BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of:		
PRATT INDUSTRIES, INC.,		
Respondent,	Case Nos.	29-CA-30271 29-CA-20281 29-CA-30382
and		
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 30,		
Charging Party.		

REPLY MEMORANDUM OF LAW OF PRATT INDUSTRIES, INC.

Dated: New York, New York
December 21, 2011

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PRELIMINARY STATEMENT

As the Administrative Law Judge ("ALJ") did before her, Counsel for the General Counsel ("GC") disregards any facts or cases that are inconvenient to her position. If the ALJ or GC could overcome those damning facts and precedent, they would have done so; their unwillingness to address these issues really is an inability to do so. Further, the GC ignores controlling precedent on the issue of subcontracting, grossly misstates Pratt's position on impasse, and wantonly misstates the record.

It is not possible to address all of the infirmities of the GC's brief within the page constraints of a Reply, but Pratt will address some of the more egregious examples.

I IMPASSE

The GC misrepresents Respondent's impasse argument, ignores virtually all case law cited by Respondent, and fails to cite a single case in support of its claim that the parties had not reached impasse.

The parties agree that in *Taft Broadcasting Co*., 163 N.L.R.B. 475, 478 (1967), *petition for review denied* 395 F.2d 622 (D.C. Cir. 1968), the Board set forth five factors to be considered in determining whether the parties have reached an impasse: 1) the good faith of the parties in negotiations; 2) the bargaining history; 3) the length of the negotiations; 4) the contemporaneous understanding of the parties as to the state of the negotiations; and 5) the importance of the issue or issues as to which there is disagreement. Respondent's Brief, p. 20; Opposition Brief, p. 12.

Despite Respondent's detailed analysis of each of these factors, the GC contends that "Respondent's argument boils down to one claim – that the parties were at an

impasse because there was no significant movement on major issues … Respondent does not rely on any other factor to support its claim of impasse." (Opposition Brief, p. 10, Respondent's Brief, pp. 21-29). Not only is this incorrect, the GC takes issue with Pratt's positions on these factors—the very factors that the GC claims Pratt failed to address.[1]

As to the parties' understanding of impasse, Pratt's position was not – as the GC claims – that the parties' understanding is irrelevant. Instead, Pratt argued (and cited four cases stating) that *both* parties need not believe that they are at impasse. Respondent's Brief, pp. 25-26; *see ACF Indus., LLC*, 347 N.L.R.B. 1040 (2006) (holding that the parties were at impasse even though the union had sent *two* letters denying the existence of the impasse and requesting more information and more meetings); *Richmond Elec. Servs*., 348 N.L.R.B. 1001 (2006) (same); *Rochester Tel. Corp*., 333 N.L.R.B. 30 (2001) (finding that the parties had reached impasse even though the union had made verbal and written statements to the employer that it did not believe they were at impasse); *see also ConAgra, Inc. v. NLRB*, 117 F.3d 1435 (D.C. Cir. 1997). The GC fails to address any of these cases in its Opposition Brief. Moreover, while claiming that there is "well-settled Board law" in its favor, the GC failed to cite a single case in support of its claim that for an impasse to exist *both* parties must actually believe they are at an impasse. Opposition Brief, p. 13.

[1] We note that as to the first factor, as Pratt noted in its Brief, there is no allegation that the Employer bargained in bad faith. (Respondent's Brief, p. 29). With respect to the bargaining history and length of the negotiations, Respondent devoted two pages of its brief discussing five cases in support of its argument that both of these factors supported its claim that the parties had reached an impasse. Respondent's Brief, pp. 21-22. Although the GC maintains that the ALJD properly considered these factors, she made no effort to distinguish any of the five cases cited by Respondent nor cite any cases of her own. Opposition Brief, p. 12.

The GC also claims that "the record evidence – most notably Vic Columbus' own admissions – compels the conclusion that neither party believed that they were at an impasse." Opposition Brief, pp. 13-14. The GC offers only two pieces of evidence and Board law refutes the significance that the GC ascribes to this evidence.

First, the GC claims that, "[t]hroughout Respondent's exceptions brief, it repeatedly argues that Respondent was always willing to meet with the Union … this is an admission that Respondent did not believe that continued bargaining was fruitless." Opposition Brief, n. 12. Once again, the GC failed to cite any case holding that a continued willingness to meet belies or precludes impasse; in fact, Board precedent is to the contrary: *see ACF Indus.*, 347 N.L.R.B. at 1041-42 (finding that an impasse existed where the employer, prior to implementing, told the union that the parties could meet and continue negotiating post-implementation; "an impasse does not necessarily mean that bargaining is at an end … if a party makes a new substantive proposal, the impasse can be broken").

Further, the GC claims that Respondent could not have believed the parties were at impasse because neither party formally declared an impasse and Respondent never stated that it was presenting the Union with a last and final offer. Opposition Brief, p. 14. However, as explained in Respondent's Brief:

> Respondent's statement that it intended to implement is tantamount to declaring an impasse. *See, e.g., ACF Indus.*, 347 N.L.R.B. at 1041 (employer had declared an impasse where its negotiator simply stated that it "had nothing further to offer, that he ha[d] his 'marching orders' and that 'I got to implement'").

Once again, the GC makes no effort to distinguish Respondent's case law and does not present a single case in support of the GC's position.

Finally, with respect to the fifth *Taft* factor, the importance of the issue or issues as to which there is disagreement, the GC maintains that:

> [A]s of the last bargaining session before Respondent's June implementation, on April 21st, the parties were engaged in serious bargaining focused on the economics of a contract until January 2010 [sic], and that this focused bargaining on economics continued up until (and after) Respondent's June 2010 implementation of schedule changes.

Opposition Brief, p. 13. This is simply not true. Although the GC points to the fact that meetings occurred and emails were exchanged through April, she conspicuously fails to mention a single substantive item on which the parties made any progress during this time. Opposition Brief, p. 13. This is because, "there had been no movement on any substantive issues, including wages, hours, vacations, pensions, medical, holidays, sick leave or any other important issue."[2] Respondent's Brief, p. 28.

The GC tries to create the impression of progress by stating that the parties "focused bargaining on economics … up until (and after) Respondent's June 2010 implementation." (Opposition Brief, p. 13.) In fact, there was *no* bargaining during this time. While meetings were scheduled in May and June, the Union cancelled those meetings. Thus, even if the parties had moved on economic issues prior to April 21st, which the record clearly shows was not the case, the lack of movement, or even talks, in

[2] The GC maintains that "[t]he judge correctly held that the union's modified proposals [on April 21st] showed the union's willingness to compromise, thus undermining Respondent's claim of impasse." Opposition Brief, p. 13. Once again, the GC fails to cite any case law to support its position and ignores case law cited in Respondent's Brief. *See Rochester Tel. Corp.,* 333 N.L.R.B. 30 (impasse found despite substantial movement by the Union because deadlock on five key issues precluded a reasonable belief that movement was possible); Respondent's Brief, p. 26. The GC also fails to note the trivial nature of the movement and the fact that it did not involve any major issue in the negotiations.

the *two months* prior to implementation is sufficient to establish that the parties were at impasse as of June 20th. *See, e.g., ACF Indus.*, 347 N.L.R.B. at 1041 (finding that although the parties had previously made progress, because there was no movement in the *two weeks* preceding implementation and the "parties were far apart on a number of significant issues", the parties were at impasse at the time the employer implemented).

In addition, the parties' first post-implementation negotiation session did not occur until October 19th, four months after implementation.[3] Thus, no negotiations occurred during the two months prior to implementation and the four months following implementation. *See McAllister Bros. Inc.*, 312 N.L.R.B. 1121 (1993) (finding impasse where the parties did not meet for two months prior to implementation and four months subsequent to implementation). While the GC claims that post-implementation events cannot be used to show impasse, there is no better evidence of the parties' inability to make progress than their failure even to meet for the four months following implementation. *Id.*

II SUBCONTRACTING

With respect to subcontracting, the GC misrepresents Respondent's position and ignores decades of Board precedent. (See Opposition Brief, pp. 46-49; Respondent's Brief, pp. 34-47).

The GC does not even acknowledge *Westinghouse Electric Corp.*, 150 N.L.R.B. 1574 (1965), a case directly addressing when an employer's past practice of

[3] The GC points to the fact that in the months following implementation the parties exchanged e-mails contemplating dates for future negotiations. Opposition Brief, p. 15. This hardly shows movement. At best it shows that for months the parties considered returning to the table, but with a marked lack of urgency.

subcontracting permits the employer to continue comparable subcontracting without bargaining. In that case the Board established *five* criteria to be considered in determining whether unilateral subcontracting violated Section 8(a)(5) of the Act:

> Whether the subcontracting "was motivated solely by economic considerations"; whether it "comported with the traditional methods by which the Respondent conducted its business operations"; whether the subcontracting in question varied "significantly in kind or degree from what had been customary under past established practice"; whether "the Union had the opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings"; and, whether the subcontracting had any "demonstrable adverse impact on employees in the unit."

Gen. Motors Corp., 257 N.L.R.B. 820, 823 (1981) quoting *Westinghouse* 150 N.L.R.B. at 1577. Respondent's Brief, p. 35.

Although the GC does not acknowledge *Westinghouse*, she implicitly notes this five-part test; however, despite the detail with which Pratt discussed *each* of these five factors, the GC claims that Respondent relies solely on past practice.[4] *See* Respondent's Brief, pp. 36-41; Opposition Brief, pp. 46-49. The GC failed to present *any* argument with respect to the other four *Westinghouse* factors. Since the five factors are to be "weighed and considered cumulatively," the GC's failure to address four of the five factors is tantamount to an admission that Respondent's subcontracting comported with the Act.[5] *Gen. Motors Corp.*, 257 N.L.R.B. at 823, citing *Gen. Elec. Co.*, 240 N.L.R.B.

[4] The GC spends considerable time addressing whether or not the subcontracting was permissible because the Union threatened to poach Respondent's E&I Employees. However, this is entirely unrelated to Respondent's argument that the subcontracting was permissible under *Westinghouse.*

[5] The GC also failed to make any argument with respect to the cases cited by Respondent establishing that *Westinghouse* should be applied to first contracts. Respondent's Brief, pp. 41-42, fn. 40.

703 (1979), *Rochester Tel. Corp.*, 190 N.L.R.B. 161 (1971) and *Union Carbide Corp.*, 178 N.L.R.B. 504 (1969); see *Titus-Will Ford Sales, Inc*. 197 N.L.R.B. 147, 153 (1972) (noting that, "The entire factual framework must be considered in order to arrive at a conclusion"); Respondent's Brief, pp. 35-36; Opposition Brief, pp. 46-49.

Even with respect to the one *Westinghouse* factor addressed by the GC, that of past practice, the GC failed to cite any relevant case law. Both cases cited by the GC, *Eugene Iovine, Inc.*, 353 N.L.R.B. 400 (2008) *aff'd in part and modified in part by Eugene Iovine, Inc.*, 356 N.L.R.B. No. 134 (2011) and *Adair Standish Corp.*, 292 N.L.R.B. 890 (1989), already were distinguished by Respondent in its Brief.[6] Opposition Brief, pp. 48-49; Respondent's Brief, pp. 42, 44. Thus, the GC has failed to present any legal argument in support of its claim that Respondent's subcontracting violated the Act.

Finally with respect to subcontracting, as to the two employees working for two weeks to learn the layout of the Mill, the Union's own witnesses testified that same employees had worked in the Mill doing the same work previously. Both parties agreed

[6] With respect to *Eugene Iovine, Inc.*, Counsel for the General Counsel relies upon dictum contained in a footnote in support of its claims that "respondent could not establish a past practice defense privileging its unilateral changes (including layoffs) based on the acquiescence of a different union that previously represented the unit employees, where the new Union had not acquiesced to such unilateral change." Opposition Brief, pp. 48-49. However, as explained in Respondent's Brief, the *Iovine* past practice had not occurred in more than five years. Thus, the Board explained that a "past practice is not part of the 'status quo' because it happened in the past, lay dormant, and an employer seeks to revive it to privilege unilateral changes undertaken years later." *Eugene Iovine, Inc*., 353 N.L.R.B. at 405; Respondent's Brief, p. 42. Here the past practice was ongoing and consistent.

Similarly, Respondent already has distinguished *Adair Standish,* 292 N.L.R.B. 890. The practice in question there – layoffs – clearly had a demonstrable adverse impact on unit employees. Moreover, the employer had "continuously refused to accede to the Union's repeated requests for recognition and bargaining." *Id*. at 891. Thus, unlike the subcontracting herein, the layoffs in *Adair Standish* clearly ran afoul of two of the *Westinghouse* factors. Respondent's Brief, p. 44.

to the overlap between work done by unit employees and contractor employees. (TR 119, 148-49, 502-03, 520). As to the subcontractor employee "auditioning" for the same job on the Visy payroll, all parties agree that of the six unit employees (not counting the employee in question), four were hired in exactly the same way. The GC fails to acknowledge any of these facts. Thus, she has conceded facts establishing a past practice.

III ACCURACY AND RELIABILITY

As should be clear, the GC's positions are factually inaccurate and legally unsupported. It is not possible within ten pages to address the scores of similar issues; however, with respect to the parties' meetings, the record ought to be accurate.

The GC claims that the parties were equally responsible for the lackadaisical meeting schedule. (Opposition Brief, pp. 17-18.) The record shows that Pratt, specifically Vic Columbus, offered multiple dates that consistently were declined by the Union. (Exs. 37, 50, 53-55, 57, 58, 62, 66). In one exchange, Columbus offered *thirty-four* dates on which he was available for negotiations. Cruse accepted seven dates, only later to cancel all of them. (Ex. 58). In another example, Vic Columbus stated he could not meet on a certain date but proposed *five* alternative dates. In response, Cruse stated that the Union was available for only one of those dates. (Exhibit 37).

The Union ignored Columbus' repeated entreaties to meet. In one email, Columbus stated, "As always, we stand ready to meet at your convenience whenever and wherever possible." (Ex. 49). On March 31, 2010, Columbus wrote, "I will work with you however we need to." (Ex. 48). On another occasion Columbus wrote, "It's been so

long since we have been able to meet, where do you want to pick up?" (Ex. 62). The record evidence shows that often times, Columbus' repeated requests were either ignored by Cruse or Cruse canceled the scheduled meetings (Ex. 54, 55, 57, 58, 62, 63).

The GC admits that the Union canceled several sessions but argues that the Union had legitimate reasons to do so. These "legitimate" reasons include Kevin Cruse's refusal to discuss the subcontracting issue so that he could appear in a photo shoot at City Hall (Tr. 424); similarly, Cruse canceled the September 23, October 11, 13, 14, November 23, and December 14 and 15 dates, alleging the electricians gave him the wrong schedule. Lastly, and perhaps the most egregious example, Cruse canceled the November 9 and 10, 2010 meetings after Columbus was *already* at the airport. Cruse's excuse for the last-minute cancelation was that Columbus had not provided a Summary Plan Description (SPD). Cruse had never mentioned that the meeting was contingent upon receiving an SPD. (Ex. 63).

The GC's distortion of the record evidence paints an incomplete picture of the events. The record evidence shows Vic Columbus' consistent availability and determined efforts to meet, while the Union took a delayed, disinterested and dilatory approach to bargaining.

The GC's brief is equally unreliable as to all issues, and should be treated accordingly.

CONCLUSION

For reasons explained at length in Pratt's initial brief, the ALJ's decision is not supported by the record or the law and should not be adopted. Pratt's position is supported by the GC's inability to do no better than this in opposition.

For all of these reasons, the Board should decline to adopt the Administrative Law Judge's Decision. Pratt respectfully requests that the Board dismiss the complaint in its entirety.

Dated: New York, New York
December 21, 2011

RESPECTFULLY SUBMITTED,

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