NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

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

PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette *and* 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

PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette *and* Pittsburgh Typographical Union No. 7, a/w The Communications Workers of America, AFL–CIO, and its Local 14827

PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette *and* 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

PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette *and* 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

PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette *and* International Union of Operating Engineers, AFL–CIO, Local 95. Cases 06–CA–212627, 06–CA–217525, 06–CA–217527, 06–CA–217529, 06–CA–217980, 06–CA–218637, 06–CA–220480

August 22, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On October 16, 2018, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and the Respondent filed reply briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

Background

The relevant facts, set forth more fully in the judge's decision, are as follows. The Respondent has longstanding collective-bargaining relationships with each of the seven Charging Party Unions representing the following separate units of its employees: Editorial, Mailing Room, Advertising, Finance, Delivery, Pressmen, and Operating Engineers. Prior to 2015, the Respondent provided healthcare insurance coverage for its employees through its own self-insured plan. It paid the entire cost of the insurance premiums, although in 2006 it successfully bargained for wage reductions to offset some of the cost.

In late 2014, the Respondent signed new and essentially identical collective-bargaining agreements with each Union. The agreements made a significant change in healthcare insurance: effective January 1, 2015, employees would receive coverage through the Western Pennsylvania Teamsters and Employers' Welfare Fund (the Fund) instead of the Respondent's self-insured plan. Each agreement included a summary of benefits listing the various deductibles, copays, and out-of-pocket maximums under the new plan. The agreements stated that the initial "required PG contributions for the calendar year 2015 will be $1,229 per month" for each employee, and "the PG contributions for years 2016 and 2017 will not exceed a 5.0% annual increase above the $1,229 per month . . . for calendar year 2015." It was employees' responsibility to compensate the Fund for any premium increases above the Respondent's 5 percent limit.

[1] The General Counsel argues that the Respondent's exceptions and supporting brief are procedurally deficient because the exceptions do not include record citations or grounds and the brief does not specifically reference each exception. Because the Respondent's exceptions and brief are substantially compliant with the requirements of Sec. 102.46 of the Board's Rules and Regulations, and the General Counsel has not shown any resulting prejudice, we reject this argument. See, e.g., *St. George Warehouse, Inc.*, 341 NLRB 904, 904 fn. 1 (2004), enfd. 420 F.3d 294 (3d Cir. 2005).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent paid the required $1229 per month for each employee in 2015. For 2016, the Fund requested a 5.9 percent increase, but the Respondent limited its increase to 5 percent ($1290.45 per employee per month) in accordance with the agreements; and the Fund reduced employees' benefits by increasing deductibles to cover the shortfall. For 2017, the Fund requested, and the Respondent granted, a 5 percent increase, to $1354.97 per employee per month.

Before the agreements expired in March 2017, the Respondent and the Unions began bargaining, separately, for new collective-bargaining agreements. The Respondent and two of the Unions agreed to extend two of the seven 2014–2017 agreements beyond March 2017: those covering the Operating Engineers–represented unit and the Guild-represented Editorial unit. The other five agreements expired in March 2017.

In the fall of 2017, the Fund requested another 5 percent increase from the Respondent. The Unions maintained that the Respondent had to pay increases necessary to maintain benefits because the expired agreements did not include a cap on contributions after 2017. The Respondent refused, asserting that its sole obligation under both the expired and extended agreements was to continue contributions at the 2017 level. Negotiations between the parties stalled, and the Respondent continued making contributions to the Fund at the 2017 level of $1354.97 per month for each employee. It did not increase its contributions. In April 2018, the Fund further reduced employees' benefits by increasing employee deductibles to cover the shortfall.

The complaint alleges that the Respondent's 2014-2017 collective-bargaining agreements established a status quo of up to 5 percent annual increases in the Respondent's contributions as requested by the Fund, and that the Respondent's 2018 refusal to increase its contributions in line with the Fund's request was a unilateral change that violated Section 8(a)(5) and (1) of the Act.

The Judge's Decision

The judge found that the Respondent unlawfully failed to maintain the status quo by discontinuing contribution increases and causing a reduction in employee benefits. He rejected the Respondent's argument that it had a duty only to maintain contributions at the 2017 level because it did not agree to additional annual increases beyond 2017. According to the judge, the issue was "not whether the General Counsel can point to language in the 2014 [a]greements showing that the Respondent agreed to pay annual increases in 2018 and thereafter," but "whether the Respondent can point to language showing that the parties intended to *preclude* the Respondent from continuing the status quo of contribution increases in 2018 and thereafter." The judge found no such preclusive language in the seven agreements, and accordingly he concluded that the Respondent was therefore obligated to pay *all* contribution increases requested by the Fund *except* in 2016 and 2017, when the increases were contractually limited to 5 percent.[3] In the judge's words, that contribution limit was a "shield" that could not be "turned into a sword that alchemically bars the Respondent from paying *any* increase to maintain the status quo after 2017."

On this basis, the judge determined that the Respondent "violated its statutory—not its contractual—duty to continue the status quo of funding the increase in contribution rates[.]" He found his interpretation "forcefully buttressed by the fact that the health care coverage schedule of benefits attached to each 2014 [a]greement could only be maintained with contribution rate increases." While recognizing that two of the seven agreements—those of the Editorial and Operating Engineers units—remained in force, the judge viewed that as only a nominal difference that did not require a different analysis. He also found that the Union did not clearly and unmistakably waive its statutory right to the increases, and he rejected various contractual and waiver defenses raised by the Respondent.

Analysis

The issue presented here is whether the Respondent changed a term or condition of employment when it maintained its contributions to the Fund at the 2017 rate rather than increasing its contributions after 2017. See *Daily News of Los Angeles*, 315 NLRB 1236, 1237-1238 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997); *Wilkes-Barre General Hospital*, 362 NLRB 1212, 1216 (2015), enfd. 857 F.3d 364 (D.C. Cir. 2017). On exception, the Respondent argues that it did not change a term or condition of employment but rather maintained the status quo. It contends that its contractual obligation to increase contributions to the Fund for 2016 and 2017 did not create a mandate to continue increasing its contributions to the Fund after 2017. We find merit in the Respondent's exception.[4]

Preliminarily, it is necessary to distinguish between the Respondent's contractual and statutory duties. See *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 207 (1991). An employer has a contractual duty to adhere to the terms of an agreement as long it remains in force.

[3] However, in accordance with the General Counsel's theory of the case, the judge ordered the Respondent to reinstate contribution increases only up to 5 percent.

[4] The Respondent also excepts to the judge's rejection of its other defenses, including waiver. In light of our finding, it is unnecessary to pass on them.

See, e.g., *Des Moines Register & Tribune Co.*, 339 NLRB 1035, 1036–1037 (2003), rev. denied sub nom. *Des Moines Mailers Union, Teamsters Local No. 358 v. NLRB*, 381 F.3d 767 (8th Cir. 2004). Contractual obligations generally end once the agreement expires, see *Litton*, supra at 206, but an employer still has a statutory duty to maintain the status quo on mandatory subjects of bargaining until the parties reach a new agreement or a valid impasse. See *Triple A Fire Protection*, 315 NLRB 409, 414 (1994), enfd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999). Contractual and statutory obligations are not necessarily coextensive. See, e.g., *Wilkes-Barre Hospital Co. v. NLRB*, 857 F.3d 364, 376–377 (D.C. Cir. 2017).

Initially, the judge erred by applying the same analysis to the Respondent's obligations under the continuing agreements with the Editorial and Operating Engineers units as he did to its obligations to the other five units after their agreements expired. Because the Editorial and Operating Engineers agreements remained in force, the Respondent's obligations to employees in those units were entirely contractual. Nonetheless, the judge considered only whether the Respondent "violated [a] statutory—not [a] contractual—duty" to continue increasing its contributions to the Fund for employees in all seven units. Unlike the judge, we analyze the continuing and expired agreements separately.

We first find that the Respondent did not abrogate any contractual duty to increase Fund contributions for Editorial and Operating Engineers unit employees after 2017. The continuing agreements covering these units established a baseline contribution level for 2015 and required the Respondent to pay contribution increases for 2016 and 2017 only. They made no provision for any additional increases in subsequent years. Thus, the Respondent was not obligated to comply with the Fund's contribution-increase request for 2018. See, e.g., *Hempstead Lincoln Mercury Motors Corp.*, 351 NLRB 1149, 1149 fn. 1 (2007). The fact that the agreements were originally slated to expire in March 2017 does not affect our analysis. The two unions chose to extend the 2014–2017 agreements, and those agreements did not provide for future contribution increases by the Respondent.

We also find that the Respondent did not abrogate its statutory duty to maintain the status quo of healthcare insurance contributions for the other five units' employees after their agreements expired. It is well established that "the status quo is . . . defined by reference to the substantive terms of the expired contract." *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970). In finding the violation, the judge interpreted the healthcare insurance provisions in the expired agreements to create a postcontract status quo of paying annual contribution increases. However, that interpretation does not reflect the actual terms of the agreements. As stated above, the Respondent contractually agreed to a contribution amount for 2015 ($1229 per employee per month), followed by contribution increases in 2016 and 2017 limited to 5 percent. It did not agree to pay the entire cost of requested contribution increases, and the express contractual limitation of increases to two specific years contradicts any finding of a postcontract status quo of "automatic increases to which the employer has already committed [itself]." See *NLRB v. Katz*, 369 U.S. 736, 746 (1962); see also *House of the Good Samaritan*, 268 NLRB 236, 237 (1983) (status quo did not require healthcare contribution increases by employer because policy manual set a maximum dollar amount for contributions and employer did not have a "consistent and inflexible" practice of covering the increases). Cases in which the Board has held that employers unlawfully discontinued, postcontract, a status quo of providing wage or benefit increases, including those relied on by the judge, are distinguishable. In those cases, the expired agreements included language providing for increases not limited to specified years.[5] Here, in contrast, the expired agreements explicitly limited increases to 2016 and 2017. Thus, when the agreements expired in March 2017, the status quo was the contribution rate for 2017, to which the Respondent lawfully adhered.[6]

[5] See *Prime Healthcare Services-Encino, LLC d/b/a Encino Hospital Medical Center*, 364 NLRB No. 128, slip op. at 9–10 (2016) ("Employees who are at or below the scale on the anniversary date of their most recent date of hire shall advance to the next step on the wage scale on that anniversary date[.]"), enfd. 890 F.3d 286 (D.C. Cir. 2018); *Wilkes-Barre General Hospital*, 362 NLRB at 1216-1218 ("Scale increases according to longevity shall become due only upon January 27th of the year following the employee's anniversary date."); *Finley Hospital*, 362 NLRB 915, 915–916 (2015) ("For the duration of this Agreement, the Hospital will adjust the pay of Nurses on his/her anniversary date."), enf. denied in relevant part 827 F.3d 720 (8th Cir. 2016); *Southwest Ambulance*, 360 NLRB 835, 843 (2014) ("Longevity Pay" raises "[e]very December 1st and June 1st of each year of this Agreement"), enf. denied on other grounds 796 F.3d 67 (D.C. Cir. 2015); *Intermountain Rural Electric Assn.*, 305 NLRB 783, 784 (1991) (employer's "maximum contribution to any of the medical insurance plans in effect for its employees covered by this Agreement 'shall not exceed' one hundred percent of . . . premiums," and employer would "pay one hundred percent . . . of the [dental] premiums for the employees covered"), enfd. 984 F.2d 1562 (10th Cir. 1993); *General Tire & Rubber Co.*, 274 NLRB 591, 592–593 (1985) (employer provided fringe benefits throughout term of agreement and during 90-day extension period), enfd. 795 F.2d 585 (6th Cir. 1986). We express no view as to whether all these cases were correctly decided.

[6] The judge found it unnecessary to address the General Counsel's alternative argument that the Respondent had a past practice of paying for all increases in employees' health insurance premiums. Because the General Counsel did not relevantly except, we likewise do not address that argument.

The judge attempted to fortify his interpretation by citing the summary of healthcare insurance benefits attached to each agreement as proof of the Respondent's commitment to maintain those benefits through future contribution increases. These summaries provided details of the insurance coverage—including deductibles, copays, and out-of-pocket maximums—to be offered by a third-party insurer at a price to be set by it. However, the summaries in no way addressed the level of the Respondent's present or future contributions. Further, the agreements made the maintenance of existing benefits contingent on employees' willingness to shoulder part of the burden of premium increases. The summaries are therefore not relevant to the question before us.

Ultimately, the fundamental flaw in the judge's analysis was his allocation of the burden of proof. In finding that the status quo included annual contribution increases, the judge disregarded the General Counsel's lack of affirmative evidence of any commitment by the Respondent to continue increasing contributions as part of the status quo. Instead, having assumed that the increases would necessarily continue, he focused on whether "the Respondent can point to language showing that the parties intended to *preclude* the Respondent from continuing the status quo of contribution increases in 2018 and thereafter." In essence, the judge required the Respondent to show that its maintenance of contributions at the 2017 rate was *not* a violation of the Act. However, "[t]he General Counsel bears the burden of establishing that the Respondent altered the status quo." *CPL (Linwood) d/b/a Linwood Care Center and its Successor 201 New Road Care Center Operations, LLC d/b/a Linwood*, 367 NLRB No. 14, slip op. at 2 (2018). Applying the correct standard, we find that the General Counsel failed to show that the Respondent changed the status quo by refusing to increase its contributions above the 2017 rate after the agreements expired.

Having found the Respondent did not have either a contractual or statutory duty to continue to increase healthcare insurance contributions after 2017, we accordingly dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 22, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Zachary A. Hebert, Esq., for the General Counsel.
Howard M. Kastrinsky, Esq., Richard C. Lowe, Esq., and *Michael D. Oesterle, Esq. (King & Ballow),* of Nashville, Tennessee, for the Respondent.
Joseph J. Pass, Esq. (Jubelirer, Pass & Intrieri, P.C., and *Marianne Oliver, Esq. (Gilardi, Oliver & Lomupo, P.A.),* of Pittsburgh, Pennsylvania*; Richard Rosenblatt, Esq. (Rosenblatt & Gosch, PLLC),* of Greenwood Village, Colorado, for the Charging Parties.

DECISION

INTRODUCTION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. These cases consider an employer's obligation under federal labor law to maintain the status quo in employment terms and conditions while it negotiates with its employees' unions for new labor agreements to replace expired (or temporarily extended) collective-bargaining agreements.

As established under each of the seven collective-bargaining agreements between the employer and its employees' unions, beginning January 1, 2015, the employees' health care coverage was to be provided through a plan sponsored by a Taft-Hartley health and welfare fund, paid for by the employer's monthly contributions to the fund of $1229 for each participating employee. A schedule of the benefits purchased by these contributions was attached to and part of each labor agreement. The labor agreements provided that for calendar year 2016, and again in 2017, the employer would increase the monthly per employee contributions as established by the fund, with the only limitation being that the employer would not be responsible for any portion of an annual increase in excess of 5.0 percent. The employer paid the annual increases in 2016 and 2017, as required under the labor agreements. It continued to pay the 2017 monthly contribution rate after the March 31, 2017 expiration and/or temporary extension of the labor agreements while the parties negotiated for new agreements.

The problem that became these cases arose in the fall of 2017, when the fund announced its annual contribution rate increase for January 2018. The employer refused to pay the increase. As a result, the fund reduced the health care benefits for the employees beginning April 2018.

The National Labor Relations Act (Act) requires that (until impasse or agreement) an employer must continue the status quo in the terms and conditions of employment while the parties negotiate for a new labor agreement. Here, the General Counsel of the National Labor Relations Board (Board) contends that this statutory obligation required the employer to continue providing the annual increases in fund contributions,

as it did in 2016 and 2017 under the labor agreements. The General Counsel contends that the employer's 2018 discontinuance of the annual increases up to 5 percent—which resulted in a reduction of the existing level of health care benefits for employees—constitutes an unlawful unilateral change in terms and conditions in violation of Section 8(a)(5) and (1) of the Act.

As discussed herein, I find that the employer's refusal in 2018 to continue to pay the fund annual contribution was a violation of the Act, as alleged. As discussed herein, Board precedent amply supports this result, and does not support the employer's claim that its refusal to continue the annual increases—but simply to maintain the 2017 rate—satisfies its obligation under the Act. I find the employer's various defenses—whether rooted in the terms of the labor agreements, in the unions' response to the employer's plans to discontinue the increases, or the claim that increased funding would violate Section 302 of the Taft-Hartley Act—to be without merit.

In reaching this result I do not reach the General Counsel's alternative argument (GC Br. at 23–25) that the duty to continue the annual increases in contributions became a term and condition of employment through a "traditional past practice analysis." I also do not reach the unions' argument—not advanced by the General Counsel, and not posed, to date, by the facts—that should there be future annual contribution increases above 5 percent, the employer's statutory duty to maintain the status quo will not be limited by the 5 percent cap that limited its contractual obligations in 2016 and 2017.

STATEMENT OF THE CASE

On January 5, 2018, the Newspaper Guild of Pittsburgh a/w Communications Workers of America, AFL–CIO, CLC, and its Local 38061 (the Guild) filed an unfair labor practice charge alleging violations of the Act by the PG Publishing Co., Inc. d/b/a/ Pittsburgh Post–Gazette (Employer or PG), docketed by Region 6 of the National Labor Relations Board (Board) as Case 06–CA–212627. The charge was amended by the Guild on April 25, 2018.

Based on an investigation into this case, on April 26, 2018, the Board's General Counsel, by the Regional Director for Region 6 of the Board, issued a complaint and notice of hearing alleging that the PG had violated the Act. The PG filed an answer to the complaint on May 8, 2018, denying all alleged violations of the Act.

On March 30, 2018, the 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 (the Mailers Union) filed an unfair labor practice charge alleging violations of the Act by the PG, docketed by Region 6 of the Board as Case 06–CA–217525. The charge was amended by the Mailers Union on May 3, 2018.

On March 30, 2018, the Pittsburgh Typographical Union No. 7, a/w the Communications Workers of America, AFL–CIO, and its Local 14827 (the Typographical Union) filed two unfair labor practice charges alleging violations of the Act by the PG, docketed by Region 6 of the Board as Cases 06–CA–217527 and 06–CA–217529. The charges were amended by the Typographical Union on May 2, 2018.

On April 6, 2018, the 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 (the Delivery Union) filed an unfair labor practice charge alleging violations of the Act by the PG, docketed by Region 6 of the Board as Case 06–CA–217980. The charge was amended by the Delivery Union on May 2, 2018.

On April 18, 2018, the 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 (the Pressmen's Union) filed an unfair labor practice charge alleging violations of the Act by the PG, docketed by Region 6 of the Board as Case 06–CA–218637. The charge was amended by the Pressman's Union on May 2, 2018

On May 18, 2018, the International Union of Operating Engineers, AFL–CIO, Local 95 (the Operating Engineers) filed an unfair labor practice charge alleging violations of the Act by the PG, docketed by Region 6 of the Board as Case 06–CA–2200480. The charge was amended by the Operating Engineers on May 24, 2018.

Based on an investigation into these cases, on June 28, 2018, the Board's General Counsel, by the Regional Director for Region 6, issued an order consolidating cases 06–CA–212627, 06–CA–217525, 06–CA–217527, 06–CA–217529, 06–CA–217980, 06–CA–218637, and 06–CA–220480, and issuing a consolidated amended complaint and notice of hearing in all of the foregoing cases alleging that the PG had violated the Act. The PG filed an answer to the amended consolidated complaint on July 9, 2018, denying all alleged violations of the Act.

A trial in this case was conducted on August 21, 2018, in Pittsburgh, Pennsylvania. At the commencement of the trial, counsel for the General Counsel and counsel for the PG moved to amend the complaint and answer to conform to certain stipulations reached between the parties. The motions were granted and the stipulations reached by the parties were admitted into evidence as Joint Exhibits 1–16.

Counsel for the General Counsel, the Union,[1] and the Respondent filed posttrial briefs in support of their positions by September 25, 2018.

On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

At all material times, the PG has been a Pennsylvania corporation with an office and place of business in Pittsburgh, Pennsylvania, and has been engaged in publishing the *The Pittsburgh Post–Gazette*, a newspaper. Annually, in conducting its operations, the PG derives gross revenues in excess of $200,000 and publishes various nationally syndicated features, advertises various nationally sold products, and holds membership in and subscribes to various interstate news services, including the Associated Press. Annually, the PG purchases and receives at its Pittsburgh, Pennsylvania facility products, goods, and materials valued in excess of $5000 directly from points

[1] Throughout this decision, references to "the Unions" are to the Charging Parties in the consolidated amended complaint, collectively. References to "each Union" are to each of the Charging Parties.

outside the Commonwealth of Pennsylvania. It is alleged, admitted, and I find, that at all material times, the PG has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is alleged, admitted, and I find, that at all material times, the Guild, the Mailers Union, the Typographical Union, the Delivery Union, the Pressman's Union, and the Operating Engineers, have each been a labor organization with the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of these cases, pursuant to Section 10(a) of the Act.

Unfair Labor Practices

Findings of Fact

Background

The PG publishes *The Pittsburgh Post–Gazette*, a daily newspaper. For many years the PG has recognized the Guild as the exclusive collective-bargaining representative of a bargaining unit of editorial employees,[2] the Mailers Union as the exclusive representative of a bargaining unit of mail room employees,[3] the Typographical Union as the exclusive representative of a bargaining unit of advertising employees[4] and of a unit of finance employees,[5] the Delivery Union as the exclusive representative of a unit of delivery employees,[6] the Pressmen's Union as the exclusive representative of a unit of pressroom employees,[7] and the Operating Engineers as the exclusive representative of a unit of operating engineers.[8]

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[2] This "Editorial Unit" is composed of:

> All employees in the Editorial Department and in all sub-divisions of the Editorial Department, excluding those employees provided for in other existing Union Agreements and all Publishers and Associate Publishers, Publisher and Editor-in-Chief, Executive Editor, Editor of the Editorial Page, Managing Editor, Deputy Managing Editor, Senior Assistant Managing Editor, Assistant Managing Editor, City Editor, Sports Editor, Sunday Editor, Technology Systems Editor, Business Editor, Night Operations Manager, Seen Editor, Associate Editor of Opinion Pages, Editorial Cartoonist, and Confidential Secretaries.

[3] The "Mailing Room Unit" is composed of full-time employees described in the most recent collective-bargaining agreement (Jt. Exh. 1(b)) between the Mailers Union and the PG as:

> All employees covered by this Agreement. The words "employee" and "employees" when used in this Contract apply to journeymen and apprentices. It is recognized and agreed that the terms and conditions of employment covering Part-Time mailer employees shall be as set forth in a separate agreement covering such employees.

[4] The "Advertising Unit" is composed of:

> All regular full time and regular part-time employees of the Advertising Department; excluding all other employees, confidential employees, guards, professional and supervisors as defined in the Act, and those specifically excluded."

Specifically excluded from the Advertising Unit is:

> All employees in the Marketing, Research and Promotion Division, including supervision, managerial, confidential, and all other employees, as well as such employees added in the future, are excluded from the Advertising Unit. In addition, the following positions are specifically excluded from the Advertising Unit:
>
> Chief Revenue Officer
> Advertising Director
> Classified Manager
> Classified Real Estate Manager
> Retail Manager
> Mgr. of Training and Sales Dev.
> Database Marketing Manager
> Co-Op and Special Sections Mgr.
> Classified Call Center Manager
> Online Sales Manager
> Production Services Manager
> New Media Bus. Dev. Mgr.—Online
> New Media Bus. Dev. Mgr.—Classified
> New Media Bus. Dev. Mgr.—National
> Executive Assistant to Adv, Director
> Preprint Distribution Manager
> Retail Territory Sales Manager
> Classified Automotive Sales Manager
> Quality Control Specialist
> Secretary to Classified Managers
> Display Advertising Manager
> Advertising Operations Manager
> Market Research Manager
> Classified Recruitment Manager
> Classified Operations Manager
> Production Services Supervisor
> Product Design Manager
> Research Analyst
> Sales Manager—Automotive
> Sales Manager—Real Estate
> Sales Manager—Retail (Territories)
> Sales Manager—New Business Dev.
> Sales Manager—Recruitment
> Sales Manager—Major/National
> Sales Supervisor—Major/National
> Sales Manager—Digital/Direct
> Production Services Manager

[5] The "Finance Unit" is composed of:

> All regular full-time and regular part-time employees of the Financial Department; excluding all other employees, confidential employees, guards, professional and supervisors as defined in the Act. The following are recognized as being confidential or supervisory employees excluded from the coverage of this Agreement: Controller, Assistant Controller, Office Manager and their confidential secretaries, Accounting Manager, Auditor, Credit Manager, Cashier Manager, Circulation Accounting Supervisor, Advertising Accounting Supervisor, and Payroll Supervisor.

[6] The "Delivery Unit" is composed of all employees performing the delivery-related work described in more detail in Sect. 2 (Jurisdiction) of the most recent collective-bargaining agreement between the Delivery Union and the PG. See, Sect. 2 of Jt. Exh. 1(e).

[7] The "Pressmen's Unit" is composed of:

> All journeymen pressmen, paperhandlers, paperhandling pressmen, and apprentice pressmen who work in the Company's pressroom and paperhandling departments.

[8] The "Operating Engineers Unit" is composed of"

> all employees employed by [the Respondent] at its facility located at 2201 Sweeney Drive, Clinton, P A; but excluding guards, office clericals, managerial personnel, confidential personnel, supervisors as defined in the National Labor Relations Act, and all other personnel.

The parties stipulated that on March 9, 2017, the PG and the Operating Engineers tentatively agreed to change the facility address listed in the above-unit description and the change will be incorporated into any successor labor agreement entered into by the PG and the Operating

The recognition of these unions as the representative of the various bargaining units has been embodied in successive collective-bargaining agreements between the PG and each Union, with a separate collective-bargaining agreement covering the terms and conditions of each of the seven bargaining units described above.

On September 11, 2014, the Unions, negotiating together as the "Unity Council," reached a settlement agreement with the PG for new labor agreements covering these seven units.[9]

Each of these successor agreements, one covering each bargaining unit, became effective on various dates in October or November 2014, and continued by their terms to at least March 31, 2017 (the 2014 Agreements).

Employee health care coverage under the 2014 Agreements

In recent years, before 2015, the collectively-bargained health care coverage for employees had been provided through a self-insured plan sponsored by the PG. The PG paid for the health care coverage (Tr. 31), although beginning in 2006, the PG bargained for a wage "diversion" which offset some of the health care costs with a reduction from wages.

In the 2014 Agreements, a significant change was made to the health care coverage, one that set the stage for the instant dispute. Pursuant to each of the 2014 Agreements, beginning January 1, 2015, health care coverage for participating employees was no longer provided through an employer-sponsored plan but, instead, through participation in a multi-employer Taft-Hartley health and welfare fund. The 2014 Agreements provided that beginning January 1, 2015, bargaining unit employees would be able to participate in the Western Pennsylvania Teamsters and Employers' Welfare Fund (the Fund). The parties stipulate that on January 1, 2015, the PG began participating in the Fund.

The schedule of benefits that the PG employees would receive from the Fund's plan 9PG was attached to or made an exhibit to each of the 2014 Agreements. The schedule of benefits summarized the deductibles, out-of-pocket maximum, and coverage for various procedures and care under the plan. The schedule of benefits also compared the 9PG benefits to the benefits offered by the existing PG health care plan that remained in effect under the 2014 Agreements until January 1, 2015.

Under the terms of each of the 2014 Agreements, beginning January 1, 2015, the PG would pay the Fund a per-employee monthly rate. In addition, under the terms of the 2014 Agreements, the wage "diversion" continued, with a percentage of employee wages being held back.[10] However, the employees contributed nothing to the Fund for their health care—the PG paid the full contribution rate set by the Fund.

The 2014 Agreements provided a set rate for the PG's 2015 contributions to the Fund, which was $1229 per month for each participating employee. The 2014 Agreements also recognized the prospect of annual increases to the Fund's contribution rate, but expressly limited the amount of increase that the PG would be required to pay in 2016 and 2017, to a 5.0 percent annual increase. More precisely, the 2014 Agreements read in pertinent 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 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.

Under the terms of the Agreements, any increase in the Fund's contribution rate in 2016 and 2017 beyond the 5.0 percent cap would be the financial responsibility of the employees. The PG agreed to perform the withholding of these additional amounts from employee pay under limited and prescribed circumstances. Paragraph 3, above, continues:

> 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.[11]

After the September 2014 settlement agreement, questions arose between the parties over how the 5 percent cap would operate. On October 13, 2014, PG Human Resources Vice-President Stephen Spolar sent Union Attorney Pass a document that Spolar described to Pass in a cover memo as "our explana-

Engineers.

[9] For some years, going back to the 1990s, the various Unions negotiated together with the PG (and until it ceased printing, with another Pittsburgh newspaper, the Pittsburgh Press) in a multi-union bargaining organization composed of all the union-represented units at the PG. This multi-union bargaining group was called the Unity Council, and from its inception was represented in bargaining by Attorney Joseph Pass.

[10] Under the different 2014 agreements, there was some variation among the bargaining units in the amount and ceiling of the diversion. The differences are not material to the issues at hand.

[11] I have reproduced and quoted (in pertinent part) the language from Exhibit A of the September 11, 2014 PG-Unity Council Settlement Agreement. This language on health care was part of each unit's collective-bargaining agreement. (Any minor variations in the labor agreement's active employee health care language are nonmaterial). Each of the 2014 agreements included this language, along with a schedule of benefits of the Fund's plan 9PG, included by exhibit or attachment, which was the plan covering employees.

tion of the 5% cap."

The document was an Excel spreadsheet prepared by the PG's outside benefits consultant, Elliot Dinkin, and reviewed internally by PG representatives before being provided to the Unions. The spreadsheet provided hypothetical examples for a variety of future Fund contribution rate increases to show how the cap would affect annual increases paid by the PG. The spreadsheet was titled "PG Determination of share of benefit costs–2015–2017," and projected hypothetical annual Fund contribution rates and increases to be paid by the PG for the years 2015, 2016, 2017, and 2018.

Employer contributions to the Fund in 2015, 2016, and 2017

As set forth in the labor agreements, for the calendar year 2015, the PG contributed $1229 per month for each bargaining unit employee participating in the Fund.

In the fall of 2015, the Fund notified the parties that for the calendar year 2016, the contribution rate was going to increase by 5.9—0.9 percent more than the contractual cap on the PGs' annual contributions increase. As a result, the PG increased its contribution rate by 5 percent for 2016, or $1290.45 per employee per month. However, as to the shortfall of 0.9 percent, instead of employees making up the difference as originally envisioned under the contracts, the Fund, with the agreement of the Unions and the PG, reduced the health care benefits to employees, increasing the deductible applicable to participating PG employees and their families. In a conversation with Teamsters Union President Joe Molinaro, PG Human Resources Vice-President Stephen Spolar agreed to this change in the deductibles as a resolution of the issue.

In the fall of 2016, the Fund notified the PG that the contribution rate would increase by 5 percent for the calendar year 2017. Accordingly, in calendar year 2017, the PG increased its monthly contributions to the Fund by 5 percent, to $1354.97 for each participating employee.

As discussed below, the 2014 Agreements expired (or in two cases were extended) as of March 31, 2017. The PG continued paying into the Fund (at the 2017 contribution rate) for all units after March 31, 2017, as the parties negotiated for new agreements.

Negotiations for successor agreements to replace the 2014 Agreements

The 2014 Agreements were scheduled to expire on March 31, 2017. In January 2017, the PG notified the Unions of its intention to negotiate a successor labor agreement separately with each Union and not through the multiunion Unity Council bargaining as had been done in past years. Pursuant to the PG's demand, bargaining commenced with each unit bargaining separately. Since then, and to date, the PG has met with each of the Unions for bargaining and has exchanged bargaining proposals. The PG's proposal for health care coverage under the successor agreements provides that employee health care coverage will no longer be provided through the Fund.

However, to date, no successor collective-bargaining agreements have been reached between the PG and any of the Unions.

For these negotiations for successor agreements to the 2014 Agreements, Attorney Pass specifically represents all of the Unions for purposes of the health care coverage issues, for which common proposals are being made by the parties. More generally, Pass represents the Guild and the Teamsters, although he has also appeared at meetings for some of the other unions.

Expiration and/or extension of 2014 agreements

As of March 31, 2017, the agreements expired for the mailing room unit, the advertising unit, the finance unit, the delivery unit, and the pressmen's unit. Since March 31, 2017, the employees in these units have been working without an agreement while their Union and the PG attempt to bargain a successor agreement.

The situation is nominally different for two of the units, the Guild-represented Editorial Unit, and the Operating Engineers-represented unit of operating engineers. On March 29, 2017, before expiration of their Agreement, the Operating Engineers and the PG entered into an agreement extending the 2014 Agreement while the parties negotiate a new agreement. Under this extension agreement, either party has the right to terminate the contract upon ten days written notice. As to the Guild unit, the 2014 Agreement between the Guild and the PG contains a clause that provides that "the terms and conditions of this Agreement shall remain in effect as long as negotiations continue" for a successor agreement. Thus, the Guild's agreement remains in effect on this basis.

The PG's refusal to pay the Fund contribution rate increase for 2018

In the fall of 2017, 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, and that would appear on the December 2017 invoice from the Fund. For the PG's Fund plan, the new announced rate was $1422.49 per month per employee, an increase of $67.52 per month, just under a 5 percent increase from the monthly rate the PG was paying in calendar year 2017.

On October 25 and 26, 2017, the PG, by Human Resources Manager Linda Guest, sent letters to the Fund, and to each Union representing a PG bargaining unit, regarding the "Annual Rate Adjustment," and stating that the PG was not obligated to pay the increased contribution rate.

A separate letter was sent to the Fund regarding each Union, and a corresponding letter sent to each Union, but notwithstanding any individual differences, in each letter the PG maintained that under the applicable labor agreement "there is no provision for any increase in its contribution to the Fund, after December 31, 2017."

Each letter to the Fund concluded by stating: "We will be discussing this matter with the Union. If, and when, a different contribution rate is agreed to with the Union, the Fund will be informed."

Each letter to a Union with which the 2014 Agreement had expired asserted that under the expired agreement, "it appears that the Company is not contractually obligated to pay the Fund's increased contribution rate for 2018," and asserted that "Our obligation under the law is to maintain the dynamic status quo conditions created by the expired CBA, that is, to continue to pay the current contribution rate." The letter to the Guild

and the Operating Engineers—the two agreements that remained in effect due to extension—asserted that "Our obligation under law is to continue to pay the current contribution rate, which is the status quo."

The letters to each Union then stated, "Therefore we think it is important to meet with the Union to discuss how to address this development" and requested that the Union contact Guest "to arrange a date and time for that meeting."

By letter dated November 6, 2017, Attorney Pass responded to Guest (on behalf of all the unions), contending that,

> As I am sure you have been advised, if there is no new collective-bargaining agreement in effect dealing with healthcare for 2018, and thereafter, the terms and conditions of the existing agreement must continue. You also are aware that the provisions of those agreements clearly provide that the "Company will provide a health insurance and prescription drug plan . . ." and that the Company's obligation for any increase is capped for the years 2016 and 2017 at 5% each year. There is nothing in the agreement that provides for caps for any years thereafter. As a result consistent with the Company's commitment it must pay for any increase needed in 2018 and thereafter to maintain the agreed upon insurance program. . . .
>
> . . . . Fortunately for the PG, it appears that the increase for 2018 is going to be 5%. However, regardless of the amount of the increase, that obligation rests squarely with the Post-Gazette.
>
> Any unilateral change to the contractual terms obviously would be an issue which we will deal with in an appropriate manner. If you have questions please don't hesitate to contact me. [Emphasis in original.]

The PG's Manager Guest responded to Attorney Pass in a letter dated November 15, 2017. In the letter, Guest stated that the "Welfare Fund is reserving the right to continue to provide health insurance coverage under a reduced benefit structure if the Company does not pay the requested 5% increased contribution rate . . . beginning January, 2018." Guest then noted that "Unfortunately, under the expired collective-bargaining agreements, any proposed increase by the Welfare Fund must be based upon the plan design effective January 1, 2015, unless the parties agree otherwise." Guest then told Pass:

> We respectfully disagree with your assertion that the Company must pay for any increases assessed by the Welfare Fund for 2018 and thereafter. The Company does not believe the expired collective-bargaining agreements for the Unions you represent address Welfare Fund contributions for 2018 or thereafter.
>
> We recognize our obligations under law to continue to pay the current contribution rate, which is the status quo. However, because of the positions taken by the Welfare Fund, we again request to meet to address these developments. Time is of the essence because the Welfare Fund will impact our employees' insurance coverage in 2018.
>
> Please contact me to arrange a date and time to meet separately with each Union

Pass responded to Guest by letter dated November 20, 2017. In his letter he asserted that "the law is quite clear and unequivocal that the maintenance of the status quo requires the Employer to continue what they promised, and that is to provide the health insurance program they currently have." In response to Guest's request to meet over the health insurance contributions, Pass responded that

> "[a]s always, all of the named Unions are more than willing to meet with you at any mutually agreeable time. Please understand however that none of the Unions are interested in bargaining over one particular subject. A new agreement entails more than the health insurance program. As you know, the Employer has put on the table a new health insurance program [in] which the Unions have little interest. Nevertheless, we are always willing to discuss any issue that is a mandatory subject of bargaining. . . .
>
> . . . . As you know, there are additional meetings being scheduled between your team and the various Unions, and they will be able to discuss these issues, including the health insurance, at each of the negotiating sessions they participate in. . . .
>
> . . . . Finally, so there is no ambiguity of positions, please advise, absent mutual agreement to do otherwise, will the Employer pay the necessary premiums to maintain the current health insurance program through the Western Pennsylvania Health and Welfare Fund beginning January 2018? [Emphasis in original.]

Attorney Pass, along with the Guild representatives met with the PG's Attorneys, Michael Oesterle and Richard Lowe (and perhaps Guest), for a regularly scheduled meeting on November 22. As Pass testified, at that meeting there was a "vigorous discussion about the fact that they were not going to be paying any increase to our health insurance that we have under the [Fund] contract to keep it in place." The Union position, as articulated by Pass was "that we had agreed to a schedule [of] benefits and our position was that those scheduled benefits are your obligations to maintain." Indeed, Pass told the PG that "[y]our caps [on increases] were for only '16 and '17. There were no caps thereafter. That was our position and . . . there was a schedule of benefits that had to be and we said that in the agreement." The union position and proposal was that the PG "maintain those benefits." Attorney Lowe, for the PG, made it clear that he did not agree. Pass proposed that the Union would pay the 5 percent increase if the PG granted the employees a 7.5 percent "wage increase right now." According to Pass, the PG did not respond—and did not agree—to this. Lowe told Pass that "he would have another discussion with the [F]und to see what could be done and he would let us know his answer by December 12."

On December 12, Pass met again with Attorney Lowe, and other PG representatives, this time at a meeting with the Teamsters Union, although, as noted above, Pass represented all the Unions with regard to health care coverage issues. At this meeting Pass reiterated his view that the PG had to pay the health insurance increase. Lowe told him "We're not interested in paying." Pass reiterated his proposal that the Union would pay the 5 percent increase if the employees received an imme-

diate 7.5 percent wage increase." Lowe indicated he would continue talking to the Fund.

The PG did not pay the increased Fund contribution for or after January 1, 2018. It continued to contribute at the 2017 monthly level. In January 2018, the Fund notified the employees that it had it had "modified the medical benefit plan applicable to Post-Gazette participants" by increasing the annual deductible beginning April 1, 2018, for single and family participants "in order to correspond the plan coverage to the contribution level provided under the Post-Gazette." The Fund stated that these actions

> were necessitated when the Post-Gazette did not pay the premium increase for 2018. Effective January 1, 2018, the Trustees approved a 5% increase in the premium cost in order to maintain the 2017 level of benefits for Plan PG. The 2017 premium rate was $1,354.97 per month, the 2018 rate needed to maintain the benefit level is $1422.49 per month, an increase of $67.52 per month per member.

Pass attended subsequent bargaining sessions in January and February. No resolution of the dispute between the Unions and the PG over the health care coverage was reached. The PG's position was that the Unions should accept the new health care proposal that the PG proposed as part of a successor labor agreement. There was no agreement reached. The Fund increased employee deductibles under the plan effective April 1, 2018, from $850 to $1100 for single coverage, and from $1700 to $2200 for family coverage.[12]

ANALYSIS

1. The statutory duty to maintain the status quo requires the PG to continue to pay the annual increase in the Fund contribution rate

The General Counsel alleges that the PG's failure to pay the annual increase in Fund contribution rates for employee health care coverage on January 1, 2018, as it had under the terms of the 2014 agreements in 2016 and 2017, and which resulted in a reduction of employee health care benefits in April 2018, constituted an unlawful unilateral change in violation of Section 8(a)(5) and (1).[13]

It is settled that—with exceptions not relevant here—while parties negotiate a successor collective-bargaining agreement the employer must maintain the status quo in terms and conditions of employment until the parties reach agreement or a valid bargaining impasse. *Marina Del Rey Hospital*, 363 NLRB No. 22, slip op. at 3 (2015); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (footnote omitted), enfd. mem. 15 F.3d 1087 (9th Cir. 1994). Accord *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995); *Intermountain Rural Electronics, Inc.*, 305 NLRB 783, 786 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993).

The genesis for this rule is the Supreme Court's recognition that a fundamental corollary of the statutory duty to bargain is that—as much as a flat refusal to negotiate—"an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5), for it is a circumvention of the duty negotiate which frustrates the objectives of § 8(a)(5) as much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Such "[u]nilateral action by an employer . . . must of necessity obstruct bargaining, contrary to the congressional policy." *Katz*, supra at 747.

Under Section 8(a)(5) "most terms and conditions of employment are not subject to unilateral change." *Litton Financial Printing v. NLRB*, 501 U.S. 190, 206 (1991). After the expiration of contractual obligations, these terms and conditions are "no longer agreed-upon terms; they are terms imposed by law, at least so far as there is not unilateral right to change them." Id. This statutory requirement exists as to any employer action on a mandatory subject of bargaining that is "an established practice and a term and condition of employment." *Daily News of Los Angeles*, 315 NLRB 1236, 1237–1238 (1994), enfd. 73 F.3d 406, 411 (D.C. Cir. 1996). It is undisputed that employer contributions to employee fringe benefit funds are a mandatory bargaining subject. See *N.D. Peters & Co.*, 321 NLRB 927, 928 (1996); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986).

The unfair labor practice inquiry is focused on whether there is a change in existing employment conditions, as "'[t]he vice involved in [a unilateral change] is that the employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge."' *Daily News of Los Angeles*, 315 NLRB at 1237 (bracketing added) (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (court's emphasis)), enfd. 73 F.3d 406 (D.C. Cir. 1996) (finding that discontinuance of discretionary merit raises constituted unlawful unilateral change).

However, it is important to note that a prohibited "change" can take many forms. The 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." *Daily News of Los Angeles*, 315 NLRB at 1237. In the *Daily News of Los Angeles*, the Board endorsed and quoted from the Fifth Circuit's decision in *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (1970):

> The cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation is that the employer has changed the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge.
>
> . . . .
>
> In other words, whenever the employer by promises or by a course of conduct has made a particular benefit part of the es-

[12] The PG attacks Pass' credibility as to his testimony regarding the parties' discussions at the November-February meetings. I note that Pass' testimony is unrebutted, even though two of the Respondent's attorneys who were identified as being in meetings with Pass were present throughout the hearing in these cases. The Respondent did not call them or any other witness to testify about these November-February meetings. I credit Pass' unrebutted testimony.

[13] An employer's violation of Sec. 8(a)(5) of the Act is also a derivative violation of Sec. 8(a)(1) of the Act. *ABF Freight System*, 325 NLRB 546 fn. 3 (1998); *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956).

> tablished wage or compensation system, then he is not at liberty unilaterally to change this benefit either for better or worse during . . . the period of collective bargaining. . . .
>
> In our view, the standard set forth in *Dothan Eagle*, which looks to whether a change has been implemented in conditions of employment, captures best what lies at the heart of the *Katz* doctrine. It neither distinguishes among the various terms and conditions of employment on which an employer takes unilateral action nor does it discriminate on the basis of the nature of a particular unilateral act. It simply determines whether a change in any term and condition of employment has been effectuated, without first bargaining to impasse or agreement, and condemns the conduct if it has.

Daily News, 315 NLRB 1237–1238 (quoting, *Dothan Eagle*, 434 F.2d at 98 (emphasis in original)).

As the Court of Appeals explained, enforcing the Board's decision in *Daily News of Los Angeles*:

> it makes absolutely no difference under *Katz* whether the change at issue adds to or subtracts from employees' wages, or whether it institutes a new employment policy or withdraws one that already exists. Thus, in some circumstances it will be an unfair labor practice to grant unilaterally a wage increase, and . . . . in other circumstances it will be an unfair labor practice to deny unilaterally a wage increase. The Act is violated by a unilateral change in the existing wage structure whether that change be an increase or the denial of a scheduled increase. . . . It cannot be doubted that, under the prevailing case law from the Supreme Court, the circuit courts, and the Board, the relevant inquiry here is whether any established employment term on a mandatory subject of bargaining has been unilaterally changed.

Daily News of Los Angeles v. NLRB, 73 F.3d 406, 411 (D.C. Cir. 1996) (first ellipses by court; internal quotation omitted).

In this case, the decisive issue is whether the Fund's annual contribution rate increases, which were required to be paid under the terms of the 2014 Agreement, were themselves terms and conditions of employment that must be continued during bargaining for a successor agreement. The General Counsel and the Unions say yes, the PG says no. The PG contends that by continuing to pay the 2017 Fund contribution rate in effect when the agreements expired (or were temporarily extended) it was maintaining the status quo. It contends that it was free to ignore the Fund's 2018 annual contribution rate increase.

The problem with this defense is that it is at odds with 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. These are not always the same thing.

As the D.C. Circuit Court of Appeals has pointed out in response to an argument much like that mounted by the PG here, an employer cannot "define the status quo by taking a snapshot . . . at the moment the [2014] CBA expired." Rather "the terms of the expired agreement define the post-expiration status quo . . . not . . .[t]he . . . circumstances at the time of expiration." *Wilkes-Barre Hospital v. NLRB*, 857 F.3d 364, 374 (D.C. Cir. 2017) enforcing *Wilkes-Barre Hospital*, 362 NLRB No. 148 (2015) (finding violation after labor contract expired and employer refused to continue to increase employee wages based on longevity-based wage increases that were set forth in the contract). Accord, *Intermountain Rural Electric Ass'n*, 305 NLRB 783, 784–785 (1991) (Board finds failure to pay increased medical and dental insurance premium rates was unlawful alteration of employee terms and conditions of employment and Board rejects judge's approach that "focuses narrowly upon the Respondent's preexisting financial obligations" at contract expiration); enfd. 984 F.2d 1562, 1567 (10th Cir. 1993) ("preserving the status quo required [employer] to pay 100% of the increased health and dental insurance premiums upon expiration of the Agreement"); *Finley Hospital*, 362 NLRB 915 (2015) (finding violation in employer's refusal to continue anniversary wage increases after expiration of one-year collective-bargaining agreement that provided for annual wage increase for each employee his/her anniversary date for the duration of agreement); enft. denied in relevant part, 827 F.3d 720 (8th Cir. 2016).

As the foregoing cases demonstrate, there is nothing foreign to the statutory status quo obligations under the Act to requiring an employer to continue to provide increases that had been required under a now expired agreement, precisely in order to avoid being found to have changed the terms and conditions of employment. The issue is never whether an employer action is a "continuance or a discontinuance, or an increase or a decrease." As far as the duty to bargain is concerned, this is "a distinction without a difference." *Finley Hospital*, 362 NLRB 915, 919. The issue is always whether "the employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge."' *Daily News of Los Angeles*, 315 NLRB at 1237.

In this case, the conclusion that the increase in contribution rates was a term and condition of the contracts that must be continued under the Act is clear from a review of the terms and operation of the 2014 Agreements.

The 2014 Agreements establish the Fund's plan as the employee health care coverage effective January 1, 2015.[14] The Fund's schedule of benefits that employees are to receive under the new plan was attached to and entered into evidence as part of the agreements. The 2014 Agreements set a precise dollar amount for the PG's funding obligation for calendar year 2015.[15] The 2014 Agreements do not specify a set predetermined amount for the contribution rate for the remaining years of the contract. Rather, the Agreements provide for the Re-

[14] "(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 than 30 hours per week."

[15] "(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."

spondent to meet the Fund's annual contribution increases in 2016 and 2017, capped at 5 percent each year. There was no discretion for the Respondent—up to 5 percent it had to pay the annual increases denoted by the Fund.[16] The Respondent admits this.[17] There is also no dispute that the Respondent met these contractual obligations. The increases had to be based on the Fund maintaining the same plan design as in 2015. The sole limitation on the Respondent's obligation to pay the Fund's rate increases was that for 2016 and 2017 the portion of the contribution increase the PG was required to pay was not to exceed a 5 percent annual increase.

Thus, the language and operation of the agreement prescribes as a term and condition of employment under the contract that during the term of the contract the Respondent was required to pay the annual Fund increases (up to 5 percent). Accordingly, by failing to meet the funding increase (up to 5 percent) prescribed by the Fund in 2018, the PG 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. By refusing to continue the increase the PG did not continue—but rather, altered—the status quo in terms and conditions.

This conclusion stands by itself, based solely on the terms and operation of the 2014 agreements regarding the contribution rate increases and the admitted contractual obligation of the Respondent to pay these contribution rate increases during the term of the agreement. In addition, the conclusion is forcefully buttressed by the fact that the health care coverage schedule of benefits attached to each 2014 agreement could only be maintained with contribution rate increases. These benefits were amended by the parties beginning in calendar year 2016, to accommodate a Fund contribution rate increase that exceeded the cap, but the schedule of benefits—as amended—was part of the terms and conditions of employment when the 2014 agreements expired (or were temporarily extended) at the end of March 2017.

The statutory duty to maintain and not unilaterally change the status quo in employee health care coverage while negotiating for a new agreement is axiomatic. In this case, that statutory duty would be meaningless if the Respondent's duty to continue the contribution rate increases—contractually mandated in 2016 and 2017—was not a term and condition of employment and could be unilaterally altered.

Finally, it is notable that this case is very much like that of *Intermountain Rural Electric Assn.,* 305 NLRB 783 (1991). There, the labor agreement, which was in effect from December 1, 1987, through November 30, 1988, provided for employee medical and dental insurance coverage under a variety of available plans, with the employer's "maximum contribution to any of the medical insurance plans in effect for its employees covered by this Agreement" capped at "one hundred percent (100%) of the Blue Cross and Blue Shield Insurance Company premiums.'' The agreement stated that the employer's contribution "shall not exceed" the BC/BS premium. When the contract expired on November 30, and the health care insurers raised their premiums on December 1, the employer refused to increase the amount it had been paying for premiums under the old plans and forced employees to make up the difference.

The administrative law judge dismissed the complaint, reasoning, as to the status quo issue, "that because the Respondent did not change the amount of its medical premium contributions and continued to pay the same amount it had paid prior to the contract's expiration, there was no change in the status quo as to that premium." The judge interpreted the contract's reference to a "maximum contribution" with respect to premiums and the limiting words "shall not exceed" as limiting "the Respondent's obligation of no more than the exact dollar amount of the Blue Cross/Blue Shield rates in effect from December 1987 through November 1988." The judge found that "[b]ecause the Respondent continued to provide the same dollar amount toward medical insurance premiums in December, he found that the Respondent made no change with respect to such insurance contributions."

The Board reversed, in reasoning worth repeating here:

> There is no question that contractually provided health plans survive contract expiration and cannot be altered without bargaining. Here the contractual medical . . . plans were provided at no cost to employees, but with a limitation upon the Respondent's maximum financial liability on medical premiums. The judge's approach focuses narrowly upon the Respondent's preexisting financial obligations, i.e., the amount of money it paid for the expiring medical and dental plans, but completely disregards employees' expectations, i.e., medical and dental coverage under noncontributory insurance plans, and the absence of any limit on the Respondent's liability that would preclude any possible increase. Although the contract language relating to medical insurance clearly refers to a maximum, no particular dollar figure is identified. Instead, the Respondent's maximum liability is described as not to exceed 100 percent of the Blue Cross/Blue Shield rates. Thus, when the dollar amount of those rates increases, so too does the Respondent's maximum dollar obligation. . . . Accordingly, by paying only the premium rates which had been in effect under the previous medical and dental plans and by making [employees] cover the higher costs, the Respondent unlawfully altered employees' terms and conditions of employment.

Id. at 784–785.

Here, the PG is engaged in precisely the conduct condemned by the Board in *Intermountain Rural Electric*. It "focuses narrowly" on its financial obligations when the contract expired and ignores that its obligation is not "a particular dollar figure" but a rate set by an outside source of health care. "[W]hen the

[16] "(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."

[17] R. Br. at 6 ("For 2016, the bargaining agreements required Respondent to pay up to a 5% increase over the 2015 contribution rate"; "For 2017, the Expired Contracts required that any contribution increase up to 5% would be paid by Respondent").

dollar amount of those rates increases, so too does the Respondent's maximum dollar obligation." That is the way it worked under the terms of the contract, and that is the Respondent's statutory obligation thereafter while the parties negotiate a successor agreement. As in *Intermountain Rural Electric*, the Respondent's refusal to increase what it pays, "unlawfully altered employees' terms and conditions of employment."

As to its arguments, the Respondent is quite clear as to the source of its objection to continuing the contribution increases in 2018. But its 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.

The Respondent repeatedly stresses that it never agreed to pay the post-contract contribution increases, in the 2014 Agreements or elsewhere.[18]

But this is beside the point. The Respondent confuses this case, which is premised on its statutory obligation to maintain the status quo, with one based on a contractual duty that survives contract expiration. As the Supreme Court has explained,

> The difference is as elemental as that between *Nolde Bros.* and *Katz*. Under *Katz*, terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them."

Litton, 501 U.S. at 207, referencing *Nolde Brothers v. Bakery Workers*, 430 U.S. 243 (1977) (contractual duty to arbitrate severance pay may survive contract termination when dispute is over an obligation arguably created by expired contract).

The issue here is not whether the General Counsel can point to language in the 2014 Agreements showing that the Respondent agreed to pay annual increases in 2018 and thereafter. Rather, the issue is whether the Respondent can point to language showing that the parties intended to *preclude* the Respondent from continuing the status quo of contribution increases in 2018 and thereafter. Unless it can show that the parties intended for it to be free of the statutory duty to maintain this status quo obligation, the Respondent is required to continue paying the contribution rate increases (until impasse or agreement). "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 1212, 1217.

In fact, the Respondent concedes that the 2014 Agreements are absolutely silent as to what happens with contribution levels after 2017. (R. Br. at 5) ("The agreed-to provision did not address health insurance contributions for 2018 or any period after the expiration of the bargaining agreements"). As it admits, there is no language at all in the agreements limiting the amount the Respondent must pay in 2018, and thereafter, to what it paid in 2017.

Moreover, the Respondent agrees that it must continue to pay the 2017-level of contributions, thus recognizing that nothing in the 2014 Agreements *prohibits* post-expiration contributions to the Fund.[19] But more pertinently, and just as surely, no reading of the 2014 Agreement can support the view that by its terms it *precludes* continuation after 2017 of the annual contribution rate increases. There is no basis on which the Respondent can claim that terms of the 2014 Agreement—or anything else—reflect an agreement that the Respondent *does not* have to continue the status quo of paying the annual increase set by the Fund.

Notably, the durational clause of the 2014 Agreements does not do it. 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.

The 5 percent contractual cap that protects the PG from unduly large annual increases for the specific years of 2016 and 2017, does not do it. That cap is a shield for the years 2016 and 2017; it cannot be turned into a sword that alchemically bars the Respondent from paying *any* increase to maintain the status quo after 2017.

The Respondent's reliance on *Hempstead Lincoln Mercury Motors Corp.*, 351 NLRB 1149 (2007), is misplaced—although instructive. 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 to the pension fund each year. One year it was $175 per employee per month. The next, $0.00. The year after that a $50 monthly increase from the year before last was prescribed requiring payments of $225 per employee. When the agreement expired the employer continued paying $225, and refused some months later to make an increase in contributions. The Board agreed that the employer was not required to meet (or set aside in an escrow fund) the increased contributions. But here, unlike in *Hempstead*, the contract provides for an undetermined annual increase in the base amount—capped at 5%--in each successive

[18] See, R. Br. at 11 ("The clear and unambiguous terms of the Expired Contracts do not require Respondent to pay any 2018 Fund contribution rate increase. Therefore, Respondent was not obligated under the terms of the Expired Contracts to pay that rate increase"); R. Br. at 12 ("Here, none of the Expired Contracts are ambiguous. . . . There is no reference to any obligation to pay for increases in that rate for 2018, or for any period of time after the last increase took effect on January 1, 2017"); R. Br. at 15 ("Given that there was no written agreement allowing for unilateral Fund contribution rate increases after 2017, Respondent did not violate Section 8(a)(5) by continuing to make contributions at the 2017 Fund rate"); R. Br. at 20–21 ("Here, the dispute is solely one of contract interpretation. . . . Respondent is relying on the clear and unambiguous terms of the Guild and Operating Engineers' Expired Contracts as the basis for its argument that those contracts do not require it to pay the 2018 Fund contribution rate increase"). R. Br. at 33 ("None of the terms of any of the Expired Contracts require Respondent to pay the 2018 Fund contribution rate increase").

[19] R. Br. at 13 ("Respondent remains obligated to pay the 2017 contribution rate which was in effect on March 31, 2017, when the Contracts expired and which became the status quo"). See also, Tr. 15; Jt. Exhs. 5(b), 6(b), 7(b), 8(b), and 9(b), 10(b), and 13.

year of the contract, based on the outside Fund's establishment of a new contribution rate. By contrast, in *Hempstead* the employer's dollar amount of contributions was set by contract and predetermined for each year. In our case, the increase *is* the agreement (up to 5 percent for 2016 and 2017). The increase is the status quo. *Hempstead* shows only that the PG has the wrong contractual language to underlie the statutory status quo argument it pursues.

The only language in the 2014 Agreements advanced by the PG as language allowing it to unilaterally cancel its obligation to continue the status quo in 2018 (or any time after the labor agreements expired) is the language stating that it is not "liable for any other payment to the Fund, other than as stated above." But any surface appeal of that argument evaporates when the language is read in the context in which it appears in the agreements:

> (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.]

Thus, the PG's "[non]liability" "for any other payment to the Fund" is part of two sentences devoted to limiting the PG's liability for handling employee portions of the contributions to the Fund "in excess of the 5%." This no-additional-liability language simply is not addressed to the issue of post-2017 contributions.

Accordingly, absent impasse or agreement, and 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 January 2018, it altered the status quo of the employment conditions.

Finally, I note that in concluding that the 2014 Agreements establish terms and conditions that make the annual increases part of the status quo, I do not reach the General Counsel's alternative argument (GC Br. at 23–25) that the duty to continue the annual increases in contributions became a term and condition of employment through a "traditional past practice analysis." In my view, this argument is superfluous. The Respondent admits that it was contractually required during the term of the 2014 Agreements to pay up to a 5 percent annual increase to the Fund. R. Br. at 6 ("For 2016, the bargaining agreements required Respondent to pay up to a 5% increase over the 2015 contribution rate"; "For 2017, the Expired Contracts required that any contribution increase up to 5% would be paid by Respondent"). As set forth, above, on that basis the annual increases were terms and condition of employment, there is no need to consider a "traditional past practice" analysis.

2. Various contractual defenses (contract coverage, waiver, sound arguable basis) and 2014 bargaining

The Respondent also asserts a defense based on the "contract coverage" analysis that some courts of appeals have adopted to analyze contractual defenses to refusal to bargain allegations.

Of course, as the Respondent recognizes, 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. *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). The Respondent—reasonably—does not even mount that argument, as it is a non-starter on the facts here. As the Board explained in *Graymont Pa, Inc.*, 364 NLRB No. 37, slip op. at 2–3 (2016):

> This [clear and unmistakable waiver] standard--endorsed by the Supreme Court in *NLRB v. C & C Plywood*, 385 U.S. 421 (1967)—"requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena*, supra at 811. In order to find a waiver based on contractual language, that language must be "sufficiently specific." *Johnson-Bateman Co.*, 295 NLRB 180, 189 (1989). Further, while "[w]aiver of a statutory right may be evidenced by bargaining history, [ ] the Board requires the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter." Id. at 185. As the Board explained in *Provena*, supra:

> The waiver standard . . . effectively requires the parties to focus on particular subjects over which the employer seeks the right to act unilaterally. Such a narrow focus has two clear benefits. First, it encourages the parties to bargain only over subjects of importance at the time and to leave other subjects to future bargaining. Second, if a waiver is won--in clear and unmistakable Language--the employer's right to take future unilateral action should be apparent to all concerned. [Id at 813.]

In this case, nothing in the 2014 agreements approaches this standard. As discussed above, no language in the 2014 agreements evidences an intent of the parties to not pay rate increases after contract expiration, or after 2017.

However, the Respondent's argument would fail even if the Board applied the PG's preferred "contractual coverage" analysis. As discussed, supra, there is simply is no language in the agreement limiting the Unions' statutory rights, no language covering the subject of the Respondent's right to cease maintaining the status quo in 2018 or beyond. The 2014 agreements are silent as to what happens postexpiration. 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. Here, the Respondent's "contract coverage" defense will fail before a court just as certainly as the employer's similar defense failed before the D.C. Circuit in *Wilkes-Barre Hospital*, supra at 376–377. It can point to no language covering the topic. Silence does not defeat the Unions' statutory claims.

The Respondent is also wrong in its claim that, as to the Guild and Operating Engineers' agreements that were extended and remain in effect, it may rely on the "sound arguable basis" standard to justify its unilateral change of the status quo. The Respondent misconceives the General Counsel's claim.

The Board applies the "sound arguable basis" defense in 8(a)(5) cases alleging a "midterm modification claim, i.e., a failure to abide by a collective-bargaining agreement in violation of section 8(d) of the Act. Cases alleging a violation of Section 8(d) of the Act are focused on allegations that the employer has modified and failed to abide by the terms of the collective-bargaining agreement. In 8(d) cases, "[w]here an employer has a 'sound arguable basis' for its interpretation of a contract and is not 'motivated by union animus or … acting in bad faith,' the Board ordinarily will not find a violation. In such cases, there is, at most, a contract breach, rather than a contract modification." *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005) (footnotes, internal quotations, and citations, omitted), enfd. 475 F.3d 14 (1st Cir. 2007). Essentially, these cases are best understood as instances in which the Board effectively defers to another forum to determine the meaning of the contract.

However, at least since the Board's decision in *Bath Iron Works Corp.*, 345 NLRB 499 (2005), it is pellucid that the "sound arguable basis" standard does not apply, where, as here, the General Counsel alleges an unlawful unilateral change in the status quo and not an 8(d) mid-term modification violation.[20]

I note that the Respondent appears to recognize and endorse the distinction—See R. Br. at 10—citing cases for the proposition that an 8(d) contract modification violation may not be found where only an unlawful unilateral change theory was litigated, and vice-a-versa. This is very much the point. It is well-settled that the General Counsel is the master of the complaint. Here, he has not pursued an 8(d) midterm modification claim, and the "sound arguable basis" defense is not relevant.[21]

Finally, beyond the contracts, the PG does not offer any other noncontractual waiver evidence supporting a claim that during bargaining "the matter at issue . . . [had] . . . been fully discussed and consciously explored during negotiations" and that "the union [had] consciously yielded or clearly and unmistakably waived its interest in the matter." *Johnson-Bateman Co.*, 295 NLRB at 185. To the contrary, the evidence precludes a finding of waiver on such grounds.

Thus, in October 2014, when questions arose between the parties over how the health care coverage cap would operate, the PG provided the Unions with an Excel spreadsheet—titled "PG Determination of share of benefit costs–2015-2017"—showing hypothetical projected contribution rate increases not only for the years of the contract—2015, 2016, and 2017, but also for 2018. This spreadsheet was created by the PG's benefit consultant, and vetted internally by PG representatives before being provided to the Union as an explanation for how the cap would affect future contribution rates. At a minimum, this spreadsheet necessarily precludes any claim that there was a conscious or clear and unmistakable waiver of the Unions' statutory right to have the increases continue past 2017, while the parties bargained new agreements.[22]

3. The waiver by inaction defense in fall 2017 and early 2018

The Respondent contends (R. Br. at 28–29) that the Unions' waived the right to bargain over the PG's failure to pay the 2018 contribution increase by failing to adequately respond when the PG announced its intentions.

[20] *Bath Iron Works*, supra at 501 ("In 'unilateral change' cases, where all that is alleged is that a union had a statutory right to bargain before an employer's proposed change, the Board has considered whether the union has clearly and unmistakably waived its right to bargain over the change," but that "is not the correct standard for an allegation of an 8(d) contract modification"); *Baptist Hospital of East Tennessee*, 351 NLRB 71, 72 fn. 5 (2007) (applying clear and unmistakable waiver standard to find unilateral change lawful, and finding that while "[a]t various times during the litigation of this case, the General Counsel appeared to make the argument that the Respondent's actions 'modified' the contract, in violation of Sec. 8(a)(5)—Sec. 8(d) . . . the General Counsel [is] master of the complaint" and "did not clearly pursue an 8(d) contract modification theory in this case"); *Finley Hospital*, supra at slip op. 5 fn. 8 ("under current Board law, the 'sound arguable basis' standard invoked by the Respondent applies only where the issue is whether the employer made a *mid-term* unilateral modification of the collective-bargaining agreement") (Board's emphasis).

[21] The ramifications of the decision to prove a unilateral change case, and not a contract modification case, include a more favorable standard for the General Counsel, but also limitations in terms of remedy. "The remedy for a [an 8(d)] contract modification is the more substantial one of ordering adherence to the contract for its terms; the remedy for a unilateral change permits the restoration of the change after bargaining to an impasse." *Bath Iron Works*, supra.

[22] 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 posttrial 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.

This defense is a non-starter, for multiple reasons. For one, given that it was in the midst of bargaining for a new collective-bargaining agreement, the Respondent was not privileged to make a discrete unilateral change. See, *Intermountain Rural Electric Association* 305 NLRB 783, 786 (1991) (distinguishing a union's duty to request bargaining in response to announced intentions to make a change in periods of non-negotiations from the situation where parties are already engaged in negotiations for a collective-bargaining agreement). As the Board explained in *Intermountain Rural Electric*:

> When parties are engaged in negotiations for a collective-bargaining agreement, however, their obligations are somewhat different. Because the parties are in fact bargaining on various proposals, there is no need for additional requests for bargaining on those proposals. During negotiations, a union must clearly intend, express, and manifest a conscious relinquishment of its right to bargain before it will be deemed to have waived its bargaining rights. Absent such manifestation by the union, an employer must not only give notice and an opportunity to bargain, but also must refrain from implementation unless and until impasse is reached on negotiations as a whole. [footnotes omitted.]

More specifically, an increase in health care premiums or contributions does not justify a unilateral change. *Oak Hill School*, 360 NLRB 359, 403 (2014). There is no exception for routine increases in health care costs to the requirement that an overall impasse must be reached before changes in employment conditions can be implemented. *Oak Hill*, supra at 403 (absent specified exceptions, "During negotiations for a collective-bargaining agreement, an employer may not unilaterally change any terms or conditions of employment without having bargained to impasse for the agreement as a whole"). Here, there is no claim of overall impasse, or valid claim of an applicable exception to the requirement of an overall impasse before implementation.[23]

Second, there is no evidence that a continuation of 2017 contribution-rates and refusal to provide increases was part of the Respondent's bargaining proposal for a new agreement. Were there an overall impasse or other exception justifying implementation, only changes reasonably comprehended within the Respondent's bargaining proposal could be implemented. *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 735 (9th Cir. 1981).

Third, even as to the piecemeal issue of the Respondent's continued funding of the Fund's 9PG health care plan, there is no evidence of waiver on this record. To the contrary, Attorney Pass' unrebutted testimony is that he made a proposal to permit the Respondent to avoid the contribution increases if the Respondent provided employees with a pay raise. Pass received no definitive answer from the Respondent's representatives on this proposal until long after January 2018 when the increased payments were due to the Fund. This is the opposite of a waiver of bargaining by a union.

4. The Section 302 defense

The Respondent contends throughout its brief that Section 302 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186, prohibits it from paying the increased contribution rate to the Fund, and, therefore, that it should not be required to do so under the Act.

Section 302(c)(5) of the LMRA requires, inter alia, that the basis for payments to an employee benefit trust fund be "specified in a written agreement with the employer." The PG contends that there is no written agreement.

However, the applicability of the Board's status quo doctrine to employee trust funds governed by Section 302 has long been recognized by the Supreme Court. *Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 6 (1988). "Consequently, any unilateral change by the employer in the pension fund arrangements provided by an expired agreement is an unfair labor practice.'" Id.

Numerous courts have held that the Section 302 "written agreement" requirement is satisfied by a collective-bargaining agreement, including an expired one. See, e.g., *Cibao Meat Prods. v. NLRB*, 547 F.3d 336 (2d Cir. 2008) ("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") (citations omitted); *Dugan v. R.J. Corman Railroad*, 344 F.3d 662, 668 (7th Cir. 2003) ("the cases hold that an expired agreement—one that has no contractual force—nevertheless can satisfy the statutory requirements [of Section 302], in part because even after 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") (internal quotations omitted); *Alaska Trowel Trades Pension Fund v. Lopshire*, 103 F.3d 881, 883 (9th Cir.1996) ("The requirement of a written agreement may be satisfied by a collective-bargaining agreement even after it has expired. . . . An expired § 9(a) agreement satisfies the § 302(c)(5)(B) writing requirement in part because even after 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

[23] Citing *Stone Container Corp.*, 313 NLRB 336 (1993), the Respondent suggests that the "*Stone Container"* exception privileges it to unilaterally change the practice of contribution funding increases without bargaining to an overall impasse. R. Br. at 32 fn. 19. However, the *Stone Container* "analysis is applicable only to first contract situations, where the parties have not yet established their own practices through contract that they can rely upon in the future." *Oak Hill School*, 360 NLRB 359, 409 (2014). It does not apply to "negotiations for successor contracts, as here." Id. In this case, the payment of annual contribution increases was established as a term and condition of employment through the 2014 Agreements. It is a part of the status quo and subject to the rule on overall impasse. Contrary to the suggestion of the Respondent (R. Br. at 32 fn. 19), the requirement that parties maintain the status quo until overall impasse is not something the General Counsel is required to plead, it is governing precedent. Indeed, a claim of impasse justifying a unilateral change is an affirmative defense, though not one pled by the Respondent.

until a new agreement or an impasse is reached"); *Peerless* Roofing, 641 F.2d at 736 (rejecting employer's argument and noting that "the collective-bargaining agreement itself survives its expiration date for some purposes. During negotiations, the employer is required by section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1976), to maintain the status quo as to wages and working conditions, even following the expiration date of the agreement. If the employer's obligation to make trust fund payments were terminated by the expiration of the agreement, the union would never have an opportunity to bargain over those contributions. This result would not advance national labor policy as articulated in the National Labor Relations Act").

Notably, the Respondent agrees that it lawfully made contributions to the Fund based on the 2014 Agreements during the term of the 2014 Agreements—and after the expiration of the 2014 Agreements (at 2017 rates). In other words, the Respondent recognizes that the 2014 Agreements satisfy Section 302's requirements even after expiration. Thus, the Respondent's Section 302 dispute is simply with the Board's application of the status quo doctrine. But the point of the doctrine is that based on the written terms and conditions of the 2014 Agreements, annual increases *are the* required status quo employment condition. Thus, this case—including 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). If the status quo is correctly applied to find that the contribution increase is an employment condition under the terms of the expired agreement, then the Respondent's Section 302 argument disappears.

Section 302's "purposefully rigid structure . . . is design[ed] to insure that employer contributions are made only for proper purposes and that fund benefits reach only proper parties." *Bricklayers, Masons and Plasterers International Union, Local 15 v. Stuart Plastering Co.,* 512 F.2d 1017, 1025 (5th Cir. 1975). "Strict compliance . . . is not an end in itself but a means of ensuring" that there is no corruption in the form of companies making payoffs to unions through trust fund payments, or that union officials misuse these funds. *National Stabilization Agreement of Sheet Metal Industry Trust Fund v. Commercial Roofing & Sheet Metal Trust Fund*, 655 F.2d 1218, 1226 (D.C. Cir. 1981). Courts recognize that employers "cannot invoke section 302 of the LMRA as a loophole through which to escape obligations to the Funds." *Bricklayers Local 21 of Illinois Apprenticeship and Training Program v. Banner Restoration, Inc.*, 385 F.3d 761, 772 (7th Cir. 2004).

Here, 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.

5. The Unions' contention that the PG's status quo obligation requires it to fund the existing health care coverage and benefits (without a cap)

The Unions contend that the status quo in increased contribution funding that the Respondent is required to maintain is not limited by the 5 percent cap.

There is much to recommend in this argument. The 5 percent cap in the 2014 agreements are—arguably—expressly stated for the specific years of 2016 and 2017, not as a general term of the agreements. As discussed above, nothing in the agreement limits increases in contribution funding post-expiration, but the cap is expressly for 2016 and 2017. And as the Unions point out, the status quo in employment conditions for unit employees includes maintenance of the schedule of benefits (as amended in 2016) attached to each of the 2014 Agreements and entered into evidence as part of the 2014 Agreements.

However, the case litigated by the General Counsel is a more limited one. In both the complaint and in his brief, the General Counsel contends that "[i]n order to preserve the status quo as required by extant Board law, the Respondent was required to continu[e] paying up to a 5% increase in contribution rates annually to the Fund for employee health insurance." (GC Br. at 20); see also complaint at ¶9(a)-(g) ("Respondent discontinued its practice of paying up to the 5% increase in contributions for [the unit's] health insurance benefits to the [Fund] as set forth under [the relevant article] of the collective-bargaining agreement").

Thus, the violation of the Act alleged by the General Counsel in this case is the failure to pay up to a 5% increase. It is well-settled that the General Counsel is the "master of the complaint and controls the theory of the case." *Fineberg Packing Co.*, 349 NLRB 294, 296 (2007), enfd. 546 F.3d 719 (6th Cir. 2008). Accordingly, "A charging party may not expand the scope of the complaint without the consent of the General Counsel." *Planned Building Services*, 330 NLRB 791, 793 fn. 13 (2000). Thus, the Unions' theory is not one I reach in this litigation.

While the scope of the unfair labor practice alleged is within the control of the General Counsel, it is well settled that a charging party may argue for, and the Board may adopt, a remedy for an unfair labor practice whether or not the General Counsel pursues that remedy. *Kaumagraph Corp.*, 313 NLRB 624, 625 (1994).

In their brief, the Unions attempt to frame their argument that Respondent must pay increases necessary to maintain the current schedule of health care benefits, without regard to the cap, as a as a request for a remedial relief. However, this relief does not follow from the scope of the violation alleged by the General Counsel. As Judge Clifford Anderson explained, in reasoning adopted by the Board, "if a particular violation of the Act is not alleged by the General Counsel and such a violation is necessary for a particular remedy to be invoked then the General Counsel has, by refusing to allege such a violation, precluded the Board from directing such a remedy." *New Breed Leasing*, 317 NLRB 1011, 1019 (1995), enfd. 111 F.3d 1460 (9th Cir. 1997); *ATS Acquisition Corp.*, 321 NLRB 712, 712 fn. 3 (1995), enfd. mem. 127 F3d. 1105 (9th Cir. 1997) ("a charging party is not free to seek remedies contingent on an amendment to the complaint or a theory of the case different from that of the General Counsel").

Accordingly, I reject the Unions' effort to expand the remedy beyond the scope of the unfair labor practice alleged.[24]

[24] Notably, because, as of the close of the record in this case in August 2018, there as yet to be a post-expiration request for an annual

CONCLUSIONS OF LAW

1. The Respondent PG Publishing Co., Inc. d/b/a Pittsburgh Post–Gazette is an employer within the meaning of Sections 2(2), (6), and (7) of the Act.

2. The Charging Party Newspaper Guild of Pittsburgh a/w Communications Workers of America, AFL–CIO, CLC, and its Local 38061 (the Guild) is a labor organization within the meaning of Section 2(5) of the Act, and at all times material the exclusive collective-bargaining representative of the following appropriate unit of the Respondent's employees (the Editorial Unit):

> All employees in the Editorial Department and in all subdivisions of the Editorial Department, excluding those employees provided for in other existing Union Agreements and all Publishers and Associate Publishers, Publisher and Editor-in-Chief, Executive Editor, Editor of the Editorial Page, Managing Editor, Deputy Managing Editor, Senior Assistant Managing Editor, Assistant Managing Editor, City Editor, Sports Editor, Sunday Editor, Technology Systems Editor, Business Editor, Night Operations Manager, Seen Editor, Associate Editor of Opinion Pages, Editorial Cartoonist, and Confidential Secretaries.

3. The Charging Party 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 (the Mailers Union) is a labor organization within the meaning of Section 2(5) of the Act, and at all times material the exclusive collective-bargaining representative of the following appropriate unit of the Respondent's employees (the Mailing Room Unit):

> full-time employees described in the most recent collective-bargaining agreement [Jt. Exh. 1(b)] between the Mailers Union and the Newspaper as:
>
> All employees covered by this Agreement. The words "employee" and "employees" when used in this Contract apply to journeymen and apprentices. It is recognized and agreed that the terms and conditions of employment covering Part-Time mailer employees shall be as set forth in a separate agreement covering such employees.

4. The Charging Party Pittsburgh Typographical Union No. 7, a/w the Communications Workers of America, AFL–CIO, and its Local 14827 (the Typographical Union) is a labor organization within the meaning of Section 2(5) of the Act, and at all times material the exclusive collective-bargaining representative of the following appropriate unit of the Respondent's advertising employees (the Advertising Unit):

> All regular full time and regular part-time employees of the Advertising Department; excluding all other employees, confidential employees, guards, professional and supervisors as defined in the Act, and those specifically excluded.
>
> Specifically excluded from the Advertising Unit is:
> All employees in the Marketing, Research and Promotion Division, including supervision, managerial, confidential, and all other employees, as well as such employees added in the future, are excluded from the Advertising Unit. In addition, the following positions are specifically excluded from the Advertising Unit:
>
> Chief Revenue Officer
> Secretary to Classified Managers
> Advertising Director
> Display Advertising Manager
> Classified Manager
> Advertising Operations Manager
> Classified Real Estate Manager
> Market Research Manager
> Retail Manager
> Classified Recruitment Manager
> Mgr. of Training and Sales Dev.
> Classified Operations Manager
> Database Marketing Manager
> Production Services Supervisor
> Co-Op and Special Sections Mgr.
> Product Design Manager
> Classified Call Center Manager
> Research Analyst
> Online Sales Manager
> Sales Manager—Automotive
> Production Services Manager
> Sales Manager—Real Estate
> New Media Bus. Dev. Mgr. - Online
> Sales Manager—Retail (Territories)
> New Media Bus. Dev. Mgr.—Classified
> Sales Manager—New Business Dev.
> New Media Bus. Dev. Mgr.—National
> Sales Manager—Recruitment
> Executive Assistant to Adv, Director
> Sales Manager—Major/National
> Preprint Distribution Manager
> Sales Supervisor—Major/National
> Retail Territory Sales Manager
> Sales Manager—Digital/Direct
> Classified Automotive Sales Manager
> Production Services Manager
> Quality Control Specialist

5. The Charging Party Typographical Union is and at all times material has been the exclusive collective-bargaining representative of the following appropriate unit of the Respondent's finance employees (the Finance Unit):

> All regular full-time and regular part-time employees of the Financial Department; excluding all other employees, confidential employees, guards, professional and supervisors as de-

Fund contribution increase of more than 5 percent, the General Counsel's more limited case is sufficient—to date—to remedy the existing violations, even under the Charging Parties' view. I do not reach the issue of whether, in the event there are subsequent annual Fund contribution rate increases beyond 5 percent necessary to maintain the existing health care coverage, and the Respondent fails to pay the amount necessary to maintain the existing health care coverage, the Unions could allege and the General Counsel could litigate in a future unfair labor practice case, that the Respondent has violated the Act anew.

> fined in the Act. The following are recognized as being confidential or supervisory employees excluded from the coverage of this Agreement: Controller, Assistant Controller, Office Manager and their confidential secretaries, Accounting Manager, Auditor, Credit Manager, Cashier Manager, Circulation Accounting Supervisor, Advertising Accounting Supervisor, and Payroll Supervisor.

6. The Charging Party 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 (the Delivery Union) is a labor organization within the meaning of Section 2(5) of the Act, and at all times material the exclusive collective-bargaining representative of the following appropriate unit of the Respondent's employees (the Delivery Unit):

> all employees performing the delivery-related work described in more detail in Section 2 (Jurisdiction) of the most recent collective-bargaining agreement between the Delivery Union and the Newspaper. [See, Section 2 of Joint Exh. 1(e).]

7. The Charging Party the 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 (the Pressmen's Union) is a labor organization within the meaning of Section 2(5) of the Act, and at all times material the exclusive collective-bargaining representative of the following appropriate unit of the Respondent's employees (the Pressmen's Unit):

> All journeymen pressmen, paperhandlers, paperhandling pressmen, and apprentice pressmen who work in the Company's pressroom and paperhandling departments.

8. The Charging Party Operating Engineers, AFL–CIO, Local 95 (Operating Engineers), is a labor organization within the meaning of Section 2(5) of the Act, and at all times material the exclusive collective-bargaining representative of the following appropriate unit of the Respondent's operating engineer employees (the Operating Engineers Unit):

> all employees employed by [the Respondent] at its facility located at 2201 Sweeney Drive, Clinton, P A; but excluding guards, office clericals, managerial personnel, confidential personnel, supervisors as defined in the National Labor Relations Act, and all other personnel.[25]

9. The Respondent violated Section 8(a)(5) and (1) of the Act, beginning on or about January 1, 2018, by unilaterally discontinuing to pay up to a 5 percent annual increase in contribution rates to the Western Pennsylvania Western Pennsylvania Teamsters and Employers Welfare Fund, for health care coverage for employees in the above-referenced bargaining units, resulting in a reduction in health care coverage for employees commencing April 1, 2018.

10. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully unilaterally discontinued paying annual increases up to 5 percent in Fund annual contribution rates shall rescind the unilateral change, and before implementing any changes in wages, hours, or other terms and conditions of unit employees, notify and on request bargain with the Unions to a lawful impasse.

Having found that the Respondent unlawfully discontinued increased annual contributions to the Fund, the Respondent shall be ordered to reinstitute payments of annual increases to the Fund and make the Fund and employees whole by making all delinquent Fund contributions on behalf of those employees, including any additional amounts due the fund in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).[26] Further, the Respondent shall be required to reimburse its unit employees for any expenses ensuing from its failure to continue to pay the increased annual contributions to the Fund, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), including all medical expenses that were not covered by the Fund's health care plan as a result of the Fund's reduction in benefits attributable to the Respondent's failure to pay the required contributions. Such amounts should be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.[27]

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted at the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily

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[25] The parties stipulated that on March 9, 2017, the PG and the Operating Engineers tentatively agreed to change the facility address listed in the above-unit description and the change will be incorporated into any successor labor agreement entered into by the PG and the Operating Engineers.

[26] The question of whether the Respondent must pay any additional amounts into the Fund in order to satisfy the "make whole" remedy is appropriately left to the compliance stage. *Merryweather Optical Co.*, supra.

[27] I note that the record suggests that employees were not permitted to directly contribute to the Fund. However, the issue was not directly litigated. Therefore, as a precaution, I include the standard direction regarding reimbursement of employee personal contributions.

communicates with its employees by such means. In the event that during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2018. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Respondent PG Publishing Co., Inc. d/b/a Pittsburgh Post–Gazette, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of its unit employees by discontinuing to pay up to a 5 percent annual increase in contribution rates to the Western Pennsylvania Teamsters and Employers Welfare Fund (Fund), for health care coverage for unit employees, without providing the employees' collective-bargaining representative notice and an opportunity to bargain to a lawful impasse.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of unit employees, notify and, on request, bargain with the Newspaper Guild of Pittsburgh a/w Communications Workers of America, AFL–CIO, CLC, and its Local 38061 (the Guild) Union to a lawful impasse as the exclusive collective-bargaining representative of the employees in the following bargaining unit:

> The Editorial Unit:
>
> All employees in the Editorial Department and in all subdivisions of the Editorial Department, excluding those employees provided for in other existing Union Agreements and all Publishers and Associate Publishers, Publisher and Editor-in-Chief, Executive Editor, Editor of the Editorial Page, Managing Editor, Deputy Managing Editor, Senior Assistant Managing Editor, Assistant Managing Editor, City Editor, Sports Editor, Sunday Editor, Technology Systems Editor, Business Editor, Night Operations Manager, Seen Editor, Associate Editor of Opinion Pages, Editorial Cartoonist, and Confidential Secretaries.

(b) Before implementing any changes in wages, hours, or other terms and conditions of unit employees, notify and, on request, bargain with the 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 (the Mailers Union) to a lawful impasse as the exclusive collective-bargaining representative of the employees in the following bargaining unit:

> The Mailing Room Unit:
>
> full-time employees described in the most recent collective-bargaining agreement between the Mailers Union and the Newspaper as:
>
> All employees covered by this Agreement. The words "employee" and "employees" when used in this Contract apply to journeymen and apprentices. It is recognized and agreed that the terms and conditions of employment covering Part-Time mailer employees shall be as set forth in a separate agreement covering such employees.

(c) Before implementing any changes in wages, hours, or other terms and conditions of unit employees, notify and, on request, bargain with the Pittsburgh Typographical Union No. 7, a/w the Communications Workers of America, AFL–CIO, and its Local 14827 (the Typographical Union) to a lawful impasse as the exclusive collective-bargaining representative of the employees in the following bargaining units:

> The Advertising Employees Unit:
>
> All regular full time and regular part-time employees of the Advertising Department; excluding all other employees, confidential employees, guards, professional and supervisors as defined in the Act, and those specifically excluded.
>
> Specifically excluded from the Advertising Unit is:
> All employees in the Marketing, Research and Promotion Division, including supervision, managerial, confidential, and all other employees, as well as such employees added in the future, are excluded from the Advertising Unit. In addition, the following positions are specifically excluded from the Advertising Unit:
>
> Chief Revenue Officer
> Secretary to Classified Managers
> Advertising Director
> Display Advertising Manager
> Classified Manager
> Advertising Operations Manager
> Classified Real Estate Manager
> Market Research Manager
> Retail Manager
> Classified Recruitment Manager
> Mgr. of Training and Sales Dev.
> Classified Operations Manager
> Database Marketing Manager
> Production Services Supervisor
> Co-Op and Special Sections Mgr.
> Product Design Manager
> Classified Call Center Manager
> Research Analyst
> Online Sales Manager

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Sales Manager—Automotive
Production Services Manager
Sales Manager—Real Estate
New Media Bus. Dev. Mgr.—Online
Sales Manager—Retail (Territories)
New Media Bus. Dev. Mgr.—Classified
Sales Manager—New Business Dev.
New Media Bus. Dev. Mgr.—National
Sales Manager—Recruitment
Executive Assistant to Adv, Director
Sales Manager—Major/National
Preprint Distribution Manager
Sales Supervisor—Major/National
Retail Territory Sales Manager
Sales Manager—Digital/Direct
Classified Automotive Sales Manager
Production Services Manager
Quality Control Specialist

The Finance Employees Unit:

All regular full-time and regular part-time employees of the Financial Department; excluding all other employees, confidential employees, guards, professional and supervisors as defined in the Act. The following are recognized as being confidential or supervisory employees excluded from the coverage of this Agreement: Controller, Assistant Controller, Office Manager and their confidential secretaries, Accounting Manager, Auditor, Credit Manager, Cashier Manager, Circulation Accounting Supervisor, Advertising Accounting Supervisor, and Payroll Supervisor.

(d) Before implementing any changes in wages, hours, or other terms and conditions of unit employees, notify and, on request, bargain with the 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 (the Delivery Union) to a lawful impasse as the exclusive collective-bargaining representative of the employees in the following bargaining unit:

The Delivery Unit:

all employees performing the delivery-related work described in more detail in Section 2 (Jurisdiction) of the most recent collective-bargaining agreement between the Delivery Union and the Newspaper.

(e) Before implementing any changes in wages, hours, or other terms and conditions of unit employees, notify and, on request, bargain with the 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 (the Pressmen's Union) to a lawful impasse as the exclusive collective-bargaining representative of the employees in the following bargaining unit:

The Pressmen's Unit:

All journeymen pressmen, paperhandlers, paperhandling pressmen, and apprentice pressmen who work in the Company's pressroom and paperhandling departments.

(f) Before implementing any changes in wages, hours, or other terms and conditions of unit employees, notify and, on request, bargain with the International Union of Operating Engineers, AFL–CIO, Local 95 (the Operating Engineers) to a lawful impasse as the exclusive collective-bargaining representative of the employees in the following bargaining unit:

The Operating Engineers Unit:

all employees employed by [the Respondent] at its facility located at 2201 Sweeney Drive, Clinton, P A; but excluding guards, office clericals, managerial personnel, confidential personnel, supervisors as defined in the National Labor Relations Act, and all other personnel.[29]

(g) Rescind the change in terms and conditions of employment for its unit employees that was unilaterally implemented on January 1, 2018, when it discontinued paying up to a 5% annual increase in contribution rates to the Fund for health care coverage for employees in the above-described units.

(h) Make all annual increases in contributions to the Fund that it failed to make, including any additional amounts due to the Fund on behalf of unit employees in the manner set forth in the remedy section of this decision, and continue to make the annual increase in contributions until the Respondent bargains with the Unions in good faith to an impasse or to an agreement.

(i) Reimburse unit employees for any expenses resulting from the failure to pay the annual increases in Fund contributions up to 5% in the manner set forth in the remedy section of this decision.

(j) Within 14 days after service by the Region, post at its facility in Pittsburgh, Pennsylvania, copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices in each language deemed appropriate shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice in each appropriate language, to all current

[29] The parties stipulated that on March 9, 2017, the PG and the Operating Engineers tentatively agreed to change the facility address listed in the above-unit description and the change will be incorporated into any successor labor agreement entered into by the PG and the Operating Engineers.

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees and former employees employed by the Respondent at any time since January 1, 2018.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 16, 2018

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally change the terms and conditions of employment of unit employees by discontinuing to pay up to a 5 percent annual increase in contribution rates to the Western Pennsylvania Teamsters and Employers Welfare Fund (Fund), for health care coverage without providing the employees' collective-bargaining representative notice and an opportunity to bargain to a lawful impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of unit employees, notify and, on request, bargain with the Newspaper Guild of Pittsburgh a/w Communications Workers of America, AFL–CIO, CLC, and its Local 38061 as the exclusive collective-bargaining representative of employees in the following unit:

The Editorial Unit:

All employees in the Editorial Department and in all subdivisions of the Editorial Department, excluding those employees provided for in other existing Union Agreements and all Publishers and Associate Publishers, Publisher and Editor-in-Chief, Executive Editor, Editor of the Editorial Page, Managing Editor, Deputy Managing Editor, Senior Assistant Managing Editor, Assistant Managing Editor, City Editor, Sports Editor, Sunday Editor, Technology Systems Editor, Business Editor, Night Operations Manager, Seen Editor, Associate Editor of Opinion Pages, Editorial Cartoonist, and Confidential Secretaries.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of unit employees, notify and, on request, bargain with the 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 as the exclusive collective-bargaining representative of employees in the following unit:

The Mailing Room Unit:

full-time employees described in the most recent collective-bargaining agreement between the Mailers Union and the Newspaper as:

All employees covered by this Agreement. The words "employee" and "employees" when used in this Contract apply to journeymen and apprentices. It is recognized and agreed that the terms and conditions of employment covering Part-Time mailer employees shall be as set forth in a separate agreement covering such employees.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of unit employees, notify and, on request, bargain with the Pittsburgh Typographical Union No. 7, a/w the Communications Workers of America, AFL–CIO, and its Local 14827 as the exclusive collective-bargaining representative of employees in the following units:

The Advertising Employees Unit:

All regular full time and regular part-time employees of the Advertising Department; excluding all other employees, confidential employees, guards, professional and supervisors as defined in the Act, and those specifically excluded.

Specifically excluded from the Advertising Unit is:
All employees in the Marketing, Research and Promotion Division, including supervision, managerial, confidential, and all other employees, as well as such employees added in the future, are excluded from the Advertising Unit. In addition, the following positions are specifically excluded from the Advertising Unit:

Chief Revenue Officer
Secretary to Classified Managers
Advertising Director
Display Advertising Manager
Classified Manager
Advertising Operations Manager
Classified Real Estate Manager
Market Research Manager
Retail Manager
Classified Recruitment Manager
Mgr. of Training and Sales Dev.
Classified Operations Manager
Database Marketing Manager
Production Services Supervisor
Co-Op and Special Sections Mgr.
Product Design Manager
Classified Call Center Manager
Research Analyst
Online Sales Manager
Sales Manager—Automotive
Production Services Manager
Sales Manager—Real Estate
New Media Bus. Dev. Mgr.—Online

Sales Manager—Retail (Territories)
New Media Bus. Dev. Mgr.—Classified
Sales Manager—New Business Dev.
New Media Bus. Dev. Mgr.—National
Sales Manager—Recruitment
Executive Assistant to Adv, Director
Sales Manager—Major/National
Preprint Distribution Manager
Sales Supervisor—Major/National
Retail Territory Sales Manager
Sales Manager—Digital/Direct
Classified Automotive Sales Manager
Production Services Manager
Quality Control Specialist

The Finance Employees Unit:

All regular full-time and regular part-time employees of the Financial Department; excluding all other employees, confidential employees, guards, professional and supervisors as defined in the Act. The following are recognized as being confidential or supervisory employees excluded from the coverage of this Agreement: Controller, Assistant Controller, Office Manager and their confidential secretaries, Accounting Manager, Auditor, Credit Manager, Cashier Manager, Circulation Accounting Supervisor, Advertising Accounting Supervisor, and Payroll Supervisor.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of unit employees, notify and, on request, bargain with the 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 as the exclusive collective-bargaining representative of employees in the following unit:

The Delivery Unit:

all employees performing the delivery-related work described in more detail in Section 2 (Jurisdiction) of the most recent collective-bargaining agreement between the Delivery Union and the Newspaper.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of unit employees, notify and, on request, bargain with the 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 (the Pressmen's Union), as the exclusive collective-bargaining representative of employees in the following unit:

The Pressmen's Unit:

All journeymen pressmen, paperhandlers, paperhandling pressmen, and apprentice pressmen who work in the Company's pressroom and paperhandling departments

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of unit employees, notify and, on request, bargain with the Operating Engineers, AFL–CIO, Local 95 (the Operating Engineers) as the exclusive collective-bargaining representative of employees in the following unit:

The Operating Engineers Unit:

all employees employed by Pittsburgh Post-Gazette at its facility located at 2201 Sweeney Drive, Clinton, PA; but excluding guards, office clericals, managerial personnel, confidential personnel, supervisors as defined in the National Labor Relations Act, and all other personnel.

WE WILL rescind the unlawful change in terms and conditions of unit employees that was unilaterally implemented on January 1, 2018, when we discontinued paying up to a 5% annual increase in contributions to the Fund for health care coverage for employees in the above-described units.

WE WILL make all annual increases in contributions to the Fund that we have failed to make, including any additional amounts due to the Fund on behalf of unit employees in the manner set forth in the remedy section of this decision and WE WILL continue to pay the annual increase in contributions until we bargain with the Unions in good faith to an impasse or to an agreement.

WE WILL reimburse you for any expenses resulting from our failure to pay the annual increases in Fund contributions up to 5 percent, including losses incurred as a result of the Fund's reduction in benefits caused by our failure to pay increased annual contributions.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/06–CA–212627 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.