

**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**

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**Case 06-CA-217529**

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

**Case 06-CA-217980**

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

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

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

**Case 06-CA-220480**

**RESPONDENT'S REPLY BRIEF  
TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF**

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## PRELIMINARY STATEMENT

Respondent urges the Board to overrule *The Finley Hospital*, 362 NLRB No. 102 (2015) and to return to a more commonsense and statutorily-based analysis of the extent of an employer's obligations after the expiration of a collective bargaining agreement. *The Finley Hospital* imposes unwarranted obligations on an employer to continue making changes after the contract expired which changes were only required to be made during the contract's term. The attempt to utilize *The Finley Hospital* and the status quo doctrine to require Respondent to pay post-expiration contribution rate increases violates Section 302(b) of the Labor Management Relations Act.

## STATEMENT OF THE CASE

This Reply Brief is submitted in response to Counsel for the General Counsel's Answering Brief (Answering Brief) in these cases.

On October 16, 2018<sup>1</sup>, Administrative Law Judge (ALJ) David Goldman issued his Decision and Recommended Order in these cases (ALJD). On November 13, PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette (Respondent) filed Exceptions to the Decision of the Administrative Law Judge (Exceptions) and a Brief in Support of Exceptions (Supporting Brief). On November 27, Counsel for General Counsel (GC) filed the Answering Brief.<sup>2</sup>

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<sup>1</sup> All dates hereinafter refer to 2018 unless otherwise specified.

<sup>2</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.), are 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. References to the Supporting Brief will be cited as "S.Br." and to the Answering Brief as "A. Br.", followed by the appropriate page number.

**I. THE ALJ'S RELIANCE UPON *THE FINLEY HOSPITAL* IS MISPLACED.**

In arguing the ALJ's findings that Respondent violated Section 8(a)(1) and (5) should be upheld, GC rehashes several of the findings and conclusions made by the ALJ. Specifically, he argues that the ALJ correctly found the status quo required Respondent to continue to pay up to a 5% annual increase in Western Pennsylvania Teamsters and Welfare Fund (Fund) contribution rates after the expiration of the 2014 Agreements, that the ALJ correctly found that Respondent had created a practice, and that the practice was an established term and condition of employment. GC also asserts that the ALJ correctly applied *Finley Hospital* and that Respondent offered no sound basis to overturn *Finley Hospital*.

One overarching issue in these cases is the continued viability of the Board's decision in *The Finley Hospital*. Thus, in response to the Exceptions and Supporting Brief, GC argues: "The Judge Correctly Found that the Respondent's Practice was an Established Term and Condition of Employment," (A. Br. 14-15), that "The Judge Correctly Applied *Finley Hospital*, and the Respondent offers No Sound Basis to Overturn *Finley Hospital*," (A. Br. 15-18), that "The Status Quo is Not a 'Snapshot,'" and "The Judge Applied relevant Extant Board Law." (A. Br. 18-23).

GC's contention that the Board, in *The Finley Hospital*, did not frame its decision on the basis of waiver (A. Br. 16), is contrary to the decision in that case, 362 NLRB at 2-4, as was pointed out by Member Johnson. *Id.* at 13. As set forth in the Supporting Brief, *Finley Hospital* should be overruled. Instead, Member Johnson's dissent in that case should be adopted as the proper statement of Board law.

## **II. THE UNIONS WAIVED THEIR BARGAINING RIGHTS.**

GC argues that the durational language in the 2014 Agreements was not a clear and unmistakable waiver and there were no other terms in those Agreements that clearly and unmistakably waived the Unions' rights.

As set forth in the Supporting Brief, these are not cases involving typical durational language. Here, the 2014 Agreements specifically defined the years in which Respondent was required to increase Fund contributions: 2016 and 2017. The clear and unmistakable terms of those Agreements clearly defined the extent of Respondent's obligations to increase its Fund contribution rate and thus, the Unions waived their rights to bargain over 2018 Fund contribution rate increases.

## **III. THE ALJ INCORRECTLY REJECTED RESPONDENT'S DEFENSES.**

GC argues that the ALJ correctly rejected Respondent's defense based on Section 302 of the LMRA. He also argues that the ALJ properly rejected Respondent's contract coverage defense.

These cases do not raise any issue concerning an employer's obligation to maintain Fund contribution payments after the expiration of a contract. The issue is whether Respondent is obligated, in the absence of a specific written agreement to increase Fund contributions, to increase those contributions after the contracts expired. GC argues that the 2014 Agreements satisfied the written agreement requirement of Section 302 and thus allowed the Fund to increase contribution rates for 2018. GC, like the ALJ, argues that the "dynamic status quo" under the NLRA satisfies Section 302's requirement for a written agreement.

Neither GC nor the ALJ points to any case holding that an expired contract can be the basis for a "written agreement" under Section 302 that allows a welfare fund to impose post-expiration contribution rate increases. No cases have held that the "status quo" in any way independently

creates a written agreement that permits post-expiration contribution rate increases absent a writing specifically authorizing such increases. Post-expiration contribution rate increases may only occur where there is a written agreement, such as a collective bargaining agreement, participation agreement, subscription agreement or trust agreement, specifically authorizing a fund to impose such increases. In the absence of such an agreement allowing the Fund to raise contribution rates after the 2014 Agreements expired, Section 302 prohibits the 2018 contribution rate increase.

With respect to the Operating Engineers-represented bargaining unit, where the parties extended the 2014 Agreement, and the Guild-represented bargaining unit, where the 2014 Agreement remains in effect because of an “evergreen” provision, the Agreements undisputedly cover health insurance contributions. Any application of the “dynamic status quo” doctrine has no application when a contract remains in effect. Rather, the issue is whether either contract requires Respondent to pay the increased 2018 Fund contribution rate. Neither contract, by its terms, requires those additional payments. The Supreme Court has cautioned that collective bargaining agreement, as with other contracts, must be interpreted by ordinary contract principles. *See CNH Industrial, N.V. v. Reese*, 583 U.S. \_\_\_ (2018); *M&G Polymers USA, LLC v. Tackett*, 574 U.S. \_\_\_ (2015) at 7. Those principles reinforce Respondent’s interpretation of those contracts. Furthermore, by not including a provision requiring Respondent to pay 2018 Fund contribution rates, the Operating Engineers and the Guild waived their right to bargain over that issue. Now is the time and these are the cases for the Board to adopt the judicially-accepted contract coverage analysis and find there can be no violation in those two bargaining units.

**IV. THE ALJ'S CREDIBILITY DETERMINATION SHOULD BE OVERTURNED.**

GC answers the Exceptions and Supporting Brief by arguing the ALJ's credibility determinations were proper and should not be overturned. The ALJ credited the testimony of Union Attorney Pass.

The credibility determination was not based on demeanor. The ALJ decided to credit Union Attorney Pass despite the unexplained and uncontroverted fact that Attorney Pass authenticated a clearly incorrect version of a document sent by Respondent to Attorney Pass. Furthermore, that incorrect version failed to include, as was included on the original, a title that clearly implicated the issues before the ALJ, i.e., that the parties did not intend for contribution rate increase to continue in 2018.

The ALJ's speculation that the omission of the title, "appears to be an inadvertent copying error," has no basis in the record. (ALJD 22, n. 22). That speculation is contrary to the testimony of Respondent's witnesses. (Tr. 67 (Spolar); Tr. 81, 83 (Dinkin)). Furthermore, neither Attorney Pass nor any other witness testified to the possibility of any such error. In fact, GC never called Attorney Pass to rebut Respondent's witnesses' testimony that the title was in the document sent to Attorney Pass. In these circumstances, the clear preponderance of the relevant evidence demonstrates that the credibility determination was incorrect and under *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951), should be reversed.

**V. THE EXCEPTIONS AND SUPPORTING BRIEF ARE NOT PROCEDURALLY DEFICIENT.**

The Exceptions and Supporting Brief are not procedurally deficient and are in compliance with the Board's rules.

Section 102.46(b)(1) of the Board's Rules and Regulations provides that exceptions (i) shall set forth specifically the questions of procedure, fact, law or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. The supporting brief shall contain a clear and concise statement of the case, a specification of the questions involved with reference to the exceptions and argument presenting the facts, and most appropriately in these cases, with the law relied upon in support of the exceptions. 29 CFR Section 102.46(b)(1).

The Exceptions, as supplemented by the Supporting Brief, meet those requirements. These cases present questions of law; the facts are relatively undisputed. The Exceptions and Supporting Brief identify each finding and conclusion of law of the ALJD to which Respondent excepted, identified to the extent possible the page and line number of each finding or conclusion to which it objected, and stated the grounds for the exception. The Supporting Brief satisfies the requirements of Section 102.46, identifying the Exceptions to which each argument therein applied. Reading the Exceptions and Supporting Brief, there can be no doubt as to each of the grounds and the bases for those grounds upon which the ALJD should be reversed.

Assuming, *arguendo*, the Exceptions and Supporting Brief are not in hyper-technical compliance with the Rules, they are in substantial compliance with those Rules. They sufficiently designate Respondent's points of disagreement with the ALJD. GC was not prejudiced by any lack of compliance.<sup>3</sup> The Board has repeatedly rejected similar arguments of hyper-technicality

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<sup>3</sup> GC's Answering Brief devoted 29 pages to a refutation of Respondent's Supporting Brief. (A. Br. 9-37). GC certainly understood the gravamen of Respondent's Exceptions and Supporting Brief.

and has refused to strike exceptions and supporting briefs. *See, e.g., TSS Facility Services, Inc.*, 363 NLRB No. 27, n. 1 (2015); *Chapin Hill at Red Bank*, 359 NLRB 1119, n. 1 (2013); *Farr Company*, 304 NLRB 203, n. 1 (1991); *Williams Services, Inc.*, 302 NLRB 492, n. 1 (1991); *Elion Concrete, Inc.*, 287 NLRB 69, n. 1 (1987); *Conway Mill*, 284 NLRB 135, n. 1 (1987). Therefore, the Exceptions and Supporting Brief should not be stricken.

**VI. THE ALJ'S REMEDY, PROPOSED ORDER AND NOTICE TO EMPLOYEES SHOULD NOT BE ADOPTED BY THE BOARD.**

Respondent's Exceptions raise two remedial issues. First, where there was no violation of the Act, there is no basis for any remedy. Second, even if the violations are upheld, any remedy should conform to the violations found and should not provide a windfall to the Fund. The Fund unilaterally reduced benefits to employees in 2018 when Respondent did not pay the increased contribution rate for that year. Employees were required by the Fund to pay increased deductibles. (ALJD 11, l. 22-32). Any remedy should only require Respondent to reimburse those employees who paid increased deductibles for those additional payments they made. It should not require Respondent to pay the Fund for benefits the Fund did not provide. *See Matson Terminals*, 367 NLRB No. 20, n. 3 (2018).

**CONCLUSION**

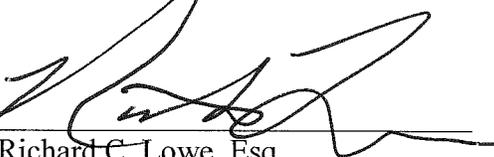
The Answering Brief presents no compelling reason to reject the Exceptions and Supporting Brief. The Exceptions should be granted and the ALJ's findings and conclusions should be reversed.

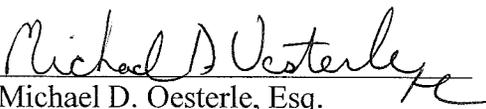
Dated this 10<sup>th</sup> day of December 2018.

Respectfully submitted,

**KING & BALLOW**

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**CERTIFICATE OF SERVICE**

The undersigned, as attorney for Respondent, hereby certifies that a true and exact copy of the foregoing Respondent's Reply Brief to Counsel for The General Counsel's Answering Brief 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:

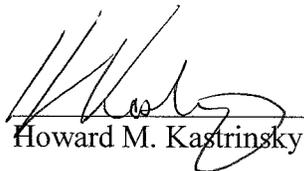
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This <sup>th</sup> 10 day of December 2018.

  
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