

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

**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**

**BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS**

TABLE OF CONTENTS

	<u>Page</u>
PURPOSE OF BRIEF.....	2
STATEMENT OF CASE .....	2
STATEMENT OF FACTS .....	4
ARGUMENT .....	5
I. RESPONDENT DID NOT VIOLATE SECTION 8(a)(5) AND (1) ON OR ABOUT JANUARY 1, 2018, WHEN IT DID NOT PAY TO THE FUND A FIVE PERCENT (5%) INCREASE FOR EMPLOYEES IN THE SEVEN BARGAINING UNITS. BOARD LAW DOES NOT AND SHOULD NOT HOLD THAT A TWO-TIME CONTRACTUAL COMMITMENT TO INCREASE CONTRIBUTIONS TO A TAFT-HARTLEY WELFARE FUND CREATES A STATUS QUO THAT BIND THE EMPLOYER TO A PERPETUAL COMMITMENT TO PAY ANNUAL CONTRIBUTION INCREASES AFTER EXPIRATION OF THE CONTRACT—EXCEPTIONS 1-2, 8-27, 38, 53 .....	5
A. <u>The ALJ’s Analysis</u> .....	6
B. <u>Finley Hospital and its Progeny Must be Overruled</u> .....	6
C. <u>The Other Cases Cited by the ALJ Do Not Support His Conclusion That The “Dynamic Status Quo” Mandated Postexpiration Fund Contribution Rate Increases</u> .....	10
D. <u>The Other Factors Cited by the ALJ Do Not Create a Dynamic Status Quo Requiring Respondent to Pay Postexpiration Fund Contribution Rate Increases</u> .....	13
1. The Attachment of a Schedule of Benefits to the 2014 Agreements Does Not Mean Respondent was Obligated to Make Postexpiration Contribution Rate Increases.....	13
2. The ALJ’s Reliance on <i>Intermountain</i> is Misplaced .....	13
3. The ALJ Wrongly Assigned the Burden to Respondent to Establish the Unions Waived Their Right to Bargain.....	14
4. The Board’s Decision in <i>Hempstead Lincoln Mercury Motors Corp.</i> Supports Respondent’s Defenses .....	14

**TABLE OF CONTENTS (Continued)**

	<b><u>Page</u></b>
II. SECTION 302 PROHIBITS RESPONDENT FROM PAYING 2018 FUND CONTRIBUTION RATE INCREASES .....	16
A. <u>Section 302 Requires a Written Agreement</u> .....	17
B. <u>The ALJ’s Findings</u> .....	19
C. <u>Respondent’s Section 302 Defense is Supported by Board Precedent</u> .....	22
D. <u>Respondent’s Section 302 Defense is Consistent with Other     Established Precedent</u> .....	24
E. <u>Respondent’s Section 302 Defense Must be Accepted and the     Consolidated Complaint Must be Dismissed</u> .....	25
III. THE ALJ ERRED BY REJECTING RESPONDENT’S CONTRACT COVERAGE DEFENSES REGARDING THE GUILD AND OPERATING ENGINEERS’ BARGAINING UNITS .....	26
IV. RESPONDENT EXCEPTS TO THE ALJ’S REMEDY, PROPOSED ORDER, AND NOTICE TO EMPLOYEES .....	28
SUMMARY .....	30

## TABLE OF AUTHORITIES

	<u>Page(s)</u>
<b><u>Cases</u></b>	
<i>Alaska Trowel Trades Pension Fund v. Lopshire</i> , 103 F.3d 881 (9 <sup>th</sup> Cir. 1996) .....	22
<i>Bath Marine Draftsmen’s Assn. v. NLRB</i> , 475 F.3d 14 .....	27
<i>Bricklayers, Local 15 v. Stuart Plastering Co.</i> , 512 F.2d 1017 (5 <sup>th</sup> Cir. 1975) .....	19, 20
<i>Bricklayers Local 21 of Illinois Apprenticeship and Training Program v. Banner Restoration, Inc.</i> , 385 F.3d 761 (7 <sup>th</sup> Cir. 2004) .....	19, 20
<i>J. N. Ceasan Co.</i> , 246 NLRB 637 (1979) .....	4
<i>Chicago Tribune v. NLRB</i> 974 F.2d 933 (7 <sup>th</sup> Cir. 1992) .....	27
<i>Cibao Meat Prods. v. NLRB</i> , 547 F.3d 336 (2d Cir. 2008) .....	21
<i>CNH Industrial, N.V. v. Reese</i> , 583 U.S. ___, (2018) .....	12
<i>Daily News of Los Angeles</i> , 315 NLRB 1236 (1994), enfd. 73 F.3d 406 .....	6
<i>Delta Sandblasting Co., Inc.</i> , 367 NLRB No. 17 (2018) .....	22, 23
<i>Dugan v. R.J. Corman R.R. Co.</i> , 344 F.3d 662 (7 <sup>th</sup> Cir. 2003) .....	21
<i>Epic Systems v. Lewis</i> , 584 U.S. ___ (2018) .....	19

**TABLE OF AUTHORITIES (Continued)**

	<b><u>Page(s)</u></b>
<i>The Finley Hospital</i> , 362 NLRB No. 102 (2015) <i>enf. denied</i> 827 F.3d 720 (8 <sup>th</sup> Cir. 2016) .....	6, 7, 8, 9, 12, 13, 14
<i>Hempstead Lincoln Mercury Motors Corp.</i> , 351 NLRB 1149 (2007) .....	14, 15, 16, 23
<i>Hen House Market No. 3 v. NLRB</i> , 428 F.2d 133 (8 <sup>th</sup> Cir. 1970) .....	23
<i>IBEW, Local 38</i> , 221 NLRB 1073 (1975) .....	4
<i>Intermountain Rural Electric Assn. v. NLRB</i> , 305 NLRB 783 (1991), <i>enf. denied</i> 984 F.2d 1562 (10 <sup>th</sup> Cir. 1993) .....	7, 10, 11, 12, 13, 14
<i>Jackson Purchase Rural Electric Cooperative Assoc. v. International Brotherhood of Electrical Workers, Local 816</i> 646 F.2d 264 (6 <sup>th</sup> Cir. 1981) .....	18, 24, 25
<i>M&amp;G Polymers USA, LLC v. Tackett</i> , 574 U.S. ____ (2015) .....	11
<i>Moglia v. Geoghegan</i> , 403 F.2d 110 (2d Cir. 1969) .....	18, 25
<i>National Gypsum Company</i> , 359 NLRB 1058 (2013) .....	23
<i>National Stabilization Agreement of Sheet Metal Industry Trust Fund v. Commercial Roofing &amp; Sheet Metal Trust Fund</i> , 655 F.2d 1218 (D.C. Cir. 1981) .....	19, 20
<i>NLRB v. Amax Coal Co.</i> , 453 U.S. 322 (1981) .....	17, 18
<i>NLRB v. Postal Service</i> , 8 F.3d 832 (D.C. Cir. 1993) .....	27
<i>Peerless Roofing Co. v. NLRB</i> , 641 F.2d 734 (9 <sup>th</sup> Cir. 1981) .....	22

**TABLE OF AUTHORITIES (Continued)**

	<b><u>Page(s)</u></b>
<i>H.K. Porter v. NLRB</i> , 397 U.S. 99 (1970) .....	8, 12
<i>Raytheon Network Centric Systems</i> , 365 NLRB No. 161 .....	27
<i>Richmond Homes</i> , 245 NLRB 1205 (1979) .....	23
<i>Samsung Electronics America, Inc.</i> , 363 NLRB No. 105 (2016) .....	4
<i>Sheet Metal Workers' International Association</i> ( <i>Central Florida Sheet Metal Contractors Assoc., Inc.</i> ), 234 NLRB 1238 (1978) .....	24
<i>U.S. v. Mabry</i> , 2005 U.S. Dist. LEXIS 39609 (E.D. MI, 2005) aff'd 518 F.3d 442 (6 <sup>th</sup> Cir. 2008), <i>cert. den.</i> 2009 U.S. LEXIS 1689 (2009) .....	18
<i>Weyerhaeuser NR Co.</i> , 366 NLRB No. 169 .....	27
<i>Wilkes-Barre General Hospital</i> , 362 NLRB No. 148 (2015), <i>enfd.</i> 857 F.3d 364 (DC Cir. 2017) .....	10

**Other Authorities**

Labor Management Relations Act 29 USC Section 186 Section 302 .....	15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 30
National Labor Relations Act 29 USC Sections 151-169 Section 8(a)(1) .....	2, 5, 30
National Labor Relations Act 29 USC Sections 151-169 Section 8(a)(5) .....	2, 5, 15, 21, 23, 30

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

**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**

# **BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS**

## **PURPOSE OF BRIEF**

This Brief in Support of Respondent's Exceptions (Brief) is submitted on behalf of PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette (Respondent) to the Decision and Recommended Order of Administrative Law Judge (ALJD) issued by Administrative Law Judge David I. Goldman (ALJ) dated October 16, 2018.<sup>1</sup>

## **STATEMENT OF CASE**

The Section 8(a)(1) and (5) Charge in Case 06-CA-212627 was filed by The Pittsburgh Newspaper Guild of Pittsburgh/CWA Local 38061 (Guild) on January 5, 2018,<sup>2</sup> and was amended on April 26. (GC Exs. 1(a), (c)).<sup>3</sup> A Complaint and Notice of Hearing issued in Case 06-CA-212637 on April 26. (GC Ex. 1(c)).

The Charge in Case 06-CA-217525 was filed by Pittsburgh Mailers Union No. M-22/CWA 14842 (Mailers Union) on March 30 and was amended on May 2. (GC Exs. 1(f), 1(h)). The Charge in Case No. 06-CA-217527 was filed by Pittsburgh Typographical Union No. 7/CWA 14827 (Typographical Union) for the Advertising Unit on March 30 and was amended on May 2. (GC Exs. 1(j), 1(l)). The Charge in Case 06-CA-217529 was filed by Typographical Union for the Finance Unit on March 30 and was amended on May 2. (GC Exs. 1(n), 1(p)). The Charge in

---

<sup>1</sup> For purposes of this Brief, Respondent has combined its arguments to related Exceptions to the Decision and Recommended Order of the Administrative Law Judge (Exceptions) filed separately with this Brief.

<sup>2</sup> All dates refer to 2018 unless otherwise specified.

<sup>3</sup> References to page numbers of the Transcript (Tr.), Stipulated Facts (Jt. Stip.), Joint Exhibits (Jt. Ex.), General Counsel Exhibits (GC Ex.), and Respondent Exhibits (R. Ex.), followed in each instance by the page number, stipulation number or exhibit number. References to the ALJD are followed in each instance by the page and, where found, line numbers.

Case 06-CA-217980 was filed by Newspaper, Newsprint, Magazine and Film Delivery Drivers, Helpers and Handlers, Local Union No. 211 of Allegheny County, a/w International Brotherhood of Teamsters (Delivery Union) on April 6 and was amended on May 2. (GC Exs. 1(r), 1(t)). The Charge in Case No. 06-CA-218637 was filed by Pittsburgh Newspaper Printing Pressmen's/Paper Handlers Local Union No. 9N, a subordinate union of the Graphic Communications Conference/International Brotherhood of Teamsters (Pressmen's Union) on April 18 and was amended on May 2. (GC Exs. 1(v), 1(x)). The Charge in Case 06-CA-220480 was filed by International Union of Operating Engineers, AFL-CIO, Local 95 (Operating Engineers) on May 18 and was amended on May 24. (GC Exs. 1(z), 1(bb)).<sup>4</sup>

An Order Consolidating Cases, Consolidated Amended Complaint and Notice of Hearing (Consolidated Complaint) in the above-referenced cases issued on June 28. (GC Ex. 1(dd)).

General Counsel, Respondent and the Unions entered into a Joint Stipulation of Exhibits and Facts on August 21. (Jt. Ex. 16). A hearing was held before the ALJ on August 21. General Counsel, Respondent and the Unions filed briefs to the ALJ on September 25.<sup>5</sup> General Counsel filed a Motion to Strike the Respondent's Brief in Part on October 10. The Unions filed Charging Parties Joinder in General Counsel's Motion to Strike the Respondent's Brief in Part on October 11. Respondent filed an Opposition to General Counsel's Motion to Strike the Respondent's Brief in Part on October 16.

On October 16, the ALJ issued the ALJD in these cases.

---

<sup>4</sup> The Guild, Mailers Union, Typographical Union, Delivery Union, Pressmen's Union and Operating Engineers are collectively referred to as the Unions. (Jt. Ex. 16, p.2).

<sup>5</sup> The ALJ referred to the Unions' Brief as the post-trial brief filed by "the Union." (Exception 4).

## STATEMENT OF FACTS

Respondent adopts, with the exceptions set forth below, the ALJ's recitation of facts and will not repeat them. (ALJD 3, l. 10 – ALJD 11).

Respondent excepts to the finding of the ALJ that in negotiations for successor agreements to the collective bargaining agreements negotiated between Respondent and each of the Unions, common proposals were made by the parties.<sup>6</sup> Each union submitted different proposals. (Jt. Exs. 2(a) – 2(g)).<sup>7</sup>

The Western Pennsylvania Teamsters and Welfare Fund (Fund) sent a memo in the fall of 2017 to employer participants in the Fund, including Respondent, notifying them of the new monthly contribution rate to be effective January 2018. (Jt. Ex. 3; Jt. Stip. 23).<sup>8</sup> The correspondence between Respondent and the Unions was correctly summarized by the ALJ. (ALJD 7, l. 26 – ALJD 10).

Respondent also objects to the ALJ's finding that the spreadsheet entitled PG DETERMINATION OF SHARE OF BENEFIT COSTS – 2015-2017 (R. Ex. 5) projected annual

---

<sup>6</sup> Those agreements are referred to as the 2014 Agreements.

<sup>7</sup> Exception 5.

<sup>8</sup> Exception 6. Respondent also excepts to the ALJ's crediting of the testimony of Unions' Attorney Joe Pass and to those Findings of Fact based upon Attorney Pass' testimony. (Exceptions 7, 32 and 34). Attorney Pass testified about GC Ex. 2(b), which was not, as characterized by the ALJ, the product of an inadvertent copying error. (Exception 34). There is no evidence in the record that there was such a "copying error." However, there is evidence in the record that Attorney Pass was sent, in 2014, a spreadsheet entitled: PG DETERMINATION OF SHARE OF BENEFIT COSTS—2015-2017" by Respondent, that Attorney Pass testified he received the spreadsheet, that Attorney Pass testified he stored the document after 2014, that Attorney Pass testified he located the document in his files, and that he printed out or copied the original document. (Tr. 48). There is no evidence or basis on the record from which the ALJ could conclude GC Ex. 2(b) was miscopied from the actual spreadsheet, R. Ex. 5. Based on that unwarranted factual leap, the ALJ credited the testimony of Attorney Pass. (ALJD 11, n. 12). That credibility determination should be overturned. Where credibility resolutions are not based primarily on demeanor, which they were not in these cases, the Board itself may proceed to an independent evaluation of credibility. *See J. N. Ceasan Co.*, 246 NLRB 637, 638 n. 6 (1979); *IBEW, Local 38*, 221 NLRB 1073, 1074 (1975). The Board should resolve credibility issues against Attorney Pass based upon the unexplained change to the original document R. Ex. 5 and the submission of the correct document, G.C. Ex. 2(b). *See Samsung Electronics America, Inc.*, 363 NLRB No. 105 at 2 (2016).

Fund contribution rates and increases to be paid by Respondent for 2015, 2016, 2017, and 2018. (Exception 51). The drafter of R. Ex. 5, Respondent's consultant Elliot Dinkin, explained that R. Ex. 5 was only intended to cover rate increases for 2015-2017, and that the "2018" column appeared on the spreadsheet because R. Ex. 5 had been created using a prior model that included 2018 but that R. Ex. 5 was not intended to model 2018 increases and rates. (Tr. 86, 88-89).

## ARGUMENT

**I. RESPONDENT DID NOT VIOLATE SECTION 8(a)(5) AND (1) ON OR ABOUT JANUARY 1, 2018, WHEN IT DID NOT PAY TO THE FUND A FIVE PERCENT (5%) INCREASE FOR EMPLOYEES IN THE SEVEN BARGAINING UNITS. BOARD LAW DOES NOT AND SHOULD NOT HOLD THAT A TWO-TIME CONTRACTUAL COMMITMENT TO INCREASE CONTRIBUTIONS TO A TAFT-HARTLEY WELFARE FUND CREATES A STATUS QUO THAT BIND THE EMPLOYER TO A PERPETUAL COMMITMENT TO PAY ANNUAL CONTRIBUTION INCREASES AFTER EXPIRATION OF THE CONTRACT—EXCEPTIONS 1-2, 8-27, 38, 53.**

The Consolidated Complaint alleges that on or about January 1, Respondent discontinued its practice of paying up to the 5% increase in contributions to the Fund for each of the seven bargaining units' employees to the Western Pennsylvania Teamsters and Employers Welfare Fund (Fund) as set forth under the 2014 Agreement covering each bargaining unit's employees, resulting in a reduction of health insurance benefits. (GC Ex. 1(dd), pp. 10-11). The ALJ found Respondent violated the status quo by changing the practice of making those contributions. There is no dispute that after the 2014 Agreements expired, Respondent continued to make contributions at the 2017 level as specified under those Agreements. (Jt. Stip. 21).

The ALJD is based on an insupportable legal premise: that an employer's compliance with a Fund contribution increase obligation based on the only two occasions during the term of a contract when it was required to do so, becomes the dynamic status quo after the expiration of the contract.

**A. The ALJ's Analysis**

The outset of the ALJ's Analysis is unremarkable: an employer may not change the status quo during negotiations.<sup>9</sup> (ALJD12-13). Where the ALJ verges into uncharted territory is when he formulates the issue in these cases as "whether the Fund's annual contribution rate increases, which were required to be paid under the terms of the 2014 Agreement, were themselves terms and conditions of employment that must be continued during bargaining for a successor agreement." (ALJD 14)<sup>10</sup> The issue in these cases is whether Respondent's payment of up to 5% of the Fund's annual contribution rate increases in 2016 and 2017, which were required under the 2014 Agreements, became the dynamic status quo after the Agreements expired. There is no dispute that the obligation to pay the Fund-determined rate in 2015, and five percent (5%) increases to that rate for 2016 and 2017, was a term and condition during the term of the 2014 Contracts. However, that time-bound obligation did not continue after the expiration of the 2014 Agreements.

**B. Finley Hospital and its Progeny Must be Overruled.**

At its crux, ALJ's decision is based on his conclusion that, if a commitment is set forth in a collective bargaining agreement, with or without a specific time frame for meeting the commitment, that commitment continues after the expiration of the CBA, unless specifically waived. That argument was accepted by the Board in *The Finley Hospital*, 362 NLRB No. 102 (2015), *enf. denied* 827 F.3d 720 (8<sup>th</sup> Cir. 2016). In *Finley*, the parties' contract provided for anniversary date increases during the term of the one-year contract. The Board transmogrified that

---

<sup>9</sup> The ALJ's repeated citation of *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996), is misplaced. (Exception 8). As noted by Member Johnson in *Finley Hospital*, 362 NLRB No. 102, at 13 (2015), *Daily News* was a first-contract situation where there was a longstanding past practice of regular wage increases established by the employer prior to the union's certification. Here, the parties have a longstanding bargaining relationship and are not negotiating for a first contract. Furthermore, there is no finding, nor evidence that there was a longstanding past practice of Respondent paying Fund contribution rate increases, except for the two years it was required to do so under the terms of the 2014 Agreements.

<sup>10</sup> Exception 9.

one-year obligation into the dynamic status quo and held, absent a clear and unmistakable waiver, the employer was obligated to continue to give anniversary date wage increases after the expiration of the contract.

*Finley* was wrongly decided. Then-Member Johnson's dissent cogently explains the deficiencies of the Board's reasoning in *Finley*, and, by implication, the ALJ's reasoning in these cases. *Id.* at pp. 11-15. He pointed out that the Board wrongly framed its decision on the basis of "waiver." Rather, the first step was to define the status quo which, under *Intermountain Rural Electric Assn. v. NLRB*, 984 F.2d 1562, 1567 (10<sup>th</sup> Cir.) was defined by the "contract language itself." *Finley Hospital*, 362 NLRB No. 102 at 12.

Member Johnson pointed out that the majority's opinion in *Finley Hospital* not only contradicted precedent governing an employer's postexpiration statutory obligation, but also abnegated the contractual durational language. The Board majority had applied to a status quo situation, waiver cases that involved postexpiration unilateral changes from the maintenance of wages and/or benefits at the same level as on the final day of a contract's term. *Id.* at 13.

He also pointed out that the "dynamic status quo" cases were developed and applied in circumstances where unrepresented employees received wage or benefit increases with such sustained frequency and regularity that the employees regarded them as established terms and conditions of employment which an employer was obligated to continue when entering into a new collective bargaining relationship *Id.* He also noted the ramifications of the majority's opinion. If an employer had provided for a concessionary decrease in the last year of the contract, would that decrease continue to be applied in subsequent years after the expiration of the contract in the absence of a new contract? *Id.*<sup>11</sup>

---

<sup>11</sup> Similarly, if an employer's obligation to pay benefit fund contribution rate changes included, as a concession, a lower contribution increase, or even an overall contribution decrease, during the final year of a collective bargaining

He characterized the Board's decision as:

. . . a startling and troubling imposition on employers of a heretofore unknown obligation to continue giving non-discretionary wage and benefit increases post expiration at the rate given in the final year of a collective-bargaining agreement. And, of course, this new rule will disadvantage unions and employees as well, by holding them captive to any negative changes to terms and conditions of employment, regardless of how the contract language circumscribed the duration of the change.

Overall, the terms and conditions of employment in a labor contract will no longer be time-bound, regardless of contrary language of the labor contract. Instead, any changes will keep replicating themselves, sometimes long after the contract itself expires, until agreement or impasse occurs. And, neither agreement nor impasse may be readily forthcoming from the party receiving this kind of windfall – a windfall that the Board has created with the decision today.

After the case in particular, employers must now bargain with unions for what they can only hope will be ironclad language expressly providing that no increases will be paid beyond a contract term. Of course, unions now will have no incentive to agree to ironclad language or to do so promptly. Given how the majority ignores the clear limiting language here, employers have no certainty that any language will be a barrier to having to continue wage increases until they reach agreement on a successor contract or impasse. Even if there is ironclad language, unions have been given added bargaining leverage to extract a price from employers for their agreement to it.

*Id.* at 14.

Member Johnson also pointed out how the Board's newly-applied status quo application did damage to the principles enunciated by the Supreme Court in *H.K. Porter*.<sup>12</sup> The imposition of a specific obligation for employers to give non-negotiated perpetual wage increases after a labor contract expires directly contravened the fundamental premise of *H.K. Porter*: that the Board cannot compel parties to agree to specific terms of a contract. The *Finley* rule, "impermissibly

---

agreement, would these decreases in contribution rates become the status quo after the contract expired? Or would the increases and decreases be averaged to determine the postexpiration status quo rate? Simply put, the ALJ's application of the dynamic status quo provides too much opportunity for discord to be a sustainable concept.

<sup>12</sup> *H.K. Porter v. NLRB*, 397 U.S. 99 (1970).

replaces a status quo that has previously been based on something that parties actually agreed to, with something that they *never* did. *Finley*, 362 NLRB No. 102 at 14. (Emphasis in original).

The Board's *Finley* decision was not received favorably by the Court of Appeals. *The Finley Hospital v. NLRB*, 827 F.3d 720 (8<sup>th</sup> Cir. 2016). The court held that a one-year-long collective bargaining agreement did not establish a status quo of annual, compounded raises that, under the National Labor Relations Act (Act), had to be continued after the agreement's expiration. It held that the Board, (like the ALJ here), misassumed that because the contract authorized one-time 3% pay raises, annual 3% raises automatically became part of the status quo that had to be maintained during negotiations. It quoted Member Johnson's dissent to the effect that by "effectively deleting the time constraint that was an inherent part of the wage increase obligation, the majority makes a time-bound obligation into a perpetual one." The Board decision allows "any incrementalist or decrementalist term [to] control over the actual language used in the contract." The Eighth Circuit continued, "[t]he purpose of the NLRA was surely not to make all wage terms in every employment agreement last beyond the tenure of the bargained-for agreement. *Id.*, at 725.

According to the *Finley* court, collective bargaining agreements are interpreted according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy. Therefore, it interpreted the parties' contract to set forth a straightforward, singular pay increase on a particular day during the one-year contract. The court noted there was minimal, if any, legal precedent supporting the notion that a one-time act by an employer creates a new status quo. *Id.* at 725. One could not separate the one-year term limit from the pay raise obligation. Therefore, the new salary at the time the contract expired, not the alleged practice of 3% annual pay raises, was the status quo that had to be maintained throughout negotiations. It denied enforcement to the Board's Order.

C. **The Other Cases Cited by the ALJ Do Not Support His Conclusion That The “Dynamic Status Quo” Mandated Postexpiration Fund Contribution Rate Increases.**

The other cases cited by the ALJ suffer from similar infirmities. *Wilkes-Barre General Hospital*, 362 NLRB No. 148, n.1 (2015), *enfd.* 857 F.3d 364 (DC Cir. 2017) was an application of *Finley* to a situation where the expired contract established a longevity-based wage table that remained in effect after the contract expired. Thus, the “snapshot” taken upon the contract’s expiration included the wage “grid” included in the contract. 362 NLRB No. 148 at 5. Employees were entitled to wage increases if warranted by their longevity after the contract expired, as long as the grid included a pay rate for them. There is nothing in *Wilkes-Barre* that required the employer to go beyond the wage rates established under that grid to conform to a dynamic status quo.

Similarly, in *Intermountain Rural Electric Ass’n*, 305 NLRB 783 (1991), *enfd.* 984 F.2d 1562 (10<sup>th</sup> Cir. 1993), benefit premium increases during a contract, standing alone, did not create an obligation on the part of the employer to continue to make those increases after the contract expired. In *Intermountain*, during the term of the contract, the employer paid the full amount of the premiums for employees’ medical and dental insurance. Because different insurance plans were available, the contract specifically provided that the employer’s maximum contribution to any of the health insurance plans “shall not exceed” 100% of the Blue Cross and Blue Shield premiums. For dental insurance, the contract stated the employer would “pay one hundred percent (100%) of the premiums for the employees covered.” *Id.* at 783-784. Apparently, this practice had continued for a number of years, predating the most recent collective bargaining agreement. *Id.* at 793. There was no durational limitation to the extent of the employer’s obligation to pay that level of premiums.

In *Intermountain*, the contract expired on November 30. Medical and dental insurance premiums were scheduled to increase on December 1. Citing the fact that the contract had expired, the employer continued to pay premium contributions at the pre-December 1 level. The Board found the employer was obligated to continue to pay 100% of the Blue Cross/Blue Shield medical and dental premiums after the contract expired. Its conclusion was based on the expired contract's reference to the employer's payment of specified amounts (100% of BC/BS and 100% of dental). *Id* at 785.

The Board stated:

Although the contract language relating to medical insurance clearly refers to a maximum, no particular dollar figure is identified. Instead, the Respondent's maximum liability is described as not to exceed 100 percent of the Blue Cross/Blue Shield rates. Thus, when the dollar amount of those rates increases, so too does the Respondent's maximum dollar obligation....Respondent agreed to pay 100 percent of those premiums. Maintaining the status quo on dental coverage means that the Respondent pays the entire premium regardless of cost. Requiring the Respondent to continue to pay 100 percent of the new December 1 Blue Cross/Blue Shield and dental insurance rates is consistent with the plain meaning of the contract, the Respondent's previous obligation, and the employees' established term of employment.

*Id.* at 785.

Here, the 2014 Agreements did not generally require Respondent to pay any contribution amounts except for 2015 contributions at a specified rate, and provided a formula for determining Respondent's maximum contribution for 2016 and 2017. The plain meaning of the 2014 Agreements is that Respondent was required to increase Fund contribution rates in 2016 and 2017, only pursuant to a formula specified in those Agreements.<sup>13</sup> The imposition of requirements that

---

<sup>13</sup> The 2014 Agreements are unambiguous. They have only one meaning: that Respondent was to pay a specific Fund contribution rate for 2015, and to pay up to a 5% increase in that rate for 2016 and for 2017. There is no reference to any obligation to pay for increases in that rate for 2018, or for any period of time after the last increase took effect on January 1, 2017. In fact, the 2014 Agreements provide that Respondent is not "liable for any other payments to the Fund." (Jt. Exs. 1(a)-(g)). Under the Supreme Court's decision in *M&G Polymers USA, LLC v. Tackett*, 574 U.S. \_\_\_\_ (2015), labor contracts should be interpreted using ordinary contract principles. 574 U.S., slip op. at 7. Where

Respondent pay Fund contribution rate increases after the Agreements expired and that Respondent utilize that same formula it used in 2016 and 2017 is not consistent with the plain meaning of the 2014 Agreements. The absence of any written basis upon which to hold Respondent to any sort of postexpiration obligation to increase Fund contributions clearly distinguishes these cases from *Intermountain*. Furthermore, unlike *Intermountain*, there is no practice predating the 2014 Agreements that required Respondent to increase Fund contributions on an annual basis.<sup>14</sup>

The Board should adopt the views expressed by Member Johnson in dissent in *Finley* and by the Eighth Circuit in *Finley*. Obligations under a collective bargaining agreement that take place at specified intervals during the term of that agreement do not become part of the status quo and require an employer to make wage and benefit increases (or decreases) that are not specified in that contract. The misuse of the “dynamic status quo,” a concept concerning the post-certification period, has no application to the parties’ obligations under their most recent collective bargaining agreements. That misuse runs afoul of the Supreme Court’s reasoning in *H. K. Porter, supra*, and must be rejected. It is unnecessary and legally incorrect to focus, as did the ALJ, upon whether the Unions waived their right to bargain over the continuation. The issue is the substance of that status as gleaned from the 2014 Agreements. *Finley Hospital* and its progeny that hold to the contrary must be overruled and the Consolidated Complaint must be dismissed.

---

the words of a contract are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent. *Id.* A contract is not ambiguous unless it is subject to more than one reasonable interpretation. *CNH Industrial, N.V. v. Reese*, 583 U.S. \_\_\_, slip op. at 1 (2018). Therefore, the clear and unambiguous terms of the 2014 Agreement should be relied upon in finding Respondent had no contractual or statutory obligation to pay the 2018 Fund contribution rate increase.

<sup>14</sup> The Fund first became the employees’ health insurance provider in 2015, during the term of the 2014 Agreements. (Jt. Stip. 9).

**D. The Other Factors Cited by the ALJ Do Not Create a Dynamic Status Quo Requiring Respondent to Pay Postexpiration Fund Contribution Rate Increases.**

**1. The Attachment of a Schedule of Benefits to the 2014 Agreements Does Not Mean Respondent was Obligated to Make Postexpiration Contribution Rate Increases.**

In his application of *Finley*, the ALJ claimed that other factors in the instant cases supported his conclusion that a dynamic status quo had been created obligating Respondent to pay a specified portion of Fund contribution rate increases in perpetuity. The ALJ claimed his conclusion was buttressed by the fact that the health care coverage schedule of benefits was attached to each of the 2014 Agreements. Each of the 2014 Agreements do not state that Respondent was obligated to maintain those benefits during or after the term of that Agreement. Nonetheless, the ALJ asserted those schedules, by their mere attachment to an Agreement, became part of the terms and conditions of employment when the 2014 Agreements expired (or were temporarily extended). (ALJD 15, 1.12-15). The ALJ cites no Board law for that proposition. Even if the schedule's inclusion represented an alleged contractual commitment to maintain those benefits, it did not follow that Respondent was responsible for paying postexpiration Fund contribution rate increases necessary to maintain those benefits. The ALJ's attempt to backdoor such an obligation should be rejected.

**2. The ALJ's Reliance on *Intermountain* is Misplaced.**

The ALJ's statement that this case is very much like *Intermountain*, *supra*, 305 NLRB 783 (1991), ignores, as set forth above, the grave dissimilarities between that case and these cases. There is a fundamental difference between, as in *Intermountain*, an employer's longstanding commitment, predating and continuing in the most recent collective bargaining agreement to pay up to 100% of the premiums for two benefit plans, with a two-year commitment to pay fund

contribution rate increases. Therefore, *Intermountain, supra* does not support the ALJ's conclusions.

**3. The ALJ Wrongly Assigned the Burden to Respondent to Establish the Unions Waived Their Right to Bargain.**

The ALJ wrongly assigned to Respondent the obligation to establish the Unions had waived the right to maintain Fund contribution rate increases after the expiration of the 2014 Agreements. (ALJD 17, l. 32-36; ALJD 18, l.1-16). His conclusion was that the 2014 Agreements' durational language, and by implication, the time limitations set forth in the health insurance provisions of those Agreements, did not serve as evidence of an intent by the parties to alter the status quo after contract expiration. (ALJD 18, l. 18-23). Once again, that is a conclusion based upon *Finley*. For the reasons set forth above, *Finley* was wrongly decided, should not be accepted as precedent, and any conclusions based upon *Finley* must be rejected. Rather, for the reasons stated by Member Johnson in *Finley*, the durational limitations set forth in the health insurance provisions of the 2014 Agreements evince a clear intent to limit Respondent's obligation to pay Fund contribution rate increases to 2016 and 2017 and not for any time after the expiration of the 2014 Agreements.

**4. The Board's Decision in *Hempstead Lincoln Mercury Motors Corp.* Supports Respondent's Defenses.**

Finally, the ALJ misconstrues the impact of *Hempstead Lincoln Mercury Motors Corp.*, 351 NLRB 1149 (2007). In *Hempstead, supra*, the employer refused to make pension fund contributions at a rate unilaterally increased by the pension fund after the expiration of the union contract. The employer continued to tender to the fund what was required under its expired union contract. That amount constituted the status quo. As in these cases, the collective bargaining agreement in *Hempstead* did not require postexpiration contribution rate increases, nor did it contain a savings clause that permitted the union or the fund to unilaterally raise the amount of the

employer's contributions.<sup>15</sup> A savings clause is any type of provision, whether contained in a labor contract or in an ancillary document such as a trust agreement, subscription agreement or participation agreement, which authorizes a fund to change rates at any time, including after the expiration of the CBA. Accordingly, in the absence of such a savings clause, the Board found in *Hempstead* the employer did not violate Section 8(a)(5) by maintaining the status quo as it existed upon contract expiration after the expiration date of the contract. By doing so, the employer had fulfilled its obligations under the expired contract and under the Act. *Id.* at n.1.

Central to an understanding of *Hempstead, supra*, is an understanding of Section 302 of the Labor Management Relations Act (LMRA). That understanding is not present in the ALJD, as set forth below. Under Section 302, an employer, such as the employer in *Hempstead*, could not lawfully make increased pension fund contributions without the cover of a written agreement. That written agreement could have been a labor contract, a savings clause in the labor contract, or any other writing. Therefore, the employer in *Hempstead* did not violate Section 8(a)(5) when it failed to make payments it could not lawfully make under another federal law. Similarly, Respondent could not make increased Fund contributions except under the aegis of a written agreement. The "dynamic status quo" did not and could not constitute a written agreement allowing for benefit contribution increases. Moreover, as set forth below, the dynamic status quo, whether it is conjured out of Board precedent or thin air, cannot satisfy the rigid requirements of Section 302. If the ALJ had recognized the instructive lessons of *Hempstead*, he would not have

---

<sup>15</sup> None of the 2014 Agreements had a savings clause. (Jt. Exs. 1(a) – 1(gg)).

been as dismissive of that case as he was. (ALJD I. 29-30).<sup>16</sup> *Hempstead, supra*, supports Respondent's position in these cases.

In essence, the ALJ has presumed that the status quo was created when the 2014 Agreements took effect in 2014, that the status quo is dynamic, and that application of that dynamic status quo required Respondent to pay up to five percent (5%) of the 2018 Fund contribution rate increase in order to provide the benefits established under the 2014 Agreements.

However, contrary to the ALJ, the actual status quo in these cases was created when the Agreements expired in March 2017. That status quo provided for Respondent to continue to pay the contribution rate then in effect for 2017. Even assuming, for argument's sake, that the dynamic status quo principle is applicable, that dynamic status quo could not last in perpetuity. The proper application of the dynamic status quo is to find that contribution rate increases occur only for those years the 2014 Agreements called for such increases. The ALJ's imposition of an obligation upon Respondent, theoretically in perpetuity, to pay up to five percent (5%) annual increases in Fund contributions is an unwarranted extension of poorly-reasoned precedent. It must not be accepted by the Board.

## **II. SECTION 302 PROHIBITS RESPONDENT FROM PAYING 2018 FUND CONTRIBUTION RATE INCREASES.**

The ALJ rejected Respondent's defense that the 2018 Fund contribution rate increase was unlawful under Section 302 and could not be lawfully demanded by the Fund or paid by Respondent.

---

<sup>16</sup> The ALJ took pains to distinguish his "status quo" analysis from a "traditional past practice analysis." (ALJD 19). However, he repeatedly relied upon the "operation of the agreement," i.e., past practices, to demonstrate the existence of that status quo.

The ALJ misconstrued the Section 302 defense raised by Respondent. It does not contest its obligation to continue to pay the amounts covered by and required under the 2014 Agreements, which meet the written agreement requirement of Section 302, and which Respondent has continued to pay. However, the written agreement requirement of Section 302(c)(5)(B) required an actual written agreement authorizing the Fund to **raise** contribution rates to a level not called for under the terms of the 2014 Agreements. Although the ALJ recognized Section 302's requirements for a written agreement, he found that those requirements for a postexpiration contribution rate increase did not have to be satisfied by an actual written document, but could be satisfied by the existence of Respondent's unwritten dynamic status quo obligations. That finding is unsupported by law and cannot be upheld.<sup>17</sup>

**A. Section 302 Requires a Written Agreement.**

The Fund is a "Taft-Hartley" multiemployer welfare benefit fund and is subject to the provisions of Section 302. (Jt. Stip. 12). Section 302(d) carries criminal penalties for a violation of its provisions. *See* 29 U.S.C. Section 186.

Section 302(a) generally prohibits the payment of anything of value from an employer to a labor organization. Section 302(b) specifically makes unlawful a request or demand for payment of anything of value prohibited by Section 302(a). Section 302(c) contains several exceptions, in that payments may be made by employers to employee health and welfare funds but only in specific circumstances. Under subsection (c), payments by an employer may only be made to a trust fund equally administered by both the employer and the union, and all arrangements for an employer to make payments must be set forth on a detailed basis in a written agreement. Section 302(c)(5)(B); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 328 (1981).

---

<sup>17</sup> Exceptions 3, 35-37.

That Section 302 requirement is inviolable and is rigidly enforced by the courts. *See Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1969) (receipt of payments by a multiemployer fund is absolutely forbidden unless there is a written agreement between the employer and the union specifying the basis upon which the payments are made; equitable estoppel cannot supply the essential element of the written agreement Congress required for subsection 302(c)(5)(B)). *See also Jackson Purchase Rural Electric Cooperative Assoc. v. Local 816*, F.2d 264 (6<sup>th</sup> Cir. 1981) (enforcement denied where obligation was purportedly based on past practice, where existence of past practice did not comply with Section 302 “written agreement” requirement; enforcement of obligation based on past practice would destroy the safeguards of law and lessen the prevention of abuses); *U.S. v. Mabry*, 2005 U.S. Dist. LEXIS 39609, at 3 (E.D. MI, 2005) (unwitting violations of Section 302 are not lawful), *aff’d* 518 F.3d 442 (6<sup>th</sup> Cir. 2008), *cert. den.* 2009 U.S. LEXIS 1689 (2009).

Fund trustees may not unilaterally increase rates (or reduce benefits) without the agreement of both the employer and the union. *NLRB v. Amax Coal Co.*, at 336 (“trustees . . . can neither require employer contributions not required by the original collectively bargained contract, nor compromise the claims of the union or the employer without regard to the latter’s contributions.”). For the Fund to increase rates for 2018 or to decrease benefits in April 2018, it needed a written agreement signed by Respondent and the Unions allowing those changes. There is no such written agreement. The 2014 Agreements do not specifically allow for the Fund to unilaterally increase rates after 2017 nor to unilaterally reduce benefits at any time. Furthermore, there are no savings clauses in any of the 2014 Agreements allowing the Fund to take those actions. Finally, there is no evidence in the record of any other agreement such as a trust agreement, participation

agreement, subscription agreement or any other similar agreement authorizing the Fund to take those actions.

There is no evidence nor legal support for any conclusion that Section 302 does not apply in these circumstances. These cases present a clear conflict between the rigid requirements of Section 302 and the ALJ's nebulous interpretation of Section 8(a)(5). General Counsel did not meet the high burden of showing a Congressional intention to supplant Section 302 with Section 8(a)(5). See *Epic Systems v. Lewis*, 584 U.S. \_\_\_, slip op. at 10 (2018) (party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "a clearly expressed congressional intention" that such a result should follow.) Therefore, the Board is bound to follow the strictures of Section 302, as interpreted by the courts.

**B. The ALJ's Findings**

The ALJ found that, under Board law, an employer's dynamic status quo obligation under Section 8(a)(5) satisfies Section 302's requirement for a written agreement. (ALJD 23, l. 20-ALJD24, l. 1-26). He cited no cases in support of that proposition, but instead relied upon acknowledged precedent that an employer's postexpiration obligations are established, for Section 8(a)(5) purposes, by an expired contract. The ALJ cited three cases, *Bricklayers, Local 15 v. Stuart Plastering Co.*, 512 F.2d 1017 (5<sup>th</sup> Cir. 1975); *National Stabilization Agreement of Sheet Metal Industry Trust Fund v. Commercial Roofing & Sheet Metal Trust Fund*, 655 F.2d 1218, 1226 (D.C. Cir. 1981) and *Bricklayers Local 21 of Illinois Apprenticeship and Training Program v. Banner Restoration, Inc.*, 385 F.3d 761, 772 (7<sup>th</sup> Cir. 2004) for the proposition that Section 302's requirements do not require strict compliance and may not be used as an employer "loophole" to escape its obligations to a multiemployer benefit fund. None of the cited cases concerns an employer's obligation to pay postexpiration increases.

Two of the cases cited by the ALJ are in direct contradiction of his attempted laissez faire approach to compliance with Section 302. In *Stuart Plastering*, the Fifth Circuit rejected a union's argument that the mere existence of a "writing" is sufficient to comply with the requirements of Section 302, holding that the union's "limited perspective" did not epitomize the congressional concern that led to the enactment of Section 302 and for the compliance with all of Section 302's requirements in fact, and not merely in intention. The writing relied upon by the union in that case did not satisfy Section 302.

In *Commercial Roofing*, the court recognized that strict compliance with the qualifications of Section 302(c)(5) was generally required. However, given the circumstances, the court held that a trust fund's alleged failure to comply with Section 302's "equal representation" requirement was not a sufficient defense to an ERISA claim brought on by an employer's failure to make contractually-required benefit fund payments for payments to which employees are entitled under a collective bargaining agreement. The Seventh Circuit stated that unlike "other defects such as the absence of a written agreement, or the absence of a detailed basis for employer payments, an equal representation defect does not practically preclude continued employer contributions." 655 F.2d at 1226-1267. Here, we have both the absence of a written agreement and the absence of a detailed basis for employer payments. Therefore, *Commercial Roofing* does not support the ALJ's reasoning.

Finally, in *Banner Restoration*, the court upheld the principle that an unsigned written agreement satisfied the requirements of Section 302 for purposes of requiring an employer to make contributions it had otherwise agreed to make and had made, holding that an agreement only need to be "written" to satisfy Section 302. 385 F.3d 761, 770. Here, there is no agreement covering 2018 Fund contribution rate increases, whether signed or unsigned. Therefore, none of these cases

cited by the ALJ holds that the Board or the courts may dispense with the requirements of the written agreement.

The ALJ cited no cases for his holding that dynamic status quo obligations under Section 8(a)(5) satisfy the requirements of a written agreement under Section 302. That is because there are none.

The cases cited by the ALJ do not stand, in any way, for the proposition that the satisfaction of the Section 302 requirement for a written agreement is met by an employer's dynamic status quo obligations under Section 8(a)(5). In *Cibao Meat Prods. v. NLRB*, 547 F.3d 336 (2d Cir. 2008), the Second Circuit unremarkably held that continued payments to a multiemployer fund did not violate Section 302, because an expired contract satisfied the "written agreement" requirement and that the employer violated Section 8(a)(5) when it ceased payments to the funds. It did not address whether a dynamic status quo obligation satisfied the written agreement requirement of Section 302 for making increased payments to a Fund, where, as here, the Respondent has continued to make the Fund contributions at the 2017 rate.

In *Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662 (7<sup>th</sup> Cir. 2003), also cited by the ALJ, the court held that an expired contract provided the written basis for an employer to continue to make fund contributions at the rate set forth in that expired contract. It also recognized that "ERISA does not authorize contributions to a union welfare fund other than in accordance with a written agreement...and that the Landrum-Griffin Act positively forbids payments to a union or union-related entity other than in accordance with a written agreement." *Id.* at 668. Thus, not only does *Dugan* **not** support the ALJ's conclusion that a dynamic status quo obligation under Section 8(a)(5) satisfies the written requirement, but it reinforces Respondent's argument that a Fund contribution rate increase required a written agreement, of which there was none in these cases.

*Alaska Trowel Trades Pension Fund v. Lopshire*, 103 F.3d 881 (9<sup>th</sup> Cir. 1996), also cited by the ALJ, simply stands for the proposition that an expired collective bargaining agreement satisfies Section 302's requirement for a "detailed written agreement," and does not address whether a statutory dynamic status quo obligation independently constitutes such a detailed written agreement. *Id.* at 882-882. In *Peerless Roofing Co. v. NLRB*, 641 F.2d 734 (9<sup>th</sup> Cir. 1981), an employer ceased to make contributions to union trust funds after its union contract expired. The employer contested, before the Court of Appeals, the Board's order requiring it to make payments for the months of May through August 1978, claiming such payments would be illegal under Section 302. The Court upheld the Board's finding that the payment obligations survived the expiration of the contract and that the employer had signed documents separate and apart from the contract establishing its obligation to pay the fund payments.

Here, Respondent has continued to pay the only rate established by a written agreement, the 2017 contribution rate. There are no signed documents separate and apart from the 2014 Agreements establishing an independent obligation of Respondent to pay postexpiration Fund contribution rate increases. Therefore, the cases cited by the ALJ do not support the claim that a "dynamic status quo" obligation constitutes a written agreement for purposes of Section 302.

**C. Respondent's Section 302 Defense is Supported by Board Precedent.**

Respondent's argument that it could only pay the 2018 Fund contribution rate increase if it was authorized by a written agreement is consistent with established law. It is the ALJD who stands in contrast to that Board law.

For example, in *Delta Sandblasting Co., Inc.*, 367 NLRB No. 17 (2018), the Board firmly acknowledged the "written agreement" requirement of Section 302(c)(5)(B). In *Delta*, the Board acknowledged that, under extant law, the written agreement requirement may be satisfied by a trust

fund agreement, citing *Hen House Market No. 3 v. NLRB*, 428 F.2d 133, 139 (8<sup>th</sup> Cir. 1970), or multiple documents, citing *Richmond Homes*, 245 NLRB 1205, 1213 (1979). But, in each case cited by the Board in *Delta*, there was some type of written agreement setting forth the employer's payment obligations. *Id.* at 3. That is because the NLRB recognizes that the LMRA requires a "writing detailing the bases on which the contributor's payments are to be made on behalf of the employees." *Richmond Homes*, 245 NLRB at 1213.

*National Gypsum Company*, 359 NLRB 1058 (2013) applied the need for a written agreement under Section 302 to an employer's refusal to pay postexpiration benefit fund contribution increases. In *National Gypsum*, the employer had refused to pay a benefit fund premium increase that took effect after the collective bargaining agreement had expired. However, the employer had signed a fund participation agreement that stated:

*Subsequent Periods.* For the period beginning with the expiration of [the specified rates above] and continuing through the expiration of this Agreement, the Employer shall make payments to the Fund at the rates prescribed by the Board [of Trustees], or its authorized agent . . . . Each period for which a particular rate is in effect is considered to be a "Subsequent Period."

*Id.* at 1060. That participation agreement provided the basis for finding the employer had the obligation to pay the postexpiration contribution fund rate increases, and that its failure to meet that obligation violated Section 8(a)(5). Again, it was the presence of a written agreement that allowed for the Board to find the employer violated Section 8(a)(5) by refusing to make contributions pursuant to that written agreement.

Finally, in *Hempstead Lincoln Mercury*, *supra*, 351 NLRB 1149, a similar analysis was applied. The expired contract provided a basis for the employer's continued benefit fund payments. It did not provide the Section 302 basis of a written agreement authorizing increased benefit fund contributions. There were no other written agreements authorizing increased

contribution payments. Finally, no argument was made that the dynamic status quo supplied the written agreement needed to satisfy the requirements of Section 302. Therefore, the employer was not obligated to pay any postexpiration contribution rate increases. Therefore, as in these cases, the employer had no postexpiration obligation to increase benefit fund contributions.

**D. Respondent's Section 302 Defense is Consistent with Other Established Precedent.**

A requirement that General Counsel prove the existence of a physical written agreement to establish a violation of Section 8(a)(5) is consistent with the courts' application of Section 302.<sup>18</sup> Most instructive of those cases is *Jackson Purchase Rural Electric Cooperative Assoc. v. International Brotherhood of Electrical Workers*, 646 F.2d 264 (6<sup>th</sup> Cir. 1981). Dues checkoff, like payments to multi-employer benefit trusts, is governed by Section 302. In *Jackson*, the employer had for years checked off union dues from employees' paychecks without the required authorization of a collective bargaining agreement. An arbitrator found the checkoff practice had become an established past practice that became part of the parties' collective bargaining agreement, and thus, shielded from Section 302.

The Sixth Circuit disagreed, holding that the dues checkoff agreement was illegal because it did not comply with Section 302 and that the courts would not give legal effect to illegal acts. It rejected the union's argument that enforcement of an illegal agreement on the ground that the evil concerned did not follow, holding that such enforcement would destroy the safeguards of law

---

<sup>18</sup> Interpretation of Section 302 is vested with the federal courts and the Board must accept that interpretation. *See, generally, Sheet Metal Workers' International Association (Central Florida Sheet Metal Contractors Assoc., Inc.)*, 234 NLRB 1238, 1244 (1978).

and lessen the prevention of abuses. *Id.* at 268. The fact that the dues checkoff had become a past practice did not supersede the requirements of Section 302.<sup>19</sup>

**E. Respondent's Section 302 Defense Must be Accepted and the Consolidated Complaint Must be Dismissed.**

Under Section 302, the imposition of the 2018 Fund contribution rate increase required a written agreement. The 2014 Agreements do not provide any agreement to pay increased rates in 2018. There is no savings clause in the 2014 Agreements, nor is there any other written agreement requiring Respondent to pay that increase. The ALJ acknowledges those facts, but holds that the Board's dynamic status quo doctrine alchemizes into, or substitutes for, a written agreement that satisfies Section 302.

The ALJ's conclusion is unsupported by law. The Board and the courts have held that Section 302 requires a written agreement. The ALJ's assertion that the written agreement requirement is unnecessary in these circumstances, because no harm of the types of harm envisioned by Section 302 have occurred, is the exact argument rejected in *Jackson*. Statutes, and the words in those statutes, have meaning: to remove the written agreement requirement from Section 302, even for the limited purpose of requiring Respondent to pay the 2018 Fund contribution rate increase, would destroy the safeguards of Section 302 and increase the opportunities for further abuses.

There is no written agreement privileging the imposition of any Fund contribution rate increase after 2017. Therefore, the imposition of that increase was illegal under Section 302. The fact that an increase could be seen as an application of the dynamic status quo doctrine does not, as with the rejected past practice argument in *Jackson*, supersede the requirements of Section 302.

---

<sup>19</sup> Similarly, equitable principles do not supersede the written agreement requirement of Section 302. *See Moglia v. Geoghegan, supra*, 403 F.2d 110.

Therefore, Respondent's Section 302 defense must be accepted, Respondent's exceptions should be granted, and the Consolidated Complaint must be dismissed.

**III. THE ALJ ERRED BY REJECTING RESPONDENT'S CONTRACT COVERAGE DEFENSES REGARDING THE GUILD AND OPERATING ENGINEERS' BARGAINING UNITS.**

Assuming, for argument's sake, that Respondent had an obligation to bargain with each Union over its decision not to pay the 2018 Fund contribution rate increase, it is clear that two unions, the Guild and the Operating Engineers, waived their right to bargain over Respondent's purported "change."

Two of the seven 2014 Agreements remain in effect. The terms of the Guild contract remain in effect due to its "evergreen provision" which provides that "The terms of this Agreement remain in effect as long as negotiations continue." (Jt. Ex 1(a), p. 38). Negotiations are continuing between Respondent and the Guild. (Jt. Stip. 33). The terms of the Operating Engineers' contract remain in effect because Respondent and the Operating Engineers agreed to extend that contract. (Jt. Ex. 1(h)). Thus, any alleged change that took place on or about January 1, occurred while those two contracts remained in effect.

The ALJ applied the Board's established waiver principles to find the Guild and the Operating Engineers did not waive their right to bargain. (ALJD 18, l. 31-36, ALJD 20, l. 21-25). The Board should abandon those timeworn principles and adopt a "contract coverage" analysis to claims of contractual waiver. Multiple circuit courts have criticized the Board's continued adherence to the "clear and unmistakable" waiver standard. They have adopted, and the Board should embrace, a "contract coverage" analysis to contractual defenses to refusal to bargain allegations.

Utilizing that analysis, it is clear the Unions have waived their right to bargain about the 2018 Fund contribution rate increase. Under that analysis, when a union and employer bargain over a subject and memorialize their agreement in the contract, “there is no continuous duty to bargain during the term of an agreement.” The contract demonstrates that the parties have already fulfilled their duty to bargain and created “a set of rules governing their future relations.” *NLRB v. Postal Service*, 8 F.3d 832, 836-837 (D.C. Cir. 1993).

A review of the clear and unambiguous terms of the Guild and Operating Engineers’ collective bargaining agreements, which remain in effect, demonstrates they provide for Fund contribution increases in 2016 and 2017, and not for any further increases. The ALJ misapplied the contract coverage analysis when he rejected Respondent’s waiver defense. The ALJ found there was “simply no language in the agreement limiting the Unions’ statutory rights.” (ALJD 20). The Guild and Operating Engineers’ contracts cover increases in Fund contributions. They required Respondent to make those increases for two years: 2016 and 2017. The contracts did not require Respondent to pay a 2018 Fund contribution rate increase or any postexpiration Fund contribution rate increases. Rather, they are completely silent as to any 2018 contract extension period or postexpiration date Fund contribution rate increases. The two unions had the opportunity to negotiate post-2017 contribution rate increases. They failed to do so. Thus, the Guild and the Operating Engineers waived their right to bargain over a 2018 contribution rate increase. *See NLRB v. Postal Service, supra*. *See also Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F.3d 14; *Chicago Tribune v. NLRB*, 974 F.2d 933 (7<sup>th</sup> Cir. 1992).<sup>20</sup> Accordingly, the Consolidated Complaint paragraphs 9(a), 10(a), 11(a), and 9(g), 10(g) and 11(g), must be dismissed.

---

<sup>20</sup> Current Board members have expressed an interest in the contract coverage analysis. *See Weyerhaeuser NR Co.*, 366 NLRB No. 169 at 9, concurring in part and dissenting in part opinion of member Emanuel (2018) (“I favor revisiting whether the Board should adopt the contract coverage analysis in a future appropriate case.”); *Raytheon Network Centric Systems*, 365 NLRB No. 161 at 20-21, Member Kaplan concurring.

#### **IV. RESPONDENT EXCEPTS TO THE ALJ'S REMEDY, PROPOSED ORDER, AND NOTICE TO EMPLOYEES.**

Respondent excepts to the ALJ's Remedy, Proposed Order, and Notice to Employees. (Exceptions 39-53). Respondent did not violate the Act. Therefore, there is no basis for any Remedy, Proposed Order or Notice to Employees.

Even if Respondent had violated the Act, which it did not, the Remedy contains several errors that need to be corrected by the Board. The ALJ ordered Respondent to "reinstigate payments of annual increases to the Fund." (ALJD, 29, l. 13-14). That Remedy is inconsistent with the ALJ's findings that Respondent's Fund contribution increase for 2018 was limited to 5%, and also inconsistent with those portions of the Order limiting Respondent's obligation to that amount. (ALJD 30, l. 12-15; ALJD 33, l. 14-17; ALJD 33, l. 25-26). Therefore, if Respondent is ordered to "reinstigate payments of annual increases" to the Fund, the five percent (5%) contribution cap should be maintained.

Furthermore, the proposed Remedy provides an unwarranted windfall for the Fund. It is undisputed that when Respondent declined to pay the unlawful 2018 Fund contribution increase, the Fund continued to provide health insurance benefits to the employees. The Fund reduced employees' benefits by increasing their maximum out-of-pocket deductibles. (ALJD 11, l. 37-38). Respondent did not reduce any employees' benefits.

The ALJ has ordered Respondent to pay the five percent (5%) Fund contribution rate increase for 2018 and also to reimburse employees for any increased deductibles they paid when the Fund reduced benefits because Respondent had not paid the 2018 contribution rate increase. (ALJD 29, l. 13-15; ALJD 33, l. 19-22; ALJD 33, l. 25-27).

At most, Respondent is liable to the Fund for paying January – March contributions at the 2017 rate while the Fund continued to provide benefits at the 2017 level. The increased rate for 2018 contributions was intended to allow the Fund to provide Respondent’s employees in 2018 the same benefits it had provided them in 2017. In April, the Fund reduced benefits. Respondent is not liable to the Fund for any increased contributions after March because the Fund reduced benefits to account for Respondent’s failure to increase contributions. Employees, who in 2018 received benefits at the 2017 level, would be entitled to reimbursement from Respondent for their extra expenses.

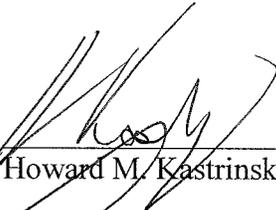
**SUMMARY**

The ALJ erred when he concluded that Respondent violated Section 8(a)(5) and (1). Board law should not require an employer who complies with a durationally-defined two-time contractual requirement to continue to continue those actions in perpetuity after the contract expires. Furthermore, the Fund's 2018 contribution rate increase was unlawful under Section 302 of the LMRA. Therefore, the Board should grant Respondent's Exceptions and dismiss the Consolidated Complaint.

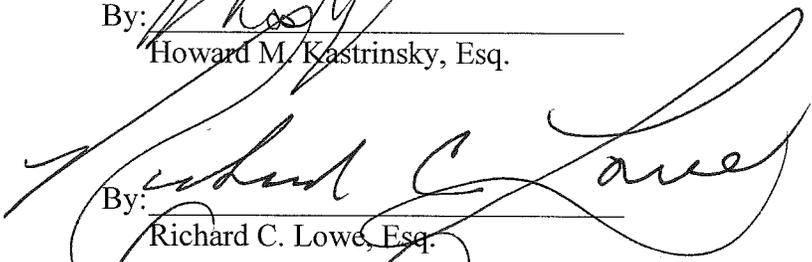
Dated this 13th day of November 2018.

Respectfully submitted,

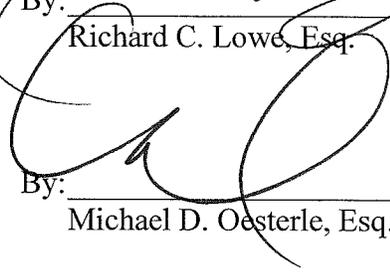
**KING & BALLOW**

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 the foregoing Brief in Support of Respondent's Exceptions 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  
**jpp@jpilaw.com**

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

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

This 13th day of November 2018.

  
\_\_\_\_\_  
Howard M. Kastrinsky