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## I. Introduction

Pennsylvania American Water Company (“PAW” or “Company”) submits this Brief in Support of Exceptions to the Administrative Law Judge’s Decision. PAW provides water utility services throughout Pennsylvania. Utility Workers Union of America, Local 537 (“Local 537” or “Union”) represents PAW employees in six different bargaining units, each having its own collective bargaining agreement.

The matter before this Board is a basic contract interpretation issue regarding sporadic work stoppages conducted by Local 537 in January 2011. For all of its twists and turns, this matter revolves around the interpretation of the no strike/no lockout provisions in the Company and Union collective bargaining agreements.

## II. Statement of Facts

### **A. PAW and Local 537 were engaged in contract negotiations with six separate bargaining units, though all contracts remained in effect, and all contained no strike clauses.**

Local 537 represents employees across six bargaining units, each with a separate collective bargaining agreement. Through the relevant time period of January 2011, five of the six collective bargaining agreements between Local 537 and PAW were extended indefinitely beyond their original stated expiration dates, so as to continue in effect at all times relevant to the matters at issue before the Board<sup>1</sup> (Tr. 27-28, 35; Jt. Ex. 1, Stip. 9).

Each of these six contracts contained the following (or substantially similar) no strike language:

“In furtherance of harmonious relations among employees, the Management and the Public, and in consideration of the adjustment procedures set forth in Section

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<sup>1</sup> The sixth contract expired in May of 2011.

3 of this Agreement, **it is mutually agreed by the parties hereto that there shall be no lockout, strike, work stoppage or intentional slowdown during the terms of this Contract.** However, there shall be no liability on the part of the Union for any strike, work stoppage, or intentional slowdown when such strike, work stoppage or intentional slowdown is not authorized by the Union and when, in addition, duly authorized officers of the Local Union shall, within five (5) hours after notification by the Company, sign and cause to be posted in prominent places within the offices or plant of the Company, a notice that the strike, work stoppage, or intentional slowdown was not authorized by the Local Union and directing all employees to return to their respective jobs promptly or to cease any action which may adversely affect any operation of the Company. The Company shall have authority to discipline any employee or employees engaged in any unauthorized strike, work stoppage, or intentional slowdown, subject to the Union's right to present a grievance as outlined in this Contract." (GC Exhs. 2-3, 5-6, Sec. 2; GC Exhs. 4, 7, Sec. 4) (emphasis added).

Interestingly, the following paragraph, hereinafter referred to as the "proviso," follows the above no work stoppage/no lock out paragraph in the Outside Districts and the Pittsburgh contracts but is not in the other four contracts (Jt. Exh. 1, Stip. 10). The picketing activity in question occurred in portions of the Outside Districts and Pittsburgh bargaining units.

"It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event **an employee refuses to enter upon any property where a lawful Primary picket line is established**, provided, however, this clause shall not apply to picket lines established under the Free Speech Proviso of the National Labor Relations Act or to what is commonly referred to as "area standards" picketing." (GC Exh. 2-3, Sec. 2) (emphasis added).

The parties have stipulated to the fact that the second paragraph was placed into these two contracts (and only these two) in order to deal with stranger picket lines (Jt. Exh. 1, Stip. 10). Specifically, the parties were motivated to add the proviso as a result of a Company bargaining unit employee, specifically a meter reader, who while performing his/her duties, came upon a picket line set up at a commercial customer's location by a union representing employees of that customer. When this language was added to the agreements, the bargaining discussions only referenced stranger picket lines, and did not reference picket lines set up by Local 537 at a

location where Local 537 members worked (Jt. Exh. 1, Stip. 10). The intent of the contract drafters and bargainers was to provide employees the choice of whether or not to cross a stranger picket line. (Tr. 23-24; Jt. Ex. 1, Stip. 10). The ALJ's decision recognizes this was the reason the proviso was added to the two agreements in or around 1979 (JD 17: 15-22).<sup>2</sup>

**B. Local 537 first engaged in informational picketing to protest labor negotiations, but then transitioned to “primary” picketing using members of one bargaining unit to picket in a separate bargaining unit for the purpose and with the effect of causing a work stoppage.**

Local 537 began its picketing activities with informational picketing in late 2010 and into January 2011, protesting the Company's negotiations position (Jt. Exh. 1, Stip. 11). However, starting on January 2, 2011, Local 537 also engaged in what it referred to as “primary labor dispute” picketing (Jt. Exh. 1, Stip. 12). Prior to any of either type of picketing, bargaining unit employees were informed by the Union that if they saw blue ink picket signs at their place of work, the blue indicated that informational picketing was occurring, and that they should cross the picket lines and go into work. However, if they saw red ink signs, which also stated “primary labor dispute” picketing, they were not to cross the picket line (Tr. 97-99). This picketing was conducted by Company employees from one Local 537 bargaining unit picketing at Company locations in other Local 537 bargaining units.

These “primary labor dispute” pickets occurred at a few of the Company's water treatment plants in the Pittsburgh and Outside Districts bargaining units, and were intended purpose of causing a work stoppage (Tr. 83, 100-101). The Union made it clear that what it called “primary labor dispute” picketing was concerted activity, and that the Union would fine

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<sup>2</sup> The Administrative Law Judge's decision in this particular case is attached to Respondent's Exceptions and is cited herein as “JD” followed by the page and line numbers of the referenced portion of the decision.

members who crossed the “primary labor dispute” picket lines (Tr. 201, 104). This is evidenced by threats made to Mr. Kevin Shrontz, a PAW bargaining unit plant operator (Tr. 208, 210). When Mr. Shrontz arrived at work one day in January of 2011, he saw pickets set up outside of his place of work. He asked what was going on and was told by the Union picketers that there was a “primary labor dispute.” When he asked if they were on strike, he was told they were not (Tr. 209). He was then told by the Local Union President that if he did cross the picket line, the Union would take internal Union disciplinary action against him (Tr. 210).

Despite the fact that the Union was threatening to fine employees who crossed the picket lines, Local 537 President, Kevin Booth, continued to assure Daniel Hufton, Senior Director of Production for PAW, that there was no strike (Tr. 152-154). The Union’s message to the employees was that there was no strike (Tr. 113). The Company and Union had in the past experienced work stoppage picketing only in connection with a strike when a labor contract (and it’s no strike clause) was no longer in effect (Tr. 205). As a result, the January 2011 work stoppage picketing, unassociated with a strike called after the termination of a labor contract, caused confusion in both employees’ and managers’ minds (Tr. 153, 156, 209).

**C. The Union Claimed that a 1982 Arbitration Decision and a 1991 NLRB decision justified the Union’s belief that the January 2011 work stoppages were lawful.**

Local 537, the General Counsel and the ALJ rely on a 1982 arbitration decision as well as a 1991 NLRB decision to assume that the Union’s 2011 conduct was lawful, and therefore that Local 537 could cause a work stoppage by having members of one bargaining unit picket another Local 537 bargaining unit while all the contract’s and their no work stoppage provisions were in effect (Tr. 24, 106; JD 17: 18-24).

In 1980, the Pittsburgh District went on strike. The Pittsburgh labor contract was terminated and the Union engaged in a full work stoppage in the Pittsburgh District (Tr. 41-42). In addition to picketing throughout the Pittsburgh District, during that 1980 strike, Pittsburgh District bargaining unit members picketed in a neighboring PAW district outside the Pittsburgh bargaining unit (the Valley District<sup>3</sup>), which had a separate collective bargaining agreement between PAW and Local 537 (the so-called “Outside Districts” contract) and set up a picket line at a leak repair site. Two Outside Districts bargaining unit workers came to do a leak repair, saw the picket line, and refused to cross. They were sent home without pay. They filed a grievance over their lost pay for the hours during which they were sent home, pointing to Outside Districts contract language promising employees a full forty hours of pay per week if they were “available” for work. The grievance was arbitrated, and the arbitrator ruled in favor of the employees, finding that they were “available” for work and thus should have been paid per the contract’s guaranteed work week language (Tr. 43-44; GC Exh. 8, p 2-4, 11).

Importantly, the Arbitrator was not ruling on the legality of the picketing or the work stoppage that it caused. That issue was never raised in the arbitrator’s decision, and apparently never raised by the Company representatives at the time. The Arbitrator ruled on the issue of pay under the contract’s guaranteed work week language. However, the Arbitrator did indicate that because the parties elected to have multiple contracts govern their different bargaining units, then there was a “possibility of one portion of the Union having a signed agreement while the other portion of the Union *is striking the Employer*” (GC Exh. 8, p. 9) (emphasis added).

The General Counsel believes that the 1982 arbitration decision “expanded the coverage of this proviso (the choice of crossing a stranger picket line proviso) to cover a picket line that is

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<sup>3</sup> This District no longer exists, and is now called Washington/Valley (Tr. 41-42).

set up by the same union, System Local 537, but [at] a different bargaining unit” (Tr. 24). This is despite the language of the arbitrator specifically pointing out that the one bargaining unit was on a full strike (GC Exh. 8 at p. 9).

In 1991, the Outside Districts labor contract between the Company and Union was terminated and the Union engaged in a full strike in the Outside Districts (Tr. 46). In addition, the striking Outside Districts bargaining unit members also occasionally picketed in the Pittsburgh District, which was not on strike (Tr. 46). The Pittsburgh District employees who refused to cross these picket lines were not paid for the time they missed from work (Co. Exh. 2). The Union filed an NLRB Charge seeking pay for these employees but the NLRB dismissed this Charge, stating that the employees should not expect to be paid if they did not work. As with the 1982 arbitration decision, the NLRB’s 1991 decision contains no language addressing the merits of the picketing, or of the work stoppage caused by the picketing (Co. Exh. 2). That dismissal even shows that the Union did not argue in 1991 that the 1982 arbitration decision controlled the outcome of its claim for pay for time spent honoring the picket line. Both of the 1981 and the 1991 events involved picketers who were on strike under an expired, no longer in effect, labor contract, and in both cases the decisions rendered did not address the merits or lawfulness of having Local 537 bargaining unit employees, who were on strike, picket at another PAW/Local 537 bargaining unit.

**D. A Company letter warned the Union of potential discipline if the Union engaged in illegal intermittent work stoppages.**

In response to the Union’s first instance of work stoppage picketing in January 2011, Carol Dascani, the Company’s Human Resource Director, issued a letter to Local 537 President Kevin Booth regarding the Company’s perspective on the picketing activity. The purpose of the

letter was to warn the Union of the Company's position on the picketing. The Company believed that the Union was telling employees that they would be paid even if they didn't cross the picket lines (Tr. 231-232). The letter states that employees will not be paid if they do not work. It further addresses a concern over continued activity:

“Lastly, the Union appears to be characterizing some of its pickets as “primary” in an attempt to avail itself of the protections afforded in the “No Strike or Lockout” clause of some of our collective bargaining agreements. Without agreeing that pickets such as those that occurred on January 2 are, indeed, primary pickets, be advised that, in the Company's view, this language is intended to protect employees from discipline in situations where they refuse to cross, or are prevented from crossing, primary pickets established by stranger unions. It would be disingenuous for the Union to suggest that this clause should protect employees who are members of the same Union that is “preventing” the employees from working. Whether such employees are working under an active agreement (such as in Pittsburgh) or under the terms and conditions of an expired agreement (such as all other PAWC-Local 537 agreements, per correspondence with Mr. Pasquarelli), such refusal would violate the “No Strike or Lockout” provisions of those agreements. In addition, if Local 537 employees repeatedly refuse to cross picket lines manned by Local 537 members, such refusal may constitute an intermittent work stoppage. The Company is, therefore, putting the Union on notice that it reserves the right to take appropriate action, including but not limited to discipline and available legal remedies, against individual employees as well as against Local 537.” (G.C. Exh. 13)

The ALJ clearly agreed with Dascani's letter's premise that if such picketing continued, it could be construed as intermittent picketing, or “hit and run” work stoppages (JD 21:19-21). In the end, no employee was disciplined as a result of this picketing activity (Tr. 236).

**E. A Company Manager posted a memo to remind employees of the long established rule for plant operators to remain on duty if the next shift operator did not appear for any reason.**

The work stoppages caused safety concerns. Because of the nature of water treatment plants, they should not be shut down and left unattended without proper planning. (Tr. 158-159)<sup>4</sup>. Because the picketing took place at shift changes, the operators on duty were left stranded

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<sup>4</sup> Some of the water plants are self-sustaining – that is, automated. However, the plants that were picketed were not of the type and were manned 24/7 (Tr. 152).

because the new operators would not cross the picket lines. This became problematic when one operator claimed to be tired and did not want to work beyond the end of his shift (Tr. 156). This presented a challenge because the operator was needed to effectively operate the plant. If the operator left without a replacement, the plant would have to be shut down (Tr. 158).

Shutting down a plant can cause a multitude of problems, not the least of which is public health and safety issues (Tr. 159-160). Because of this, shut downs are generally planned and prepared for well in advance, with staff remaining present. The Local's work stoppage picketing, conducted on three separate dates in January 2011, occurred solely at a select few of the Company's water treatment plants (different plants on different days (Jt. Exh. 1, Stip. 12). These plants are manned 24/7 because they cannot be left running unattended (Tr. 158). Because these plants provide water service for large populations and support the public needs of numerous residents, businesses and organizations, unplanned shutdowns create numerous risks to public health and safety. Numerous issues can occur on plant shut down and start up that need to be carefully coordinated and managed, such as ensuring that isolation valves complete shut off water flow and no process unit overflows occur, as well as that chemical feed systems completely shut down and do not continue to feed into the water potentially creating chemical safety concerns. Further, shutting down when the water tanks are not full affects water pressure for the entire service area, impacting customers and fire hydrant flows (Tr. 158-160).

Because of the above cited risks, there is a long standing Company rule that an operator is not to leave the plant until another operator arrives, regardless of the reason why another operator has not arrived (Tr. 157, 160). This rule has been in place as long as Company manager Hufton, Senior Director of Production for PAW, could remember, and predated his arrival with

the Company in 2004 (Tr. 151, 160).<sup>5</sup> This issue is so important that it is presented during the interview process for the position of plant operator. Potential applicants are informed about the responsibility of staying with a plant during their interview process (Tr. 160).

Dan Hufton posted a memo in January 2011 reminding employees of this well-established past practice and rule that employees are not to leave a plant until relieved by another operator, regardless of the reason the next operator doesn't appear (Tr. 161; G.C. Exh. 11). Employees were directed to stay at their posts until their replacement arrived, in keeping with the well-established practice and Company protocol (GC Exh. 11).

**F. Local President Booth posted on plant bulletin boards a letter he wrote to the Company, which the Company removed from the bulletin boards because the Union President's letter stated that employees were free to leave a plant unattended despite Mr. Hufton's memo and the Company's longstanding rule to the contrary.**

Subsequent to the publication of Mr. Hufton's memo, Mr. Booth, President of Local 537, responded to Mr. Hufton with a letter (GC Exh. 12). Mr. Booth directed that this letter be posted on all plant bulletin boards to which the Union had access (Tr. 85-86). This letter directed plant operators on what to do if their replacements did not arrive. This letter's directives were contrary to the memo published by Mr. Hufton, and called employees to act in a manner inconsistent with Mr. Hufton's memo.

“This letter puts you on notice that in the event a similar situation may occur; the Operator will attempt to make contact with the on-duty personnel, and then his/her supervisor with[in] a reasonable amount of time. If after a reasonable amount of time, a replacement operator is not provided; the plant may be shut down, secured, and the operator may leave. I expect you should respond as outlined in your local [Emergency Response Plan].” (GC Exh. 12)

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<sup>5</sup> This rule is so strong that in the past a plant operator was not allowed to leave until a replacement operator arrived even though she wanted to leave because her son was taken to a hospital emergency room (Tr. 206).

Mr. Hufton, concerned that employees would see the direct contradiction between his and President Booth's statements, had Mr. Booth's letter removed from the bulletin boards (Tr. 164-165). Mr. Hufton subsequently sent emails to the management of the Company informing them to remove Mr. Booth's letter, and to remind the employees that the directives of his memo and the longstanding Company rule were to be followed (Tr. 165-166).

### III. Argument

**It was unlawful for Local 537, while not on strike, to utilize employees of one bargaining unit to picket a separate PAW bargaining unit location for the purpose of causing a work stoppage, thereby violating the no-strike provisions of the respective collective bargaining agreements.**

The ALJ engaged in an overly convoluted analysis to justify the improper conclusion that it is acceptable for the Union to cause a work stoppage by merely shifting picketers between bargaining units, even though contractual bar against a work stoppage remained in effect in all its bargaining units. This ruling ignores the stipulated to intent of the bargainers of the labor agreements. It also ignores the plain language of the waiver of the right to have a strike or work stoppage for which the Company and Union contracted. Finally, it misinterprets the extrinsic evidence by assuming that the Company's not challenging the foreign bargaining unit picketing in one labor arbitration must mean that the contract terms were altered beyond the bargainers' intent merely by virtue of the Company's not raising such unnecessary arguments before an arbitrator analyzing a different subject, namely a contractual hours of work guarantee provision.

PAW advocates a simpler, clearer explanation. PAW's interpretation honors the original intent of the bargainers of the labor agreements, the plain meaning of the agreement, and the extrinsic evidence, without doing harm to any of the above.

**A. Basic principles of contract interpretation provide a clear and convincing interpretation of the relevant collective bargaining agreements, giving full meaning to each clause while honoring the bargainers' intent. [Exception No. 1]**

“It is well recognized that rules applicable to the construction of contracts in general apply to labor contracts. **The contract must be construed as a whole, and effect must be given to the mutual intention of the parties involved.**” *Alliance Mfg. Co., Inc.*, 200 NLRB 697, 700 (1972) (emphasis added). The primary goal of contract interpretation is to “determine the mutual intent of the parties.” Elkouri and Elkouri, *How Arbitration Works*, note 4 at pg. 348 (4<sup>th</sup> ed. 1988). There is an obligation to construe collective bargaining agreements so as to carry out the original intent of the authors. *Capital Parcel Delivery Company*, 256 NLRB 302, 314 (1981); *Painters (AFL-CIO) Local 1778, Glaziers (Binswanger Glass Co.)*, 137 NLRB 975, 978 (1962); *Southern Indiana Gas & Elec. Co.*, 86 LA 342, 343 (Schedler, 1985); *Indep. School Dist. No. 47*, 86 LA 97, 103 (Gallagher, 1985); *Labor Standards Ass’n*, 83 LA 9, 11 (Talarico, 1984). When interpreting a collective bargaining agreement, the Board looks at the parties’ intent, the wording of the contract, as well as the extrinsic evidence that *may assist* in interpreting the document. *Indianapolis Power & Light Co.*, 291 NLRB 1039 (1988), *enfd.* 898 F.2d 524 (7<sup>th</sup> Cir. 1990) (emphasis added). While the ALJ here relies upon *Indianapolis Power* for the authority to use past practice evidence to interpret contract language considered unclear, the Court in *Indianapolis Power* agreed with the NLRB that “we shall give the parties’ intent controlling weight.” *Id.* at 1039. Further, the Court reasoned that the issue “**depends on the intent of the contracting parties**” *Id.* at 1040, citing *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 382, 94 S.Ct. 629, 639 (1974).

In the case cited by the ALJ’s decision at issue here as the basis for his contract interpretation, the Board clearly stated that it should “give the parties’ intent **controlling**

weight.” *Indianapolis Power & Light Co.*, 291 NLRB 1039, 1040 (1988), *enfd.* 898 F.2d 524 (7<sup>th</sup> Cir. 1990) (emphasis added). In the matter before us, there is absolutely no question as to the parties’ intent for the proviso in question. As the ALJ clearly articulated in his decision here, and all parties agree via stipulation, the intention of the sympathy strike proviso when it was added to the agreement in 1979 was as follows:

“...the second paragraph was added in or about 1979 after a meter reader encountered a picket line at a customer’s worksite and this ‘stranger’ picket line was the focus of the negotiators’ discussions when the language was added to the Outside Districts contract.” (JD 17:12-16).

The Company, Union and General Counsel stipulated to the following.

“[The sympathy strike proviso] was added to the Outside District CBA in or around 1979 as a result of a Company bargaining unit employee, a meter reader, who in the course of doing his/her job duties by going to customer locations to read water meters, encountered a picket line set up at commercial customer’s location by a union representing employees of that customer. When this language was negotiated and agreed to be put in the Outside District CBA, the bargaining discussion between the parties concerning it only referenced stranger picket lines such as this and never mentioned a picket line set up by the Union here (UWU 537) at a location where bargaining unit employees represented by this Union worked.” (Jt. Ex. 1, Stip. 10)

As a result, the evidence is clear that the intended purpose of the sympathy strike proviso was to enable employees to have the freedom to decide whether or not to cross a stranger picket line while they were out in the field doing their job. Clearly it was **not** the Company’s and Union’s intent to allow this paragraph to give the Union the opportunity to create a work stoppage which the Union agreed not to do in the immediately preceding paragraph of the contract. If, as the ALJ concludes, that the sympathy strike language in conjunction with the broad no strike language is ambiguous, then “[t]o interpret an ambiguous contractual provision, a factfinder must attempt to discover what the contracting parties ... intended the clause to mean.” *Teamsters Welfare Fund v. Rolls-Royce Motor Cars Inc.*, 989 F.2d 132, 136-37 (3d Cir. 1993), citing *John*

*F. Harkins Co. v. Waldinger Corp.*, 796 F.2d 657, 659-60 (3d Cir. 1986), *cert. denied*, 479 U.S. 1059, 107 S.Ct. 939 (1987). Since it is undisputed here what the contracting parties' intended the clause to mean – that it was designed to cover a stranger picket line – it is inappropriate to construe the provision as covering more than that.

Further principles of contract interpretation require that we construe the contract as a whole. *Sheet Metal Workers, Local No. 3 v. Lozier Corp.*, 255 F.2d 549, 551 (8<sup>th</sup> Cir. 2001), citing *Amcar Div., ACF Indus. v. NLRB*, 641 F.2d 561, 569 (8<sup>th</sup> Cir. 1981); *S & W. Fine Foods, Inc.*, 74 NLRB 1316, 1318 (1947). Collective bargaining agreement terms must be read in their context. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 281, 76 S. Ct. 349, 100 L.Ed. 309 (1956). “The law, however, demands that collective bargaining agreements be construed as a whole with the terms read in the context of the entire agreement.” *Bureau of Engraving, Inc. v. Graphic Communication Intern. Union, Local 1B*, 285 F.3d 821, 825 (8<sup>th</sup> Cir. 2002).

“Though all the parts of the agreement do not necessarily make a consistent pattern, the interpretation which is most compatible with the agreement as a whole is to be preferred over one which creates anomaly.” Shulman, *Reason. Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1018 (1956), reprinted in *Proceedings of the Ninth Annual Meeting, National Academy of Arbitrators* 169, 181 (1956).

In this case, we have two separate paragraphs, the first defining a prohibition in clear and unmistakable language against any “work stoppage, slowdown ...” The second paragraph details a specific allowance for an employee to refuse to cross a lawful picket line. Reading these two paragraphs together, as informed by the bargainers' intent, makes perfect sense. There is to be no work stoppages, but if employees out in the field come upon a lawful picket line, they can decide on their own whether to cross that picket line without fear of reprisal. Reading these two paragraphs in a plain and straightforward manner leads one to conclude that they really are not in conflict at all. Instead, the second paragraph simply addresses a very specific issue

regarding stranger picket lines, and permits individual employees to decide whether to cross said picket lines. It is undisputed that it was never the intent of the drafters of the sympathy strike proviso to have it be interpreted that the Union could move picketers between bargaining units to thwart the no work stoppage provisions of the contract while the contracts were in effect.

The very wording of the sympathy strike language makes it apparent that it was not designed to give the Union rights to overcome the broad no work stoppage/no lockout of the first paragraph of this contract section. The sympathy strike provision is not worded in a fashion to give any rights to the Union. Instead, it is worded to give “an employee” the right “to refuse[] to enter upon any property where a lawful primary picket line is established ....” (GC Exhs. 2 & 3, Sec. 2). This is phrased in a fashion that is very plausible and consistent with the bargainers’ original intent of covering or applying only in the context of a stranger picket line. That is all the bargainers intended. Had this section been intended to give additional rights to the Union it would have been phrased in words giving some right or exception to the Union. But, instead, it is only worded to give an employee the option. The very wording of this provision does not water down or lessen the restrictions upon the Union. Thus, to follow the basic contract interpretation principles of adopting a meaning that gives effect to all the wording and its most plausible interpretation that is consistent with the bargainers’ intent, the sympathy strike language proviso should not be interpreted as giving the Union great freedom to undo its broad no work stoppage commitment in the prior paragraph.

Indeed, the NLRB has already considered similar sympathy strike language and determined that it has the same meaning as maintained by the Company in the current case. In *Teamsters Local 688 (Frito-Lay, Inc.)*, 345 NLRB 1150 (2005), the NLRB construed a labor

contract which, as here, contained a broad no-strike provision and also, similar to here, contained a sympathy strike provision reading as follows:

“It shall not be a violation of this agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a lawful primary labor dispute ....” 345 NLRB at 1151.

The NLRB ruled that since this sympathy strike provision was worded to give “an employee [the right to] refuse[] to enter upon any property involved in a lawful primary labor dispute” it did not amount to lessening or changing the Union’s obligation under the broad no work stoppage to refrain from causing a work stoppage while the contract was in effect. *Frito-Lay*, 345 NLRB at 1152. The NLRB specifically stated that because the sympathy strike provision was explicitly worded to give employees rather than the union additional rights, the sympathy strike provision does not sanction what the no work stoppage provision plainly prohibits – namely, the union calling upon employees to engage in a work stoppage. *Idem*.

The sympathy strike language in the current case is materially identical to that in the *Frito-Lay* case. The PAW/Local 537 sympathy strike language only sanctions employee not union actions.<sup>6</sup> Thus, it does not override the no strike provision’s plain prohibition of the Union causing a work stoppage when the contract is in effect. Application of the governing principles of contract interpretation – giving the most plausible meaning to the whole contract consistent with the bargainers’ intent – requires that the sympathy strike provision not be construed to permit the Union to picket itself when all labor contracts and their no strike provisions remain in effect. Just as in the picketing involved in *Frito-Lay*, the Union here threatened to fine those members who crossed its January 2011 picket lines (Tr. 210, 104). Thus, the Union here did not

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<sup>6</sup> The sympathy strike language in the present case similarly states: “It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property where a lawful Primary picket line is established ....” GC Exhs. 2 & 3, Sec. 2.

give the employees the freedom to choose on their own to refuse to cross a lawful primary picket line, as is the limit and requirement of the contractual phrasing of the sympathy strike provision.

To accept the reading that the Union could avoid its contractual no work stoppage commitment by using different bargaining units to effectuate a work stoppage at any one bargaining unit is to have the exception swallow up the rule, which is a clear violation of the principles of contract interpretation. All provisions of the agreement should be given effect<sup>7</sup>.

The ALJ's interpretation ends up with there being little force or applicability left to the first paragraph of the labor contracts' no strike provisions – the paragraph where the Union and Company promise that there will be no work stoppages or lockouts while the contracts are in effect. The ALJ rationalizes that the full bargain struck by the Company and Union in the contracts is not lost by interpreting the no strike/no lock out first paragraph as being limited to prohibiting the Union from striking over issues it could grieve (JD 16: 32-41). This is incorrect

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<sup>7</sup> The ALJ here attempts to demonstrate that he is giving full accord to all parts of the contract with a long and extensive review of the “textual basis for distinguishing a prohibited strike on behalf of the bargaining unit from a permitted strike undertaken on behalf of another unit’s dispute” (JD16:8-9). However, the ALJ is assuming a textual basis that does not exist. The only two agreements that contains the language which he cited is the Brownsville and Outside District’s contracts (GC Exh. 2, 4, Sec. 2). None of the other agreements mention the “adjustment procedures.” Interestingly, even the Brownsville agreement states that the no-strike language is intended “in furtherance of harmonious relations among employees, the Management and Public, and in consideration of the adjustment procedures set forth in Section 3 ...” This would imply a broader interpretation than simply in exchange for the adjustment procedures only. Courts have consistently held that the interpretation of the breadth of no-strike clauses is a matter of interpretation based upon the language of the agreement. *Ryder Truck Lines, Inc. v. Teamsters Freight Local Union No. 480*, 727 F.2d 594 (6<sup>th</sup> Cir. 1984) (en banc), *cert denied*, 469 U.S. 825, 105 S.Ct. 103, 83 L.Ed.2d 48 (1984). “To hold that no-strike clauses must be construed as prohibiting only strikes over arbitrable issues would undermine the fundamental premise of freedom of contract on which federal labor policy is based by undercutting management’s ability to obtain ‘an across-the-board no-strike clause and labor’s ability to gain concessions in return for such a pledge’” *Id.* at 601. (quoting *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 460 (3<sup>rd</sup> Cir. 1981).

because the no strike/no lock out paragraph is not limited to subjects covered by the grievance and arbitration procedure. The ALJ correctly notes that the first paragraph states that it is entered into in consideration of the adjustment procedures contained elsewhere in the contract (JD-24: 8-12). But a mere statement that one provision in an agreement is entered into in consideration for another provision does not mean those provisions are coterminous. That would be like saying an agreement that settles a lawsuit in which it is stated that the release of claims is in consideration for the payment of a portion of the damages sought in the lawsuit amounts to the release being limited to the claims contained in the lawsuit when the release provision of the agreement is worded more broadly. The agreements here are not worded in a fashion to indicate that the Union can engage in a work stoppage or the Company can lock out employees over a dispute that is not suitable for the grievance and arbitration procedure while the contract is in effect. Instead, the first paragraph of the contract is worded to plainly state that neither the Union nor the Company can cause a work stoppage or lock out, without any limitation as to the reason for or underlying dispute causing the work stoppage or lockout, while the contract is in effect. It is faithful to the plain full wording of the first paragraph to state that in return for the Company agreeing not to engage in a lockout for any reason while the contract is in effect and agreeing to process and arbitrate certain grievances, the Union agrees to not engage in a work stoppage, without limitation as to the reason for the work stoppage, while the contract is in effect (except for a sympathy strike which the bargainers who added the sympathy strike proviso undisputedly only considered to apply to a stranger picket line). It is dishonest to and effectively amends the language of the first paragraph of the no strike provision to limit its scope to disputes covered by the grievance procedure. Further, it is dishonest to the bargainers' intent to interpret the second paragraph as being an exception that destroys the meaning and strength of the first

paragraph, as the bargainers’ intent in adding the second paragraph was to allow an employee not the Union to make the decision to not cross a stranger picket line. In short, the ALJ’s interpretation also violates the governing principle of contract interpretation to give each part of the document its full and intended effect where possible.

It is undisputed that unions have a statutory right to strike and/or picket, unless that right is waived by agreement. However, such a waiver has to be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The waiver contained in the party’s collective bargaining agreements is clear and unmistakable. The language is without equivocation and without limitation.

“[I]t is mutually agreed by the parties that hereto that there shall be no lockout, strike, work stoppage or intentional slowdown during the terms of this Contract.” (GC Exh. 2 & 3, Sec. 2)

This waiver is clear on its face. The very next paragraph is the proviso language.

“It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property where a lawful primary picket line is established ...” (GC Exh. 2, Sec. 2)

These two paragraphs are not mutually exclusive, nor are they in disagreement. The first waives the Union’s right to strike or cause a work stoppage, the second allows each employee the ability to choose whether to cross a lawful primary picket line. The obvious meaning in the second paragraph of a “lawful primary picket line” is, amongst other things, a picket line that does not violate the first paragraph of this contractual provision, while the contract is in effect. This is further clarified by the uncontroverted understanding that the parties’ intent behind the addition of the second clause was to allow meter readers, while out in the field, a choice of whether or not to cross stranger picket lines. It was not drafted and was not intended to cover the situation at issue here. Local 537 has attempted to be clever and create a situation where it could have its

proverbial cake and eat it too (despite promising to wait to eat cake until after the contract is no longer in effect). The ALJ's interpretation is a counterintuitive result that is divorced from the bargainers' intent. There is no question as to the bargainers' intent, as it is a stipulated fact agreed upon by all parties. The question is whether it is appropriate to ignore that intent because of the extrapolated reasoning of the past practice evidence here.

**B. Extrinsic evidence may inform the interpretation of a contract, but may not disturb the clear intended meaning. [Exception No. 1]**

Extrinsic evidence should not be used to add terms to a contract that is plausibly complete without them. *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7<sup>th</sup> Cir. 1993), citing *Calder v. Camp Grove State Bank*, 892 F.2d 629, 632 (7<sup>th</sup> Cir. 1990). When retired employees brought a class action against their former employer alleging that the postretirement termination of their medical and life insurance benefits violated ERISA, the Court was left to interpret the collective bargaining agreement. *UAW v. Skinner Engine Company*, 188 F.3d 130 (3<sup>rd</sup> Cir. 1999). In so doing, it looked at testimony from the employer's chief operating officer as extrinsic evidence. The court relied upon well-established contract interpretation rules that extrinsic evidence may be used when a contract is ambiguous, but it may not be used to create an ambiguity where none exists. *Id.* at 145. The Court cited the Seventh Circuit.

“[A]lthough extrinsic evidence can be used to show that a contract is ambiguous ... extrinsic evidence cannot be used to create an ambiguity ... There is no contradiction here. The party claiming that a contract is ambiguous must first convince the judge that this is the case ... and must produce objective facts, not subjective and self-serving testimony, to show that a contract which looks clear on its face is actually ambiguous ... Just as the court must determine whether a contract is ambiguous, so too the court must determine whether the extrinsic evidence offered in a given case interprets or contradicts the contract.” *Skinner Engine Co.*, 188 F.3d at 145 citing *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 565 (7<sup>th</sup> Cir. 1995).

The Third Circuit in *Skinner Engine Co.* goes on to state that there are dangers in allowing extrinsic evidence, and therefore its use should be limited.

“There are, therefore, limits on the use of extrinsic evidence in interpreting collective bargaining agreements. As Judge Posner’s lead opinion in *Bidlack* recognized, permitting the use of extrinsic evidence in interpreting otherwise unambiguous or complete contracts creates the danger of depriving parties of the benefits of their written agreements.” *Skinner Engine Co.*, 188 F.3d at 146.

“Although extrinsic evidence is admissible to show that a written contract which looks clear is actually ambiguous, perhaps because the parties were using words in a special sense, ... there must be either contractual language on which to hang the label of ambiguous or some yawning void ... that cries out for an implied term. Extrinsic evidence should not be used to add terms to a contract that is plausibly complete without them.” *Bidlack*, 993 F.2d at 608.

In this matter, the ALJ relies upon a 1982 arbitration and a 1991 NLRB decision involving the Company and Union to disrupt the bargainers’ undisputed intent of the agreements. The theory espoused by the ALJ is that, though we know the bargainers’ intent, and thus the meaning of the contract, the 1982 arbitration and 1991 NLRB decisions provide “extrinsic evidence” which informs the fact finder of a “practice of longstanding” (JD 19: 18). He spends no small amount of time engaging in an explanation of how the language of the contract could be read to allow for the Union to cause a work stoppage by sending picketers from one of its bargaining units to another (while the contracts are in effect), despite the fact that such a reading is obviously different than what we know to be the original intent of the bargainers. Moreover, as discussed subsequently herein, the ALJ ignored the crucial distinction of this extrinsic evidence that, unlike the events upon which the 1982 and 1991 decisions were based, in 2011 all the Company and Union labor contracts and their no strike provisions remained in effect.

The ALJ’s use of extrinsic evidence emasculates the plain meaning of the agreements, aborts the bargainers’ intent, and disregards other more plausible explanations for the Company’s and Union’s behavior in 1982 and 1991. The ALJ views his approach as using

extrinsic evidence to inform the interpretation of the agreements. However, extrinsic evidence is only used when the language of the agreements is not clear, and thus needs clarification. That is not the case here. Instead, the language is clear, particularly when read in light of the undisputed intent of the bargainers who put the language in the contract. In these circumstances, there is no need to utilize past practice. The meaning of the contract is plain without it.

**C. Even if Extrinsic Evidence were Appropriate to Use Here, the ALJ's Decision Improperly Extended It Beyond the Circumstances of the Limited Past Practice Involved. [Exception No. 1]**

Even if, for the sake of argument, it were reasonable to utilize here extrinsic evidence other than the bargainers' intent, the extrinsic evidence present here was improperly interpreted and applied beyond its circumstances. The extrinsic evidence here consists of the 1982 arbitration decision and the 1991 NLRB decision regarding pay for time an employee misses work honoring a picket line. Neither situation involved a determination as to the bargainers' intent in drafting the sympathy strike language. The ALJ maintains that the 1982 arbitration decision indicates that "the parties accepted that pursuant to this language the Union is entitled to establish a picket line – on behalf of another Employer bargaining unit – and that employees who honor the picket line are protected from discipline for honoring that picket line" (JD 17: 22-24). However, that is a non-sequitur. It does not follow that because the Company did not raise that issue before the Arbitrator in 1982 or the NLRB in 1991 that it accepted the behavior in the current situation, or that this limited past practice of two occasions was considered similar to the current situation. As discussed below, there is another more plausible explanation.

**D. The “ally doctrine” provides the necessary context to understand why the Company did not object to bargaining unit employees picketing in other bargaining unit locations during the 1982 and 1991 strikes, while at the same time honoring the contract language and bargainers’ intent. [Exception No. 1]**

The ALJ’s decision did not adequately assess the key distinction in this matter. In 1982 and 1991 the picketing employees were on strike. Their labor contract had been lawfully terminated. The no strike provision no longer applied to the picketers. Because they were on strike, the “ally” doctrine applied, and the Company had no basis to contest the picketing.

As previously discussed, employees have the right to engage in concerted activities, including engaging in a strike, once the labor contract and its no strike clause covering those employees has been terminated. During such a strike, one of the protected activities is the right to picket an employer. However, “secondary employers,” or employers not directly engaged in the dispute with the union, are protected from such activity by Section 8(b)(4)(B) of the Act.

An ally relationship is found when one entity is sufficiently or closely connected to or involved in the work of the struck employer, and also when the two entities form a “single enterprise.” The concept is that where the struck entity and the “neutral” or other entity are so closely related or are a single enterprise it would be unfair to give the other entity the protection of 8(b)(4)(B). The Supreme Court established that the controlling factors in finding an ally relationship are “...the interrelation of operations, common management, centralized control of labor relations and common ownership.” *Newspaper Production Co. v. NLRB*, 503 F.2d 821, 827 (5<sup>th</sup> Cir. 1974), citing *Radio Technicians Local 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256, 85 S.Ct. 876, 877, 13 L. Ed. 2d 789 (1965); see also *Dean v. American Federation of Government Employees, Local 476*, 509 F.Supp.2d 39, 56 (D.C. 2007); *NLRB v. Browning-Ferris Industries of Pa., Inc.*, 691 F.2d 1117, 1122 (3<sup>rd</sup> Cir. 1982); *J.G. Roy & Sons Co. v. NLRB*, 251 F.2d 771, 773-74 (1<sup>st</sup> Cir. 1958); *Sheet Metal Workers v. Atlas Sheet Metal*

*Co.*, 384 F.2d 101, 105 (5<sup>th</sup> Cir. 1967), citing *NLRB v. Milk Drivers & Dairy Employees Local 584*, 341 F.2d 29 (2d Cir. 1965); *Miami Newspaper Pressmen's Local 46 v. NLRB*, 322 F.2d 405 (D.C. Cir. 1963); *Truck Drivers & Helpers Local 728 v. Empire State Express, Inc.*, 293 F.2d 414 (5<sup>th</sup> Cir. 1961); *Bachman Machine Co. v. NLRB*, 266 F.2d 599 (8<sup>th</sup> Cir. 1959); *Denver Bldg. & Constr. Trades Council*, 219 F.2d 870 (10<sup>th</sup> Cir. 1955).

The ally doctrine was well established law in 1982. Thus, when the Company and Union came before the Arbitrator in 1982, to protest the picketing outside the bargaining unit site would run straight into the teeth of the ally doctrine. It is beyond challenge or controversy that the PAW Outside Districts, while a separate bargaining unit, was closely allied or a single enterprise with the PAW Pittsburgh District, such that when one of them was on strike it was permissible for the strikers to picket at the other. In 1981 the Pittsburgh District was on strike and picketers went to the Outside Districts also. In 1991, the Outside Districts were on strike and picketers went to the Pittsburgh District also. It is crucial to understand that the ally doctrine applied to each of these situations only because the picketing employees were on strike. If they had not been on strike, the ally doctrine would not have applied, and the Company would have been able to challenge the validity of the Union's tactics. But, because there was a strike under an expired, no longer in effect, labor contract, to argue that they were not allowed to picket at a PAW facility outside the picketers' home bargaining unit would have been futile given the ally doctrine.<sup>8</sup>

It is also important to note, as the ALJ's decision acknowledges, that in both of these cases – the 1982 arbitration and the 1991 NLRB Charge, the picketing was not the issue before the factfinder (JD 19: 9-12). The arbitrator was ruling on whether the labor contract's forty hour work week required pay for the time the workers honoring the strikers' picket line were sent

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<sup>8</sup> Also, for the sake of argument, even if the Company failed to present an argument it had in one of those cases, that failure does not amount to a waiver in future cases such as this.

home. The 1991 NLRB ruling concerned a similar question of whether pay was due for time spent honoring the strikers' picket lines. The ALJ recognized this by stating he accepted that the 1982 arbitration decision and the 1991 NLRB ruling concern "a different issue" than that involved in the current case and thus it renders both those rulings as "something less than definitive" (JD 24: 10-13). Thus, both cases did not decide the legality of the picketing in their respective decisions. Moreover to the extent they are seen as the Company waiving an argument there regarding the legality of the picketing, the ally doctrine provides the most plausible explanation for why the picketing was not challenged or considered unlawful.

The fact that the picketers were not on strike is a crucial distinction, and one all but ignored by the ALJ. In his entire 27 page decision, only two paragraphs deal with the lack of an underlying strike in his assessment and application of the extrinsic evidence (JD 19: 26 - 20: 6). Moreover, the ALJ's decision never even mentions or analyzes the ally doctrine which was argued in the Company's Post-Hearing Brief.

In the January 2011 picketing at issue here, none of the labor contracts had been terminated and no Union bargaining unit was on strike. Thus, there is no ally doctrine upon which to rely regarding the January 2011 picketing. Conversely, the labor contracts, which were all in effect, clearly articulate that there are to be no work stoppages. Therefore, the work stoppage was not lawful. As such the Union's activities were unprotected and no unfair labor practices can be alleged against the Company. This interpretation honors the language of the agreement, the intent of those who drafted the agreement, as well as the extrinsic evidence.

**E. The alleged past practice should not be interpreted beyond the circumstances of the 1982 Arbitration and the 1991 NLRB Decision. [Exception No. 1]**

The ALJ decision makes a pivotal reliance on the fact that, after the 1982 arbitration decision, and again when the Union sent strikers to picket Company locations outside the striking bargaining unit in 1991, the Company did not seek to change the sympathy strike language of the labor contract. JD 18. This is aside from the fact that one occasion in the nearly thirty years following the 1982 arbitration decision is hardly a “practice.”<sup>9</sup> Moreover, a past practice should not be interpreted to apply beyond the circumstances underlying that past practice. *See e.g., Past Practice and the Administration of Collective Bargaining Agreements* (Proceedings of the 14<sup>th</sup> Annual Meeting, National Academy of Arbitrators; BNA 1961), at p. 57; F. & E. Elkouri, *How Arbitration Works*, (5<sup>th</sup> Ed. 1997; Volz & Goggin, Editors), at p. 643. It is undisputed that the past practice -- namely the 1981 and 1991 work stoppages -- was limited to situations where a labor contract between the Company and Union had been terminated and the Union went on strike (and as part of that strike sent picketers to Company locations outside the striking bargaining unit). It is not faithful to this past practice to conclude that the termination of the labor contract and the calling of a full lawful strike was not a material underlying circumstance to the resultant picketing in 1981 and 1991. It was reasonable, as explained above, for the Company in 1981 and 1991 to conclude that the ally doctrine made it lawful for the Union to picket outside the bargaining unit of the picketers because those picketers had terminated their labor contract and went on strike -- i.e., they were no longer violating their no strike provision because it was no longer in effect as a result of the termination of the labor contract. This is the plausible explanation for the Company’s not challenging the Union’s

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<sup>9</sup> *Quick v NLRB*, 245 F.3d 231, 247 (3d Cir. 2001) (evidence of one occasion “is not evidence of ‘past practice’”); *Erie County*, 129 LA 79 (D’Eletto, 2011) (two instances do not establish past practice); *Defense Logistics Agency*, 128 LA 442 (Wang, 2010); *Stuart Manufacturing*, 125 LA 1076, 1078 (Brunner, 2008) (two instances in a 15 year period is not a past practice, particularly when it is remembered that past practices are inevitably dependent upon their circumstances).

picketing in 1981 and 1991 as illegal. It is the explanation given by the Company witnesses – they were confused by the fact that, for the first time ever, the Union in 2011 was engaging in work stoppage picketing without having called a strike (Tr. 156, 165, 182). Since the past practice at issue was limited to a strike under a terminated labor contract, it is unreasonable to apply that to the different circumstances in January 2011 where all labor contracts were in effect.

Additionally, courts have addressed the use of past practice in the interpretation of collective bargaining agreements, and warned against the dangers of same.

“The existence of this ‘industrial common law’ does not necessarily mean ... that the parties should be bound by their customs to the same extent as by explicitly negotiated provisions in their collective bargaining agreement. Unlike contractual agreements, past practices may not always be the result of joint determination” *Judsen Rubber Works, Inc. v. Manufacturing, Production & Service Workers Union Local 24*, 889 F.Supp. 1057 (N.D. Ill. 1995) (citing *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580, 80 S.Ct. 1347 (1960)).

They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. Elkouri & Elkouri, *How Arbitration Works* 394 (3d ed. 1976) (quoting *Ford Motor Co.*, 19 Lab.Arb. (BNA) 237, 241-42 (1952)).

Based on these various reasons, the contracts’ sympathy strike proviso should be interpreted as not applying to authorize the Union to engage in the 2011 work stoppage picketing, based on the fact that the language itself of this proviso only speaks to authorizing an employee to decide to honor a lawful sympathy strike but does not state that it is an exception to the Union’s broad no work stoppage promise. In addition, the bargainers’ intent in adding the sympathy strike proviso did not cover any situation other than a stranger picket line. Further, the limited past practice under this provision only arose in circumstances, not present here, where the picketers’ labor contract was terminated and a strike underway. The Union’s actions here in setting up picket

lines with the purpose and effect of causing a work stoppage violated the contractual prohibition on work stoppages, giving reasonable effect to all of the contractual provisions and the bargainers' intent. Thus, the Union's and employees' activity was unprotected because it was not a lawful work stoppage.

In light of the above, the unfair labor practice charges against the Company involved here – i.e., that it made statements to employees amounting to improper threats and that it improperly removed a union letter from bulletin boards, must be dismissed as the underlying activities associated with the picketing were unprotected. However, in the interest of a thorough analysis of the matters before the Board, we present the following argument showing additional grounds for dismissal of the charges regarding the following.

**IV. The removal of the Booth letter was lawful because the letter called employees to act in derogation of a recent management directive that reiterated a long standing neutrally applied rule, as well as potentially creating a risk to public health and safety.  
[Exception No. 2]**

Daniel Hufton, Senior Director of Production for PAW sent a letter to all production (i.e., water treatment plant) employees reminding them of the Company's long standing rule that a plant operator was not to leave a plant unattended (including not shutting down a plant) if the next shift operator did not appear for any reason. In response, and posted in the plants by the Union for all employees to see, Kevin Booth, Local 537 President, posted a letter stating that in the event of future picketing at a water treatment plant by the Union a plant operator who is on duty during the picketing and wishes to leave the plant when the next shift operator does not cross the picket line may shut down and leave the plant unattended if a supervisor does not relieve the operator a "reasonable time" (GC Exh. 12). This was in direct contradiction to Mr. Hufton's directive and the Company's longstanding rule which does not permit an employee to

leave until relieved (Tr. 205-207). Indeed, in past strikes conducted by the Union, consistent with the Company's longstanding rule, the Union instructed the plant operators that if they were on duty when the strike and picketing started, such that the next shift operator did not report to work as a result of the strike, they were to remain working at the plant until relieved by a supervisor regardless of how long it took for the supervisor to come to the plant and relieve them (Tr. 206-07). Booth's posted letter to the contrary in January 2011 was nothing less than a call to disobedience.<sup>10</sup> The employer has a right to protect the work, and the workplace when "such a restriction is necessary to maintain production or discipline." *NLRB v. Challenge-Cook Bros., Inc.*, 374 F.2d 147, 153 (6<sup>th</sup> Cir. 1967). When a union passed out buttons using the word "scab," the employer lawfully told the employees that they could not wear the buttons (*Caterpillar Tractor Co.*, 230 F.2d 357 (7<sup>th</sup> Cir. 1956)). The court reasoned that the company "was under no compulsion to wait until resentment piled up and the storm broke before it could suppress the threat of disruption by exercising its right to enforce employee discipline" *Id.* at 359. Similarly, the Company had every right to remove Booth's letter which, in direct contradiction to Hufton's memo, told employees that if the replacement did not arrive, they could shut down the plant and leave. The company had the right to preserve its policies and procedures. Further, an employer is not required to "wait until a disturbance actually occurs before taking reasonable steps to maintain employee discipline and efficiency." *NLRB v. Harrah's Club*, 337 F.2d 177 (9<sup>th</sup> Cir.

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<sup>10</sup> The case law relied upon by the ALJ, *Container Corp. of America*, 244 NLRB 318 (1979), deals with inflammatory and defaming postings on a company bulletin board, not with a posting that calls employees to disobedience. Therefore, the case states that for language to lose the protection of the Act requires that it be "offensive, defamatory, or opprobrious." citing *Timpte, Inc.*, 233 NLRB 1218 (1977); *Ben Pekin Company*, 181 NLRB 1025 (1970), *enfd.* 452 F.2d 205 (7<sup>th</sup> Cir. 1971). However, this is a separate consideration than a posting which encourages employees to act in defiance of management directives.

1964); *Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357 (7<sup>th</sup> Cir. 1956), as cited by *Virginia Elec. and Power Co. v. NLRB*, 703 F.2d 79, 83 (4<sup>th</sup> Cir. 1983).

The ALJ's decision relies upon *Cleveland Pneumatic Co.*, 271 NLRB 425 (1984). In that case a company had employees work overtime contrary to the provisions of the relevant collective bargaining agreement. The union steward was told to post the company's notice of this overtime. In so doing, the steward wrote on the notice "Union does not authorize this overtime." 271 NLRB at 426. The NLRB held that the union steward had not violated the Act because nothing in his writing told employees what they were supposed to do, and therefore he had not called the employees to a partial strike by having them refuse to work overtime.

The ALJ in the current case held that Booth's letter, like the note written by the steward in *Cleveland Pneumatic*, did not call the employees to disobey a management directive (JD 23:7-8). The ALJ supported this conclusion with the view that the letter was not written to employees, but instead to Company manager Hufton (JD 23: 9) and as such it was not a call to action but instead just the Union's opinion on the matter of shutting down the plants (JD 23:12-13). However, no matter to whom the letter was drafted, Local 537 President Booth had the letter posted on all plant bulletin boards to which the Union had access. Clearly he wanted his letter to be seen by the plant operators and other employees. His letter plainly stated that plant operators were free to shut down the plant if their replacements did not arrive in a reasonable amount of time. Booth's invitation to shut down the plants created potential public health and safety concerns in the community. This was in direct opposition to Hufton's memo and the long standing rule at the Company, complied with by the Union in past strikes, which said that plant operators were to stay at their posts until their replacement arrived.

Booth's letter is more appropriately compared to the emails sent by a union steward in *DaimlerChrysler*, 344 NLRB 1324 (2005). In this case, the Board found that a union steward was directing employees to engage in a deliberate slowdown. This matter involved requesting corporate pool cars, and whether or not an employee should use his or her personal car if no pool car was available. *Id.* at 1324. The agreement between the parties stated that "[w]hen the demand of Corporation business causes [the pool] cars to be unavailable, employees may be asked to use their personal car and be reimbursed for mileage based on Corporate guidelines" *Idem.* The union steward sent out a series of emails discouraging employees from using personal vehicles. *Id.* at 1325. The steward stated "the Union strongly recommends against using your personal vehicle on company business" *Idem.*<sup>11</sup> What the steward advocated would have confounded the employer and slowed down its ability to do its job. The ALJ in that case had relied on *Cleveland Pneumatic* to find no violation. The Board reversed the ALJ's decision, saying that there was a violation because the steward called the employees to *act* in the effort to frustrate and interfere with company operations to modify the current contract or obtain leverage for future negotiations. *Idem.* The Board placed heavy emphasis on the fact that the steward was trying to pressure the company with this action.

In the current matter before the Board, Union President Booth clearly called the employees to act in contradiction to the past practice and the directives of Mr. Hufton's memo. His letter was not "engaging in debate," but instead authorized employees to disregard

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<sup>11</sup> Two additional emails were sent. The second email stated "Don't volunteer to find a rider and make arrangements. Let management tell you who your [sic] riding with. At that time, you have an opportunity to shoot down their arrangement by referring [sic] to your 'team' conflicts which are almost certain to arise. Kapesh [sic]?" The third and final email was responsive to a specific question, and thus was not as widely disseminated to all employees.

established rules which were recently reiterated by the Company. Therefore, the Company acted properly in removing the Booth letter from the bulletin boards.

**V. The ALJ's decision missed the distinction that the Carol Dascani letter only mentioned discipline in connection with its statement that if intermittent picketing occurred that would be illegal and subject employees to discipline. [Exception No. 3]**

The Carol Dascani letter was intended to provide guidance to the employees about their behavior, and about possible negative consequences if their behavior continued. Had the Company intended on disciplining the employees on January 4, 2011 when the letter was issued, the Company would have disciplined employees. However, the Company did not discipline any employees at that time. The potential discipline warned of in the letter was in the future, tied to the fact that if such behavior continued in the future on an intermittent basis it would be intermittent picketing, which is unlawful, and therefore subject to discipline (GC Exh. 13).

One basic principle of contract interpretation, which can be transferred to all written communication, is that the expression of something in one part of the writing and not in another part shows that it was not intended in the other (“*expressio unius est exclusio alterius*”). *Sunland Construction Co.*, 309 NLRB 1224, 142 LRRM 1025, 1028 n. 15 (1992); *Marion Center Area School Dist. v. Marion Center Area Educ. Ass’n.*, 982 A.2d 1041, 1046 (Pa. Comm. 2009); *Local 1640, Am. Fed. Of State, Cty. And Mun. Empl. (Children’s Home of Detroit)*, 2005 WL 41541 (NLRB 2005). Said in a little more detail, the inclusion of a specific item in certain statements or points, while not including or mentioning the same item in other statements or points indicates that item only applies to the statement or point where it is mentioned. *Consolidation Coal Co.*, 83 LA 927, 931 (Duff, 1984). Though most often used as a principle of contract and statutory interpretation, this same principle applies to interpreting letters. *See e.g., Rosenstein v City of Dallas*, 901 F.2d 61, 62 (5<sup>th</sup> Cir. 1990).

Dascani's letter addressed the fact that the Company did not believe that the language of the collective bargaining agreement protected the Union's work stoppage activity. However, her letter did not mention discipline when discussing this contract interpretation point. Her letter then changes focus (via a transition sentence that begins with "In addition") to discuss the statutory issue of whether continuation of the sporadic picketing in the future would amount to illegal intermittent picketing. (GC, Exh. 13, p. 2). With that transition sentence, her letter moved into a discussion of the possibility that the Union might engage in the future in intermittent picketing, and informs the reader that the Company is, "therefore", or on the basis of the new subject of intermittent picketing, putting the Union on notice that the Company may take appropriate action in response to future picketing that is intermittent, "including but not limited to discipline and available legal remedies." *Id.*

Applying the *expressio unis est exclusio alterius* principle of interpreting wording to this writing, the expression of the discipline only in the discussion of potential future intermittent picketing, but not in the discussion of the contract violation the Company claimed was present in the picketing that had already occurred indicates that the letter only conveys that discipline is being considered in relationship to intermittent picketing. This is important, because the discussion regarding the intermittent picketing is in the future tense. The states as follows:

"if Local 537 employees repeatedly refuse to cross picket lines manned by Local 537 members, such refusal may constitute an intermittent work stoppage" (*Id.*).

It is only then, in the future, if these conditions are met, that the discipline would become a reality. Therefore, Dascani's letter only threatened discipline in the event of future intermittent work stoppages which would clearly be unprotected. It is undisputed, as the ALJ recognized (JD 21:16-23), that intermittent picketing is unprotected activity and thus discipline may be lawfully imposed or threatened regarding it. *Electronic Data Systems Corp.*, 331 NLRB 343, 343 (2000);

*Illinois Bell Telephone Co.*, 255 NLRB 380, 381 (1981); *NLRB v. Robertson Industries*, 560 F.2d 396, 398 (9<sup>th</sup> Cir. 1976).

The ALJ decision makes the point that the Dascani letter asserted that any observance of the picket line violated the Act (JD 21:28). While it may be true that the Dascani letter considered that the picket lines were unlawful as a contract violation, the threat of discipline was only attached to the future possibility of intermittent picketing. Of course, as discussed above, reversal of the ALJ decision regarding whether the Union's work stoppage picketing violated the labor contracts would effectively render the Dascani letter not only correct on this point but would also render the Union's activity unprotected. But, even without this point, the threat of discipline in the letter was only mentioned with and thus should only be assessed with regard to intermittent picketing. As such, the mention of future intermittent picketing subjecting employees to discipline was a lawful statement.

## **VI. Request for Oral Arguments**

In addition to filing this written brief, PAW respectfully requests oral arguments on these matters prior to the Board ruling on its Exceptions to the Decision of ALJ Goldman.

## **VII. Conclusion**

Based on the above, PAW requests that the Board grant its Exceptions to ALJ Goldman's Decision and find that there was not a violation of the Act in these matters.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

July 16, 2012

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE to be served upon the counsel of record stated below via electronic mail, this 16<sup>th</sup> day of July, 2012 and addressed to:

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