

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

**PG PUBLISHING CO., INC. d/b/a
PITTSBURGH POST GAZETTE**

and

Case 06-CA-233676

**GRAPHIC COMMUNICATIONS
INTERNATIONAL UNION,
GCC/INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL 24M/9N**

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN REPLY TO RESPONDENT'S
ANSWER TO GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S DECISION**

In accordance with Rule 102.46 of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel ("General Counsel") respectfully requests that the Board consider the following brief in response to Respondent's Answering Brief¹ to the

¹ Respondent refers to its Answering Brief as "Respondent PG Publishing Co., Inc.'s Response to Brief in Support of Counsel for General Counsel's Exceptions to the Administrative Law Judge's Decision."

Exceptions of the General Counsel dated November 13, 2020 (“Respondent’s Answering Brief”).² In support of this Reply, the General Counsel states the following.³

Many of the matters raised in Respondent’s Answering Brief have already been addressed in the General Counsel’s Exceptions and brief in support thereof, making further repetition unnecessary. Certain issues, however, merit a response. Namely, Respondent’s Answering Brief is riddled with mischaracterizations, inaccuracies and misplaced arguments that should be rejected.

First, Respondent’s “Statement of Facts” section in its Answering Brief is so misleading that it should be disregarded in its entirety. Most notably, Respondent has repeatedly cited the contents of letters that it wrote to the Union during negotiations (in which the parties were clearly in disagreement about how negotiations were going) and held them out to be stipulated facts. If the tables were turned, Respondent would clearly not hold the statements that the Union wrote in the letters the Union sent to Respondent during negotiations, which are also in the record as exhibits, to be facts. Respondent engages in such misleading representations throughout its “Statement of Facts” section that each sentence warrants a fact-check with the record. The stipulated facts and the exhibits attached thereto speak for themselves. All the examples below highlight that Respondent’s deceptive resuscitation of the facts should be disregarded.

² On June 8, 2020, the Counsel for the General Counsel (“General Counsel”), the Union and Respondent filed a Joint Motion to submit this case to the Administrative Law Judge (“ALJ”) based on a stipulated record, which the ALJ granted on June 8, 2020. That joint submission contains an agreed-upon list of documentary exhibits, comprising of Exhibits 1 through 19, and a Stipulation of Facts numbered 1 through 39. Citations herein are generally either to the Stipulation of Facts (Facts, ¶ __) or Joint Exhibits (Exh. __) contained in the Joint Motion.

³ Reference to the April 20, 2020 Decision and Recommended Order (“ALJD”) of the Administrative Law Judge David I. Goldman (“ALJ”) appear as (ALJD XX: YY), where XX and YY designate page and line numbers, respectively.

For instance, Respondent wrote, “[t]he Union never requested effects bargaining”, and then writes that the Union’s chief spokesperson only responded that he would engage in effects bargaining after the Respondent offered to meet.⁴ In support of these “facts”, Respondent cites to letters in the Exhibits that Respondent wrote to the Union during negotiations; this is obviously not the same as a stipulated fact.⁵ Respondent does this repeatedly throughout its Answering Brief, boasting that bargaining only took place “at Respondent’s instigation”, that “the Union did not respond to Respondent’s offers to meet for further effects bargaining”, and that the “Union had failed to respond to any of the effects bargaining dates offered by Respondent”.⁶ None of this information is a stipulated fact in the record and Respondent is being incredibly misleading by representing it as such.

Similarly, Respondent also writes in its Answering Brief statements that it claims were made during bargaining with the Union on July 25, 2018. For instance, Respondent made such misrepresentations by providing that during effects bargaining on July 25, 2018, “Respondent explained” and “[b]oth parties agreed” and other phrases signaling that Respondent is quoting one of the parties.⁷ However, the parties did not stipulate, nor is there any testimonial evidence, regarding what was said in bargaining on that date. Rather, Respondent again is citing to letters that it wrote to the Union during negotiations, the contents which are clearly disputed.

Finally, as another example of Respondent mischaracterizing the facts, Respondent writes that, “[d]elivering the news through digital platforms fundamentally altered the scope and nature

⁴ Respondent’s Answering Brief, p. 4.

⁵ Respondent’s Answering Brief, p. 4-5.

⁶ Respondent’s Answering Brief, p. 5-7.

⁷ Respondent’s Answering Brief, p. 5.

of Respondent's business."⁸ This statement makes it seem like on June 26, 2018, it announced that it would become a digital-only news organization completely right away.⁹ However, to be clear, Respondent did not entirely eliminate its print operations in 2018 leading up to the disputed layoffs. Respondent wrote to the Union on June 26, 2018 that "becoming a digital news organization is *our future*"¹⁰ and that they would start on August 25, 2018 by eliminating two days of their print operations of the Post-Gazette newspaper.¹¹ As explained in General Counsel's post-hearing brief, this distinction is important because it demonstrates where Respondent had room to bargain with the Union over the effects of its entrepreneurial decision.¹²

Respondent is apparently mischaracterizing the facts regarding its decision to reduce print days as a last-minute attempt to bolster its argument that the *Bottom-Line*¹³ overall-impasse rule is not applicable here. In its Answering Brief, Respondent cites numerous cases such as *Rigid Pak Corp.*, 366 NLRB No. 137¹⁴ (July 25, 2018) to support its argument that it could layoff unit employees during successor contract negotiations and was only obligated to engage in

⁸ Respondent's Answering Brief, p. 4.

⁹ Respondent's Answering Brief, p. 4.

¹⁰ Emphasis added.

¹¹ Exh. 5.

¹² Noting that the instant case is most factually analogous to *Litton Business Systems*, where the Board held that even where layoffs are the direct result of a decision that is not itself a mandatory subject of bargaining, there is still room for bargaining about the layoffs themselves because the employer could have taken other actions, such as transferring workers to other facilities or retrained workers on different equipment. 286 NLRB 817, 820, enfd. in pertinent part 893 F.2d 1128 (9th Cir. 1990), reversed in part on other grounds 501 U.S. 190 (1991).

¹³ 302 NLRB 373 (1991).

¹⁴ 366 NLRB No. 137

good faith effects bargaining over its *First National Maintenance* decision.¹⁵ In these cases such as *Rigid Pak Corp.*, the Board focused on the fact that the employer had made a decision that “involved a significant change in the scope and direction of its enterprise.”¹⁶ Indeed, Respondent notes that the cases it cites all involve a “significant change in the scope and direction of the enterprise.”¹⁷ However, in the instant case, Respondent decided to eliminate two days of its print operations. Respondent did not entirely discontinue its printing operation and therefore, it was not a significant change in the scope and direction of the enterprise that is of such significance to excuse its bargaining obligations.

General Counsel maintains that the ALJ erred in finding that the *Bottom Line* overall-impasse rule is not applicable here and urges the Board to find that Respondent could not implement the layoffs without first concluding contract negotiations or bargaining to an overall impasse in contract negotiations. As discussed more fully in the General Counsel’s Brief in Support of Exceptions, it defies logic to permit Respondent, while bargaining for a successor contract, to circumvent its bargaining obligations under these circumstances and undermine the Union’s bargaining position by deciding to make an entrepreneurial decision at that time that results in layoffs.

Respondent makes another misleading claim that, because Respondent put in its Answer to the Complaint as an affirmative defense that the parties reached impasse, then the Counsel for the General Counsel is incorrect in its assertion that the parties did not declare impasse.¹⁸

¹⁵ *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); Respondent’s Answering Brief, p. 13-14.

¹⁶ *Rigid Pak Corp.*, 366 NLRB No. 137, slip op. at 5.

¹⁷ Respondent’s Answering Brief, p. 14.

¹⁸ Respondent’s Answering Brief, p. 16.

Respondent seems to be arguing that just because it claimed impasse as an affirmative defense in its Answer to the Complaint in this matter that it has proven this defense. Truly, there is no evidence in the stipulated record demonstrating that either party declared impasse or contended that impasse had been reached prior to the Respondent laying off the two unit-employees. The layoffs were not an inevitable consequence of Respondent's decision to eliminate two print days, yet the evidence demonstrates that the only effects bargaining the Respondent engaged in was over severance pay. Respondent rejected the Union's efforts to explore ways in which Respondent could avoid or reduce the layoffs. Respondent's argument that the parties were at impasse must fail.

Respondent makes another argument completely unsupported by the stipulated record that the Union engaged in dilatory tactics in effects bargaining.¹⁹ Along these lines, Respondent also asserts that the General Counsel has ignored the exception to the impasse bargaining rule, which is that an employer may unilaterally implement where the union has avoided or delayed bargaining.²⁰ Both of these arguments are absurd in light of the true facts of the case. As an initial matter, the General Counsel clearly cited in its Post-Hearing Brief to the ALJ that the Board has recognized two limited situations in which an employer's unilateral action may be justified absent overall impasse: "when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining" and when an economic exigency exists.²¹ Second, the record is devoid of any evidence

¹⁹ Respondent's Answering Brief, p. 22-26.

²⁰ Respondent's Answering Brief, p. 23.

²¹ See Brief on Behalf of Counsel for the General Counsel to Administrative Law Judge David Goldman, p. 18; citing *Bottom Line Enterprises*, 302 NLRB at 374.

establishing that the Union engaged in dilatory tactics; rather, the record evidence shows that the Union met with Respondent and regularly communicated back-and-forth with bargaining proposals. However, most importantly, Respondent clearly and unequivocally stipulated that the Union did not waive its right to bargain over the layoffs through any of its conduct.²² As such, Respondent is precluded from making the argument that the Union engaged in conduct that waived its right to bargain over the layoffs.

Finally, Respondent's arguments that it was not obligated to furnish the Union with the information it requested on September 28, 2018 must fail. Respondent makes a bizarre claim that it did not have the obligation to furnish the Union with the requested information because it concerned a permissive subject of bargaining.²³ Respondent also claims that the information requested was not relevant because it concerned Section 10.2 of the parties expired CBA, which was no longer relevant because it expired.²⁴ The Board has held that parties to a collective-bargaining relationship are entitled to information that is relevant and reasonably necessary for policing a collective-bargaining agreement.²⁵ The fact that the contract contained a grievance and arbitration clause, which defines a grievance as "a dispute over an alleged violation of this Agreement", gives the Union the right to continue its contract compliance function even after the expiration of the agreement.²⁶ As such, the Union is entitled to the requested information in order to gather evidence establishing whether Respondent complied with the expired contract and

²² Facts, ¶27.

²³ Respondent's Answering Brief, p. 31.

²⁴ Respondent's Answering Brief, p. 31.

²⁵ *Audio Engineering, Inc.*, 302 NLRB 942, 944 (1991).

²⁶ *Id.* (Exh. 2).

determine the merits of their grievance. Accordingly, Respondent's failure to provide the requested information to the Union, pursuant to the Union's legitimate interest in policing Respondent's compliance with the expired CBA, violated Section 8(a)(5) of the Act.

Based on the foregoing, the General Counsel again urges the Board to reject the ALJ's findings, grant the General Counsel's Exceptions and order Respondent to fully remedy its unlawful acts as set forth in the Brief in Support of Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision.

Dated at Pittsburgh, Pennsylvania this 3rd day of December 2020.

Respectfully submitted,

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6**

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
IN REPLY TO RESPONDENT'S ANSWER TO GENERAL COUNSEL'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on December 3, 2020 I served the above-entitled document(s) by **electronic mail**, as noted below, upon the following persons, addressed to them at the following addresses:

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Date

/s/ Julie M. Polakoski-Rennie

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