this

1 matter?

2 A. No, I did not.

3 Q. Were you advised about what had happened here?

4 A. Yes, I was.

5 Q. How did you learn what happened on December 27?

6 A. In the afternoon or evening of December 27 I received
7 a telephone call from General Counsel Clint Miller.

8 Q. And can you describe that conversation?

9 A. He was really upset at the results that had happened.
10 He thought that there was a lot of explanations that wasn't
11 explained, and maybe that the Court was not really
12 understanding the issues. And he said that there was one
13 issue that could pertain to allow us to continue this
14 because he thought that Arthur Fox had made a very big
15 mistake in naming me as a defendant in this case instead of
16 just the United Transportation Union.

17 And there was rumors circulating that the new
18 administration was opposed to the merger and having secret
19 meetings with some of the plaintiffs, and that he suggested
20 the only way this could continue after the first of the
21 year, if the new administration took a different approach,
22 was for me to become involved in it and carry on if I so
23 chose to do so.

24 And I said yes, I definitely think this -- my heart
25 lives for this organization and the commitments that I made

1 to other people, and I definitely wanted to continue. And
2 he indicated that he would get in touch with the Sheet Metal
3 Workers and see if there would be some arrangements maybe
4 that would allow us to participate and continue this issue.

5 Q. So did Clint Miller then make arrangements for you to
6 have legal representation in this case?

7 A. Yes. I never did talk to Clint Miller again after
8 that date up to this date, but I did receive a telephone
9 call sometime between the 27th and the 1st of the year from
10 Pat Riley, who is the general counsel for the Sheet Metal
11 Workers. And he said, are you really wanting to go forward
12 with this? And I said, yes, I am. I feel very strongly
13 about it.

14 And then I think on the 1st or 2nd of January, you and
15 I exchanged e-mails, and that's how I retained you.

16 Q. And who is paying your attorney's fees in this case?

17 A. Sheet Metal Workers.

18 Q. Is there any conflict of interest between you and the
19 Sheet Metal Workers in this case?

20 A. Absolutely not.

21 Q. Have you actively participated in all decisions
22 regarding the litigation in this matter?

23 A. Yes, I have.

24 Q. What outcome are you seeking in this case?

25 A. I'm seeking the outcome that we were committed to,

1 that the board of directors committed to, that the entire
2 membership through their ratification process committed to,
3 and the document that I signed with General Counsel Mike
4 Sullivan, that this merger would be complete and was
5 complete effective, I think, August the 8th is when we
6 signed the document.

7 MS. GOLDSTEIN: I have no further questions, your
8 Honor.

9 THE COURT: Thank you.

10 On behalf of the plaintiffs, counsel, you may
11 cross-examine.

12 CROSS-EXAMINATION OF PAUL

13 BY MR. FOX:

14 Q. Mr. Thompson, you said that you retired as president
15 of the UTU; is that correct?

16 A. That's correct.

17 Q. And did you retire from the industry, from the
18 railroad industry as well?

19 A. Yes, I did.

20 Q. So you no longer carry seniority in any shop or at any
21 railroad?

22 A. No.

23 Q. And you are a retired member of the union. You said
24 you're a member of the union, but that needs to be modified
25 by you're agreeing you are a retired member of the union; is

1 that correct?

2 A. Well, I still hold the status of president emeritus.

3 Q. Right, the constitution just automatically designates
4 you president emeritus?

5 A. Yes.

6 Q. As long as -- withdraw that.

7 Mr. Thompson, as a retired member, are you entitled to
8 vote for officers in elections?

9 A. No, sir.

10 Q. Would you be entitled to vote in another referendum on
11 a collective bargaining contract?

12 A. No, sir.

13 Q. Or on a merger agreement?

14 A. No, sir.

15 Q. You mentioned that you and a small group had done most
16 of the negotiations with the Sheet Metal Workers. Do you
17 recall how many times, roughly, you met with the Sheet Metal
18 Workers?

19 A. I'm going say in the neighborhood of between 17 and 20
20 different times.

21 Q. And I think your testimony was that after each one of
22 these negotiations, you, personally, reported back to the
23 entire board of directors exactly what had taken place
24 during these negotiation meetings; is that correct?

25 A. No, that is not correct.

1 Q. Tell me how.

2 A. I would, after we had these meetings, I would either
3 have a conference telephone call, on many occasions, and
4 advise the board if progress was made and what we were
5 doing. If there was no progress made, I would address and
6 advise them at the board of directors meeting when we
7 regularly convened of the status that had happened between
8 one board meeting and the other.

9 So if progress was made and we were making some
10 initial movements, I would usually have a conference
11 telephone call with the board of directors. If there was no
12 movement being made, then it would be explained to them at
13 our board of directors meeting.

14 So after every meeting I had with the Sheet Metal
15 Workers Union, no, I didn't conference the board on
16 everything unless there was movement.

17 Q. Now, you said that there were regional meetings, one
18 in Kansas City, one in Pittsburgh, attended by eight hundred
19 or a thousand who were the attendees? Were these ordinary
20 rank and file members, or were these local union officers?

21 A. Both. Both. UTU has always had regional meetings in
22 certain parts of the country. We try to have one in the
23 west part and one in the east part. And every
24 member, including retirees, were invited to attend. And a
25 lot of them were officers, a lot of them were local

1 officers, a lot of them were members. I can't tell you the
2 ratio.

3 Q. Now, you said on June the 10th, right after, I guess,
4 you got the approval of the board of directors, you sent a
5 letter to all the members?

6 A. No. I wrote a letter on June the 10th. After we had
7 the meeting and it was approved, I put a letter out that was
8 dated June the 10th, but it was probably mailed a day or two
9 later. I don't remember the date.

10 Q. Right. Now, I think you testified that you gathered
11 at the board on the 10th, but the merger agreement wasn't
12 approved until the following morning; is that correct?

13 A. We convened the board of directors on two days, June
14 the 10th and it carried over to June the 11th, yes.

15 Q. But it wasn't until the 11th that the board actually
16 voted its unanimous approval?

17 A. That's correct.

18 Q. But you wrote your letter on the 10th saying that it
19 had been approved?

20 A. I may be wrong on the exact date.

21 Q. Okay.

22 A. It was in that period of either June the 10th or June
23 the 11th, after we got the approval. The letter did not go
24 out until the board of directors approved it.

25 Q. Very well. Now, you say this letter was mailed to

1 every member of the union?

2 A. Yes. I believe it was.

3 Q. It wasn't just posted on the Internet?

4 A. Oh, no, no, no. It was probably posted on the
5 Internet, but it was also mailed telling the membership that
6 there was a vote coming.

7 Q. And you're certain of that?

8 A. I'm pretty certain, yes.

9 Q. You could be wrong?

10 A. I could be wrong about what?

11 Q. About the letter having gone in the U.S. postal
12 service mail to every member of the union.

13 A. I believe it was mailed to every -- yeah, I could be
14 wrong. That's been almost a year ago.

15 Q. And you say that Ms. Goldstein's attorney fees, or her
16 representing you in this proceeding, are being paid by the
17 Sheet Metal Workers?

18 A. Yes.

19 Q. And you are in total agreement with whatever the Sheet
20 Metal Workers position is as well in this litigation?

21 A. I didn't say that.

22 Q. Well, tell me if that's wrong. You said you had no
23 conflicts. You were in total agreement with the Sheet Metal
24 Workers about this case?

25 A. I am. I am in complete agreement that we put out for

1 ratification a complete document, including the SMART
2 constitution as it existed at the time. And it was changed
3 somewhat at our convention. I agree completely with that
4 provision.

5 Now, if there is conflicts that's out there that I
6 agree or disagree with, no, I haven't taken a position
7 either way on those.

8 Q. Isn't it a fact that Mr. Riley, who is on the staff, a
9 lawyer on the staff of the Sheet Metal Workers, sent an
10 e-mail to Clint Miller identifying some 40-odd conflicts
11 between the two constitutions while you were still
12 president?

13 A. There was a letter, an e-mail sent from Pat Riley to
14 Clint Miller, that basically indicated from Pat Riley these
15 look like possible conflicts between the two constitutions.

16 That was not sent to me from the general president,
17 Mike Sullivan. That was staff people handling something
18 from one staff person to the other, the legal department.
19 And we met on a couple of occasions, and none of those
20 issues were ever resolved or did we agree or disagree on any
21 of these issues.

22 Q. Okay. But you were made aware of that e-mail by Mr.
23 Miller, your general counsel, were you not?

24 A. Yes, after he received it, yes.

25 MR. FOX: I have no further questions.

1 THE COURT: Thank you.

2 On behalf of defendants, counsel, do you wish to
3 inquire?

4 MR. GUERRIERI: No questions, your Honor.

5 THE COURT: Thank you.

6 Any redirect of the witness?

7 Just one second, sir.

8 Do you have anything further, Ms. Goldstein?

9 MS. GOLDSTEIN: Yes, your Honor.

10 REDIRECT EXAMINATION OF PAUL THOMPSON

11 BY MS. GOLDSTEIN:

12 Q. With respect to the issue that you were just asked
13 about, about possible conflicts between the UTU and the
14 Sheet Metal Workers constitutions, in your opinion, is there
15 any -- in your opinion, is there any provision that is in
16 conflict that would affect the membership?

17 A. The only conflict that I can think of that would
18 affect the entire membership of the United Transportation
19 Union -- and it would be limited in scope as to how much
20 effect it would have -- would be the provision that was
21 passed by the delegates at the UTU convention regarding
22 strike benefits.

23 Q. And that was passed in 2007 at the August 2007
24 convention?

25 A. Yes, it was.

1 Q. And other than that, are you aware of any other
2 conflicts between the two constitutions that would affect
3 the membership?

4 A. Not that would affect the entire membership of the
5 UTU, no.

6 Q. Other than what is in the merger agreement itself, did
7 you reach any other agreements with the Sheet Metal Workers
8 regarding what would be in the SMART constitution?

9 A. Absolutely not. The entire merger document is all
10 that was agreed upon. There was no other side agreements,
11 secret agreements, or anything else that was agreed upon
12 between myself and Mike Sullivan or anybody on the
13 committees.

14 Q. Thank you.

15 THE COURT: All right. Thank you. Counsel --
16 sir, just one second. Counsel? I want to make sure no one
17 else has any questions based upon on your counsel's inquiry.
18 Any other questions?

19 MR. FOX: No, your Honor.

20 THE COURT: All right, sir. You may step down.
21 You're excused. Thank you.

22 (Witness excused.)

23 THE COURT: Counsel, you may call your next
24 witness.

25 MS. GOLDSTEIN: The next witness I would like to

1 call is John Babler.

2 JOHN BABLER,
3 of lawful age, a witness called by the Proposed
4 Intervenors, being first duly sworn, was examined
5 and testified as follows:

6 THE COURT: Adjust the microphone so your
7 testimony may be heard. Thank you.

8 Counsel, you may inquire.

9 MR. GOLDSTEIN: Thank you, your Honor.

10 DIRECT EXAMINATION OF JOHN BABLER

11 BY MS. GOLDSTEIN:

12 Q. Mr. Babler, what is your address?

13 A. 719 East Meadow Lane, Palatine, Illinois.

14 Q. Are you a member of the union?

15 A. Yes, I am.

16 Q. What union is that?

17 A. United Transportation Union.

18 Q. Since when have you been a member of the UTU?

19 A. For 38 years, since 1970.

20 Q. What positions have you held within UTU?

21 A. Local chairman, secretary/treasurer of the local,
22 legislative rep for the local, vice general chairman,
23 general chairman, alternate vice president, and my current
24 position is vice president -- vice president.

25 Q. As vice president you are now a member of the board of

1 directors?

2 A. That's correct.

3 Q. And could you briefly review your employment history
4 in the industry?

5 A. I started off as a switchman, brakeman, conductor,
6 fireman, locomotive engineer.

7 Q. And who were your employers?

8 A. Two employers, the former Chicago Northwestern which
9 was merged into Union Pacific.

10 Q. Now, you're currently, you said, a member of the board
11 of directors as a vice president?

12 A. Yes.

13 Q. How many members are there on the board of directors?

14 A. There are 11.

15 Q. What I would like to do is to go through the names of
16 the proposed intervenors in this case and see if you can
17 identify whether they're current members of the board of
18 directors.

19 A. Okay.

20 Q. That serve with you. Victor Baffoni?

21 A. Yes, he is a vice president.

22 Q. And that's a position that is a board position?

23 A. Yes, it is.

24 Q. James Brunkenhoefer?

25 A. He is our national legislative director, and position

1 on the board of directors.

2 Q. Roy Boling?

3 A. He is an international vice president and a member of
4 the board of directors.

5 Q. Tony Iannone?

6 A. International vice president, member of the board of
7 directors.

8 Q. J.R. Cumby?

9 A. International vice president, and a member of the
10 board of directors.

11 Q. And John Fitzgerald?

12 A. International vice president, and a member of the
13 board of directors.

14 Q. So together there are seven of you?

15 A. That's correct.

16 Q. And there are a total number on the board of 11?

17 A. Yes.

18 Q. So who are the other four?

19 A. President Mike Futhey, assistant president Arthur
20 Martin, and general secretary and treasurer Kim Thompson.

21 Q. And there is one more. Is there a Canadian vice
22 president?

23 A. There is a Canadian, and he is the -- I believe his
24 title is vice president legislative person.

25 Q. And he is from Canada?

1 A. Yes, he is.

2 Q. Were you a member of the board of directors prior to
3 January 1, 2008?

4 A. No, I was not. I lacked sufficient seniority to hold
5 that position.

6 Q. So you were a vice president but not one that served
7 on the board?

8 A. That's correct.

9 Q. Could you describe your interest in this case?

10 A. My interest in the case really revolves around that I
11 believe the merger is good for the membership. With the
12 Sheet Metal facilities around the country, it provides us an
13 opportunity for not only training our members for the
14 on-the-job training, but also training our union officers,
15 which is very critical to proper representation.

16 It also gives us more clout at the bargaining table.
17 As we are under the Railway Labor Act, and the final stage
18 always seems to be a Presidential Emergency Board if we
19 can't reach an agreement. It seems like more and more the
20 carriers are pushing us towards our settlements being made
21 by Congress or a PEB. So with the --

22 Q. PEB?

23 A. Presidential Emergency Board.

24 So with our additional political clout, I think we
25 would be the seventh largest PAC union out there, that would

1 give us considerable clout on Capitol Hill which would
2 actually deter the carriers from going to Congress to get
3 agreements and give us a chance at the bargaining table to
4 consummate a system for national agreements.

5 MR. FOX: Your Honor, same objection as before.
6 Going to the merits of why the merger other than why the
7 intervention.

8 THE COURT: Yes, please. Counsel, please, deal
9 with the intervention issue. That's the only issue before
10 me today.

11 MS. GOLDSTEIN: Your Honor, with all due respect,
12 one of the standards for invention is to demonstrate that
13 the intervenors have an interest in the litigation. And the
14 question that I asked Mr. Babler was to describe what his
15 interest in the case is.

16 THE COURT: And I allowed that question.

17 MS. GOLDSTEIN: Thank you.

18 THE COURT: As far as the ongoing questions,
19 please, I would like you to limit them to the specific issue
20 before me, the intervention issue as opposed and contrasted
21 with the merits of the claim, please. Thank you.

22 BY MS. GOLDSTEIN:

23 Q. How will the merger affect you personally?

24 A. I don't think it will affect me much different
25 than -- my title will probably change. I will have

1 basically the same duties that I do now as an international
2 vice president. There is a question whether the salary is
3 commensurate with my current salary. My take on it, it
4 would appear that the salary is less.

5 Q. Do you know Mike Futhey?

6 A. Yes, I do.

7 Q. Who is he?

8 A. He is the current international vice president of the
9 UTU.

10 Q. Current international vice president?

11 A. I'm sorry. He is the current president of the UTU.

12 Q. Do you know whether he shares your views regarding the
13 merger?

14 A. I don't believe he does.

15 Q. How do you know his views?

16 A. Through various sources. Initially it appeared that
17 he supported the merger. We were all together on the
18 merger. After our convention, we had a meeting in December
19 in Washington, DC with all of the Sheet Metal people. It
20 appeared that all was well with the merger, although we were
21 hearing rumblings from the plaintiffs that they were going
22 to try to sue to block the merger.

23 My first real tell, I believe, was January 1 or
24 January 2 after the BART decision where there was an article
25 on our UTU official Web site that referred to the merger as

1 a shotgun wedding and was derogatory towards the merger.

2 Q. And who posted that shotgun wedding posting on the UTU
3 Web site?

4 A. It was posted by President Futhey.

5 Q. And did you see that on January 1?

6 A. It was either January 1 or January 2.

7 Q. And what did you do when you saw that?

8 A. I had concerns, and I contacted some of the vice
9 presidents as to what they were hearing and wondering where
10 the merger was headed in light of the recent Court decision,
11 and it appeared -- I expressed concern that I didn't think
12 our top officer of the union was going forward with the
13 merger in the manner in which it was consummated.

14 Q. And on January 3, did you attempt to reach Mr. Futhey?

15 A. Yes, I did. I called our headquarters in Cleveland.
16 I was told he wasn't in.

17 The reason for the call was I wanted to find out what
18 our position was going to be the following day on the
19 conference call with the Judge as to whether we were still
20 supporting the merger.

21 And I was told Mr. Futhey wasn't in. I asked to be
22 connected to our general counsel, Clint Miller. He would
23 not give me a commitment as to what the official position of
24 the president was going to be. And at that point in time, I
25 had some real concerns as to whether anybody was supporting

1 the movement or the merger movement in the office of
2 Cleveland.

3 Q. And did you talk with anyone else in the Cleveland UTU
4 headquarters that day?

5 A. Yes, I knew that Vice President Jim Cumby was in the
6 office because I had talked to him earlier that day on other
7 matters, and I indicated to him, find out what's going on in
8 there because it appears that our general counsel and our
9 president are not supporting the merger.

10 And I said, I just called looking for the president
11 and I was told he wasn't in. And Jim expressed to me
12 that --

13 Q. Jim Cumby?

14 A. -- Jim Cumby expressed to me that President Futhey
15 was in fact in, and he said he would go down and talk to the
16 general counsel and let me know what the outcome of that
17 conversation was.

18 Shortly after that, Jim Cumby had called me back
19 indicating that the general counsel had taken a position
20 that wouldn't tell him anything.

21 Q. Did you speak with any of the other members of the
22 board of directors that day?

23 A. Yes. Shortly after that, I believe I got a call from
24 the national legislative director, James Brunkenhoefer. He
25 expressed the same concerns that I was feeling, that it

1 appeared that the international president and the general
2 counsel were no longer supporting the merger.

3 Q. And what did you do as a result of these various
4 communications?

5 A. We discussed the fact that as members of the board of
6 directors we felt that if there was a change in the position
7 of the international's merger, that it should have been
8 agreed upon by the board of directors. At which time I said
9 I believe we need to send a letter to the president, asking
10 him to continue to support the merger that was consummated
11 by the membership and voted upon. At which time, I drafted
12 a short letter and e-mailed it to the international
13 president, and I forwarded it to the other board of
14 directors.

15 Q. Did you get a response to the letter that you sent to
16 Mr. Futhey?

17 A. In a roundabout way. The following day there was a
18 Web site article on our UTU official Web site. It was
19 derogatory. It was attacking us. It basically said: Let
20 them explain themselves.

21 Q. And who was the "them"?

22 A. Referring to the seven of us that sent the letter
23 supporting -- asking him to support the merger that the
24 membership voted for. It would be the seven intervenors or
25 the seven vice presidents.

1 Q. So that was on January the 4th?

2 A. Yes.

3 Q. And what was your reaction to that?

4 A. I was somewhat annoyed. First of all, it was an
5 internal correspondence that went to the president, and I
6 didn't feel that airing it on the Web page and personal
7 attacks were very appropriate, particularly as a member of
8 the board of directors. There is no point in airing our
9 dirty laundry.

10 Q. And what did you do in response to when you saw the
11 Web posting on January 4?

12 A. Throughout the day then we -- you know, either I
13 contacted members of the board of directors or they
14 contacted me, and we at that point in time discussed that it
15 appears we were going to need some legal help to get this
16 merger consummated that was voted for by the membership.

17 Q. Still sticking with that Friday, January 4, did you
18 have a communication with all of the members of the board of
19 directors that day?

20 A. Yes. Well --

21 Q. All of the seven of you?

22 A. The seven of us set up one of these 800-type number
23 conference calls, and we expressed our concerns.

24 Q. And what was the upshot of that conference call on
25 January 4?

1 A. The upshot of that was that we felt that we were going
2 to have to push forward through some legal action to have
3 the merger implemented as drafted, and that we probably
4 needed to start looking for some legal advice and an
5 attorney.

6 Q. After that, did you have another conference call on
7 January 7?

8 A. That would have been the following Monday. We had a
9 conference call again, at which time there was the seven
10 potential intervenors on the conference call and a couple
11 representatives from the Sheet Metal Union, I believe,
12 President Sullivan -- General President Sullivan was there,
13 general secretary and treasurer was on there, and I believe
14 Pat Riley, their general counsel, was on the call, too.

15 Q. And why were the representatives of the Sheet Metal
16 Workers on the call?

17 A. We were looking to see if we could get financial help
18 to continue with the merger.

19 Q. And did you know at that time what the Sheet Metal
20 Workers position would be with respect to the merger?

21 A. We had asked General President Sullivan if he still
22 wanted to go through with the merger. He indicated that he
23 did, and he felt it was good for both organizations.

24 Q. Was there a decision made about how to proceed on that
25 call?

1 A. There was a decision made to have counsel, yes.

2 Q. Did you engage counsel to represent you?

3 A. Yes. It was you, Ms. Goldstein.

4 Q. And who is paying your attorney's fees?

5 A. The attorney fees are being paid by Sheet Metal
6 Workers.

7 Q. Now, early on in this matter, did you review and
8 approve a joint representation agreement that was signed by
9 me, as your lawyer, and lawyers for the Sheet Metal Workers
10 agreeing that we would all work together to implement the
11 merger and protect our communications as privileged?

12 A. Yes, I did review it.

13 Q. And was it discussed and approved by all of the
14 proposed intervenors?

15 A. Yes, I believe it was.

16 Q. Is there any conflict of interest between you and the
17 Sheet Metal Workers regarding the implementation of the
18 merger?

19 A. None that I know of.

20 Q. Have you actively participated in all decisions that
21 have been made in this case regarding the litigation?

22 A. Yes, I have.

23 Q. How have decisions been made regarding the positions
24 that have been taken in the litigation?

25 A. As a consensus of the other six individuals that are

1 potential intervenors.

2 Q. The other six, when you say the other six, you mean
3 the other six vice presidents?

4 A. Yes.

5 Q. And how about Mr. Thompson?

6 A. Not normally, in that Paul is not normally on the
7 conference calls, but he has been on some of them, yes.

8 Q. Has any -- has he been on e-mail communications?

9 A. Yes, yes.

10 Q. Has any official from the Sheet Metal Workers Union
11 influenced you regarding any positions you've taken in this
12 litigation?

13 A. No.

14 Q. How many board of directors meetings have you
15 attended?

16 A. Only one, the one in April of this year.

17 Q. Was there discussion at that April board meeting about
18 this case and the UTU's position in this case?

19 A. Yes, there was. And there was also a petition put out
20 that we should -- that the seven of us put out asking that
21 there be made a record that we do certain things to
22 consummate the merger.

23 Q. When you say petition, can you describe what you mean
24 by that?

25 A. We drafted a document outlining various steps that we

1 felt as the board of directors that should be followed to
2 get this process moving and this merger consummated. It was
3 a six-part petition.

4 Q. And who signed it?

5 A. Eight -- seven vice presidents signed it and the
6 national legislative director.

7 Q. So in addition to the seven proposed intervenors who
8 are members of the board of directors, was there an
9 additional member of the board of directors who signed that?

10 A. Yes, the Canadian agreed to sign it.

11 Q. So there were eight of the eleven members of the board
12 of directors that signed the document regarding what
13 position to take in this case?

14 A. That is correct.

15 Q. And the position that was being urged in that document
16 was what?

17 A. To consummate the merger as negotiated and ratified.

18 Q. At your board meeting, was that document discussed?

19 A. Briefly. We were ruled out of order by the officer
20 conducting the meeting. We disagreed. And that's the
21 reason we reduced it to writing and voted to make it
22 a -- requested that it be made part of the record.

23 Q. And the officer that you referred to is Mr. Futhey?

24 A. I don't remember if it was Mike Futhey that denied it
25 or the officer that was assistant president, Artie Martin,

1 who was holding the meeting at the time, and he ruled us out
2 of order.

3 Then later, at the end of the meeting, when Mike
4 Futhey was present, we again brought up the subject matter,
5 and he said that it wasn't part of the agenda.

6 There was no agenda that day. We never saw an agenda.
7 And it's commonplace that we bring up things at the board
8 session as board members to address the concerns of the
9 membership.

10 Q. Did Mr. Futhey agree to honor that resolution?

11 A. To my knowledge, no.

12 Q. What outcome are you seeking in this case?

13 A. The outcome I would like to see is the merger
14 consummated as it was negotiated and ratified by our
15 membership.

16 Q. And why did you decide to attempt to intervene in the
17 case?

18 A. I feel it's my obligation as a member -- as a union
19 officer and a member of the board of the directors to follow
20 through with the mandate of the membership who ratified the
21 agreement.

22 Q. And how strongly do you feel about this?

23 A. I feel very strongly. I've essentially, through
24 various threats, had my job put at risk, a threat of
25 termination, they filed charges against us, we have been

1 deluged with just a ton of very derogatory e-mails, that
2 sort of thing.

3 Q. Thank you. I have no further questions.

4 THE COURT: Thank you, counsel.

5 On behalf of plaintiff, sir, you may cross-examine.

6 CROSS-EXAMINATION OF JOHN BABLER

7 BY MR. FOX:

8 Q. Mr. Babler, you said it was your take, I believe is
9 the way you phrased it, that you would make less money if
10 you were part of SMART than if you continued to be a vice
11 president of the UTU; is that correct?

12 A. That is correct.

13 Q. How much money -- what was your annual salary as a UTU
14 vice president currently?

15 A. 139, and then under the SMART it would be 114. But
16 they have different ways they pay per diem, which is
17 basically some type of expense money.

18 Q. And isn't the per diem \$35,000 a year over and above
19 your salary?

20 A. I don't know the exact number. If that is what it is,
21 I never did figure it out.

22 Q. And do you not also get another \$9,000 as an
23 automobile allowance? You would get that if you were part
24 of SMART?

25 A. That is true.

1 Q. And adding those three numbers up, 114, 35 and 9 comes
2 to 158 which is considerably almost \$20,000 more you would
3 receive from SMART than if you were to continue under UTU;
4 is that not correct?

5 A. It is not correct. The gross number is more, but the
6 fact is that the per diem covers expenses that are otherwise
7 covered -- that are fully covered now. So when you get your
8 per diem and in turn you spend your per diem, it's coming
9 right out of pocket.

10 Q. Mr. Babler, you were furnished with a discovery
11 request, interrogatory requests and production requests by
12 myself, were you not?

13 A. I believe I was, yes.

14 Q. And you submitted financial information that you had
15 received from Mike Sullivan back in early December when you
16 met with him; is that not correct?

17 A. Yes, that would be our pay schedule.

18 MR. FOX: May I approach, your Honor?

19 THE COURT: Yes, sir, you may.

20 BY MR. FOX:

21 Q. Is this, Mr. Babler, a copy of the financial package
22 you received from the Sheet Metal Workers in early December?

23 A. It would appear to be, yes.

24 Q. Now, directing your attention to -- well, this is
25 marked PRD 0037. The numbers I quoted to you a moment ago,

1 are these not reflected here, the 114,000 salary, base
2 salary, 35,000 and \$40 per diem, another \$9,000 for
3 automobile allowance, and then it also lists three percent
4 of salary to a 401(k), and that would be the employers
5 contribution; am I right?

6 A. If I contributed into the 401(k), yes.

7 Q. Now, you said a moment ago that your per diem would be
8 eaten up by expenses that you would incur; is that right?

9 A. Yes, some of it would be, yes.

10 Q. Directing your attention to page -- what is on this
11 document noted as 42, that is a page headed Expense
12 Reimbursements. In fact, doesn't the Sheet Metal Workers
13 reimburse employees for their expenses above and beyond this
14 per diem?

15 A. Not all of them.

16 Q. And in fact, on page 44, it identifies exactly what is
17 covered by the per diem and what they will compensate you
18 for in addition to the per diem; is that correct?

19 A. Yes.

20 Q. Who is paying your attorney fees in this case?

21 A. As I stated earlier, the Sheet Metal Workers.

22 Q. And you have signed a retainer agreement with them?

23 A. I have signed a retainer agreement with Ms. Goldstein.

24 Q. Now, you said that there was a conference call, I
25 believe, with Mike Sullivan and other people in the Sheet

1 Metal Workers. Did you say that was on the 7th of January?

2 A. Yes, I believe it was.

3 Q. And who set up that conference call? Who made the
4 arrangements?

5 A. I believe Vice President Iannone set it up.

6 Q. And so who drew in our made the arrangements to have
7 the Sheet Metal Workers officers participate?

8 A. I'm not sure.

9 Q. Could it have been Ms. Goldstein?

10 A. I don't know.

11 Q. Now, you referred to decision-making, and that you had
12 participated in all decision-making with regard to your
13 participation in this lawsuit; am I right?

14 A. That's correct.

15 Q. And I believe you said you didn't -- you have not
16 received, is this correct, any communications from the Sheet
17 Metal Workers or any of their agents, their lawyers, about
18 how to proceed in this case?

19 A. Not to my knowledge.

20 Q. Okay. But you have had extensive discussions, I
21 assume, with your own lawyer; is that correct?

22 A. Yes.

23 Q. That's Joyce Goldstein?

24 A. Yes.

25 Q. And she is being paid by the Sheet Metal Workers?

1 A. Yes, she is.

2 Q. So you don't really know, for example, whether the
3 recommendations she's made to you were recommendations that
4 she received from the Sheet Metal Workers? You just know
5 that they came from her?

6 A. I know they came from her as our counsel.

7 Q. You said you had seen a joint representation
8 agreement?

9 A. Yes.

10 MR. FOX: This document is already in the record
11 as document 79-4. Rather than giving it a new exhibit
12 number -- I'm happy to do that, your Honor, if you would
13 like us to -- fine.

14 May I approach the witness and just let him --

15 THE COURT: Yes, sir, you may.

16 Q. Take your time and look at that document. And tell
17 me, please, if that is the document that you were referring
18 to earlier?

19 A. It appears so, yes.

20 Q. And the document that you saw, like the one you have
21 in front of you, had signatures on the last page?

22 A. Yes, it does.

23 Q. And do you know when you reviewed and approved that
24 document? Can you fix a time in your mind?

25 A. In my mind, early January.

1 Q. Really? You're sure of that? If you're not sure, now
2 is your time to --

3 A. I really don't know. I honestly couldn't pin it down
4 to --

5 Q. Could it have been a month or so ago?

6 A. No.

7 Q. Now, you said that you attended board meetings in
8 early April, would that be correct?

9 A. I believe it was April 1, yes.

10 Q. And that is when you and the other six vice presidents
11 expressed your view, the views that you testified to earlier
12 this morning?

13 A. Yes.

14 Q. And you said that later on, I believe, you said that
15 your position got reduced to writing and submitted for the
16 record?

17 A. We reduced what we wanted as board of directors to
18 happen with the merger, and we made a motion to put it on
19 the floor at the board of directors meeting.

20 Q. That was verbal or written?

21 A. It was written.

22 Q. So a written document reflecting your position was
23 presented at that meeting?

24 A. Yes.

25 MR. FOX: No further questions.

1 THE COURT: Thank you.

2 Counsel, do you have any follow-up?

3 I'm sorry. Before I do that. I apologize. Counsel
4 for defendant, do you have any questions?

5 MR. GUERRIERI: No questions, your Honor.

6 THE COURT: Thank you, sir.

7 Ms. Goldstein.

8 REDIRECT EXAMINATION OF JOHN BABLER

9 BY MS. GOLDSTEIN:

10 Q. Mr. Babler, just regarding the issue of the per diem
11 and the expenses, in your position how much traveling do you
12 do?

13 A. I travel extensively. From the first of the year I've
14 traveled -- I'm not saying every day, but virtually every
15 week. I live in the suburbs of Chicago, so I have to get to
16 O'Hare. That's usually a 40 to 45 dollar cab ride, which
17 just is one the items that really isn't covered. And if you
18 park at O'Hare it's anywhere from 32 to 34 dollars a day
19 parking. And that's another item that is not covered.

20 And the other thing with the per diem, albeit it's 96,
21 after taxes and that, you net about 60 dollars of that. And
22 now a trip to the airport just ate up, for example, 45
23 dollars of that.

24 Q. Thank you.

25 MR. FOX: Your Honor, I don't have extra copies

1 of this Plaintiff's Exhibit 27, but I would like to move its
2 admission.

3 THE COURT: We will take a break, sir, and we
4 will deal with the admission of exhibits in a moment. At
5 the break we'll have copies made.

6 I have one question, sir, before we allow you to step
7 down.

8 With regard to this -- I will call it a merger motion
9 that you presented in writing at the April 1 meeting, is
10 there a copy of that available, or are you familiar with the
11 demands that you made verbally?

12 THE WITNESS: I don't have a copy with me. My
13 attorney may have it.

14 THE COURT: Do you recall specifically the
15 demands that were made?

16 THE WITNESS: Yes. It involved six items, most
17 dealing with the merger. We asked Mike to comply with the
18 time table to start meeting with the General President
19 Sullivan in order to start resolving some of the issues.

20 THE COURT: Do you know the rest of them, or do
21 you recall the others?

22 THE WITNESS: Some dealt with appointing
23 designated legal counsel. It's been a problem for this
24 union over the years. And we wanted to put together a board
25 of ethics to handle that sort of issue. Without the

1 document in front of me -- they all -- I think, I believe
2 the first four things dealt with the merger, various steps
3 we wanted to see, and an issue dealing with the board of
4 ethics.

5 THE COURT: Thank you.

6 Ms. Goldstein, do you wish to --

7 MS. GOLDSTEIN: Your Honor, I believe that that
8 document was submitted as an exhibit to our reply brief in
9 support of the motion to intervene.

10 THE COURT: All right. Thank you.

11 MR. FOX: Your Honor, it is document 87-8.

12 THE COURT: All right. Thank you.

13 Sir, you may step down.

14 You have no other questions, I take it, Ms. Goldstein.

15 (Witness excused.)

16 THE COURT: We are going to take about 15
17 minutes, ladies and gentlemen, allowing the clerk to make a
18 copy of the last document that was referenced and allow the
19 court reporter a brief break.

20 So we will stand adjourned until approximately 10:45,
21 and we will reconvene at that time, please.

22 Thank you very much.

23 (Recess taken, 10:03 a.m. until 10:50 a.m.)

24 THE COURT: Counsel for the intervenors, you may
25 call your next witness, please.

1 MS. GOLDSTEIN: I would like to call Tony
2 Iannone.

3 THE COURT: Thank you.

4 TONY IANNONE,
5 of lawful age, a witness called by the Prospective
6 Intervenors, being first duly sworn, was examined
7 and testified as follows:

8 THE COURT: Be seated in the witness stand, if
9 you would. Adjust the microphone so your testimony can be
10 heard, sir.

11 Counsel, you may inquire.

12 MS. GOLDSTEIN: Thank you.

13 DIRECT EXAMINATION OF TONY IANNONE

14 BY MS. GOLDSTEIN:

15 Q. Where do you live, Mr. Iannone?

16 A. 319 Huffman Drive, Exton, Pennsylvania.

17 Q. Are you a member of the union?

18 A. Yes, I am a member of the UTU since 1970.

19 Q. What positions have you held with the UTU?

20 A. I hired on as brakeman in 1970, railroad brakeman. I
21 was elected to office in 1986 as a local chairman. In 1992,
22 I was elected general secretary to a general committee
23 adjustment. Later on I was elected vice general chairman.
24 In 1999 I was elected international vice president,
25 reelected, and presently serving as international vice

1 president and a member of the board of directors with the
2 United Transportation Union.

3 Q. Could you describe your views regarding the merger
4 between the UTU and the Sheet Metal Workers?

5 A. My views regarding the merger, to put it very simply,
6 it was a good thing for the members. It was negotiated by
7 President Thompson. It was unanimously approved by the
8 board of directors. It was put out to the membership for
9 ratification, and it passed.

10 And my view is I was looking forward to the
11 implementation of the merger January 1, 2008.

12 Q. And have you been familiar with the Sheet Metal
13 Workers International Association prior to the merger
14 discussions?

15 A. Yes. I've always had a working relationship. Because
16 of my assignments over the years, I have always established
17 a good working relationship with other unions.

18 The reason why I had a good relationship with Sheet
19 Metal Workers was because we had common interests. We
20 shared assignments together. And in my neighborhood in
21 Philadelphia, Local 19 is a recognized organization, and
22 it's --

23 Q. Local 19 of the Sheet Metal Workers?

24 A. Of the Sheet Metal Workers, I'm sorry.

25 And we worked together on many assignments.

1 Prior to the merger agreement, we -- I utilized the
2 facility in New York and New Jersey and Philadelphia.

3 Q. What kind of facility?

4 A. The union halls, for instance, we held meetings there.
5 And I worked with Dewey Garland who was the president -- no.
6 He is the director of the transportation division of the
7 Sheet Metal Workers. I worked with him for the past 15
8 years. I worked with Richard Ziegler. He is the general
9 chairman of the Sheet Metal Workers in the midwest. And
10 Paul Corts out of New York. We just -- we share
11 assignments. I have had assignments on the various
12 passenger committees, and they also share those assignments.

13 Q. What do you mean passenger committees?

14 A. General chairmen that had jurisdiction over, for
15 instance, METRA, SEPTA, AMTRAK, Boston Transit, and VCR.
16 We -- presently we are working with the Sheet Metal Workers
17 in New York on a METRA North assignment. And we are
18 organizing efforts up there. We are trying to organize our
19 members up there -- I should say our former members up there
20 in the METRA unit.

21 Q. Why former members?

22 A. They had left the UTU and gone to an independent
23 union.

24 Q. Sir, how do you believe that a merger would benefit
25 the membership?

1 A. Oh, the resources are -- well, the UTU is -- excels in
2 the area of Railway Labor Act. We do a fantastic job there.
3 We don't have as much resources in the area of organizing,
4 for instance. Sheet Metal Workers excel in that area.

5 As far as training the local officers, I think the
6 Sheet Metal Workers have better resources than what we do.

7 Legislatively, we share common interests. We've
8 worked with the Sheet Metal Workers as well as the other
9 unions over the years on many legislative issues. For
10 instance, railroad retirement. That was a big issue for us.
11 And they were very instrumental in working with us in that
12 area.

13 Q. How would the merger effect you personally?

14 A. Minimal effect. I would say -- I'm not very good in
15 this particular area as far as my pay is concerned. My wife
16 usually takes care of that. I never cashed a check since I
17 was 18 year old, so you have to forgive me.

18 I think my base salary would be reduced overall.
19 There would be -- the Sheet Metal Workers handle their
20 expenses differently than the UTU. In the UTU, my base
21 salary would be about \$140,000, and then we would get
22 reimbursed for money that we put out for expenses.

23 In the Sheet Metal Workers, I believe the base salary
24 would be probably somewhat less than that. I don't know
25 exactly how much less. And they give us -- they would

1 provide us expense money up front. Whatever we don't spend,
2 then we would -- that would be taxable.

3 So overall it's probably a wash.

4 Q. Now, directing your attention to the January 1 UTU Web
5 posting regarding the shotgun wedding, did you see that?

6 A. Yes. It was e-mailed to me by someone. I don't
7 remember who.

8 Q. Does the UTU have an e-mail alert system?

9 A. Yes, I'm part of that. But I remember that particular
10 item because it was brought to my attention by someone,
11 another officer. And I was -- I was disappointed. I was
12 disappointed that, obviously, that the new administration
13 had decided not to support the merger.

14 Q. And after you saw that e-mail, what did you do?

15 A. Well, probably within a day I -- the first call I made
16 was to my good friend Roy Boling. I called Roy up, asked
17 him what he thought. He was upset.

18 Q. Roy is a vice president?

19 A. I'm sorry. He is another international vice
20 president. I've worked with him since 2000. We have a good
21 working relationship. We are quite friendly with each
22 other. We share each other's experiences, and we share
23 opinions. And I rely on him for -- he's senior to me in
24 many ways, and I rely on him for direction and advice.

25 And his advice was that, you know, we're members of

1 the board of directors. We are the new board of directors,
2 so we're going to have to get involved in this. And I
3 agreed with him.

4 And our opinion was that, you know, we should sit down
5 with the president and work this thing out because the
6 former board of directors had made a decision that was
7 ratified by the membership.

8 So we wanted to protect the UTU from further
9 litigation. That was first down on our list. And we needed
10 to support the vote of the members. And we felt that was
11 paramount in our decision.

12 Q. And did you talk to any of the other members of the
13 board at around that time?

14 A. Yes.

15 Q. After the first of the year, who else did you talk to?

16 A. I talked to Broken Rail.

17 Q. Who is Broken Rail?

18 A. James Brunkenhoefer.

19 Q. His nickname is Broken Rail?

20 A. Yeah. His nickname is Broken Rail. That's another
21 person that I rely on for advice because over the years my
22 working relationship with him is very important. So we
23 shared opinions. We don't always agree, but in this
24 particular situation, we did agree that we needed to protect
25 the vote of the membership.

1 Q. And did you do anything to try to reach out to either
2 Mike Futhey or Clint Miller or anyone else who was part of
3 the administration of the union?

4 A. I think it was January the 3rd I did reach out to
5 another good friend, Clint Miller. And my concern -- I
6 approached him in this way. I asked him if there was
7 anything I could do to help him promote the merger, and if I
8 needed to do something to assist, because I knew that there
9 was going to be a conference call regarding the merger on
10 January the 4th --

11 Q. With the Court?

12 A. With the Court. And I wanted to -- whatever I could
13 do to help, please advise me. His response was, I would
14 say, nonresponsive. He just did not react.

15 And I was -- he didn't have to hit me in the head with
16 a two-by-four. I knew we were in trouble as far as the
17 merger was concerned.

18 So the next step was to go back to Roy and talk to Jim
19 Brunkenhoefer and see what we can do. Because we felt -- I
20 felt, as a member of the board of directors, I wanted to do
21 whatever I had to do to uphold my responsibility as a member
22 of that board.

23 Q. So on January 3, prior to the January 4 call with the
24 Court, did you communicate your views to Mike Futhey?

25 A. Prior to January the 3rd?

1 Q. No, not prior to January the 3rd. On January 3?

2 A. No, I did not.

3 Q. Did you send an e-mail or a letter?

4 A. Yes. We did. And I said we did, and I need to
5 clarify that. It was suggested that we sign -- I forget who
6 it was. It may have been Roy or Jim -- that we sign a
7 letter. And I didn't like that idea. I thought it best
8 that we sent our letters individually.

9 And the basis of the -- the intent of the letter was
10 very simple. It was to request to be part of the process.
11 As members of the board, we wanted to be part of the
12 process.

13 I may be wrong about this. I believe it's under
14 Article 23 of the UTU constitution that, you know, anything
15 affecting a merger with another organization, that we needed
16 to be part of that process. And we requested to be made
17 part of that process.

18 And I copied Clint Miller, and I copied Artie Martin,
19 and Kim Thompson and naturally the other members of the
20 board.

21 Yes, so I did write a letter to President Futhey.

22 Q. And did you e-mail that to him?

23 A. I e-mailed it to him. As a matter of fact yes, I did
24 e-mail. I never mailed it. And I got a return response
25 that they received it.

1 Q. And did you get a response back from Mr. Futhey to
2 your communication?

3 A. No. No. The only response we got -- well, that was
4 the next Web site article. That was the "let them explain
5 themselves." And from that point on it was downhill for me.

6 Q. So the "let them explain themselves" was a January 4
7 Web posting?

8 A. Yes.

9 Q. By Mr. Futhey?

10 A. The posting, really, that was the capper for me.
11 Well, because there was no doubt in my mind that the
12 administration had joined the plaintiffs and that we were on
13 our own as far as those of us who supported the merger,
14 those of us including the members.

15 Q. And what did you do at that point? We're still on
16 January 4.

17 A. January 4, I think I made arrangements somehow to
18 conference the other members of the board of directors. I
19 went to the general chairman's office in Philadelphia, made
20 arrangements to talk to everyone so that everyone could
21 share opinions. Because we really didn't know each other.
22 I did not have a working relationship with John Babler or
23 Jim Cumby. I knew Jim Cumby, but I never shared assignments
24 with him.

25 Q. Was that because you just all became collectively

1 members of the board of directors as of January 1?

2 A. Yes. And we were somewhat naive in the process as
3 members of the board of directors. There is seven of us.
4 Only one, James Brunkenhoefer, was a former board member.
5 The rest of us did not -- we had no idea how the process
6 worked.

7 So I felt as though there was a little bit of
8 education involved here, and I encouraged the idea of
9 conference calls.

10 And once -- because we had to get to know each other.
11 And we needed a comfort zone and we needed to know -- we
12 needed to have a consensus of what to do next, how to
13 approach this, what do we do?

14 And all of us agreed -- it was amazing that all of us
15 came together with the same intent to protect the rights of
16 the members who voted for it. And, you know, we felt, those
17 of us, believed that we needed to protect the organization
18 from further litigation.

19 Q. So what happened on that January 4 conference call?

20 A. Well, it was decided -- and I think I took over the
21 responsibility of setting up another conference call with
22 the Sheet Metal Workers, having a good working relationship
23 with some of those guys. I never met Mike Sullivan. Well,
24 I met him in June for a short time. I never had a
25 relationship with him. But I felt as though -- and I took

1 it upon myself. I think we needed to know whether they were
2 willing to go down the road with us, at least give us some
3 sort of support.

4 We, you know, we just needed some direction because,
5 obviously, we could not use Clint Miller anymore, because we
6 viewed him as being on the other side.

7 So we set up a conference call, and --

8 Q. A second conference call?

9 A. A second conference -- yeah. It was 6:30. It was
10 6:30 on a Monday night.

11 Q. January the 7th?

12 A. January the 7th, and it was on a call, I think Mike
13 Sullivan was on the call, Pat Riley.

14 Q. Counsel for the Sheet Metal Workers?

15 A. Yes, and then there was another attorney, Stevenson.

16 Q. Arlus Stephens?

17 A. Arlus Stevenson. And it was just general conversation
18 and nothing remarkable, I would say. But when they dropped
19 off, we asked them to drop off --

20 Q. "They" being?

21 A. The Sheet Metal Workers. Then we talked amongst
22 ourselves.

23 Q. Before you get to that, when Mike Sullivan was on the
24 call, the president of the Sheet Metal Workers, what did he
25 say?

1 A. He didn't say too much except that if we were willing
2 to continue to support the merger, he would, you know,
3 provide any resources he could, whatever he could do for us,
4 that it was -- he didn't elaborate, to tell you the truth.

5 That concerned us because I remember afterwards we
6 talked and we still were not convinced exactly how we were
7 going to approach this.

8 Q. So when -- I interrupted you. You started to say that
9 the Sheet Metal Workers representatives left the call and
10 you all, the seven of you, continued on the call?

11 A. Yes.

12 Q. And then what happened?

13 A. Then we talked about, oh, my goodness, we were more
14 concerned about the political backlash than anything else.
15 You know, were we willing to go through this road to hell,
16 and why would we be willing to do that? And in fact at one
17 point, I believe it was Brunkenhoefer suggested that we all
18 just forget about it, let him go on by himself. And we
19 said, no -- well, I said no. There was no way. I really
20 believed that this was a merger that had benefits for the
21 membership. It was time for rail and labor to come
22 together. I mean, it's a simple concept, but very difficult
23 to implement. It's easily said, but try to make it happen.
24 Very difficult.

25 And that is something that I think all of us agree

1 that it was time for rail and labor to come together, and we
2 wanted to make sure that the UTU led the way.

3 Because I was very familiar with the fact that other
4 rail unions were looking at this whole process. They were
5 watching us. And they were waiting for us to make that
6 decision. And there would be no reason not to expect that.
7 You know, we had the right people in the right place, at
8 least I thought we did.

9 Q. So what was -- was there any decision made on that
10 call after the Sheet Metal Workers dropped off of it?

11 A. Yes. We made a decision that we would go forward,
12 and -- I don't know exactly. Now I'm in an area that I just
13 don't recall specifics. But I do remember that -- I think I
14 had a conversation with Arlus Stevenson. And this is where
15 I get really confused because I didn't pay attention.

16 I do know that as far as -- it was -- I can't remember
17 how we got your name. I just don't remember. But I do
18 remember signing a retainer with you to represent us.

19 And it gets very confusing for me because the UTU are
20 defendants in this case. But I do remember that your name
21 was mentioned during a conversation because you represented
22 Paul Thompson. And you were recommended by Clint Miller.
23 So I think that's how we basically connected with you and
24 retained you as our attorney.

25 Q. Who is paying your attorney's fees?

1 A. The Sheet Metal Workers.

2 Q. And early on in this case, did you review and approve
3 a joint representation agreement that I had signed as well
4 as Arlus Stephens?

5 A. Yes.

6 Q. And Patrick Riley?

7 A. Yes.

8 Q. And do you recall that being discussed and approved by
9 all of the proposed intervenors?

10 A. Yes. Whatever we -- whatever I did, we did together.
11 No one walked -- broke branch here. We shared
12 constant -- the idea of the conference calls were very
13 important, I thought, the constant communication.

14 Q. Is there any conflict of interest between you and the
15 Sheet Metal Workers Union with respect to the implementation
16 of the merger agreement?

17 A. No.

18 Q. Is there any conflict of interest between you and the
19 Sheet Metal Workers with respect to the position that you're
20 interested in taking in this case?

21 A. No.

22 Q. Have you had any conversations with Mike Sullivan
23 about your participation in this case?

24 A. Yes. Yes.

25 In fact, I met Mike Sullivan, maybe, a couple months

1 ago at a social affair in Philadelphia. And he was
2 just -- he just basically said as long as you guys are
3 willing to, you know, to go forward with this, he was going
4 to support us. In fact, Roy was there. Roy and I were both
5 there, Roy Boling, the other international vice president.

6 Q. What outcome are you seeking in this case?

7 A. To affect the merger, to implement the merger
8 agreement as presented.

9 Q. And why did you decide to attempt to intervene?

10 A. On a personal level, I think it's the right thing to
11 do. I don't think that, with all due respect -- with all
12 due respect to my president, to Mike Futhey, I think that I
13 would be the proper intervenor on behalf of the members. I
14 think that -- and I respect his opinion, but at the same
15 time, I think his position by supporting the plaintiffs is
16 wrong.

17 Q. Do you personally risk anything by seeking to
18 intervene in this case?

19 A. Personally? No. I'm very comfortable with my
20 decision. I don't -- I mean, I've got the support of my
21 wife and my family. I'm very comfortable.

22 Do I risk anything? Well, reputation-wise, yes. You
23 know, I've been charged. There are internal charges. I'm
24 subject to expulsion. I could lose my job. But, you know,
25 I've got an electrician's license, so I can do that. I'm

1 very comfortable where I'm at in life.

2 Q. Thank you.

3 A. Thank you.

4 THE COURT: Counsel, you may cross-examine on
5 behalf of plaintiffs.

6 MR. FOX: Your Honor, before I begin,
7 housekeeping matter. It's 11:15, and the order of the Court
8 signed on May the 14th said that time is being divided
9 equally among the three parties. And I just don't know how
10 much longer the intervenors' counsel is planning to go or
11 how many more witnesses she plans to put on.

12 And it would be helpful for me if I knew that before I
13 begin cross of this witness.

14 THE COURT: Well, we will ask. I've been keeping
15 contemporaneous time, so I do have running totals of time.
16 So, do some quick math again. I will hold counsel strictly
17 to the two hours that we referenced, and I've been keeping
18 tabs of the time you have been using for cross-examination,
19 so there is sufficient time. Go ahead.

20 CROSS-EXAMINATION OF TONY IANNONE

21 BY MR. FOX:

22 Q. Mr. Iannone, you said that during your conference call
23 on January the 7th, that you had set up -- am I correct?

24 A. Yes.

25 Q. And that on that conference call were Mike Sullivan

1 and Pat Riley from -- and was this Arlus Stephens also on
2 that conference call?

3 A. I believe so.

4 Q. And when was the first time -- when and how does the
5 name Joyce Goldstein first come up? Did it come up during
6 that conference call?

7 A. No, sir. I don't think so.

8 Q. That was on the 7th?

9 A. On the 7th.

10 Q. You signed a retainer agreement with Joyce Goldstein,
11 right?

12 A. Yes.

13 Q. And do you recall when that was?

14 A. No.

15 MR. FOX: May I approach and show the witness
16 document number 71-4, pages 22 through 24, which is the
17 retainer agreement?

18 THE COURT: Yes, sir, you may.

19 Q. Now, is this the retainer agreement that you in fact
20 signed with Joyce Goldstein?

21 A. Yes.

22 Q. And on what date did you enter into that or sign the
23 agreement?

24 A. It appears January 9.

25 Q. Okay. So on January the 9th, you formally retained

1 Joyce Goldstein. And on the evening of January the 7th, you
2 had this conference call. Tell me how it was you found your
3 way to Joyce Goldstein?

4 A. I don't remember. I believe it may have been through
5 conversation with the other vice presidents. I'm sorry. I
6 just don't remember. There was a lot of activity at that
7 particular time.

8 Q. I understand that you are probably one of the people
9 who voted in favor of the merger agreement last summer,
10 right?

11 A. Yes.

12 Q. You believe very strongly that a unification of the
13 rail unions would be good for the employees of the
14 railroads; is that correct?

15 A. Yes.

16 Q. And the position you want to take in this case is to
17 implement the merger agreement?

18 A. Yes.

19 Q. Or the merger, I think you said. I don't want to put
20 words in your mouth.

21 A. That's okay.

22 Q. To implement the merger?

23 A. Right.

24 Q. Because it's good for the members, in your view?

25 A. Yes, it is.

1 Q. Now, let me ask, if you would, to explain for me how
2 the conduct of a new referendum over a finalized SMART
3 constitution among the rank and file of the UTU would
4 nullify the votes that were cast last summer in support of
5 the merger agreement.

6 A. Are you suggesting a new referendum --

7 Q. Yeah, I'm asking you if there were a new referendum --

8 A. If there were a new referendum.

9 Q. -- to ratify the Smart constitution?

10 THE COURT: Sir, wait. Sir, you let him finish
11 his question before you being to answer. The court reporter
12 cannot transcribe when two individuals are speaking at the
13 same time.

14 Your question again, please.

15 BY MR. FOX:

16 Q. Can you explain, please, how the conduct of a new
17 referendum over a SMART -- a finalized SMART constitution
18 would nullify the votes of those individuals, like yourself,
19 who voted in favor of the merger agreement last summer?

20 A. I do not believe a new referendum is necessary.

21 Q. So that's your belief?

22 A. That's my belief.

23 Q. You would like to see the merger go forward without
24 another referendum on a SMART constitution?

25 A. Yes.

1 Q. And so also would the Sheet Metal Workers?

2 A. I'm confused. A merger agreement --

3 Q. You said earlier that your view and those of the Sheet
4 Metal Workers were in complete alignment. And I'm assuming
5 then that the Sheet Metal Workers would like to see this
6 merger go forward without a referendum over a SMART
7 constitution, a referendum among the UTU membership?

8 A. I could only guess. I never had --

9 Q. And your guess would be?

10 A. I never had a conversation regarding that specific
11 item with the Sheet Metal Workers.

12 Q. Did you have that conversation with your lawyer, Joyce
13 Goldstein?

14 MS. GOLDSTEIN: Objection.

15 THE COURT: It's overruled.

16 A. No.

17 BY MR. FOX:

18 Q. But it is your view that the merger should go forward
19 without a vote on a new finalized SMART constitution; is
20 that correct?

21 A. Under the circumstances, yes. I do not think
22 it's -- it would be necessary.

23 Q. Not necessary. Would it be useful? Do you believe
24 the UTU members are entitled to see the constitution that
25 governs their working lives for the indefinite future before

1 the merger goes forward?

2 A. I think that decision has already been made. I think
3 that was presented to the membership and they already voted
4 on it.

5 Q. So it's your view that approval of the merger
6 agreement is tantamount to approval of the entire merger?

7 A. Yes.

8 Q. And that's what you're trying to affect in this
9 lawsuit?

10 A. I'm trying to affect -- and I'm trying to protect the
11 unanimous decision of the former board of directors. I'm
12 trying to protect the ratification vote as approved by the
13 members who voted for this merger.

14 Q. Right. But if they -- ratification of the merger
15 agreement is not at issue, were it not at issue, and the
16 only thing that was at issue was whether or not the members
17 also wished to approve a SMART constitution, what would be
18 your objection to that?

19 A. The SMART constitution was approved.

20 Q. Ah. Your view is the SMART constitution was approved?

21 A. Yes.

22 Q. And that's what you would like to argue to this Court
23 going forward as an intervenor if your motion is granted?

24 A. Well, that -- yes.

25 MR. FOX: No further questions, your Honor.

1 THE COURT: Thank you.

2 Any redirect of the witness?

3 MR. GUERRIERI: No questions.

4 THE COURT: I'm sorry, sir. I keep -- since you
5 have had no questions throughout the proceeding, I apologize
6 for overlooking you.

7 Counsel for the intervenors, do you wish to inquire
8 further?

9 MS. GOLDSTEIN: No, your Honor.

10 THE COURT: All right. Sir, you may step down.
11 You're excused.

12 THE WITNESS: Thank you.

13 (Witness excused.)

14 THE COURT: Counsel, you may call your next
15 witness, please.

16 MS. GOLDSTEIN: J.R. Cumby.

17 THE COURT: Sir, if you would step forward,
18 please.

19 J.R. CUMBY

20 of lawful age, a witness called by the Prospective
21 Intervenors, being first duly sworn, was examined
22 and testified as follows:

23 THE COURT: Adjust the microphone so your
24 testimony may be heard.

25 Counsel, you may inquire.

1 MS. GOLDSTEIN: Thank you, your Honor.

2 DIRECT EXAMINATION OF J.R. CUMBY

3 BY MS. GOLDSTEIN:

4 Q. Mr. Cumby, where do you live?

5 A. 14908 Lennox Drive, Strongsville, Ohio.

6 Q. Are you a member of the union?

7 A. Yes, I am.

8 Q. What union?

9 A. United Transportation Union.

10 Q. For how long have you a been a member of the UTU?

11 A. 32 years.

12 Q. What positions have you held within the UTU?

13 A. I've held the position of local chairman, local
14 president, assistant to the president yardmasters, vice
15 president.

16 Q. And your current position?

17 A. Vice president, member of the board of directors.

18 Q. What's your employment history within the industry?

19 A. I hired in 1976 with Penn Central Railroad in ground
20 service. I worked as a switchman, retired after a year,
21 became yardmaster.

22 Q. Would you describe your views regarding the merger
23 between the UTU and the Sheet Metal Workers agreement, the
24 international association?

25 A. I agree with my previous brothers, that it's a good

1 deal for the membership. The UTU excels -- just like the
2 other vice presidents have alluded to, we probably do more
3 than the lion's share when it comes to the Railway Labor
4 Act. We are the premier organization when it comes to the
5 Railway Labor Act.

6 And the Sheet Metal Workers, they're under the
7 National Labor Relations Act. And that would help our bus
8 department. We could help their -- we could help the Sheet
9 Metal Workers, Dewey Garland's group.

10 Q. Dewey Garland is the head of the current
11 transportation division?

12 A. That's correct.

13 Q. Within the Sheet Metal Workers?

14 A. That is correct.

15 Q. I'm sorry. Did you complete your answer?

16 A. I'm sorry. That is correct.

17 Q. How would the merger effect you personally?

18 A. I would assume that the duties I do now will carry on
19 forward. I do foresee a change in the way we're paid, but I
20 would -- my daily duties would be the same.

21 Q. And how would your compensation be affected?

22 A. Again, like has been previously testified to, our
23 gross pay is reduced. There is some per diem money there.
24 There is a car allowance there. But by the time you pay tax
25 on it and you start spending that money, it's not really

1 everything it is at face value.

2 Q. Now, directing your attention to the January 1 Web
3 posting, the one that Mr. Futhey put up on the Web site,
4 they referred to the merger as a shotgun wedding; do you
5 recall that?

6 A. Yes, ma'am.

7 Q. And did you see that on or about January 1?

8 A. Yes, ma'am.

9 Q. What was your reaction to that?

10 A. I was disappointed. I thought that we were well on
11 our way to become SMART. I thought waking up New Year's Day
12 was a new beginning for the members of the UTU, that we were
13 now part of SMART.

14 When I left the convention in Hollywood, Florida last
15 August, there was no doubt in my mind that the merger had
16 been completed. And I was really looking forward to 2008.
17 It was a new beginning for rail and labor protected by both
18 organizations.

19 Q. Did you have communications with other members of the
20 board of directors soon after the first of January?

21 A. Yes, I did.

22 Q. Could you describe those communications?

23 A. We started having -- the phone started ringing. There
24 was dismay and unhappiness among the other board of
25 directors at the direction in which we were going in,

1 without at least a phone call advising the board of
2 directors of the change of position that President Futhey
3 had taken.

4 Q. Did you communicate your views to President Futhey at
5 that time?

6 A. No, I did not.

7 Q. Did you send a letter or e-mail to him on January 3?

8 A. I did on January 3.

9 Q. What did you say in that?

10 A. The letter that was send to President Futhey was
11 identical from the seven of us, ma'am. It was a request to
12 stay the course that the membership had voted on and support
13 the merger and finish the work in the merger document and
14 put the two organizations together.

15 Q. And this was the same communication that Mr. Babler
16 had said he was the one that drafted it?

17 A. That's correct.

18 Q. Did you get a response to your January 3 communication
19 from Mr. Futhey?

20 A. If you want to call it one. It was a Web posting on
21 January 4 assassinating the character of the seven
22 individuals that had sent the letter to the president over
23 the caption of "let them explain themselves."

24 Q. And in response to that, did you have a communication
25 with the other board members?

1 A. Yes, ma'am.

2 Q. Was that the conference call that we've heard about on
3 January the 4th?

4 A. Yes, ma'am.

5 Q. And describe what happened in that call?

6 A. We had a discussion of how shocked we were that
7 instead of calling the board of directors and trying to iron
8 this out internally that they would go public and try to
9 assassinate us and our character, and how out of character
10 we thought it was, and wasn't in the best interest of the
11 union or the membership.

12 What was our best avenue going forward? We discussed
13 how and if we could go forward. And at that point, we
14 needed to -- we needed to know just how far the Sheet Metals
15 were going to stay with us, and that's what really led to
16 the call on the 7th.

17 Q. So then you had the follow-up call on the 7th?

18 A. Yes, ma'am.

19 Q. You participated in that call?

20 A. Yes, ma'am.

21 Q. What decision was made in that call?

22 A. It was decided that -- first off, we wanted to know if
23 the Sheet Metal Workers still wanted us, you know, if there
24 was still a place for us. And once we found out that the
25 Sheet Metal Workers were still interested in finishing --

1 consummating the merger agreement, and the decision by Mike
2 Sullivan that he would help us out with our legal fees going
3 forward, they dropped off the call, like Tony Iannone said.
4 And we voted -- we had a discussion deciding how we were
5 going to go forward from there.

6 Again, James Brunkenhoefer said, maybe it's best I
7 pick up the torch and go forward by myself. And we decided
8 either we were all going to go forward or not, that this was
9 a group effort. We felt we took an oath as officers of this
10 union, and we've stuck together with that oath to this point
11 now.

12 Q. And did you engage counsel to represent you?

13 A. Yes, ma'am.

14 Q. And who was your counsel?

15 A. Joyce Goldstein.

16 Q. And who is paying your attorney's fees?

17 A. Sheet Metal Union.

18 Q. In your opinion, did the membership of the UTU already
19 ratify the SMART constitution?

20 A. Absolutely.

21 Q. Is there any conflict of interest between you and the
22 Sheet Metal Workers that you're aware of?

23 A. Not that I'm aware of.

24 Q. Have you actively participated in all decisions that
25 have been made in this case regarding the course of the

1 litigation?

2 A. Absolutely.

3 Q. Has any official from the Sheet Metal Workers
4 influenced you regarding the positions you've taken in this
5 case?

6 A. No, ma'am.

7 Q. What outcome are you seeking?

8 A. The will of the membership. I'm looking to have the
9 next step in the merger document to go forward to finish
10 putting these two organizations together. That was the will
11 of the membership. They voted in favor of it.

12 Q. And why did you decide to attempt to intervene in the
13 case?

14 A. Because I took my oath seriously. I think that the
15 membership has spoken. They don't always speak in, maybe,
16 the manner in which I think they should, but they have
17 spoken in this -- on this situation resoundingly, 71
18 percent. And I believe it needs to be finished. It's what
19 they voted on. It needs to be finished.

20 Q. And do you have any personal risk from intervening in
21 this case?

22 A. Just like my seven other brothers, ma'am, I'm under
23 charges just like the rest of them, facing expulsion and
24 removal from office. Yes. Great, I would say.

25 Q. Thank you.

1 THE COURT: Thank you.

2 On behalf of the plaintiffs, counsel, you may inquire.

3 MR. FOX: Thank you, your Honor.

4 CROSS-EXAMINATION OF J.R. CUMBY

5 BY MR. FOX:

6 Q. Mr. Cumby, you mentioned a moment ago that on January
7 the 4th you were subjected to character assassination in a
8 Web site posting, am I right?

9 A. That's correct.

10 MR. FOX: May I approach the witness? I'm going
11 to show him Exhibit B that is attached to an affidavit that
12 was filed on the 15th of April. And it's labeled a document
13 81-2.

14 Q. And let me ask you, that is an e-mail that went out to
15 those people who signed up to receive e-mail news flashes
16 from the UTU; is that correct?

17 A. It appears to be, yes. I'm on that list also.

18 Q. Right. So you would have received the identical
19 e-mail?

20 A. That's correct, sir.

21 Q. And this is the Web site -- then it was also posted on
22 the Web site; is that correct?

23 A. Yes, sir.

24 Q. And that's the document you were referring to a moment
25 ago?

1 A. That's correct.

2 MR. FOX: No further questions.

3 THE COURT: Thank you.

4 Anything further, Ms. Goldstein, of this witness
5 before I ask -- well, I'll ask counsel for the defendants if
6 they have any questions.

7 MR. GUERRIERI: No, your Honor.

8 THE COURT: All right.

9 Ms. Goldstein, anything further?

10 MS. GOLDSTEIN: No, your Honor.

11 THE COURT: Sir, I have one question.

12 THE WITNESS: I'm sorry, sir.

13 THE COURT: You keep referring to the 71 percent
14 of the membership that voted in favor of the merger.

15 How many members are there in your union?

16 THE WITNESS: I think there is probably in the
17 low 80s, sir.

18 THE COURT: My recollection is about 84 thousand
19 members, according to the record, I believe. And how many
20 members actually voted in this referendum?

21 THE WITNESS: It's my understanding, your Honor,
22 that there was 68,000 ballots voted, that there was
23 somewhere around 12,000 that was returned because of bad
24 addresses, or we didn't have their correct address on the
25 membership, and that the number that voted on it was in the

1 eight thousand-something, your Honor.

2 THE COURT: So out of the 84 thousand, or
3 thereabouts, members, eight thousand voted in favor of the
4 merger, approximately?

5 THE WITNESS: Approximately, eight
6 thousand-something, that's correct, your Honor.

7 THE COURT: And there was only approximately 12
8 thousand or so, roughly, a little more than 12 thousand
9 ballots cast in total?

10 THE WITNESS: That's my understanding.

11 THE COURT: So the 71 percent you're referring to
12 is 71 percent of the 12 thousand ballots that were cast
13 compared and contrasted with the over 80 thousand member of
14 the union?

15 THE WITNESS: I'm sorry. Could you repeat that?

16 THE COURT: So the 71 percent you're referring to
17 references the individuals of the eight thousand who voted,
18 eight thousand plus who voted? 71 percent of -- excuse me.
19 71 percent of the 12 thousand who voted were in favor of the
20 merger?

21 THE WITNESS: Once you take the 12 thousand away,
22 then you take the 12 thousand off the 80-whatever-thousand
23 it is, and that's where the percentage comes up, your Honor.

24 THE COURT: Oh, so you're referring to the 12
25 thousand of the 80 thousand?

1 THE WITNESS: No -- there was 12 thousand ballots
2 returned.

3 THE COURT: And of those 12 thousand, how many
4 were in favor of the merger?

5 THE WITNESS: There is no way of knowing how many
6 were in favor. Those were returned because of bad
7 addresses, your Honor. I'm sorry if I didn't clarify.

8 THE COURT: Oh. There were 12 thousand that were
9 returned because of bad addresses?

10 THE WITNESS: That's my understanding.

11 THE COURT: That's something either new to me or
12 I missed in the record. My recollection of the record is --
13 counsel can correct me if I'm wrong me -- that there is 84
14 thousand members of the union, but only 12 thousand ballots
15 were returned, meaning only 12 thousand, roughly, members
16 voted. And of the 12 thousand that voted, only
17 approximately 8,500 were in favor of the merger?

18 Do you recall any of that at all?

19 THE WITNESS: It's a possibility. I might have
20 my math messed up. You could be absolutely correct, your
21 Honor.

22 THE COURT: So you don't know exactly.

23 THE WITNESS: The 71 percent is the figure that
24 I've read, your Honor.

25 THE COURT: So you don't have any independent

1 knowledge of that. Where did you get the 71 percent figure?

2 THE WITNESS: Something I've read, your Honor.

3 THE COURT: Thank you, sir.

4 Did my questions cause any additional questions on
5 behalf of the counsel for the intervenors?

6 REDIRECT EXAMINATION OF J.R. CUMBY

7 BY MR. GOLDSTEIN:

8 Q. Do you know who would have more accurate information
9 with respect to the questions that the Judge just asked?

10 A. Triple A, I would imagine.

11 Q. American Arbitration Association?

12 Is there anyone within the UTU who would know that?

13 A. I would imagine it's available, but again, in my
14 belief it would have to come from the triple A, ma'am.

15 Q. Thank you.

16 THE COURT: Thank you.

17 MR. FOX: Your Honor, could I just briefly --

18 THE COURT: Just one moment. Let Ms. Goldstein
19 remove her papers and get situated.

20 RECROSS-EXAMINATION OF J.R. CUMBY

21 BY MR. FOX:

22 Q. Let the record reflect that I'm going to show the
23 witness document 6-21 which is Plaintiff's Exhibit 11 in
24 support of the motion for preliminary injunction. It is the
25 certification of results of the binding American Arbitration

1 Association?

2 THE COURT: All right, sir. Go ahead.

3 Q. Is that a document you've seen before?

4 A. I don't recall. I could have, but I don't -- I
5 couldn't put a date to it, if I did.

6 Q. Would you have any reason to dispute the numbers that
7 appear on this certification of results by the American
8 Arbitration Association?

9 A. I would have no -- I wouldn't dispute it at all.

10 Q. Thank you. Nothing further, your Honor.

11 THE COURT: All right. Thank you.

12 You're excused, sir. You may step down.

13 (Witness excused.)

14 THE COURT: Counsel for the proposed intervenors,
15 you may call your next witness.

16 MS. GOLDSTEIN: John Fitzgerald.

17 JOHN FITZGERALD,

18 of lawful age, a witness called by the Proposed
19 Intervenors, being first duly sworn, was examined
20 and testified as follows:

21 THE COURT: Have a seat in the witness stand,
22 sir. Please adjust the microphone so your testimony may be
23 heard. Thank you.

24 Counsel, you may inquire.

25 MS. GOLDSTEIN: Thank you.

1 DIRECT EXAMINATION OF JOHN FITZGERALD

2 BY MS. GOLDSTEIN:

3 Q. Where do you live?

4 A. Battleground, Washington.

5 Q. Are you a member of a union?

6 A. Yes.

7 Q. Of the UTU?

8 A. Yes.

9 Q. Since when have you been a member of the UTU?

10 A. 1970.

11 Q. What positions have you held within the UTU?

12 A. Local chairman beginning in 1975, assistant general
13 chairman G0386, 1982.

14 Q. What is a G0386?

15 A. It's a general committee.

16 General chairman, 1993. And vice president beginning
17 the first of this year, and member of the board of
18 directors.19 Q. So you're current position is a vice president and
20 member of the board of directors?

21 A. Yes.

22 Q. Could you review your employment history within the
23 industry?24 A. Hired on in 1970 as a brakeman, promoted to conductor
25 in 1973.

1 Q. And what railroad was that?

2 A. Burlington Northern. Now it's Burlington Northern
3 Santa Fe.

4 Q. Would you describe your views regarding the merger
5 between the UTU and Sheet Metal Workers?

6 A. Initially questioning. Once the vote was taken and
7 counted, I considered it a closed issue. The merger was
8 sanctioned and ratified. I support it now.

9 Q. When you say you originally questioned, could you
10 elaborate on that a little more?

11 A. There were some issues. I wasn't really enamored with
12 the announcement in Kansas City, and I had some questions.
13 I submitted a number of questions to President Thompson. I
14 got answers. I read and acquired a copy of the Sheet Metal
15 constitution. We posted that on our Web page.

16 Q. When you say we posted it, who is "we"?

17 A. The person that handles my Web page, or used to in my
18 office, is the general chairman.

19 Q. So you have a separate Web site from the UTU's Web
20 site?

21 A. Absolutely.

22 Q. So you posted the Sheet Metal Workers constitution on
23 that Web site?

24 A. We posted every bit of information we could get, yes.

25 Q. I'm sorry. I interrupted you, you were --

1 A. No, that's fine.

2 Q. So were your questions answered to your satisfaction?

3 A. They were answered to my satisfaction for the most
4 part, yes. I still was not absolutely sure of what was
5 going to happen as far as the position I was running for at
6 that time as vice president.

7 Q. What do you mean by that?

8 A. Well, I was not absolutely sure what the structure
9 would be. I read the constitutions, and I was not
10 absolutely sure of what my status would be, what my title
11 would be, whether there would be changes in salary or
12 anything like that. And I was running for vice president at
13 that point in time.

14 Q. Did you ever get the answers to your questions?

15 A. I had answers that I received that said everything
16 would remain the same.

17 Q. And how will the merger effect you personally?

18 A. As far as any work that I do, I don't see any change.
19 It may have an impact on salary. I was not a vice president
20 prior to January 1, 2008, so I can't speak to that at this
21 point in time.

22 I think the salary under SMART would be somewhat less,
23 depending on how much you travel and how many days you're
24 out of town. I can tell you that at that December 4 meeting
25 I remember vice president --

1 Q. December 4 meeting?

2 A. The December 4 meeting in D.C. with the Sheet Metal
3 Workers and the other newly elected officers, John Babler
4 did raise the issue and asked why we could not just remain
5 under the UTU salary structure.

6 Q. And was there a response to that?

7 A. They encouraged us to look at the new structure, and I
8 think everybody in there agreed that we would review it
9 after six months.

10 Q. So that at this December 4 meeting between the two
11 unions it was still left open as to how the salary structure
12 was going to work?

13 A. We were each presented -- or at least I was presented
14 with a binder that outlined the salary structure. And after
15 that discussion between a number of the newly elected
16 officers and Mr. Sullivan, it was determined that we would
17 stay under that structure they provided for six months and
18 then have further discussions on it.

19 Q. Why did you decide to attempt to intervene in this
20 case?

21 A. Because I learned that President Futhey, when he came
22 into office, obviously took a different tact that opposed
23 the merger. I believed that, as a member of the board of
24 directors, we should have been communicated with. We should
25 have been asked to make a decision on that, if there was

1 going to be a change in the policy. And that policy was set
2 by the previous board of directors who unanimously supported
3 the merger, who unanimously decided to put it out to a vote
4 for the membership, and the membership did ratify it. They
5 ratified it by 71 percent.

6 I believe there was 8,400 -- 8,600 votes in favor,
7 3,400 opposed, and I believe anybody that didn't vote waived
8 their rights.

9 Q. Did you engage counsel to represent you in this case?

10 A. Yes, I did.

11 Q. And who is your counsel?

12 A. Joyce Goldstein.

13 Q. And who is paying your attorneys fees?

14 A. To the best of my knowledge, the Sheet Metal Workers.

15 Q. Are you aware of any conflict between you and the
16 Sheet Metal Workers?

17 A. No.

18 Q. Have you actively participated in all decisions that
19 have been made in this case regarding the litigation?

20 A. Absolutely.

21 Q. Has any official from the Sheet Metal Workers
22 influenced you regarding positions taken in this litigation?

23 A. None whatsoever.

24 Q. What outcome are you seeking in the case?

25 A. I believe the merger should be consummated as it was

1 ratified and supported by the board of directors and the
2 membership.

3 Q. What personal risk do you face by participating in
4 this case?

5 A. Just as the other members of the board of directors
6 that are here as intervenors, I've been charged. I stand to
7 lose my position as an officer. Essentially I stand to be
8 forced into retirement.

9 Q. Thank you.

10 THE COURT: All right. Thank you, counsel.

11 Sir, you may cross-examine on behalf plaintiffs,
12 please.

13 CROSS-EXAMINATION OF JOHN FITZGERALD

14 BY MR. FOX:

15 Q. Mr. Fitzgerald, you heard me ask Mr. Iannone earlier a
16 question, and I'm going to ask the same question of you if I
17 may, and that is, if you personally could explain to me how
18 the conduct of a new referendum among UTU membership on a
19 finalized SMART constitution would nullify the votes of
20 those 8,600 people that voted in favor of the merger
21 agreement?

22 A. I believe at this point in time with all the rhetoric
23 that's been placed on Web pages, the international Web site,
24 documentation through the Courts that's been spread out
25 helter-skelter, that I believe there would be a total

1 inability to have a fair election at this point.

2 Q. So that's why? You want to bank on the election
3 last -- the referendum last summer because you think that a
4 new referendum wouldn't be fair?

5 A. I did not say that.

6 Q. Well --

7 A. I said I don't believe a new referendum would be fair.
8 The well has been poisoned by the plaintiffs and even by
9 some officers in the UTU.

10 At this point in time, to go back and consider doing
11 it over again, I think, is superfluous. I don't believe
12 it's functional. I believe it was done properly the first
13 time.

14 Q. You mentioned that you personally had concerns because
15 you had looked at the Sheet Metal Workers constitution as
16 well as the UTU constitution and were unable to figure out
17 exactly how this would impact you. Am I right?

18 A. When I looked at the Sheet Metal Workers, that was
19 after I had returned home. When I returned to Vancouver,
20 Washington and to my office.

21 Q. Returned from?

22 A. Kansas City where the announcement was made.

23 Q. Right.

24 A. I had concerns when I heard the announcement to begin
25 with, and I had concerns as relayed to me from members of my

1 general committee, and I acted on those concerns. I did
2 have concerns about what was going to be the structure, how
3 do you say, of the officer structure, etcetera, down the
4 road, and I inquired. I did get some answers. I didn't
5 necessarily, how do you say it, commit all those answers to,
6 how do you say, being fact at that point in time.

7 Q. But you did attempt to figure out how this combination
8 of a Sheet Metal Workers constitution and a UTU constitution
9 would impact you and create a structure that would affect
10 you, and you were unable to completely identify how that
11 would work?

12 A. Well, I knew there would be changes. I knew there
13 would be changes and consolidations. You know, you don't
14 get any efficiencies if you don't have those changes.

15 But when it comes down to it, I analyzed every bit of
16 material I could. You bet. And we provided that material
17 to any member that wanted to visit our Web site or that
18 called me. And I did get concerns from those individuals,
19 and from my belief, they voted in the fashion that they
20 understood.

21 MR. FOX: Thank you, your Honor.

22 THE COURT: Anything on behalf of the defendants,
23 please?

24 MR. GUERRIERI: No, your Honor.

25 THE COURT: Thank you, sir.

1 Anything further of this witness on behalf of the
2 plaintiffs, the intervenors, please?

3 MS. GOLDSTEIN: No, your Honor.

4 THE COURT: Thank you.

5 THE WITNESS: You bet.

6 (Witness excused.)

7 THE COURT: Counsel, it's about ten until noon, I
8 have a brief hearing at noon. What additional evidence do
9 you wish to present?

10 MS. GOLDSTEIN: Your Honor, there are two more
11 proposed intervenors that are here available to testify. I
12 can say with a fair degree of certainty that their testimony
13 would be cumulative, except it would be different because it
14 would be coming from different individuals. But the
15 substance of what they would say with respect to why they're
16 participating in this case, the manner in which they are
17 participating, their relationship with the Sheet Metal
18 Workers, and their concerns about the merger, all of the
19 substantive issues, I think, would be fairly similar to what
20 you've already heard.

21 But because you had put on the order, of course,
22 directing all of them to be here available to testify, they
23 are here and available to do so. So I leave that up to you,
24 your Honor.

25 The additional witness we had here, Patrick Drennan, I

1 think that we at this point do not need to call, and the
2 only other witness who I had identified on our witness list
3 was Malcolm Futhey, and I'm prepared to just have Mr. Futhey
4 corroborate that the testimony that he provided at his
5 deposition was truthful and leave it at that.

6 THE COURT: Who is Mr. Drennan, please?

7 MS. GOLDSTEIN: Mr. Drennan is not a proposed
8 intervenor. He is a member and was a former member of the
9 board of directors. And a declaration was submitted by him
10 in connection with the pleadings that we had previously
11 filed.

12 THE COURT: Well, given our time limit that I put
13 in place, who is it that you wish to call on the balance of
14 your time?

15 MS. GOLDSTEIN: Well, I guess I would next call
16 Mr. Futhey.

17 THE COURT: Mr. Futhey. Step forward please and
18 be sworn.

19 MALCOLM FUTHEY,

20 of lawful age, a witness called by the Proposed
21 Intervenors, being first duly sworn, was examined
22 and testified as follows:

23 THE COURT: Be seated in the witness stand, sir.
24 Adjust the microphone so you may be heard. Thank you.

25 Counsel, you may inquire.

1 DIRECT EXAMINATION OF MALCOLM FUTHEY

2 BY MS. GOLDSTEIN:

3 Q. Mr. Futhey, do you recall that I took your deposition
4 in this case on April 15?

5 A. That's correct.

6 Q. Was your testimony that day truthful?

7 A. Yes, it was.

8 Q. Thank you. I have no further questions.

9 THE COURT: All right, sir. Anyone else wish to
10 inquire of this witness?

11 MR. FOX: Your Honor, I would let counsel for Mr.
12 Futhey do any cross he wants to. I don't know that --

13 THE COURT: Well, you have the right, if you
14 wish. If you do not, then of course, you can defer to
15 counsel for Mr. Futhey if he wishes to inquire. It's
16 entirely up to you, gentlemen.

17 MR. GUERRIERI: Just a few questions, your Honor.

18 THE COURT: All right, sir. Thank you.

19 CROSS-EXAMINATION OF MALCOLM FUTHEY

20 BY MR. GUERRIERI:

21 Q. My name is Joseph Guerrieri. I have been previously
22 introduced to the Court. I represent the defendant Malcolm
23 Futhey as well as the UTU, United Transportation Union.

24 Mr. Futhey, when did you become president of the
25 United Transportation Union?

1 A. On January 1, 2008.

2 Q. And when were you elected to that position?

3 A. In August of 2007.

4 Q. And on the ballot on which people had the opportunity
5 to vote for you, what position was identified on that
6 ballot?

7 A. President of UTU.

8 Q. Okay. And did there come a time when you attended a
9 board of directors meeting on June 10, 2007 in Kansas City?

10 A. That's correct.

11 Q. And did you vote for the merger at that time?

12 A. Absolutely.

13 Q. And did you support the merger at that time?

14 A. Yes, sir, I did.

15 Q. Did there come any time when Mr. Sullivan of the Sheet
16 Metal Workers spoke to you concerning any possible conflicts
17 between the Sheet Metal Workers constitution and the UTU
18 constitution?

19 A. The first indication that I had from the Sheet Metal
20 Workers there were potential conflicts was --

21 Q. No, my question is this: At that June 10 meeting,
22 direct your attention to that meeting, what if anything did
23 Mr. Sullivan represent to you concerning conflicts between
24 the two documents?

25 A. Oh, whenever we had a meeting that evening, after we

1 got through with the reception, I personally asked Mr.
2 Sullivan if there were any conflicts between the UTU
3 constitution and the Sheet Metal Workers constitution, and
4 he told me that he didn't know of any conflicts.

5 Q. All right. And the convention of the UTU occurred in
6 August of 2007; is that right?

7 A. Correct.

8 Q. And was that after the ratification vote for the
9 merger between the Sheet Metal Workers and the UTU?

10 A. Yes, sir.

11 Q. And can you explain briefly for the Court, what is a
12 convention of the UTU?

13 A. A convention is where delegates from the different
14 locals across the country come together. And at the
15 convention they were under the Robert's Rules of Order, and
16 they handle elections and changes to the constitution.

17 Q. And at that time did Mr. Sullivan speak to the
18 convention?

19 A. Yes, sir, he did.

20 Q. Did he reference any conflicts between the two
21 documents?

22 A. No, sir, none.

23 Q. Now, did there come a time between August of 2007 and
24 the present that you began to have misgivings about the
25 merger?

1 A. Absolutely.

2 Q. And when did that begin to occur?

3 A. It started to occur during the transition period where
4 after the convention took place in August of 2007, in
5 September of 2007, I went to the international for the
6 purpose of the transition from Paul Thompson's
7 administration to my administration.

8 During that transition period, Paul Thompson related
9 to me that there were a lot of things that need to be taken
10 care of that we couldn't have gotten passed that we need to
11 change in the constitution.

12 For example, craft autonomy, which is the linchpin
13 that was used to put the UTU together to begin with, that,
14 among a number of other issues that he talked about, the
15 autonomy of the general committees, he gave me some
16 information that said that the general chairmen doesn't need
17 to be able to go out and make crew consist agreements that
18 in his words screw the membership and enriches the general
19 chairmen, and whenever I heard that from him I contacted Mr.
20 Sullivan.

21 Q. And what if anything -- did you raise this issue with
22 Mr. Sullivan?

23 A. Yes, I did. I talked to Mr. Sullivan. I said, this
24 is a real problem. General chairmen are not going to
25 support doing away with the autonomy of the general

1 committees. And he stipulated to me, he said, I am not
2 going to allow general chairmen to make crew consist
3 agreements that screw the membership and enrich the general
4 chairmen, word for wore, verbatim, that President Thompson
5 told me. So I viewed it as his communication between the
6 two of them.

7 Q. Does the current UTU constitution, the current UTU
8 constitution, permit general chairmen the autonomy you were
9 discussing with Mr. Sullivan?

10 A. Yes, sir, it does.

11 Q. Now, did there come a time in October of 2007, October
12 10, 2007, when you attended a western general chairmen's
13 conference association meeting?

14 A. Yes, sir, I did, in San Diego California, and
15 President Thompson reiterated exactly what I just told you
16 there at the conference in San Diego.

17 Q. What if anything did Mr. Thompson say he had
18 discovered in conversations with Mr. Sullivan about
19 potential conflicts between the two documents?

20 A. The only thing that he commented on was the fact that
21 they had had meetings and discussed potential conflicts that
22 would potentially take place between the constitutions, that
23 those were ongoing meetings.

24 Q. All right. And do you recall what conflicts were
25 identified at that October 10 meeting?

1 A. Yeah, he talked about the fact that craft autonomy
2 which, as I said before, was the linchpin of the UTU had
3 served its purpose and its time was gone, and it was time to
4 change it and it was time to make changes by virtue of the
5 merger that he couldn't get changed by the delegates.

6 Q. Besides craft autonomy was there mention of any other
7 issues?

8 A. He talked about the compensation for the delegates,
9 that they -- basically said they were only there to line
10 their own pockets and that they were going to do things to
11 change the way the delegates got elected and they were also
12 going to change the way they got compensated.

13 Q. Were there any questions asked at that meeting about
14 what your fate would be once the merger took place?

15 A. Yeah, there were a lot of people concerned about the
16 fact that, in my conversations that I had with Mike
17 Sullivan, that I was going to be placed in Washington D.C.
18 and that the person that I defeated, and that could not win
19 his own vice president spot, was going to be put in charge
20 of the UTU in Cleveland, Ohio.

21 Q. Did you have subsequent conversations about the fact
22 that the individual who you defeated would be put in charge
23 of the Cleveland office?

24 A. Yeah. I called Mike Sullivan, and I explained to him,
25 I said, you don't understand the perception of it. It was

1 after the meeting in October in San Diego. I called him. I
2 said, you don't understand the perception out here. People
3 really have a hard time with David Hakey. They are not
4 going to accept the fact that he is going to be in
5 Cleveland, Ohio in charge of the operation there with me in
6 Washington, D.C. I said, I need to be in Cleveland, Ohio
7 where the operation of the UTU is located.

8 Q. And what if anything did Mr. Sullivan say to that?

9 A. He says, I don't mind you being there a couple months,
10 but, he said, you need to be in Washington, D.C.

11 Q. Now, did there come a time when you attended, here in
12 this courtroom, a hearing on a temporary restraining order?

13 A. Yes, sir, I was here on December 27, on the day of the
14 hearing.

15 Q. And had you submitted an affidavit or declaration on
16 behalf of the plaintiffs in that case?

17 A. Yes, sir. I, along with the majority of the board of
18 directors at the time of the merger, submitted affidavits
19 stipulating that what was promised to us was not what was
20 delivered.

21 Q. There has been testimony today that you oppose the
22 merger between the United Transportation Union and the Sheet
23 Metal Workers. Is that an accurate characterization of your
24 position?

25 A. Absolutely not. I have been very consistent from the

1 get-go, and Tony Iannone was in the meeting and James
2 Brunkenhoefer was in the meeting, two of the intervenors, as
3 well as members from the Sheet Metal Workers, the assistant
4 president and general secretary and treasurer. I told them,
5 I said, what I want is the merger that was promised to me
6 whenever I was on the board of directors that Paul Thompson
7 said was going to happen. That's what I told him on
8 December 3 that I wanted to happen.

9 Q. All right. And are you in favor of having a -- having
10 negotiations with the Sheet Metal Workers to achieve a
11 SMART -- integrated SMART constitution and to put that out
12 to the membership for ratification?

13 A. I am not -- not only am I in favor of that, I have
14 submitted a letter to the Sheet Metal Workers saying that
15 that's indeed what I would do, sit down and make a
16 constitution with the understanding that we would put it out
17 to the membership for ratification.

18 Q. All right.

19 A. And they rejected it.

20 Q. In her papers, Ms. Goldstein suggests that you
21 authorized the payment of UTU funds to support the
22 plaintiffs in this litigation; is that accurate?

23 A. No, that's a tortured interpretation on the part of
24 Ms. Goldstein because nothing could be further from the
25 truth. There have been no United Transportation Union

1 International funds that have been submitted for support of
2 the plaintiffs.

3 What I have done is there have been subordinate bodies
4 with their own funds that have requested whether or not they
5 can submit money. And I said, so long as you follow the
6 procedures correctly, then you have the right to submit
7 whatever money so long as it's done in accordance with your
8 bylaws and structure.

9 Q. And with regard to a post settlement of this case, did
10 you settlement this case with Mr. Fox?

11 A. No, sir. I have not settled the case with Mr. Fox.

12 Q. And do you know if your attorneys had conversations
13 with Mr. Fox concerning settlement?

14 A. Yeah, from what I understand, in conversations that I
15 had with you, Joe, is the fact that we have submitted to the
16 plaintiffs what we see as potential settlement of this
17 thing, that is, put the constitution together in its
18 entirety and resubmit it to the membership so they can have
19 a vote.

20 As I said, I was here on December 27. I understood
21 the direction the Court was going.

22 MR. GUERRIERI: I have no further questions of
23 this witness, your Honor.

24 THE COURT: Thank you, sir.

25 MR. FOX: I have nothing, your Honor.

1 THE COURT: Ms. Goldstein, do you wish to inquire
2 further?

3 REDIRECT EXAMINATION OF MALCOLM FUTHEY

4 BY MS. GOLDSTEIN:

5 Q. Mr. Futhey, other than the merger agreement, are you
6 aware of any other written agreements between the UTU and
7 the Sheet Metal Workers regarding the merger?

8 A. There is no way I would know because I haven't been
9 part of any of the meetings. So I wouldn't know of any.

10 Q. So there is no written agreement that you know of
11 other than the merger agreement itself?

12 A. Right, because I wouldn't have access to that.

13 Q. Well, you're now acting as the international president
14 of the UTU; isn't that correct?

15 A. That is correct.

16 Q. Do you have access to all UTU documents?

17 A. No, ma'am.

18 Q. What UTU documents would you not have access to as the
19 president?

20 A. We have found that there is documents that are missing
21 from the office. So I don't know what it is that -- the
22 part that's missing, I don't know what they contain.

23 Q. Have you ever inquired of either Mr. Thompson or Mr.
24 Sullivan if they had any other written agreements other than
25 what you've seen?

1 A. No, I have not.

2 Q. But they've told you that there are no other written
3 agreements, haven't they?

4 A. No.

5 Q. You've never been told that by Mr. Thompson in any
6 manner?

7 A. Not that I can recall.

8 Q. You talked a little bit about someone name David
9 Hakey?

10 A. Um-hum.

11 Q. Who ran for president when you ran, and lost. Where
12 is Mr. Hakey now?

13 A. When I ran and lost? Is that what you said?

14 Q. I'm sorry, when you ran. He lost, you won. Where is
15 Mr. Hakey now?

16 A. From what I understand, he is working on the railroad.

17 Q. He's not working for any international union that you
18 know of?

19 A. Not that I know of.

20 Q. On the subject of payment of the plaintiff's
21 attorney's fees in this case, isn't it true that UTU member
22 dues money has been spent on the plaintiff's attorney's fees
23 in this case?

24 A. I'm certain that there has been because there has been
25 petitions from state board, but -- and general committees.

1 But as I said before, all of those that were approved were
2 done in accordance with the procedure that was set forth by
3 that board. And so therefore it was done according to what
4 that board has done. I can't dictate to them what they
5 spend their money on. All I can tell them is whether or not
6 it's proper or not.

7 Q. But you indicated to them it was proper for union
8 member dues money to be spent on the plaintiff's attorney's
9 fees; isn't that correct?

10 A. If they go through the proper procedure, yes, ma'am.

11 Q. And checks have been cut and signed by the
12 international secretary/treasurer of the UTU paying -- that
13 have gone to the Save Our Union Web site for the purpose of
14 paying the plaintiff's attorney's fees in this case; isn't
15 that true?

16 A. I don't know that they went to the Save Our Union Web
17 site. I don't know where they went to. I haven't seen any
18 of them.

19 Q. But you are aware that checks have been signed by the
20 UTU general secretary/treasurer to pay for the plaintiff's
21 attorney's fees?

22 A. There is a misrepresentation there. You're acting as
23 though the secretary and treasurer is signing the funds out
24 of the UTU International. The only thing the secretary and
25 treasurer does is authorize them after they have been

1 approved by state boards and general committees. Those
2 funds are coming from the state boards and the general
3 committees, not from the international.

4 Q. Who signs the checks?

5 A. The secretary/treasurer does, just like he signs their
6 payroll checks, just like he signs their rent or anything
7 else that they have to pay expenses for out of their
8 particular funds.

9 Q. When you talked with the Sheet Metal Workers about
10 trying to resolve any potential conflicts that may exist
11 between the two unions' constitutions, did you ever make an
12 unconditional promise to just sit down and work out and
13 discuss whatever the issues are without it being conditioned
14 upon sending it out for another vote?

15 A. It was conditioned upon it being sent out for another
16 vote.

17 Q. When Mr. Sullivan -- strike that.

18 Just to be clear about something, you talked about
19 Paul Thompson speaking at a meeting, this western general
20 chairmen's meeting?

21 A. Yes, ma'am.

22 Q. Did he say at that time that he had made an agreement
23 with the Sheet Metal Workers regarding any of the issues
24 that he was talking about, or did he say that going through
25 the merger process would be an opportunity to address some

1 of those issues?

2 A. He said, we are going to use the merger to make
3 changes in the constitution that the delegates would not
4 approve at the convention.

5 Q. But he didn't make any changes, did he?

6 A. He said what he said, so -- beyond that, he said that
7 they were in the process of having discussions and ongoing
8 discussions about the conflicts and what they were going to
9 do. I was not at any of those meeting, so I don't know what
10 agreements have been made.

11 Q. Since you have been in office, from January 1, have
12 you had any meetings with the Sheet Metal Workers to work
13 out what are the supposed conflicts?

14 A. Yes, ma'am, I have.

15 Q. How many meetings have you had?

16 A. Two.

17 Q. What was discussed at those meetings?

18 A. The potential conflicts that were in the constitution,
19 and to put it out for another vote again.

20 Q. And who did you meet with?

21 A. Mike Sullivan.

22 Q. What were the conflicts that you discussed?

23 A. A number of things, the things that I had in my
24 affidavit that I talked about, and I'm really
25 hesitant -- and I leave it upon the Judge here as to what

1 latitude I have. This was done in strictest confidence with
2 each other.

3 So I'm answering your questions truthfully, but we
4 have pledged to each other a confidence, and I'm -- I really
5 believe that this questioning is probably going to be
6 detrimental to that process.

7 Q. Do you know whether the proposed intervenors in this
8 case have been told anything about the meetings that you're
9 discussing?

10 A. The only one that I think might know about it would be
11 Mr. Brunkenhoefer, because they called him asking where the
12 townhouse with the UTU was the first meeting that we had.
13 So he gave them the information on where the townhouse was
14 for Mr. Sullivan to come over.

15 Q. And other than that, you're not aware that the
16 proposed intervenors had any idea about any of the substance
17 of what you and Mr. Sullivan may have talked about at these
18 meetings?

19 A. I wouldn't -- Mr. Sullivan said he was not going to
20 repeat any of the things that took place in that meeting and
21 I told him I would not do the same -- I would go the same
22 direction myself.

23 MS. GOLDSTEIN: I have no further questions.

24 MR. FOX: Your Honor, one quick question.

25 THE COURT: Just one second, sir.

1 Thank you, Ms. Goldstein.

2 Now, you may inquire.

3 CROSS EXAMINATION OF MALCOLM FUTHEY

4 BY MR. FOX:

5 Q. Mr. Futhey, if the members and officers of a general
6 committee or a state board, local, whatever, subordinate
7 entity within the UTU, were to duly approve a contribution
8 to the NAACP Legal Defense Fund or to the Relief for Myanmar
9 Victim's Fund and instruct the UTU to cut a check, would you
10 do so?

11 A. Oh, absolutely. I mean, it's been done. We've had
12 general committees that have sued the international, and we
13 have approved the payment of their attorney to sue the
14 international. So absolutely. That's just -- historically
15 we have done that.

16 Q. It's their money to do with as they choose?

17 A. Exactly.

18 Q. No further questions.

19 THE COURT: So what you're telling me is if some
20 locals around the country decided they wanted to raise funds
21 and contribute some for the benefit of plaintiffs, then the
22 international union simply acted as a passthrough, so to
23 speak?

24 THE WITNESS: Yes, sir, from the general
25 committees and the state board. We wouldn't do it for the

1 local. They retain their own funds. But the general
2 committees, which are the governing body of the contract
3 maintenance, and the state legislative boards, which handle
4 the legislative matters with the state, we retain their
5 money in the international in Cleveland. But it is their
6 money.

7 THE COURT: All right, sir. Now I think I
8 understand.

9 All right. Did my questions give rise to any
10 additional questions by any counsel, please?

11 MS. GOLDSTEIN: Yes, your Honor.

12 THE COURT: Quickly, please.

13 FURTHER REDIRECT EXAMINATION OF MALCOLM FUTHEY
14 BY MS. GOLDSTEIN:

15 Q. To clarify what the Judge just said, we are not
16 talking about that these organizations, these locals or
17 subordinate bodies, raised money for the purpose of paying
18 the plaintiff's attorney's fees. We're talking about using
19 union dues money that would be in their treasury as a result
20 of a check-off that exists in a collective bargaining
21 agreement?

22 A. What would occur, Ms. Goldstein, is the local would
23 bring it up at a local meeting, and the membership would
24 have to vote to approve that money to go to the plaintiffs.
25 That's the process, that's the bylaws, and that's what they

1 have to do in order to -- because it's under Robert's Rules
2 of Order. They have to approve it.

3 Q. I'm not asking about the approval. I'm asking about
4 the money.

5 THE COURT: Well, it's helpful that he is telling
6 you that. It's beneficial to me. Sorry to interrupt.

7 BY MS. GOLDSTEIN:

8 Q. I'm sorry, but the money we are talking about is union
9 member dues money that would be paid via a payroll check-off
10 that would be in a collectively bargaining agreement?

11 A. Yes, ma'am.

12 Q. Not money that was specifically raised for the purpose
13 of paying plaintiff's attorney's fees?

14 A. Yes, ma'am, you're correct.

15 THE COURT: All right. Thank you.

16 All right, sir. You may step down.

17 (Witness excused.)

18 THE COURT: Counsel, we are going to adjourn for
19 45 minutes. I have other parties waiting. We'll reconvene
20 at 1:00. I'll hear at that time from the plaintiffs and the
21 defendants with regard to any other evidence you wish to
22 present in response to the intervenors' evidence and
23 testimony.

24 Let me offer this suggestion over the lunch hour,
25 counsel. I obviously have a motion to intervene that's

1 before me. I also have a motion for a preliminary
2 injunction that's been fully briefed and is currently before
3 me.

4 Obviously, it is premature, and I offer no opinion yet
5 as to how I'm going to rule on the motion to intervene. I
6 could simply deny the motion to intervene, once I hear all
7 the evidence, of course. I may grant same. If I grant it,
8 in all likelihood it will be prospective and not
9 retrospective, meaning the motion for preliminary injunction
10 is ripe and I will rule on that based on all the papers and
11 the briefs. It's been fully briefed by competent and very
12 capable counsel.

13 And as I've indicated in the past, this litigation is
14 going to go on and on and on irrespective of what decision I
15 make in the absence of some agreement.

16 I take no direct position as it relates to these
17 ongoing negotiations except to say that it would make some
18 sense to me that some discussion be had with the Sheet Metal
19 Workers to see to it, and see if a finalized constitution
20 could not be put in place so that there could be no dispute
21 as to what the parties agreement is in this matter.

22 I've already stated in my earlier ruling that it may
23 be argued, may be argued, that the merger agreement is
24 nothing more than an agreement to agree.

25 And if it is indeed just that, then it would make

1 great sense to me that the parties, again, to repeat myself,
2 see if in fact a finalized form of constitution, is the word
3 I want to use, could not be put into place.

4 If that were to be the case, then it would strike me
5 that given the tremendous import to the union, the parties
6 should give some consideration to some method, manner and
7 means of allowing the membership to consider that
8 constitution, the documents that would govern their future
9 relationship with both the Sheet Metal Workers and indeed
10 govern their future as it relates to members of a union. It
11 would make, I think, in the eyes of most neutral observers,
12 a great amount of sense, particularly given the fact that
13 the vote in this particular situation was not overwhelming.

14 84 thousand members, if my memory is correct as to the
15 record, are members of this union. For whatever reason, be
16 it time, be it lack of notice, be it -- I don't know all the
17 specific reasons as of yet. I will obviously have to opine
18 on that, perhaps. But only 12 thousand plus members out of
19 84 thousand even chose to vote. And of those 12 thousand
20 plus, I think only 85 hundred voted in favor.

21 So in essence, less than ten percent of this union, or
22 ten percent, thereabouts, arguably, without the benefit of a
23 written constitution, knowing what is going to govern the
24 future relationship, or the future for these members, will
25 set in place the likely -- the long-term, the path that that

1 union will follow.

2 So I strongly suggest -- and I offer no opinion as to
3 how -- again, take none of my comments as any indication how
4 the Court might rule in this matter. But for the benefit of
5 all, particularly the cost, the expense, and the ongoing
6 acrimony this relationship will continue to have, I would
7 strongly suggest that some serious discussions be had along
8 those lines, recognizing Mr. Futhey's reference to some
9 confidence here. Perhaps Mr. Sullivan may be available, and
10 if the parties wish, we can certainly use my conference room
11 and the conference phone to engage in conference calls if
12 need be.

13 But counsel, I strongly suggest that there be some
14 serious discussion along those lines, or whatever other
15 lines that you might creatively think in terms of bringing a
16 resolution to this.

17 In these kind of economic times, union members dues,
18 both Sheet Metal Workers dues -- I assume the Sheet Metal
19 Workers Union, through their leadership and through their
20 membership, have approved the payment of the attorney fees
21 on behalf of these intervenors. Likewise, I assume that the
22 UTU members, at least at the local level, have approved the
23 payment of these fees. Their dues can be better had. A
24 better use can be made of those dues than investing in this
25 long-term, and this will be long-term litigation.

1 So you've got 50 minutes to at least initiate that
2 effort. And I hope that perhaps reasonable minds could
3 discuss, again, some resolution short of this ongoing time,
4 energy, and expense.

5 Thank you for your patience and courtesy. I'll see
6 you in about 40 minutes, and my clerk will assist you if you
7 need to make use of a conference room, etcetera.

8 Thank you very much, ladies and gentlemen.

9 (Recess taken, 12:20 p.m.)

10 (Proceedings adjourned at 12:20 p.m.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

I N D E X

1		
2		
3		
4	DIRECT EXAMINATION OF PAUL THOMPSON	4
5	BY MS. GOLDSTEIN	
6	CROSS-EXAMINATION OF PAUL	30
7	BY MR. FOX	
8	REDIRECT EXAMINATION OF PAUL THOMPSON	36
9	BY MS. GOLDSTEIN	
10	DIRECT EXAMINATION OF JOHN BABLER	38
11	BY MS. GOLDSTEIN	
12	CROSS-EXAMINATION OF JOHN BABLER	53
13	BY MR. FOX	
14	REDIRECT EXAMINATION OF JOHN BABLER	59
15	BY MS. GOLDSTEIN	
16	DIRECT EXAMINATION OF TONY IANNONE	62
17	BY MS. GOLDSTEIN	
18	CROSS-EXAMINATION OF TONY IANNONE	77
19	BY MR. FOX	
20	DIRECT EXAMINATION OF J.R. CUMBY	84
21	BY MS. GOLDSTEIN	
22	CROSS-EXAMINATION OF J.R. CUMBY	91
23	BY MR. FOX	
24	REDIRECT EXAMINATION OF J.R. CUMBY	95
25	BY MR. GOLDSTEIN	

1	RE-CROSS-EXAMINATION OF J.R. CUMBY	95
2	BY MR. FOX	
3	DIRECT EXAMINATION OF JOHN FITZGERALD	97
4	BY MS. GOLDSTEIN	
5	CROSS-EXAMINATION OF JOHN FITZGERALD	102
6	BY MR. FOX	
7	DIRECT EXAMINATION OF MALCOLM FUTHEY	107
8	BY MS. GOLDSTEIN	
9	CROSS-EXAMINATION OF MALCOLM FUTHEY	107
10	BY MR. GUERRIERI	
11	REDIRECT EXAMINATION OF MALCOLM FUTHEY	116
12	BY MS. GOLDSTEIN	
13	CROSS EXAMINATION OF MALCOLM FUTHEY	122
14	BY MR. FOX	
15	FURTHER REDIRECT EXAMINATION OF MALCOLM FUTHEY	123
16	BY MS. GOLDSTEIN	

17

18

C E R T I F I C A T E

19

20

21

22

23

24

25

S/Caroline Mahnke

6-1-08

Caroline Mahnke, RMR, CRR

Date