

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**PG PUBLISHING CO., INC. D/B/A PITTSBURGH  
POST-GAZETTE**

**And**

**THE NEWSPAPER GUILD OF PITTSBURGH  
A/W COMMUNICATIONS WORKERS OF AMERICA,  
AFL-CIO, CLC, AND ITS LOCAL 38061**

**Case 06-CA-212627**

**PITTSBURGH MAILERS UNION NO. M-22, A/W THE  
PRINTING, PUBLISHING, AND MEDIA WORKERS  
SECTOR OF THE COMMUNICATIONS WORKERS  
OF AMERICA, AFL-CIO, AND ITS LOCAL 14842**

**Case 06-CA-217525**

**PITTSBURGH TYPOGRAPHICAL UNION NO. 7, A/W  
THE COMMUNICATIONS WORKERS OF AMERICA,  
AFL-CIO, AND ITS LOCAL 14827**

**Case 06-CA-217527**

**PITTSBURGH TYPOGRAPHICAL UNION NO. 7, A/W  
THE COMMUNICATIONS WORKERS OF AMERICA,  
AFL-CIO, AND ITS LOCAL 14827**

**Case 06-CA-217529**

**NEWSPAPER, NEWSPRINT, MAGAZINE AND FILM  
DELIVERY DRIVERS, HELPERS AND HANDLERS,  
A/W THE INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS AND ITS LOCAL UNION NO. 211 OF  
ALLEGHENY COUNTY**

**Case 06-CA-217980**

**PITTSBURGH NEWSPAPER PRINTING  
PRESSMEN'S/PAPER HANDLERS LOCAL UNION  
NO. 9N, A/W THE GRAPHIC COMMUNICATIONS  
CONFERENCE/INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS AND ITS LOCAL 24M/9N**

**Case 06-CA-218637, and**

**INTERNATIONAL UNION OF OPERATING  
ENGINEERS, AFL-CIO, LOCAL 95**

**Case 06-CA-220480**

**RESPONDENT'S OPPOSITION  
TO GENERAL COUNSEL'S MOTION  
TO STRIKE THE RESPONDENT'S BRIEF IN PART**

## SUMMARY OF ARGUMENT

General Counsel's Motion to Strike Respondent's Brief in Part should be rejected. General Counsel misapprehends the purpose and nature of Respondent's Brief. In its Brief, Respondent argued, based upon the record and the physical comparisons that can be drawn from Exhibits in this record, that an exhibit offered by General Counsel was not genuine. That is the function of a post-hearing brief: to make arguments based upon the record evidence and to ask the trier of fact to draw conclusions from that evidence.

Respondent had good cause to present to the Administrative Law Judge (ALJ) a discrepancy between an exhibit submitted by General Counsel and the exhibit two Respondent witnesses testified was the genuine document. Respondent had the right to draw conclusions from the discrepancy and to argue those conclusions to the ALJ. Respondent drew its entire argument from the record and did not utilize sources outside the record to make that argument. Therefore, the Motion to Strike should be denied.

## FACTS

On September 25, 2018, Respondent filed its Brief to Administrative Law Judge ("Brief"). At pages 22-25 of the Brief, as part of a section entitled, "**E. There is no other Evidence in this Record to Support an Argument that Respondent is Obligated to Pay the 2018 Contribution Rate.**" Respondent argued:

### ***1. General Counsel has Proffered a Fabricated Document***

*General Counsel introduced G.C. Ex. 2(b) in support of the argument that Respondent is obligated to pay the 2018 contribution rate increase. The record is clear that G.C. Ex. 2(b) is an incomplete copy of a document, missing the material information contained in the original R. Ex. 5.*

*Respondent and the Union negotiated the Settlement Agreement setting forth the health insurance provisions of the Expired Contracts. (R. Ex. 1; Tr. 55,*

68). *The Settlement Agreement established that the Expired Contracts would expire on March 31, 2017. The agreed-upon health insurance provisions established an initial rate for Respondent's 2015 contributions to the Fund and a cap on its contribution rates for 2016 and 2017, the remaining two insurance years during the terms of the Expired Contracts.*

*Questions arose from the Unions about how the cap on any contribution increase demanded by the Fund would operate. Respondent's outside benefits consultant, Elliot Dinkin, prepared a spreadsheet entitled "PG DETERMINATION OF SHARE OF BENEFIT COSTS – 2015-2017," and sent that spreadsheet to Respondent's chief management officer for the contract negotiations Steve Spolar. (Tr. 74). Spolar then sent the spreadsheet to the Union's attorney, Mr. Pass, along with an accompanying email. (R. Ex. 5; Tr. 67).*

*At the hearing, General Counsel and Mr. Pass offered into evidence through Mr. Pass Spolar's email, but not the true version of the spreadsheet, because it had the title to that document redacted from the original version sent by Respondent to Mr. Pass. (G.C. Ex. 2(b)). Mr. Pass testified that:*

- He received G.C. Ex. 2 from Respondent;*
- G.C. Ex. 2 had been stored by Mr. Pass since 2014;*
- He located the document in his files;*
- He printed it out from his computer records or copied the document;*
- G.C. Ex. 2, including G.C. Ex. 2(b), was the entire document he received from Spolar;*
- G.C. Ex. 2(b) accurately reflected the original attachment to Spolar's email (Tr. 50-51); and*
- He first presented G.C. Ex. 2(b) to Respondent at the current negotiations. He claimed at that time to Respondent's negotiators the document was an email he had received from Spolar in 2014. (Tr. 48).*

*From Mr. Pass' testimony, it is clear that G.C. Ex. 2(b) was shown to Respondent during the current negotiations to imply G.C. Ex. 2(b) represented Respondent's commitment to pay Fund contribution rate increases for 2018. (Tr. 52). When Mr. Pass testified about G.C. Ex. 2(b), he testified the document was the entire spreadsheet he had received from Respondent. (Tr. 51). Dinkin and Spolar conclusively testified that G.C. Ex. 2(b) was not the original document sent to Mr. Pass. Rather, R. Ex. 5 was the original document. (Tr. 67, 83, 86).*

*A side-by-side comparison of the two Exhibits shows that in the original, R. Ex. 5, the title, "PG DETERMINATION OF SHARE OF BENEFIT COSTS -- 2015-2017" begins 7/16" from the top of the page.<sup>13</sup> The title is two lines, extending down approximately 1/4", so that the title ends 5/8" from the top of the spreadsheet. The "EXAMPLE 1" starts 1/4" from the top of the spreadsheet.*

*The significance of that title is clear. Whether Respondent is obligated to pay the 2018 Fund contribution rate increase is the material issue in these cases. In October 2017, the Fund demanded a contribution rate increase for 2018. Respondent replied in October 2017 that it had no contractual or other obligation to pay that 2018 rate increase. The Unions contended in late 2017 that Respondent should pay the 2018 rate increase without citing any justification for their position. (Jt. Exs. 12, 14). A document from Respondent showing a column for possible 2018 rate increases could help support the Union's position. The complete version of that document would render the Unions' position untenable.*

*Thus, the title is omitted from G.C. Ex. 2(b). "Example #1" starts approximately 9/16" down the page, just below the title on the original R. Ex. 5. Interestingly, on the cover email, G.C. Ex. 2(a) and R. Ex. 5, p. 1, the left hand margin of both emails is 1/2". The consistency of the reproduction of the two emails establishes that only the spreadsheet, G.C. Ex. 2(b), was altered.*

*According to his testimony, Mr. Pass was the only person who controlled, located and printed/copied the email and spreadsheet. Obviously, Mr. Pass provided General Counsel with the spreadsheet. General Counsel then offered G.C. Ex. 2(b) into evidence through Mr. Pass. Mr. Pass was not called by General Counsel as a rebuttal witness to explain the missing portion of the original spreadsheet even though there was ample opportunity to do so. Mr. Pass had testified at the hearing earlier that day. He remained at the counsel table throughout the hearing. An adverse inference must be drawn from his failure to testify as a rebuttal witness that Mr. Pass was culpable for modifying and then misrepresenting G.C. Ex. 2(b) as an accurate copy of the document he had received from Respondent. General Counsel's silence, thus far, on this fabrication is deafening. General Counsel, as the propounder of the clearly fabricated document, had the obligation to explain or withdraw G.C. Ex. 2(b). He did neither and is likewise accountable.*

*G.C. Ex. 2(b) is a doctored version of the original spreadsheet provided by Respondent. The original spreadsheet was carefully recopied without its original "2015-2017" title. That "2015-2017" title relates to the overriding issue in these cases: whether Respondent was obligated to pay the 2018 contribution rate increase. Such a fabricated document has no probative value. It must be rejected*

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<sup>13</sup> The spreadsheet in R. Ex. 5 was printed in a landscape mode so that the top margin of the spreadsheet is the left margin of the exhibit. (Footnote in original)

and the Administrative Law Judge should find there is no basis for finding Respondent was obligated to pay the 2018 Fund contribution rate increase.<sup>19</sup>

Also, as a footnote to the Brief's **SUMMARY**, Respondent wrote:

*None of the terms of any of the Expired Contracts require Respondent to pay the 2018 Fund contribution rate increase. There are no other written agreements requiring Respondent to pay that increase. To demand that Respondent pay that increase violates federal law. There is no binding past practice governing the payment of Fund contribution rate increases, and, even if such a practice existed, it does not satisfy Section 302's requirements for a written agreement authorizing Respondent to make those payments. Therefore, the Fund had no authority to impose an increase in contribution rates for 2018 nor to reduce benefits without the consent of Respondent. Accordingly, Respondent did not violate Section 8(a)(5) when it did not pay that increase. Therefore, the Consolidated Complaint should be dismissed.<sup>20</sup>*

### **GENERAL COUNSEL'S MOTION TO STRIKE**

On October 10, 2018, General Counsel filed a Motion to Strike the Respondent's Brief in Part ("Motion").

General Counsel moved to strike the subsection of Respondent's Brief entitled, "General Counsel has Proffered a Fabricated Document," footnote 20 of Respondent's Brief and "any other reference to the document marked as G.C. Ex. 2(b) as being fabricated, doctored, or not an original document."

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<sup>19</sup> To the extent the Unions, and not General Counsel, argue that the Administrative Law Judge should make findings beyond the scope of the Consolidated Complaint and General Counsel's theory of the case, that argument must be rejected. See *Smoke House Restaurant*, 3347 NLRB 192, 195 (2006), *enfd.* 325 Fed.Appx. 577 (9<sup>th</sup> Cir. 2009) (General Counsel controls the complaint and the charging party cannot enlarge upon or change the General Counsel's theory of the case). (Footnote in original)

<sup>20</sup> Respondent would be remiss if it did not direct the Administrative Law Judge's attention to the fabricated document introduced by General Counsel through Union counsel Pass. (G.C. Ex. 2(b)). In response to the introduction and testimony about a fabricated document, the Administrative Law Judge has sufficient authority to take or to recommend appropriate action. See *Invista*, 346 NLRB 1269, n. 3 (2006). Another alternative is to follow the approach taken in *Kings Harbor Health Care*, Supplemental Decision and Order dated December 8, 1978 (attached). Finally, Respondent expended significant resources and incurred attorney fees in defending the Consolidated Complaint, and G.C. Ex. 2(b) was an integral part of General Counsel's case. Therefore, Respondent should be awarded litigation costs and attorney fees under the Board's inherent authority to protect its proceedings. See *Lake Holiday Manor*, 325 NLRB 469 (1988). (Footnote in original)

General Counsel argues that Respondent had waived its objection to GC Ex. 2(b) because Respondent did not specifically argue, in its objection to the admission of GC Ex. 2(b), the grounds of incompleteness and lack of authenticity.

General Counsel further argues Respondent's contentions in its Brief are factually untrue and are not supported by the record. General Counsel also argues there is no evidence of unethical conduct. Finally, General Counsel argues that Respondent's arguments are frivolous and an abuse of process and that Respondent made a frivolous claim for litigation costs and attorneys' fees.

### **ARGUMENT**

The Motion to Strike should be denied in its entirety. General Counsel objects to certain conclusions drawn from the record by Respondent. General Counsel may disagree with those conclusions and urge the ALJ to reject those conclusions, but he may not deny Respondent the right to argue those conclusions. A motion to strike is not the proper vehicle by which General Counsel may voice his objections to Respondent's record-based arguments. The Motion is, in fact, an improperly-submitted reply brief for which General Counsel did not seek leave to file.<sup>1</sup> Therefore, the Motion must be denied.

The facts show that General Counsel offered into evidence, without fully explicating why, a purported attachment to an email. That attachment was a one-page spreadsheet. G.C. Ex. 2(b) was accepted into evidence by the ALJ, over Respondent's objection. In its case, Respondent introduced the complete document, R. Ex. 5, to rebut any possible confusion in the record. It was not until General Counsel filed his Brief to the Administrative Law Judge that the motive for the introduction of G.C. Ex. 2(b) was revealed: to support an argument not made in or amended into

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<sup>1</sup> Under *Gallup, Inc.*, 349 NLRB 1213, 1217 (2007), the ALJ has authority to grant leave to file a reply brief. General Counsel has not sought such leave.

the Consolidated Complaint. That untimely argument was that Respondent had, in a writing, G.C. Ex. 2(b), shown an intention to pay Fund contribution rate increases for 2018, which is the issue in dispute in these Cases.

G.C. Ex. 2(b), and, for that matter, R. Ex. 5, are irrelevant parol evidence. The parties' Expired Contracts clearly and unambiguously set forth Respondent's obligations and there is no reason to use the parol evidence set forth in G.C. Ex. 2(b) or R. Ex. 5.

Even if the two Exhibits are considered, the record shows that General Counsel and Respondent offered into evidence two competing versions of the same spreadsheet. In its original form, the spreadsheet bore the title, "PG DETERMINATION OF SHARE OF BENEFIT COSTS-2015-2017." (R. Ex. 5).<sup>2</sup> Respondent has argued to the ALJ the undisputed fact that the two exhibits differ in that one material respect, the title, which is absent from G.C. Ex. 2(b). Respondent has argued that GC Ex. 2(b) is not genuine. Respondent has further argued, based on the uncontradicted testimony of two witnesses, Elliot Dinkin, who prepared the spreadsheet and Steven Spolar, who sent it from Mr. Dinkin to Attorney Pass, what it believes to be the most logical explanation: that the document received into evidence as G.C. Ex. 2(b) was not genuine. It has argued that Attorney Pass, who testified to that Exhibit's "retrieval," was responsible for the variance. Respondent's argument is an application of the philosophical principle known as "Occam's Razor."<sup>3</sup> Respondent has argued that, after considering the evidence, the ALJ should come to the same conclusion.

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<sup>2</sup> General Counsel has, in its Brief to the ALJ and in its Motion studiously refused to quote the original title of the spreadsheet. Acknowledgement of that title would undercut GC's argument that the spreadsheet created an obligation by Respondent to pay the 2018 Fund contribution rate increase.

<sup>3</sup> Suppose there exist two explanations for an occurrence. In this case the one that requires the least speculation is usually better. Another way of saying it is that the more assumptions you have to make, the more unlikely an explanation ([https://en.wikipedia.org/wiki/Occam%27S\\_razor](https://en.wikipedia.org/wiki/Occam%27S_razor)).

**A. Respondent's Failure to Utter the Words "Incomplete" or "Inaccurate" when Objecting to the Introduction of G.C. Ex. 2(b) is Irrelevant.**

General Counsel seeks to strike Respondent's recitation of record evidence and the conclusions Respondent drew from its examination of the record on the basis that Respondent did not properly phrase its objection to G.C. Ex. 2(b). That argument is foolish. General Counsel may object to the conclusions drawn by Respondent from the record, but may not, via the Motion, object to Respondent's right to draw and argue its conclusions. Respondent has not argued that GC Ex. 2(b) is inadmissible. It has only argued that the ALJ should not give weight to GC Ex. 2(b). Objections going to the weight of a particular piece of evidence are not a proper basis for denying the admissibility of that evidence. Respondent has argued that when reviewing GC Ex. 2(b), the ALJ should attribute the missing information to the party who offered the document into evidence. Again, that was not and is not a question of admissibility. In any event, the ALJ understood Respondent's objection and admitted GC Ex. 2(b) at the time, because, to him it appeared to be authentic. (Tr. 52).<sup>4</sup> Therefore, General Counsel's argument must be rejected.

**B. Respondent's Argument is Based upon the Record.**

Respondent properly reviewed the record and, in its Brief, argued that the ALJ should draw certain conclusions from the record: that G.C. Ex. 2(b) is not an original document, is a fabricated document and was doctored. General Counsel has the gall to move to strike the conclusions Respondent has asked the ALJ to draw, because he disagrees with those conclusions. General Counsel never presented any testimony from Attorney Pass to rebut Respondent's witnesses'

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<sup>4</sup> Respondent engaged in voir dire examination of Attorney Pass after General Counsel moved to admit G.C. Ex. 2(b). (Tr. 50). As the ALJ acknowledged, the purpose of voir dire, at that point, was to ascertain the authenticity of a document being offered into evidence. At the conclusion of the voir dire examination, Respondent objected to the admission of G.C. Ex. 2(b). (Tr. 51-52). The ALJ overruled that objection on the basis that G.C. Ex. 2(b) appeared to be authentic. (Tr. 52). Even if an "authenticity" objection was not specifically articulated, the ALJ understood the substance of the objection and ruled accordingly. Therefore, even if Respondent had argued in its Brief that G.C. Ex. 2(b) was not admissible, it would have preserved that argument.

testimony and instead argues that the conclusions drawn by Respondent are unwarranted. That is, at best, a reply brief argument and not the basis for a motion to strike.

Respondent has asked the ALJ to compare two exhibits in the record, note what is missing from the copy offered by General Counsel, i.e., the title “PG DETERMINATION OF SHARE OF BENEFIT COSTS-2015-2017,” draw conclusions, and, if appropriate, assign responsibility for the change to the original spreadsheet. There is nothing outside the record to draw from in making such a conclusion.<sup>5</sup>

Respondent is not asking the ALJ to deem any actions as “unethical.” Any such actions speak for themselves. Any determination of the ethical nature of such actions should only be made upon the direction of the Board or by the appropriate State Bar. Therefore, the Motion should be denied.

**C. It is not Frivolous for Respondent to Point out Discrepancies in the Exhibit Offered by General Counsel.**

Once again, General Counsel is conflating the function of a motion to strike. The Board permits, in certain circumstances, the award of litigation costs and attorney fees to protect its proceedings. *See Lake Holiday Manor*, 325 NLRB 469 (1988).

General Counsel does not contest the authority of the Board to order such relief. He only argues that such relief is inappropriate in these cases.<sup>6</sup> General Counsel’s contention that Respondent is not entitled to that relief is not based upon any argument that Respondent may never be entitled to litigation costs and attorney fees. General Counsel has no basis for seeking to strike

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<sup>5</sup> The absurdity of General Counsel’s Motion to Strike is epitomized by his demand that the ALJ strike from the Brief any reference to G.C. Ex. 2(b) as “not an original document.” Two witnesses confirmed R. Ex. 5 and not G.C. Ex. 2(b) was the original spreadsheet sent to Attorney Pass in 2014. That testimony certainly supports Respondent’s claims that G.C. Ex. 2 is not an authentic document. General Counsel may not like those facts, but that is not a basis to strike Respondent’s argument that G.C. Ex. 2(b) was “not an original document.”

<sup>6</sup> Such relief may also be appropriate for replying to the Motion.

a request for relief that he believes to be unwarranted in the circumstances of the cases. Therefore, there is no basis to strike footnote 20 of Respondent's Brief.

It is not frivolous for Respondent to ask the ALJ to draw a conclusion from the discrepancy between the two Exhibits in the record. It is not frivolous for Respondent to point out to the ALJ his options. It is General Counsel who is making a frivolous argument by seeking to strike Respondent's call for such relief where such relief may be warranted under Board precedent.<sup>7</sup>

### **SUMMARY**

General Counsel is attempting to address issues he should have addressed in his Brief to the ALJ. He failed to do so, and declined to seek leave to file a reply brief. The Motion is a thinly-disguised attempt by General Counsel to avoid established Board precedent governing the filing of reply briefs by designating as a "Motion to Strike" what is, in essence, a reply brief. The Motion is without merit and must be denied.

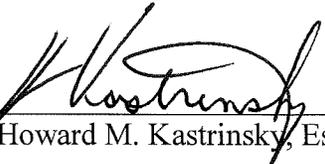
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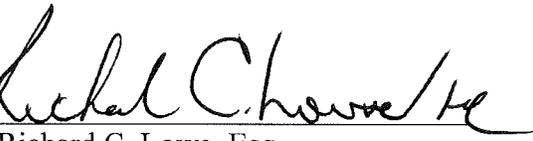
<sup>7</sup> On October 11, 2018, Counsel for the Charging Parties filed a Joinder to the Motion. Charging Parties contend it would defy common sense for them to deliberately omit the spreadsheet, "Determination of Share of Benefit Cost – 2015-2017," because that title "clearly evidences Respondent's agreement to extend that cap to 2018." That contention is nonsensical: the spreadsheet title shows Respondent intended to limit contribution rate increases for the period of 2015-2017. The Union's argument should have been included in the Union's brief to the ALJ, but was not made, and is not the proper basis for a motion to strike. Therefore, the Charging Parties' Joinder must be rejected.

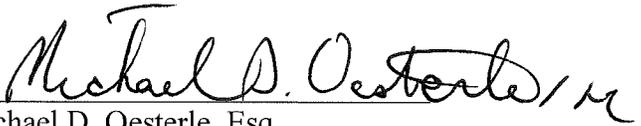
Dated this 16th day of October 2018.

Respectfully submitted,

**KING & BALLOW**

By:   
Howard M. Kastrinsky, Esq.

By:   
Richard C. Lowe, Esq.

By:   
Michael D. Oesterle, Esq.

1100 Union Street Plaza  
315 Union Street  
Nashville, Tennessee 37201  
(615) 259-3456

Counsel for PG Publishing Co., Inc.  
d/b/a Pittsburgh Post-Gazette

**CERTIFICATE OF SERVICE**

The undersigned, as attorney for Respondent, hereby certifies that a true and exact copy of Respondent's Opposition To General Counsel's Motion To Strike The Respondent's Brief In Part was electronically filed via the NLRB E-Filing System with the National Labor Relations Board and served on the parties listed below via email and first-class mail, postage prepaid:

Joseph J. Pass, Esq.  
Jubelirer, Pass & Intreri, P.C.  
219 Fort Pitt Blvd.  
Pittsburgh, PA 15222-1576  
**jjp@jpilaw.com**

Richard Rosenblatt, Esquire  
Rosenblatt & Gosch, PLLC  
8085 E. Prentice Boulevard  
Greenwood Village, CO 80111-2705  
**rrosenblatt@cwa-union.org**

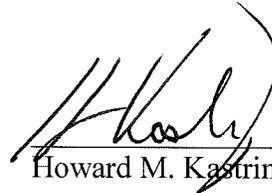
Marianne Oliver, Esquire  
Gilardi, Oliver & Lomupo, P.A.  
The Benedum Trees Building  
223 Fourth Avenue, 10<sup>th</sup> Floor  
Pittsburgh, PA 15222-1717  
**moliver@lawgol.com**

Judge David Goldman  
National Labor Relations Board  
Division of Judges  
1015 Half Street SE  
Washington, DC 20570-0001  
**david.goldman@nlrb.gov**

Zachary Hebert,  
Counsel for General Counsel  
National Labor Relations Board, Region 6  
1000 Liberty Avenue, Room 904  
Pittsburgh, PA 15222  
**zachary.hebert@nlrb.gov**

Chief ALJ Robert Giannasi  
National Labor Relations Board  
Division of Judges  
1015 Half Street SE  
Washington, DC 20570-0001  
**robert.giannasi@nlrb.gov**

This 16th day of October 2018.

  
Howard M. Kastrinsky