UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

PG PUBLISHING CO., INC. D/B/A PITTSBURGH POST-GAZETTE	
And	**Case 06-CA-212627**
THE NEWSPAPER GUILD OF PITTSBURGH A/W COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, CLC, AND ITS LOCAL 38061	
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**

COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF

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PRELIMINARY STATEMENT

Administrative Law Judge David Goldman ("the ALJ," or "the Judge") accurately set forth a statement of the facts of this case in his decision, which he issued on October 16, 2018 ("the Decision").[1]

In short, based on the facts and applicable law, the Judge found that the Respondent violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("the Act") by failing to continue making contribution payments to a health and welfare fund for its employees in seven bargaining units, consistent with the established status quo. More specifically, the Judge determined that the Respondent was obligated to continue paying up to a 5% annual increase in contribution rates to the Western Pennsylvania Teamsters and Employers Fund ("the Fund") – as it had during the entire term of the most recent collective bargaining agreements – in order to maintain the status quo. The Judge concluded that the Respondent failed to do so in calendar year 2018. With this conduct, and in consideration of the relevant testimony, documentary evidence, and applicable law, the Judge correctly found that the Respondent violated the Act.

The Respondent submits exceptions ("Respondent's Exceptions," or "Exceptions") to the Decision based on virtually every aspect of the Decision. This includes exceptions to the Judge's factual findings, exceptions to the Judge's legal reasoning and conclusions of law, and exceptions to the Judge's remedy and order. However, these exceptions are often made without any statement of support, or indication as to the grounds for the exceptions. The Respondent's

[1] References to the exhibits of the General Counsel, the Respondent, and any joint exhibits will be cited herein as "GCX-," "RX-," and "JX-," respectively, followed by the appropriate exhibit number or numbers, and where appropriate, the page number(s). References to the transcript will be cited herein as "Tr-." References to the Administrative Law Judge's Decision will be cited herein as "ALJD," followed by the appropriate page and line numbers. References to the Respondent's Brief in Support of Exceptions to Administrative Law Judge David Goldman's Decision ("Brief in Support of Exceptions") will be cited herein as "R. Br."

Brief in Support offers little, and often no, additional support. Instead, as fully described below, the Respondent's exceptions are both procedurally deficient and substantively without merit. The Decision was cogently considered and the Judge correctly rejected the Respondent's legal arguments and authorities.

At the most fundamental level, the Respondent has failed to show by a clear preponderance of the evidence that any aspect of the Decision was incorrect. Accordingly, the Respondent's exceptions should be dismissed in their entirety, and the Decision should not be disturbed.

STATEMENT OF THE CASE

The Judge accurately set forth the statement of the case and facts in the Decision. (ALJD 1-12).

On November 13, 2018, the Respondent filed the Respondent's Exceptions and Brief in Support of Exceptions.

Counsel for the General Counsel submits this Answering Brief to the Respondent's Exceptions pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations. It is Counsel for the General Counsel's position that the Decision was correct as to matters of law and fact, and that the Board should reject the Respondent's Exceptions on both procedural and substantive grounds, and instead adopt the Decision and the Judge's Recommended Order and Remedy in its entirety.

INTRODUCTION

The facts in this case are simple and largely undisputed. The parties jointly stipulated and agreed that the Respondent, a Pennsylvania corporation, is engaged in publishing a daily newspaper, *Pittsburgh Post-Gazette*. (JX 16, at ¶ 1). There are seven distinct bargaining units, represented by six different unions, at the Respondent's operation.[2] (*Id*., at ¶¶ 2-8). For many years, the Respondent has recognized the Unions. (*Id*.). This has resulted in a series of separate, successive collective bargaining agreements, dating back at least two decades. (*Id*.; *see also* Tr. 25-26). The most recent of these collective bargaining agreements each expired by their terms[3] on March 31, 2017. (JX. 16, at ¶ 21) (collectively, "the Expired Contracts"). However, shortly before expiration, the Operating Engineers agreed to extend its collective bargaining agreement with the Respondent "while the parties negotiate a new collective bargaining agreement." (JX 1(h)).

For consecutive years, the Respondent paid a 5% annual increase in contribution rates to the Fund for the purpose of providing health insurance benefits to participating employees, in

[2] These bargaining units and unions are described and short-named by joint stipulation. (JX 16, at ¶¶ 2-8). These short-names and unit descriptions are used here, as well, to ensure clarity and consistency. The unions include: the Guild, the Mailers Union, the Typographical Union, the Delivery Union, the Pressmen's Union, and the Operating Engineers. Collectively, these are referred to as "the Unions."

[3] However, the Guild's contract, marked JX 1(a), contains an "evergreen clause" that reads:

> 1. This Agreement shall commence on the October 15, 2014 and expire on the thirty-first day of March 2017.
> 2. Not less than 60 days prior to the expiration of this Agreement either party desiring to open negotiations for a new Agreement shall submit its proposals for such new Agreement in writing to the other party. The respondent party, if it desires to file a counter proposal of the conditions it will seek to establish, shall do so at the earliest practicable date, but in any event not longer than thirty (30) days from receipt of notice by the moving party. In the absence of such statement within the prescribed time limit, the existing Agreement becomes automatically the proposal of the respondent party. The terms and conditions of this Agreement shall remain in effect as long as negotiations continue, but in the event a new Agreement is arrived at within four (4) months of the submission of the new proposal, all the terms and conditions of the new Agreement shall be retroactive to the date of the expiration of this Agreement.
> (*See* JX 1(a), at Art. XXIII).

accordance with the terms of the Expired Contracts.[4] However, following calendar year 2017, the Respondent refused to pay any increased contribution rate to the Fund. (JX 16, at ¶ 30). The record contains no suggestion, much less proof, that the parties reached an impasse in bargaining before the Respondent refused to pay this increase.

On April 1, 2018, the health insurance benefits for participating employees were reduced, consistent with the Fund's letter on December 27, 2017, as the Respondent refused to pay the increased contribution rates for calendar year 2018. (JX 16, at ¶ 32).

ARGUMENT

Put most simply, the Respondent's exceptions are erroneous and wholly without merit. Accordingly, Counsel for the General Counsel does not concede the validity of any arguments made by the Respondent in either its exceptions or in its brief in support of exceptions, including those not specifically referenced here. Much to the contrary, Counsel for the General Counsel maintains that the Decision, in its entirety, is supported by the clear preponderance of the evidence.

[4] More precisely, the Expired Contracts read in relevant part:

> (1) Effective January 1, 2015, all eligible bargaining unit employees will participate in the Western Pennsylvania Teamsters and Employers Welfare Fund (the "Fund"). Participation in the plan is limited to employees averaging annually more 30 than 30 hours per week.
> (2) The required PG contributions for the calendar year 2015 will be $1,229 per month for each participating full-time bargaining unit employee (regardless of family size) and regardless of the option chosen.
> (3) The PG contributions for years 2016 and 2017 will not exceed a 5.0% annual increase above the $1,229 per month set forth above for calendar year 2015. Any such increases must be based upon the plan design effective January 1, 2015. The PG will receive from the Fund at least 60 days notice of any such annual contribution increase prior to January 1. . . . Increases in excess of 5% will be the responsibility of the bargaining unit members via direct billings from the Fund. If direct billing is not available, the PG will only assume responsibility for any withholding of any additional amounts after receiving the expressed written consent of each member and will not assume any other responsibility for collection of any other amounts, or be liable for any other payment to the Fund, other than as stated above.

(*See* ALJD 6; *see also* JX 1(a) at Art. XX(3)(A)(3); JX1(b) at Sec. 21; JX1(c) at Art. 30(A); JX1(d) at Art. 31(A); JX1(e) at p. 18; JX1(f) at Art. 37.1(A)(4); and JX1(g) at Art. 19.1(A)(3)).

Before reaching the substance of the argument, however, it should be noted that a number of these exceptions, including 4, 5, and 6, hardly merit any response at all. In exception 4, the Respondent excepts to the Judge's finding that "the Union" filed a brief, presumably because it was filed by the Unions. Similarly, in exception 5, the Respondent objects to the Judge's finding that "in negotiations for successor agreements to the 2014 Agreements, common proposals are being made by the parties." The basis for this objection is that the parties are bargaining for separate successor contracts. (Tr. 32). However, this semantic argument not only has no practical import, but also flies in the face of the Respondent's stipulation that the Respondent submitted a single proposal for health care[5] and the unrebutted testimony that Joseph Pass represents each of the Unions for the purposes of health care negotiations.[6] In exception 6, the Respondent argues against the Judge's finding that "in the fall of 2018 the Fund sent a memo to employer participants in the health and welfare fund notifying them of the new monthly contribution rate to be effective January 2018." Of course, this typographical error is undisputed, as the parties stipulated that this memo was sent in the fall of 2017. (JX 3; JX 16, at ¶ 23). For these reasons, Counsel for the General Counsel respectfully requests that exceptions 4, 5, and 6 be denied and dismissed.

For the reasons outlined below, Counsel for the General Counsel respectfully requests that the remainder of the Respondent's Exceptions be similarly denied and dismissed.

[5] (Tr. 39).

[6] (Tr. 27).

I. The Respondent's Exceptions Are Procedurally Deficient, and Should be Dismissed.

As a threshold matter, the Respondent's Exceptions, including its Brief in Support of Exceptions, fail to meet the clear requirements outlined in the Board's Rules and Regulations for the filing of exceptions and the brief in support thereof. Here, the Respondent's Exceptions are procedurally deficient because they do not provide any citation to the portions of the record relied upon, and do not state any grounds for the exceptions. Likewise, the Respondent's Brief in Support of Exceptions is deficient because it does not specifically reference each exception, and there are a number of exceptions which are not even mentioned, much less argued and supported, by the Respondent.

A. The Respondent's Exceptions Fail to Comply with Section 102.46(a)(1) of the Board's Rules and Regulations.

The Respondent's Exceptions do not comport with the requirements of the Board's Rules and Regulations. Specifically, the Respondent's Exceptions must:

> (A) Specify the question of procedure, fact, law, or policy to which exception is taken;
> (B) Identify that part of the Administrative Law Judge's decision to which exception is taken;
> (C) Provide precise citations of the portions of the record relied on; and
> (D) Concisely state the grounds for the exception.
> 29 C.F.R. 102.46(a)(1)(i)(A)-(D).

Here, the Respondent's Exceptions do not meet these requirements.

First, the Respondent's Exceptions do not provide any citations to the portions of the record upon which it relies. In fact, the Respondent does not even provide record citation for a number of exceptions in its Brief in Support of Exceptions. Second, the Respondent's Exceptions do not state the grounds for any of the exceptions. Again, as discussed more below,

the Respondent does not even provide the bases for certain exceptions in its Brief in Support of Exceptions.

Consequently, given the Respondent's failure to comply with the clear requirements of the Board's Rules and Regulations, it is respectfully requested that the Respondent's Exceptions be denied and dismissed in their entirety.

B. The Respondent's Brief in Support of Exceptions Fails to Comply with Section 102.46(a)(2) of the Board's Rules and Regulations.

With respect to its brief, the Respondent falls well short of the Board's demands under Section 102.46 of the Rules and Regulations. More precisely, the Rules and Regulations unmistakably require that any brief in support of exceptions contain a "specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate." 29 C.F.R. 102.46(a)(2)(ii). The Respondent has utterly failed in this endeavor.

Notably, the Respondent fails to address exceptions 17, 18, 24, 28, 30, 31, 37, 38, 40-48, and 51 anywhere in its Brief in Support of Exceptions. Indeed, neither the Exceptions nor the Brief in Support of Exceptions include any argument or citation of authority in support of any of these exceptions. *See Rocket Industries*, 304 NLRB 1017 (1991); *Sunshine Piping Inc.*, 351 NLRB 1371, 1371, fn. 1 (2007) (finding that bare exceptions without argument or support should be disregarded). For example, the Respondent does mention exceptions 30 or 31, which purportedly take issue with the Judge's characterization of the Respondent's post-hearing brief as "calumnious" and the Judge's rejection of the Respondent's request for costs, attorneys' fees, and other sanctions. These bare exceptions, much like the bare assertions made in the Respondent's original post-hearing brief, are offered without support, evidence, or argument.

Indeed, this is because there can be no doubt that the Judge was absolutely accurate in his assessment.

Furthermore, the Respondent's Brief in Support of Exceptions contains no reference to exceptions 40 through 48, or 51. These exceptions deal with various aspects of the Judge's proposed Remedy and recommended Order, including the cease and desist orders, the Notice posting and distribution, and certain affirmative actions. However, the Respondent makes no argument as to why it believes that these specific items are improper, or why it suggests that the Remedy and proposed Order are improper on their face. Lastly, neither the Exceptions nor the Brief in Support of Exceptions provides any support for the objections raised in exceptions 17, 18, 24, 28, 37, or 38. These exceptions simply quote portions of the Decision that the Respondent apparently dislikes, but states no reason for these objections, much less any argument in support. Put most simply, despite the clear requirements of the Board's Rules and Regulations, the Respondent has failed to make any citation to authority or even attempt to provide an explanation as to the issues underlying exceptions 17, 18, 24, 28, 30, 31, 37, 38, 40-48, and 51. Accordingly, it is respectfully requested that the Board specifically dismiss these exceptions based on non-compliance with the Board's Rules and Regulations.

Counsel for the General Counsel is prejudiced by the Respondent's failure to comply with the Board's Rules and Regulations, as it is impossible to discern the Respondent's arguments. Without specific references to each exception in the Respondent's Brief in Support of Exceptions, as required by the Rules and Regulations, Counsel for the General Counsel is left to speculate about the Respondent's arguments and guess at appropriate responses to the Respondent's exceptions. In order for Counsel for the General Counsel to meaningfully "answer" the Respondent's exceptions, the Respondent should first present its exceptions and arguments in a

manner which provides a clear roadmap. Due to the prejudiced position in which the Counsel for the General Counsel currently finds himself, it is respectfully requested that the Board deny the Respondent's Exceptions in their entirety, as its Brief in Support of Exceptions does not comport with the Board's Rules and Regulations.

II. The Judge's Credibility Determinations Were Proper and Should Not be Overturned.[7]

The Courts and the Board are in agreement with respect to the significant amount of deference owed to an administrative law judge's findings regarding credibility. *See, e.g. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951); *NLRB v. So-White Freight Lines*, 969 F.2d 401, 407 (7th Cir. 1992) (finding that an administrative law judge's credibility determinations are entitled to deference because he or she is able to observe both what, and how, a witness testifies); *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enf'd 188 F.2d 362 (3d Cir. 1951) ("[A]s the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified, it is [the Board's] policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor."). Administrative law judges are uniquely positioned, unlike the Board or any reviewing courts, to observe the witnesses' demeanor and to hear them testify. Credibility determinations in this regard may also be based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the totality of the record. *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996); *Medeco Security Locks, Inc.*, 322 NLRB 665 (1996) *enfd. in relevant part*, 142 F.3d 733 (4th Cir. 1998).

[7] Notwithstanding the fact that the Respondent's Brief in Support of Exceptions does not clearly refer to, or support, each exception, this Section responds to exceptions 7, 32, and 52.

Given this backdrop, the ALJ's credibility determinations here should only be overturned if the clear preponderance of the evidence shows that these determinations were, in fact, incorrect. This is a highly deferential standard, which demands significant evidence in order to disturb the ALJ's Decision. None exists here.

Here, the Judge found Joseph Pass, counsel for the Unions, to be a credible witness, specifically as to his testimony regarding the parties' discussions at bargaining meetings. (ALJD 11; Tr. 31-33). This testimony was unrebutted, even though, as the Judge correctly points out, "two of the Respondent's attorneys who were identified as being in meetings with Pass were present throughout the hearing in these cases." *Id*. Clearly, there is nothing to support an argument from the Respondent that this unrebutted testimony should not have been credited.

The Respondent takes particular exception to the Judge's credibility findings related to GCX 2(b). In so doing, the Respondent grossly misrepresents the Judge's credibility determinations. At issue is the following language from the Decision:

> At the hearing, the parties expended a significant bit of effort highlighting the inclusion of 2018 on the spreadsheet (in the case of the General Counsel) and attempting to explain its insignificance (in the case of the Respondent). The intensity over this spreadsheet continued into the PG's post-trial brief (R. Br. at 23–25 & 33 fn. 20) where counsel for the PG launched a calumnious attack on opposing counsel, accusing them of ethical violations relating to the introduction into evidence of a copy of this spreadsheet that omitted the title. The PG moves for costs, attorneys' fees, or other sanctions. Counsel for the General Counsel moves to strike the portions of the PG's brief containing the accusations. I deny both motions. The PG's accusations are entirely baseless and the outburst suggests a veritable panic over this spreadsheet and the admission within it that contribution rate increases in 2018 were contemplated by the parties. Putting aside that the omission of the title appears to be an inadvertent copying error, and putting aside that the PG is as likely the source of the error as is the Union counsel or counsel for the General Counsel, the most salient point is that no one would commit this crime because this crime could not pay. Contrary to the PG's claim, the omission of the title has no

> impact on whether the PG is obligated to pay the 2018 Fund contribution rate increases. I note that the omission of the title was corrected at the hearing by the PG when it introduced the version of the spreadsheet with the title, which I have relied upon in the text.
>
> (ALJD 22, at fn 22).

With this, the Respondent argues that the Judge should have discredited Pass' testimony concerning GCX 2(b), finding instead, as the Respondent argues, that the title of the document was omitted from that spreadsheet exhibit.[8] In making this argument, however, the Respondent cites to footnote 12 on page 11 of the ALJD, rather than the above language. However, that footnote in the Judge's decision makes no mention of GCX 2(b). Rather, as mentioned above, the Judge's credibility determination in footnote 12 was limited "to [Pass'] testimony regarding the parties' discussions at the November-February meetings." In making his findings regarding GCX 2(b) and RX 5, the Judge clearly did not rely on the testimony of Pass, despite the Respondent's argument to the contrary in its exceptions. Rather, the Judge's credibility in this determination arose from his proper evaluation of the weight to be afforded to the documents, inherent probabilities, and reasonable inferences. The Respondent's disingenuous attempts to conflate different portions of the Decision do not save its unsupported arguments.

Lastly, the Judge correctly concluded that the spreadsheet in GCX 2(b) and RX 5 showed "hypothetical contribution rate increases not only for the years of the contract – 2015, 2016, and 2017, but also for 2018." (ALJD 21). The Respondent's exception 52 objects to this finding,

[8] *See* R. Br., at fn. 8 ("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.").

arguing that the inclusion of 2018 in the spreadsheet was inadvertent. (R. Br., at 5; Tr. 86, 88-89). However, as the Judge accurately notes, this document was created by the Respondent's consultant and reviewed internally before it was provided to the Unions. (ALJD 21). In fact, the Respondent's witness, Elliott Dinkin,[9] admitted on cross examination that contribution rates for other calendar years outside the contract term, including calendar year 2018, had been discussed by the parties. (Tr. 88-89). Even more tellingly, under the heading "Example 2," there is a hypothetical increase of 9% for calendar year 2018. (GCX 2(b); RX 5). In that scenario, the Respondent's "explanation" was that it would be responsible for paying a 5% increase in the contribution rate that year, and the participating employees would share the remaining the cost. (*Id*.). The Respondent's argument that this inclusion was inadvertent does not pass muster, and the Judge's credibility determinations and conclusions on this issue are wholly supported by the evidence.

Contrary to the Respondent's complaints, the record supports, as set forth in the Judge's Decision, the credibility determinations, the reasonable inferences drawn therefrom, and the Judge's evaluations of the inherent probabilities of record testimony. It is respectfully submitted that the Board should reject the Respondent's exceptions 7, 32, and 52 adopt the Judge's credibility findings and, based thereon, adopt the Judge's unfair labor practice findings.

[9] The Respondent's outside Benefits and Pension Consultant.

III. The Judge Correctly Found that the Respondent Violated Sections 8(a)(1) and (5) of the Act by Unlawfully Implementing a Unilateral Change by Refusing to Pay the Annual Increase in Health Insurance Contributions to the Fund.

A. The Judge Correctly Found that the Status Quo Required the Respondent to Continue Paying Up to a 5% Annual Increase in Contribution Rates.

The Respondent excepts to the Judge's finding that it violated Section 8(a)(5) of the Act when it failed to maintain the status quo by continuing to pay up to a 5% annual increase in contribution rates to the Fund.[10] Specifically, the Respondent begins by taking exception to the Judge's finding that the status quo required the Respondent to continue paying up to a 5% annual increase. In support, the Respondent argues that the practice was not sufficiently long-standing to become part of the status quo. The Respondent next argues that *The Finley Hospital*[11] should be overturned.[12] The Respondent continues to take issue with the Judge's application of binding legal precedent, including *Wilkes-Barre General Hospital*[13] and *Intermountain Rural Electric Association*.[14] Finally, the Respondent argues against the Judge's finding that "other factors" support the conclusion that the Respondent's commitment to pay the annual increase was part of the status quo. Each of these arguments is unpersuasive. At the heart of the matter, these

[10] Notwithstanding the fact that the Brief in Support of Exceptions does not clearly refer to, or support, each exception, this Section responds to exceptions 1, 2, 8-27, and 53.

[11] 362 NLRB No. 102, *enf. den.* 827 F.3d 720 (8th Cir. 2016).

[12] Counsel for the General Counsel assumes that the Respondent is arguing this point based on the Respondent's Brief in Support of Exceptions. However, the only exception in the Respondent's Exceptions related to *Finley Hospital* simply takes issue with the Judge's "citation" to the case for a given proposition. *See* Exception 11. This confusion is created by the Respondent's failure to comply with the Board's Rules and Regulations and emphasizes the prejudiced position of Counsel for the General Counsel in attempting to respond. Again, Counsel for the General Counsel respectfully requests that the Respondent's Exceptions be dismissed in their entirety because they are procedurally deficient.

[13] 362 NLRB No. 148 (2015), *enfd*. 857 F.3d 364 (D.C. Cir. 2017).

[14] 305 NLRB 783 (1991), *enfd*. 984 F.2d 1562 (10th Cir. 1993).

arguments are not that the Judge erred in some way, but that the Respondent simply does not like the well-established law in this area or its application to this case.

1. The Judge Correctly Found that the Respondent's Practice was an Established Term and Condition of Employment.

The Judge correctly applied *Daily News of Los Angeles*[15] and *Finley Hospital* to find that the Respondent's commitment to pay up to the 5% annual increase in contribution rates became the dynamic status quo. (ALJD 13-15). However, the Respondent argues that the Judge's reliance on *Daily News of Los Angeles* was misplaced because this case does not involve first contract bargaining and there was "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."[16] These attempts to distinguish *Daily News of Los Angeles* are unconvincing, at best.

Even if the Respondent's argument that it only paid the annual increases for two years is correct, that alone would support the Judge's finding that the practice became part of the status quo. *See, e.g.*, *Finley Hospital*, *supra* (practice spanning one year found to constitute an established term and condition of employment); *Arc Bridges, Inc. v. NLRB*, 662 F.3d 1235 (2011) (noting that "two consecutive years of wage increases might be enough to establish a term of employment when that span constitutes 100% of the record evidence."). Here, the Respondent paid a 5% increase in contribution rates for both calendar years 2016 and 2017. (JX 16, at ¶ 17; Tr. 29-31). Since the Fund only began providing health insurance coverage for the Respondent's employees in 2015, the Respondent paid each annual increase announced by the

[15] 315 NLRB 1236 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996).

[16] *See* R. Br., at 6, fn. 9.

Fund. More still, throughout this term, and for decades preceding, the employees did not pay any direct premium contributions for health insurance. (Tr. 28). The Respondent's assertion that there is no evidence that the practice was longstanding is simply absurd.

Based on the above, it is respectfully submitted that Respondent's exception 8 be dismissed.

2. The Judge Correctly Applied *Finley Hospital*, and the Respondent Offers No Sound Basis to Overturn *Finley Hospital*.

The Judge correctly applied *Finley Hospital*, which is extant Board law, to reach the predictable conclusion. (ALJD 13-15). In its brief, the Respondent spends ample time discussing its displeasure with the *Finley Hospital* decision, but offers no basis for its argument that it should be overturned. Rather, the Respondent simply summarizes the dissent in the Board decision and then offers a case briefing of the Eighth Circuit decision.

As a preliminary matter, the Respondent's exception 11 takes issue with the Judge's "citation" to *Finley Hospital* "for the proposition that it is a violation of the Act for an employer to refuse to continue anniversary wage increases after the expiration of the one-year collective bargaining agreement that provided for annual wage increases for each employee on their anniversary for the (one-year term of that agreement)." To the extent that the Respondent is excepting to the Judge's "citation" to *Finley Hospital*, there is no basis for this argument. Rather, the Judge correctly applied binding, extant Board law to reach a predictable conclusion. The Respondent has not provided any citations to any Board decisions overturning *Finley Hospital*, and instead points only to the fact that the Eighth Circuit denied enforcement. This fact alone does not question the appropriateness of the Judge's citation to the decision. Nor has the Respondent argued that the Judge's characterization of the case was inaccurate. To the

contrary, the Judge accurately and precisely applied the propositions contained within the *Finley Hospital* decision. Accordingly, exception 11 should be denied and dismissed.

Substantively, there are is no support for the Respondent's argument that the "dynamic status quo" doctrine described in *Finley Hospital* should not be applied here. Insofar as the Respondent attempts to make this argument, it flies in the face of recent Board law reinforcing the dynamic status quo doctrine. *See, e.g.*, *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017) ("[T]he case law (including the *Katz* decision itself) makes clear that conditions of employment are to be viewed dynamically and that the status quo against which the employer's 'change' is considered must take account of any regular and consistent past pattern of change. An employer modification consistent with such a pattern is not a 'change' in working conditions at all.") (quoting Robert A. Gorman, Matthew W. Finkin, LABOR LAW ANALYSIS AND ADVOCACY, at 720 (Juris 2013); citing *Finley Hospital*, 362 NLRB No. 102 (2015)).

Likewise, there is no support for the Respondent's argument that the Board in *Finley Hospital* "wrongly framed its decision on the basis of 'waiver.'" (R. Br., at 7). If the Respondent is arguing that the "clear and unmistakable waiver" doctrine should not be applied, then it is arguing against clear Board precedent extending well beyond *Finley Hospital*. That standard has long been embraced by the Board, and has been described as "the oldest and most familiar of Board doctrines, the clear and unmistakable waiver standard, in determining whether an employer has the right to make unilateral changes in unit employees' terms and conditions of employment during the life of a collective-bargaining agreement." *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-11 (2007).

To the extent that the Respondent is arguing that the holding contravenes *H.K. Porter*,[17] that argument is misplaced because that case is inapposite. In that case, the Supreme Court stated that "[i]t is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. . . . [T]he fundamental premise on which the Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *Id*. at 108. The Respondent clearly ignores the fact that the parties never reached a collective bargaining agreement in *H.K. Porter*. Here, where the parties' bargaining culminated in a final and binding agreement, the Respondent would not be "compelled" to agree to any new or different contract provisions. Rather, the Respondent is simply required to "abide by an obligation once extant by reason of the binding contract but then continuing on after its expiration, in limited form, not by reason of the contract itself but because of the dictates of the policy embodied in the National Labor Relations Act." *Hinson v. NLRB*, 428 F.2d 133 (8th Cir. 1970), *affg*. *Hen House Market No. 3*, 175 NLRB 596 (1969).

Finally, to the extent that the Respondent is arguing that the Board should apply "ordinary principals of contract law,"[18] then the Respondent again apparently misunderstands statutory duties arising under the Act, as opposed to contractual duties arising by force of contract. The Judge correctly points out that the Respondent "violated its statutory – not its contractual – duty to continue the status quo of funding the increase in contribution rates to pay for the Fund's health care for employees." (ALJD 15). As the Supreme Court clearly explained, while a *contractual* right does not survive expiration of the contract, the *statutory* right often

[17] *H.K. Porter v. NLRB*, 397 U.S. 99 (1970).

[18] *See* R. Br., at 9.

does because, "most terms and conditions of employment are not subject to unilateral change … They are no longer agreed-upon terms; they are terms imposed by law, as least so far as there is no unilateral right to change them." *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 206 (1991). This distinction between contractual and statutory rights is "elemental." *Id*. Consequently, although the question of whether a contractual right survives the expiration of an agreement is properly determined by normal principles of contract interpretation, a statutory right to maintenance of the status quo for established conditions of employment will typically survive the expiration of a contract and unilateral change to it will violate the Act. *Id*. This fundamental misunderstanding appears to flavor many of the Respondent's exceptions.

Based on the above, it is respectfully submitted that Respondent's exception 11 be dismissed.

3. The Judge Correctly Determined that the Annual Increases Were Part of the Status Quo.[19]

The Judge correctly found that "as a matter of statute, not contract, the Respondent must pay the Fund annual contribution rate increases just as it did in each successive year of the contract. When it failed to do so in July 2018, it altered the status quo of the employment conditions." (ALJD 19).

i. The Status Quo is Not a "Snapshot."

First, the Judge properly concluded that "settled precedent that holds that the status quo is not determined, as the Respondent would have it, by reproducing a snapshot of the employer's obligations at the expiration of the labor agreement, but by continuing the employees' employment terms and conditions." (ALJD 14). The Respondent excepts to this conclusion,

[19] Notwithstanding the fact that the Brief in Support of Exceptions does not clearly refer to, or support, each exception, this Section responds to exceptions 2, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 27.

arguing instead that it had no obligation to continue paying any *increased* rate. Rather, the Respondent argues that it was only committed to continue paying that same rate it paid in the last year of the Expired Contracts. This notion defies existing Board precedent. In fact, the Judge correctly found that the Board had already specifically rejected this type of argument in *Intermountain Rural Electric*. (ALJD 14). In that case, the Board found that an employer's failure to pay increased medical and dental insurance premium rates following the expiration of a contract was an unlawful unilateral change of employees' terms and conditions of employment. 305 NLRB at 784-85. More directly, the Board rejected the ALJ's approach that "focus[ed] narrowly upon the Respondent's preexisting financial obligations" at contract expiration. *Id*. The Tenth Circuit agreed, finding that "preserving the status quo required [the employer] to pay 100% of the increased health and dental insurance premiums upon expiration of the Agreement." 984 F.2d at 1567. In fact, this principle is found repeatedly across a number of extant Board decisions. *See, e.g., Finley Hospital*, 362 NLRB No. 102 (2015) (finding that an employer's refusal to continue anniversary wage increases after expiration of one-year collective-bargaining agreement was an unlawful unilateral change to the status quo); *Wilkes-Barre Hospital*, 362 NLRB No. 148 (2015) (finding that an employer's refusal to continue to provide longevity-based increases to employee wages set forth in an expired contract was an unlawful unilateral change to the status quo) (finding that an employer cannot "define the status quo by taking a snapshot" at the time the contract expired, because "the terms of the expired agreement define the post-expiration status quo . . . not . . .[t]he . . . circumstances at the time of expiration."). The Respondent labors hard in an attempt to distinguish this case from every relevant Board decision in this realm. Unsurprisingly, though, the Respondent finds no support for these arguments.

ii. The Judge Applied Relevant, Extant Board Law.

The Board's decision in *Intermountain Rural Electric Association*[20] exemplifies the correct analysis for determining the status quo arising from the terms of an expired contract. There, the Board reviewed the terms of an expired collective bargaining agreement that obligated the employer to "keep in full force and effect during the terms of this Agreement" the employees' medical and dental benefits, and to pay "up to 100 percent" of the premium rates for these benefits. 305 NLRB at 784-85. There, like here, the employer unsuccessfully argued that the status quo required the employer to continue paying the same premium amount as it had paid immediately before the contract's expiration. Consequently, the employer refused to pay any subsequent increase in premium rates. The Board squarely rejected this argument. Instead, the Board held that, when considering the "employee's expectations," the employer was obligated to maintain the status quo by paying "the entire premium regardless of the cost," including increases. *Id*. Viewing the employer's conduct from the point of the employee's expectations, the Board found that the employer "unlawfully altered employees' terms and conditions of employment" by "paying only the premium rates which had been in effect under the previous medical and dental plans," and refusing to pay the increased costs that arose post-expiration. *Id*. at 785.

In the Decision, the Judge accurately described *Intermountain Rural Electric*, clearly articulated the relevant legal propositions, and correctly applied them to the facts here, concluding that "the [Respondent] engaged in precisely the conduct condemned by the Board in *Intermountain Rural Electric*." (ALJD 16-17). In both cases, the Judge notes, the obligations arising under the contracts were not for a "particular dollar figure," but a rate set by an outside

[20] 305 NLRB 783 (1991).

source. In *Intermountain Rural Electric*, the employer was obligated to pay 100% of the premium costs which increased annually, and here, the Respondent was obligated to pay up to a 5% the annual increase. Neither of these obligations are static figures. Consequently, as the Judge correctly found, "When the dollar amount of those rates increases, so too does the Respondent's maximum dollar obligation." Thus, the Respondent's refusal to pay the increase "'unlawfully altered employees' terms and conditions of employment.'" (ALJD 17) (quoting *Intermountain Rural Electric*, 305 NLRB at 784-85).

The Respondent's attempts to distinguish *Intermountain Rural Electric* utterly fail. More specifically, the Respondent's arguments in this regard continue to misconstrue, and conflate, contractual obligations and statutory duties. In its Brief in Support of Exceptions, the Respondent concedes that it was obligated to pay a particular dollar amount only in 2015, but argues that the Expired Contracts only provide a mechanism for requiring payment of increases in 2016 and 2017. The Respondent uses this to argue that the "absence of any written basis upon which to hold Respondent to any sort of postexpiration [sic] obligation to increase Fund contributions clearly distinguishes these cases from *Intermountain*." (R. Br., at 11-12). Again, the Respondent's use of contract interpretation principles misses the mark. That notwithstanding, substantively, the Respondent has identified no reason to find any meaningful difference between: (1) the Expired Contracts here, which provide a clear delineation of obligations for the life of the contracts; and (2) the expired contract in *Intermountain Rural Electric* that specified the parties' obligations "for the duration of the agreement."

Furthermore, the Judge correctly applied *Wilkes-Barre Hospital*, and the Respondent's attempts to distinguish that case again have no basis. The Respondent argues that "there is nothing in *Wilkes-Barre Hospital* that required the employer to go beyond the wage rates

established under [the wage grid] to conform to a dynamic status quo." (R. Br., at 10). However, the Judge did not rely upon *Wilkes-Barre Hospital* for that proposition. Rather, the Judge cited to this decision for the proposition that "the terms of the expired agreement define post-expiration status quo … not … [t]he … circumstances at the time of expiration." (ALJD 14) (quoting *Wilkes-Barre Hospital v. NLRB*, 857 F.3d 364, 374 (D.C. Cir. 2017) *enforcing Wilkes-Barre Hospital*, 362 NLRB No. 148 (2015). Additionally, the Judge cites to *Wilkes-Barre Hospital* for the propositions that: (1) a waiver of rights to a continuation of benefits will only be found if there is specific language in the expired collective bargaining agreements;[21] and (2) durational language alone is not sufficient to constitute a "clear and unmistakable" waiver.[22] There is nothing in the Respondent's Exceptions or Brief in Support of Exceptions that takes issue with the Judge's application of *Wilkes-Barr Hospital* for these propositions.[23]

Finally, the Judge correctly found that the "increase in contribution rates was a term and condition of the contracts that must be continued under the Act," which is "clear from a review

[21] *See* ALJD at 17-18 ("Absent language specifically limiting the applicability of the provision [for increases] to the term of the contract, that provision continues in effect." *Wilkes-Barre Hospital*, 362 NLRB 148, slip op. 6.).

[22] *See* ALJD at 18 ("As a matter of law, standard 'durational' contract language does not serve as evidence of an intent by the parties to alter the status quo after contract expiration. *Wilkes-Barre Hospital v. NLRB*, 857 F.3d at 375, citing *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125, 128, 132–133 (D.C. Cir. 2001) ("Under *Katz* and *Litton*, however, an expiration date in a standard contract duration clause without more, cannot defeat the unilateral change doctrine"); *Finley Hospital*, supra at 3–4.); *see also* ALJD at 20 (As the D.C. Circuit Court of Appeals held in *Honeywell Int'l v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001), applying the "contractual coverage" analysis the "standard durational clause . . . without more, cannot cover and thereby vitiate the Union's statutory claim to continued" contribution increases. *Wilkes-Barre*, supra at 377 (original emphasis, omitting internal quotations and bracketing), quoting, *Honeywell Int'l v. NLRB*, 253 F.3d at 128, 132–133).

[23] Note that there is no mention of *Wilkes-Barre Hospital* anywhere in the Respondent's Exceptions, but it is included in the Respondent's Brief in Support of Exceptions as described. Once more, the Respondent's failure to either clearly reference specific exceptions in its Brief in Support of Exceptions or provide even a brief statement of the basis for its exceptions in the Respondent's Exceptions themselves, results in arguments that are rarely clear, leaving Counsel for the General Counsel to speculate about the Respondent's intent. Counsel for the General Counsel again renews his request that the Respondent's Exceptions be dismissed in their entirety for these blatant procedural short-comings.

of the terms and operation of the 2014 Agreements." (ALJD 14). The Respondent argues that the Judge should not have looked to the attachment of the Schedule of Benefits as evidence that the Respondent "was obligated to maintain those benefits during or after the term of that Agreement" because the Judge "cites no Board Law for that proposition." (R. Br., at 13). Curiously, just a few pages earlier in its Brief in Support of Exceptions, the Respondent discusses the Judge's application of *Wilkes-Barre Hospital* and argues that the case is inapposite because in that case the Board applied the status quo to a continuation of a benefit defined in an appendix to the expired contract. Just as the wage grid in *Wilkes-Barre Hospital* was included as an appendix and found to be a term and condition of employment, so too did the Judge here correctly find that the Schedule of Benefits, included as an appendix to the Expired Contracts, constitute a term and condition of employment. The Respondent further argues that even if "the schedule's [sic] inclusion represented an alleged contractual commitment to maintain those benefits, it did not follow that Respondent was responsible for paying postexpiration [sic] Fund contribution rate increases necessary to maintain those benefits." (R. Br.. at 13). Yet again, the Respondent conflates its contractual commitments, which do not survive contract expiration, with its statutory duty to maintain the status quo. As the Judge correctly notes, the Respondent's "position flows from a basic error as to what it means to maintain the statutory status quo. It is an error expressed over and over again throughout its brief." (ALJD 17).

Based on the above, it is respectfully submitted that Respondent's exceptions 2, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 27 be dismissed.

B. The Judge Correctly Found that the Unions Did Not Waive Their Bargaining Rights.[24]

The Judge correctly found that the Unions did not waive their bargaining rights, either by "clear and unmistakable" waiver language or by conduct. (ALJD 19-23).

The Respondent argues that the Judge "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 [Expired Contracts]" because "this is a conclusion based upon *Finley*." (R. Br., at 14). As an initial matter, this principle extends far beyond *Finley Hospital*. To the contrary, as already discussed, the Board has reaffirmed its "adherence to one of the oldest and most familiar of Board doctrines, the clear and unmistakable waiver standard, in determining whether an employer has the right to make unilateral changes in unit employees' terms and conditions of employment during the life of a collective-bargaining agreement." *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-11 (2007). Indeed, as the Supreme Court in *Metro Edison Co. v. NLRB* instructed, "[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." 460 U.S. 693, 708 (1983). The Judge appropriately cited to these decision, including the Supreme Court case, and appropriately applied them here. (ALJD 18-20).

[24] Notwithstanding the fact that the Brief in Support of Exceptions does not clearly refer to, or support, each exception, this Section responds to exceptions 21, 22, 23, 24, 26 and 27.

1. The Durational Language was Not a Clear and Unmistakable Waiver.

The Respondent further excepts to: (a) the Judge's statement that, "as a matter of law, standard 'durational' contract language does not serve as evidence of an intent by the parties to alter the status quo after contract expiration;"[25] (b) the Judge's "conflation of contractual durational language with the terms of the 2014 Agreements that provide for contribution rate increases for only 2016 and 2017;"[26] and (c) the Judge's "hyperbolic conclusion that while the contractual rate increase provisions were a shield for years 2016 and 2017, they cannot be turned into a sword that alchemically bars the Respondent from paying increases to maintain the status quo after 2017."[27] But, the Respondent's Exceptions contain no further basis – not even the "concise" statement of the grounds for the exceptions required by the Board's Rules and Regulations[28] – for any of these exceptions.

To the extent that the Respondent takes issue with the Judge's finding that the durational language of the Expired Contracts was not sufficient to establish a "clear and unmistakable" waiver of the Unions' rights to a continuation of the benefits, that argument is unpersuasive. Again, the Respondent's only basis for this argument is that "*Finley* was wrongly decided, should not be accepted as precedent, and any conclusions based on *Finley* must be rejected." (R. Br., at 14). Yet, the Judge did not rely solely on *Finley Hospital* in reaching this finding.

[25] Exception 22.

[26] Exception 23.

[27] Exception 24.

[28] 29 C.F.R. 102.46(a)(1)(D).

Rather, the Judge cited to *Wilkes-Barre Hospital*[29] for finding, "[a]s a matter of law, standard 'durational' contract language does not serve as evidence of an intent by the parties to alter the status quo after contract expiration." (ALJD 18).

The Respondent provides no other bases for exceptions 22, 23, or 24 anywhere in its Exceptions or its Brief in Support of Exceptions. Because these exceptions have no articulated basis, and represent nothing but bare assertions, it is respectfully requested that these exceptions be dismissed.

Nonetheless, even without knowing the grounds for the Respondent's exceptions, Counsel for the General Counsel submits that these assertions lack merit. The Board has steadfastly refused to find a waiver of statutory protections against post-expiration unilateral changes through the simple inclusion of durational language in collective bargaining agreements, absent specific reference to post-expiration conduct. The Respondent's position here is no stronger than any of the employers' positions in those cases.

For example, in *General Tire & Rubber Co.*, 274 NLRB 591 (1985), the Board refused to find that the union waived its bargaining rights through language in a contract that stated that the fringe benefits provided "shall be provided for 90 days following termination." The employer there – just like the Respondent here – then unilaterally discontinued the fringe benefits 90 days after the expiration of the contract, during negotiations for a successor contract. The Board found in that case that the contract "provide[d] for an extra 90 days of contract coverage for [fringe] benefits beyond the 3 years [of the expired contract]," and did not clearly and unmistakably waive the union's right to bargain over the continuation of the fringe benefits

[29] *Wilkes-Barre Hospital v. NLRB*, 857 F.3d at 375, citing *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125, 128, 132–133 (D.C. Cir. 2001).

beyond that 90-day period, because "[n]owhere in this contract provision is there mention of what is to [happen] to these [fringe] benefits after the 90 days have expired." *Id.* at 593. Here, too, there is no contract provision in any of the Expired Contracts that states what is to happen to the unit employees' right to health insurance benefits once the contracts have expired.

Similarly, mere reference to the term of the collective bargaining agreement is not sufficient to constitute a waiver of contributions after the expiration of the agreement. In *KBMS, Inc.*, 278 NLRB 826, 849 (1986), the Agreement and Declaration of Trust stated: "Effective Date of Contributions. All contributions shall be made effective as of the date specified in the collective bargaining agreements between AFTRA and the Producers, and said contributions shall continue to be paid as long as a Producer is so obligated pursuant to said collective bargaining agreements." There, the Board affirmed the ALJ's finding that this language does not constitute a clear and unmistakable waiver because the language does not deal with the termination of the employer's obligation to make fund contributions.

By contrast, in *Cauthorne Trucking*, the Board identified what *would* constitute language necessary to find a waiver of the right to bargain over post-expiration changes in benefits. 256 NLRB 721 (1981), *enfd. in part* 691 F.2d 1023 (D.C. Cir. 1982). There, the pension trust fund agreement, pursuant to which the employer was providing health and welfare benefits, explicitly stated that the employer's obligation "shall terminate" at the expiration of the collective bargaining agreement "unless, in a new collective bargaining agreement, such obligation shall be continued." Such language was found to "expressly [waive] both the employees' right to receive the benefits of pension fund contributions and the Union's right to bargain regarding the employer's cessation, at the expiration of a contract, of payments into the pension … fund absent a renewed agreement to continue such payments." *Id.* at 722. Nonetheless, the Board still held

that, without such express language in the health and welfare agreement, a similar unilateral cessation of payments would be unlawful. *Id*. Thus, *Cauthorne* was unique in that it involved a "pension agreement that unambiguously provided for termination of benefits upon expiration of [the] collective-bargaining agreement … ." *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1115 (D.C. Cir. 1986). It is clear that no such language exists here.

The Board's refusal to read durational language as a "clear and unmistakable" waiver has long-standing support in prior case law, as well. *See, e.g., AlliedSignal Aerospace*, 330 NLRB 1216, 1216-1222 (2000), *review denied sub nom. Honeywell International v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001) ("[w]hatever the scope of the [r]espondent's obligation as a matter of contract, there is no basis for finding the [u]nion waived its [statutory] right to continuance of the status quo as to terms and conditions... after contract expiration"); *General Tire & Rubber Co.*, 274 NLRB at 592-93 (finding that since the contract did not address the employer's statutory obligation to pay benefits post-expiration of a contractual benefit continuation period, then there was no waiver of the union's rights).

2. There Was No Language in the Expired Contracts that Clearly and Unmistakably Waived the Unions' Rights.

The Judge properly rejected the Respondent's argument that it was entitled to unilaterally change its obligation to maintain the status quo after calendar year 2017 based on the language in the Expired Contracts that it is not "liable for any other payments to the Fund, other than as stated above." (ALJD 18-19). The Respondent's exception 26 objects to this conclusion, and argues that ordinary contract principles dictate a contrary result. However, the Judge used ordinary principles of contract interpretations, and read this clause in the context of the contract provision. Specifically, the full provision reads:

> (3) The PG contributions for years 2016 and 2017 will not exceed a 5.0% annual increase above the $1,229 per month set forth above for calendar year 2015. Any such increases must be based upon the plan design effective January 1, 2015. The PG will receive from the Fund at least 60 days notice of any such annual contribution increase prior to January 1. Increases in excess of 5% will be the responsibility of the bargaining unit members via direct billings from the Fund. If direct billing is not available, the PG will only assume responsibility for any withholding of any additional amounts after receiving the expressed written consent of each member and will not assume any other responsibility for collection of any other amounts, **or be liable for any other payment to the Fund, other than as stated above**. [Emphasis added.]

Reading this clause in context, the Judge correctly determined that the Respondent's "[non]liability for any other payment to the Fund" does not grant the Respondent a unilateral right to discontinue the status quo. Even the Respondent admits in its Brief in Support of the Exceptions that the Expired Contracts are silent as to the years beyond calendar year 2017. (R. Br., at 27) ("[The Expired Contracts] are completely silent as to any 2018 contract extension period or postexpiration date Fund contribution rate increases."). Accordingly, the Judge correctly found that this clause was simply a limitation on the Respondent's liability for contributions to the Fund "in excess of the 5%."

Based on the above, it is respectfully submitted that Respondent's exceptions 21, 22, 23, 24, 26 and 27 be dismissed.

IV. The Judge Correctly Found that the Respondent's Defenses Failed.

A. The Judge Properly Rejected the Respondent's Defenses Under Section 302 of the LMRA.

The Respondent excepts to the Judge's dismissal of the Respondent's defense that, under Section 302 of the Labor Management Relations Act ("LMRA"), it is prohibited from paying an increased annual contribution rate to the Fund. [30] In support of these exceptions, the Respondent

[30] Notwithstanding the fact that the Brief in Support of Exceptions does not clearly refer to, or support, each exception, this Section responds to exceptions 3, 25, 33, 34, and 35.

argues first that the LMRA requires a written agreement to authorize payments to the Fund. The Respondent then argues that existing case precedent does not provide support for the Judge's finding that the Respondent's status quo contributions under the Act are sufficient to meet the requirements of Section 302. Both of these arguments are unpersuasive, and the Judge properly applied the appropriate legal precedent in finding that the Respondent's defense failed.

First, the Judge correctly found that the Expired Contracts satisfied the "written agreement" requirement of the LMRA. (ALJD 23-24). Specifically, the Judge properly noted that "[n]umerous courts have held that the Section 302 'written agreement' requirement is satisfied by a collective-bargaining agreement, including an expired one." (ALJD 23) (citing *Cibao Meat Prods. v. NLRB*, 547 F.3d 336 (2d Cir. 2008); *Dugan v. R.J. Corman Railroad*, 344 F.3d 662, 668 (7th Cir. 2003); *Alaska Trowel Trades Pension Fund v. Lopshire*, 103 F.3d 881, 883 (9th Cir.1996); and *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 735 (9th Cir. 1981)). There can be no doubt that the Judge applied clear legal precedent to reach an obvious conclusion that the Expired Contracts were sufficient to meet the "written agreement" requirement of the LMRA.

In support of its exceptions, the Respondent mischaracterizes and selectively cites to various federal court cases. For example, the Respondent concedes that in *Cibao Meat Products*, the Second Circuit "unremarkably" found that an expired contract satisfied the "written agreement" requirements of Section 302, but argues that the case "did not address whether a dynamic status quo obligation" satisfied the written agreement requirement. This convoluted argument is unsupported and unsupportable. In fact, the Second Circuit in that case clearly stated that "Today, we join several of our sister circuits in holding that an expired collective-bargaining agreement satisfies the written-agreement requirement of § 302(c)(5)(B). This

follows from both the requirement that an employer maintain the status quo following expiration of a collective-bargaining agreement, and that such continued payments under an expired collective-bargaining agreement do not implicate the purpose of § 302." 547 F.3d at 341 (internal citations omitted). Clearly, the court did find that a status quo obligation arising from the terms of an expired contract is sufficient under the LMRA, even if it did not use the word "dynamic." The Respondent similarly mischaracterizes *Dugan v. R.J. Corman R.R. Co.*, arguing that the case does not support the Judge's conclusion "that a dynamic status quo obligation under Section 8(a)(5) satisfies the written requirement." Once again, the Respondent misses the mark. There, the Seventh Circuit specifically stated, "an expired agreement – one that has no contractual force – nevertheless can satisfy the statutory requirements, 'in part because even after the expiration of such an agreement, an employer has a duty to bargain in good faith and maintain the status quo as to wages and working conditions until a new agreement or an impasse is reached.'" 344 F.3d at 668-69.

It appears that the Respondent is effectively arguing that since the courts do not use the term "dynamic" before referring to the "status quo" created by expired contracts, these cases are inapposite. This simply reflects the Respondent's continued confusion over what it means to maintain the "status quo." As the Judge correctly noted, however, "[t]he duty to maintain the status quo is in force whether the employer's challenged action was a "continuance or a discontinuance, or an increase or a decrease . . . of a condition of employment." (ALJD 13) (citing *Daily News of Los Angeles*, 315 NLRB at 1237).

To this end, the Judge correctly noted that the "Respondent's Section 302 dispute is simply with the Board's application of the status quo doctrine." (ALJD 24). The Respondent excepts to this statement through exception 33 in its Exceptions. However, it does not provide

concise grounds for this statement in its Exception, and makes no argument to this point in its Brief in Support of Exceptions. Similarly, in exception 34 of the Respondent's Exceptions, the Respondent takes issue with the Judge's finding that "the Respondent's Section 302 defense—rises or falls on the determination of the amount of the Respondent's status quo obligations under Section 8(a)(5) and if the status quo is correctly applied to find that the contribution increase is an employment condition under the terms of the expired contracts, then the Respondent's Section 302 argument disappears." (sic) *See* Exceptions, at 6. Again, the Respondent provides no grounds for this exception in the Exceptions, and does not reference this convoluted exception in its Brief in Support of Exceptions. Once more, Counsel for the General Counsel respectfully requests that exceptions 33 and 34 specifically be dismissed based on the Respondent's failure to provide any support anywhere, and the Exceptions generally be dismissed in their entirety for these procedural defects.

Nonetheless, the Judge correctly concluded that "the Respondent's status quo obligations are based on written terms of the expired collective-bargaining agreements. The Respondent's status quo-determined contribution obligations under the Act satisfies Section 302." (ALJD 24). As the Seventh Circuit found, an expired agreement satisfies the LMRA "[i]n part because even after the expiration of such an agreement, an employer has a duty to bargain in good faith and maintain the status quo as to wages and working conditions until a new agreement or an impasse is reached.'" *Dugan*, 344 F.3d at 668-69; (quoting *Alaska Trowel Trades Pension Fund v. Lopshire*, 103 F.3d 881, 883 (9th Cir. 1996)). The Judge appropriately applied this legal principle to this case, and reached the correct conclusion.

Lastly, the Judge correctly found that the Respondent's reliance on *Hempstead Lincoln Mercury Motors Corp.*[31] was misplaced. (ALJD 18). As the Respondent notes in its Brief in Support of Exceptions, in that case "[]the employer continued to tend to the fund what was required under its expired union contract. That amount constituted the status quo." (R. Br., at 14). The Respondent continues by noting that "the collective bargaining agreement in *Hempstead* did not require postexpiration [sic] contribution rate increases," and that there was no savings clause in that contract. The former fact is the key distinction to be made, as the Judge correctly points out that in *Hempstead*, "the employer's refusal to increase pension fund contributions was based on a contract (as renewed) that prescribed a predetermined precise dollar amount per employee that the employer was required to pay the pension fund each year." (ALJD 18). Here, on the other hand, the contract provides for an increase in the base amount, capped at up to a 5% annual increase, for each successive year in the contract. The rates are not predetermined. Thus, *Hempstead* is entirely distinguishable from the instant case, as the increase is provided for in the agreement, and therefore becomes the status quo here.

Based on the above, it is respectfully submitted that Respondent's exceptions 3, 25, 33, 34, and 35 be denied and dismissed.

B. The Judge Properly Rejected the Respondent's Contract Coverage Defense.

By its exceptions 3 and 29, the Respondent asserts that the Judge improperly rejected the Respondent's argument that the Guild and the Operating Engineers waived their right to bargain over the Respondent's unilateral change. In support of its exceptions, the Respondent argues that

[31] 351 NLRB 1149 (2007).

the Judge should not have applied the well-established "clear and unmistakable waiver" analysis, and instead should have used a "contract coverage analysis" adopted by various circuit courts.

The Board has been clear in its rejection of this approach. As the Judge correctly found, "the Board does not apply the 'contract coverage' standard, but rather, the long-established 'clear and unmistakable waiver' standard for claims involving the waiver of statutory rights." (ALJD 19) (citing *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007)). The Respondent has not provided any persuasive argument as to why the contract coverage analysis should be applied here, except to say that "[m]ultiple circuit courts have criticized the Board's continued adherence to the 'clear and unmistakable' waiver standard." However, the Board has already made short work of this exact argument, finding that "[i]n the framework established by Congress, however, it is the function of the Board, not the courts, to develop Federal labor policy." *Provena*, 350 NLRB at 810-11 (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975)).

To the extent that the Respondent seeks to overturn Board law rejecting the contract coverage doctrine, this case is not a good vehicle for doing so because the Judge correctly found that the Respondent's arguments would fail even if the contract coverage analysis were applied. In reaching this conclusion, the Judge noted that under the contract coverage analysis, a "standard durational clause … without more, cannot cover and thereby vitiate the Union's statutory claim to continued" contribution increases. (ALJD 20) (citing *Honeywell International v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001); *Wilkes-Barre Hospital v. NLRB*, 857 F.3d 364, 377 (D.C. Cir. 2017)). With this, the Judge found that "there is simply no language in the agreement[s] limiting the Union's statutory rights, no language covering the subject of the Respondent's right to cease maintaining the status quo in 2018 or beyond." The Judge then

correctly concluded that "[s]ilence does not defeat the Unions' statutory claims." (ALJD 20). Somewhat remarkably, the Respondent takes issue with the Judge's finding, while simultaneously conceding that the contracts are, indeed, "completely silent as to any 2018 contract extension period or postexpiration date Fund contribution rate increases." (R. Br., at 27).

In sum, the Judge applied the correct legal standard to reach the proper conclusion that the Unions did not clearly and unmistakably waive their right to a continuation of the contribution benefits following calendar year 2017. Therefore, it is respectfully requested that exceptions 3 and 29 be denied and dismissed.

V. The Judge's Remedy, Proposed Order, and Notice to Employees Are Correct.

The Respondent apparently objects to nearly every aspect of the Judge's Remedy, Proposed Order, and Notice to Employees.[32] However, the Respondent only provides three arguments in support of these exceptions: (1) the Respondent did not violate the Act;[33] (2) the ordered reinstitution of payments for annual increases to the Fund should be capped at 5%;[34] and (3) since the Respondent did not directly reduce employee benefits, it should not be required to reimburse the fund for the 5% increased contribution rate after benefits were reduced. (R. Br., 28-29).[35] The Respondent makes no reference to any of the other exceptions, and makes no other arguments in their support. Without any concise statement of the grounds for these exceptions in the Exceptions, or any support in the Brief in Support of Exceptions, it is respectfully requested that bare exceptions 37, 38, 40-48, 50, and 51 be dismissed.

[32] *See* exceptions 1, 36-51.

[33] *See* exception 1.

[34] *See* exception 39.

[35] *See* exception 36 and 49.

As to the Respondent's first argument involving the Judge's Remedy, Order and Proposed Notice, the evidence shows, and the Judge correctly found, that the Respondent violated Sections 8(a)(1) and (5) of the Act by unilaterally changing an established term and condition of employment when it refused to pay the annual contribution rate increase to the Fund for calendar year 2018. In light of this violation, the remedies recommended by the Judge are entirely justified by both the record evidence and applicable legal precedent, and should be adopted by the Board.

Second, the Respondent's argument that the Judge's Order requiring the Respondent "reinstitute payments of annual increases to the Fund" should be capped at 5% represents a distinction without a difference. The Fund's contribution rate for calendar year 2018 increased by 5%. The Order requiring a reinstitution of contribution rate payments consistent with the annual increase would be for no more than 5% for the remainder of the calendar year. Regardless of whether the Remedy and Order specifically incorporate a cap, the Respondent is liable for the 5% increase for calendar year 2018.

Finally, the Respondent's argument that it did not directly reduce the employee's health care coverage,[36] and therefore it should not be required to reimburse the fund for the 5% increased contribution rate after benefits were reduced after March 2018,[37] is unpersuasive. According to a letter sent by the Respondent's Senior Human Resources Manager to the Unions, the Respondent understood that the Fund could provide a reduced benefit structure "if the Company does not pay the requested 5% increased contribution rate under the Welfare Fund's Plan 906, beginning January, 2018." (JX 13). Therefore, the Judge properly concluded that

[36] *See* exception 36.

[37] *See* exception 49.

benefit structure was reduced "as a result" of the Respondent's refusal to pay any portion of the annual increase in contribution rates for calendar year 2018. (ALJD 1). Other than bare assertions that it did not *directly* reduce the benefits, the Respondent has provided no arguments, evidence or legal authority in support of these exceptions. More still, the Judge's Remedy properly considered the Respondent's argument that the Fund reduced benefits, but nonetheless found that this reduction in benefits was "attributable to the Respondent's failure to pay the required contributions." (ALJD 29). Thus, the Remedy provided by the Judge in this regard is fully in accord with applicable legal precedent in *Mayweather Optical Co.*,[38] *Kraft Plumbing & Heating*,[39] and *Ogle Protection Services*.[40]

Since the Respondent has provided no sound basis for overturning any portion of the Decision, or the Judge's Remedy, Proposed Order and Notice to Employees, it is respectfully requested that exceptions 1, and 36-51 be dismissed and the Decision and Remedy, Proposed Order and Notice to Employees be adopted.

[38] 240 NLRB 1213, 1216 (1979) (ordering a respondent to "make whole" its employees for an 8(a)(5) violation by transmitting the required contributions to the union's pension and trust funds, and remit withheld dues to the union, with interest).

[39] 252 NLRB 891 (1980) *enfd. mem*. 661 NLRB F.2d 940 (9th Cir. 1981) (ordering a respondent to cure an 8(a)(5) violation by "[r]eimburs[ing] the Union for losses due to Respondent's failure to honor the dues-deduction authorizations of its employees in the appropriate unit" and to "[m]ake whole its unit employees for their loss of wages and other benefits which resulted from the Respondent's unfair labor practices, and pay to those employees appropriate interest …").

[40] 183 NLRB 682 (1970), *enfd*. 444 F.2d 502 (6th Cir. 1971) (finding that "effectuation of the policies of the Act necessitates that Respondents reimburse the Union for the dues which Respondents unlawfully failed to withhold and transmit in accordance with the checkoff provision of the contract ….").

CONCLUSION

For the reasons articulated above, Counsel for the General Counsel maintains that the Decision is clearly supported by the record and applicable Board law. The Respondent's exceptions raise no basis for disturbing these findings of fact or conclusions of law. Accordingly, Counsel for the General Counsel respectfully requests that the Board dismiss all of the Respondent's exceptions and adopt the Decision in its entirety.

Respectfully submitted,

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