UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PENNSYLVANIA AMERICAN WATER COMPANY

and

UTILITY WORKERS UNION OF AMERICA, AFL-CIO, SYSTEM LOCAL NO. 537

CASE NOS.

06-CA-037197, 06-CA-037198, 06-CA-037202, 06-CA-037241, 06-CA-037243

BRIEF OF UTILITY WORKERS UNION OF AMERICA, AFL-CIO, SYSTEM LOCAL NO. 537 IN OPPOSITION TO EXCEPTIONS OF PENNSYLVANIA AMERICAN WATER COMPANY RELATIVE TO DECISION OF ADMINISTRATIVE LAW JUDGE DAVID GOLDMAN

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STATEMENT OF THE CASE

Pennsylvania American Water Company (hereinafter "PAWC") is a public utility company that provides water service to customers in various areas of the Commonwealth of Pennsylvania. PAWC calls its various service areas "districts" and those districts are generally denominated by place or geographic names. Jt. Ex. 1, No. 1. In each of its districts, PAWC has established "departments", which are, for the lack of a better description, sections of the district that perform certain classes of work. Jt. Ex. 1, No. 4. Each district has a "Distribution Department" where employees perform water pipeline maintenance, repair and installation, a "Plant Department" or "Production Department" (the terms are used interchangeably) where the work of water treatment and distribution of treated water into pipelines is performed, a "Meter Department" (sometimes called the "Outside Commercial Department" or "Field Service Department") where meter reading, meter repair and similar work is performed, and an "Office Department" where clerical work is performed. Jt. Ex. 1, No. 4. Not all districts have a Production Department or an

Office Department but all have a Distribution Department and a Meter Department. Jt. Ex. 1, No. 4.

There are six separate union-represented bargaining units in Pennsylvania wherein PAWC is the employer and Utility Workers Union of America, AFL-CIO, System Local 537 (hereinafter "Local 537") is the certified collective bargaining representative. All of these units are covered by separate collective bargaining agreements. The parties refer to these units as the Pittsburgh District, which comprises a portion of the City of Pittsburgh District and its adjacent suburban areas and covers 150 employees (Jt. Ex. 1, No. 7), the "Outside Districts", comprising eleven separate geographical areas, all of which are covered under one contract and consist of one district, generally lying outside the City of Pittsburgh/Allegheny County area, stretching from the Pennsylvania/New York border in the north to the Pennsylvania/West Virginia border in the south and from the Pennsylvania/Ohio border in the west to approximately the Indiana County/Jefferson County area in the east and covering 201 employees (Jt. Ex. 1, No. 7), the Brownsville District, comprising the area around Brownsville, PA in southwestern Pennsylvania, covering 8 employees (Jt. Ex. 1, No. 7), the Mechanicsburg/West Shore District, which is near the cities of Harrisburg and Hershey, covering 28 employees (Jt. Ex. 1, No. 7), the White Deer (sometimes called Milton) District, in north-central Pennsylvania, near Lewisburg and Williamsport, Pennsylvania, covering 19 employees (Jt. Ex. 1, No. 7) and the Wilkes-Barre/Scranton District, in eastern Pennsylvania, near the cities of Wilkes-Barre and Scranton, covering164 employees. (Jt. Ex. 1, No. 7). As of January 1, 2011, the Pittsburgh District agreement was due to expire on May 17, 2011 (Jt. Ex. 1, No. 6,8), the Outside Districts" agreement had expired on November 17, 2009 but Local 537 advised PAWC that it was willing to

continue working under the expired agreement for a reasonable period of time until a new agreement could be negotiated, and as of January 1, 2011, work was continuing under those terms (Jt. Ex. 1, No. 6, 9), the Brownsville District agreement had expired on September 30, 2009 but Local 537 advised PAWC that it was willing to continue working under the expired agreement for a reasonable period of time until a new agreement could be negotiated, and as of January 1, 2011, work was continuing under those terms (Jt. Ex. 1, No. 6, 9), the Mechanicsburg/West Shore District agreement expired on January 31, 2010 but Local 537 advised PAWC that it was willing to continue working under the expired agreement for a reasonable period of time until a new agreement could be negotiated, and as of January 1, 2011, work was continuing under those terms (Jt. Ex. 1, No. 6, 9), the White Deer (sometimes called Milton) District agreement expired on April 4, 2010 but Local 537 advised PAWC that it was willing to continue working under the expired agreement for a reasonable period of time until a new agreement could be negotiated, and as of January 1, 2011, work was continuing under those terms, (Jt. Ex. 1, No. 6, 9) and the Wilkes-Barre/Scranton District agreement expired on October 31, 2010 but Local 537 advised PAWC that it was willing to continue working under the expired agreement for a reasonable period of time until a new agreement could be negotiated, and as of January 1, 2011, work was continuing under those terms. (Jt. Ex. 1, No. 6, 9). Since January 1, 2011, the Brownsville, White Deer, Mechanicsburg and Wilkes-Barre/Scranton agreements were successfully renegotiated, the Pittsburgh agreement expired on May 17, 2011 and has not yet been renegotiated, although Local 537 advised PAWC that it was willing to continue working under the expired agreement for a reasonable period of time until a new agreement could be negotiated, and as of the current time, work is continuing under those terms and the

Outside Districts agreement still has not been renegotiated and the parties are still working under Local 537's stated willingness to continue working under the "old" agreement. (Jt. Ex. 1, No. 6, 9).

At all times material to this matter, each of the six collective bargaining agreements contained language relative to the right of bargaining unit employees to engage in strikes during the term of each agreement. The relevant language in each of the agreements is set forth below:

1. Pittsburgh District-

> "In furtherance of harmonious relations among employees, the management and the public, it is mutually agreed by the parties hereto that there shall be no lockout, strike, work stoppage, or intentional slowdown during the term of this Agreement. However, there shall be no liability on the part of the Union for any strike, work stoppage, or intentional slowdown when such strike, work stoppage or intentional slowdown is not authorized by the Union, and when in addition duly authorized officers of the Local Union shall within five (5) hours after notification by the Company sign and cause to be posted in prominent places within the office or plant of the Water Company a notice that the strike, work stoppage or intentional slowdown was not authorized by the Local Union and directing all employees to return to their respective jobs promptly or to cease any action which may adversely affect any operation of the Company. The Company shall have authority to discipline any employee or employees engaged in any unauthorized strike, work stoppage or intentional slowdown subject to the Union's right to present a grievance as outlined in this Contract.
>
> It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property where a lawful primary picket line is established; provided, however, this clause shall not apply to picket lines established under the Free Speech Proviso of the National Labor Relations Act or to what is commonly referred to as "area standards" picketing." GC Ex. 2, § 2; GC Ex. 3, § 2.

2. Outside Districts

> "In furtherance of harmonious relations among employees, the management and the public, <u>and in consideration of the adjustment procedures set forth in Section 3 of this Agreement,</u> it is mutually agreed by the parties hereto that there shall be no lockout, strike, work stoppage, or intentional

> slowdown during the term of this Agreement. However, there shall be no liability on the part of the Union for any strike, work stoppage, or intentional slowdown when such strike, work stoppage or intentional slowdown is not authorized by the Union, and when in addition duly authorized officers of the Local Union shall within five (5) hours after notification by the Company sign and cause to be posted in prominent places within the office or plant of the Water Company a notice that the strike, work stoppage or intentional slowdown was not authorized by the Local Union and directing all employees to return to their respective jobs promptly or to cease any action which may adversely affect any operation of the Company. The Company shall have authority to discipline any employee or employees engaged in any unauthorized strike, work stoppage or intentional slowdown subject to the Union's right to present a grievance as outlined in this Contract. (emphasis added).
>
> It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property where a lawful primary picket line is established; provided, however, this clause shall not apply to picket lines established under the Free Speech Proviso of the National Labor Relations Act or to what is commonly referred to as "area standards" picketing." GC Ex. 2, § 2; GC Ex. 3, § 2.

The remaining four agreements contained language virtually identical to the first paragraph of the above quoted language but none of the language in the second paragraph of the above quoted language appeared in any of those agreements.

The above-quoted language comprising the second paragraph of the Outside Districts agreement was added to that agreement in the 1979 contract negotiations. Jt. Ex. 1, No. 10. Local 537 had made a request at those negotiations in 1979 that there be added to the contract language allowing bargaining unit employees to permissibly refuse to cross primary picket lines because shortly before those negotiations began, a bargaining unit meter reader covered by the Pittsburgh contract who was sent to read a water meter at the facility of a PAWC customer encountered a primary picket line established by another union which was conducting a strike at that facility. Jt. Ex. 1, No. 10. Upon encountering the picket line, the Pittsburgh employee contacted his supervisor

to indicate that a picket line was in place and that the employee would not cross it. While the supervisor at first insisted that the meter reader cross the picket line, upon the meter reader's continued refusal to cross, the supervisor found an alternate way to have the meter read, and the matter was resolved at that point. Local 537 sought to resolve issues involving the crossing of primary picket lines by including language in the Outside Districts collective bargaining agreement that allowed its members to refuse to cross such lines. Jt. Ex. 1, No. 10. PAWC's attorney, then acting as its chief labor contract negotiator, proposed the addition of the above-quoted language, Local 537 agreed to it and it was included in the 1979-1982 Outside Districts contract. Jt. Ex. 1, No. 10. No evidence that the proposal was limited to stranger picket lines appears of record.

The next labor contract to come up for negotiation between PAWC and Local 537 was the Pittsburgh contract which was due to expire on May 17, 1980. GC Ex. 3. Although the contract expired on May 17, 1980, Local 537's members continued to work under the terms of the expired agreement until December 8, 1980, when Local 537 commenced a strike against PAWC. (N.T. 41-42). On December 30, 1980, pickets from the Pittsburgh District appeared in the Valley District, which is one of the districts covered by the Outside District contract, and established a picket line at a work location where Valley employees were to repair a water line. GC Ex. 8. When the Valley employees appeared at that work location and observed the picketers, they refused to cross the picket line and perform the work that they were assigned to do, GC Ex. 8, relying on the language in the Outside Districts contract that was placed in it in 1979 which provided that:

> "It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property where a lawful primary picket line is established;

> provided, however, this clause shall not apply to picket lines established under the Free Speech Proviso of the National Labor Relations Act or to what is commonly referred to as "area standards" picketing." GC Ex. 2, § 2.

The Valley employees stated that they were willing to perform any other work that would be assigned to them except for work that required them to cross the picket line. PAWC did not assign them any additional work and instead sent them home and did not pay them for appearing for work on December 30, 1980. GC Ex. 8. These individuals filed grievances over PAWC's refusal to pay them and the grievances proceeded to final and binding arbitration under the terms of the Outside Districts labor agreement. PAWC argued at the arbitration hearing that the aforesaid language should not bar it from refusing to pay those employees who honored a picket line that Local 537 had set up the picket line that its own members refused to cross. (GC Ex. 8, p.6). The arbitrator ruled that the language in the labor contract did not admit of such an exception, he applied it to this situation and he ruled that the Valley employees who did not cross the picket line did not violate the terms of the Valley agreement and thus were entitled to be paid for appearing for work on the day in question since the Valley labor agreement provided that anyone appearing for work on the first day of the work week was entitled to 40 hours of pay for that week. GC Ex. 8.

The 1980 Pittsburgh strike was settled in January of 1981 and the same language dealing with the right of bargaining unit employees to refuse to cross primary picket lines that was in the 1979 Outside Districts contract was included verbatim in the 1981-1983 Pittsburgh contract (N.T. 43-44). Even though PAWC was in receipt of the grievance filed by Local 537 on behalf of the Valley District employees who were not paid for refusing to cross the Local 537 picket line established by the striking Pittsburgh employees in 1980, no change was made to the language. The arbitrator's decision was

received some time in February of 1982. GC Ex. 8. In 1982, and every three to five years thereafter, the Outside Districts contract came up for re-negotiation and the language at issue remained in the agreement unchanged. (N.T. 47). In 1983 and every three to five years thereafter, the Pittsburgh District contract came up for re-negotiation and the language at issue remained in the agreement unchanged. (N.T. 47).

By the end of 2010, the Outside Districts contract, the Brownsville contract, the Mechanicsburg/West Shore contract, the White Deer contract and the Wilkes-Barre/Scranton contract had all expired. In each of those cases, Local 537 continued to work under the terms of the expired agreement, stating that it would do so for a reasonable time in an effort to arrive at successor agreements. On three separate days in January, 2011 (January 2, January 9 and January 29), Local 537 pickets from the Brownsville District appeared at various Outside Districts and Pittsburgh District locations carrying picket signs reading "Primary Labor Dispute, Utility Workers Union of America, System Local 537, Brownsville, has a labor dispute with PA American Water. We are seeking a fair contract with PA American Water Company." (Jt. Ex. 1, No. 12-additionally, the picket signs were available at the hearing and were viewed by the Administrative Law Judge and the parties). As employees covered by the Outside Districts contract and the Pittsburgh District contract approached the work locations where these pickets were stationed, they elected, in every case but one, not to cross the picket lines that were established. (N.T. 210). The testimony of Jeffrey Michael Kachurek, one of the Outside Districts employees who did not cross the picket line that he encountered, indicates that he advised PAWC that he was willing to work at any location where there was no picket line and when PAWC would not reassign him, he simply waited outside the picket line area until the picketers left and then he went to

work. (N.T. 129, 130, 131-132). He was told by Kristin Snyder, his supervisor, that if he did not cross the picket line, there would be "ramifications" (N.T. 128-129). He was not paid for the hours that elapsed between the beginning of his shift and the actual time that he started work (GC Ex. 13). When employee Daniel Toth approached the picket line, he was also told by Ms. Snyder that he was "expected" to work. (N.T. 179). The one individual who did cross the picket line, Kent Shrontz, was told by a Local 537 officer that the union's bylaws provided for internal disciplinary procedures for union members who crossed primary picket lines. (N.T. 83, 90, 101, 103). Mr. Shrontz crossed the picket line and no internal union action or charges were brought against him. It also appears that at some time before he determined to cross that picket line, Mr. Shrontz spoke to a PAWC supervisor, who told him that he was "required" to be at work and he was "expected" to be at work. (N.T. 211).

On January 4, 2011, PAWC's Human Resources Director sent a letter to the President of Local 537 stating, inter alia, it was

> ". . . disingenuous for the Union to suggest that this clause should protect . . . members of the same Union that is "preventing" the employees from working. Whether such employees are working under an active agreement (such as in Pittsburgh) or the terms and conditions of an expired agreement (such as all other PAWC-Local 537 agreements, per correspondence from Mr. Pasquarelli), such refusal [to cross the picket lines] would violate the "No Strike or Lockout" provisions of those agreements. In addition, if Local 537 employees repeatedly refuse to cross picket lines manned by Local 537 members, such refusal may constitute an intermittent work stoppage. The Company is. . . putting the Union on notice that it reserves the right to take appropriate action, including . . . discipline . . . against individual employees. . . ." (GC Ex. 13).

Since all four of the picket lines that had been established had been mostly established at water treatment plants (GC Ex. 15), and since all oncoming plant employees except Mr. Shrontz had refused to cross the picket lines, Daniel Hufton, PAWC's Senior Production

Director, prepared a letter addressed to "All production employees" advising that no one was permitted to shut down a water treatment plant without the permission of a supervisor (GC Ex. 11) and he also made it clear that no plant employee was to leave a water treatment plant until relieved by someone else. GC Ex. 11. This letter and these directives came about because when picketers appeared at water treatment plants, the operators on duty called their supervisors to advise of the presence of the pickets, to advise that oncoming operators may refuse to cross the picket lines and to advise that the currently working operator expected to be relieved within a reasonable time following the end of his/her shift, failing which he/she may have to shut down the plant. (N.T. 119-121, 122). As a result of Mr. Hufton's letter, Local 537 President Kevin Booth prepared a letter to Mr. Hufton requesting detailed information as to the bases for Mr. Hufton's letter and stating that if additional picketing would occur, the operator on duty would contact his/her supervisor to advise of the situation and if no replacement individual appeared to operate the plant "after a reasonable amount of time", the plant may be shut down and the operator on duty may leave. (GC Ex. 12). Mr. Booth directed local union officials to post his letter on bulletin boards generally accessible to the union for its use. PAWC directed Mr. Booth's letters to be removed and when a local union official, Patricia Presnar, told Mr. Booth that this had occurred, Mr. Booth told her to advise supervision that she was to re-post his letter. (N.T. 136-137, 165-167). The testimony adduced at the hearing in this matter established that no operator shut down a plant, that operators remained beyond the end of their shifts until relieved and that Local 537 itself had adopted a policy of waiting for relief operators to appear before on duty operators were to leave water treatment plants. (N.T. 48-49, 76-77).

As a result of all of the foregoing, Local 537 filed a number of unfair labor practice charges, complaining, inter alia, that the January 4, 2011 letter from PAWC's Human Resources Director was a violation of the Act because it threatened discipline to employees who engaged in the protected activity of refusing to cross a primary picket line, that various PAWC supervisors threatened unspecified discipline to employees who appeared at picket lines and who asked about the consequences of crossing them and that the removal of Mr. Booth's letter from bulletin boards and the unspecified threats of reprisal to any employee who sought to re-post that letter also constituted violations of the Act. The Regional Director determined to file a complaint against PAWC relative to these matters and the matters raised in the complaint and PAWC's answer were the subject of a hearing held before Administrative Law Judge David Goldman in Pittsburgh, Pennsylvania on January 24, 2012. The Administrative Law Judge found that the allegations of the complaint were well-founded and he directed PAWC to cease threatening employees with discipline for honoring a picket line at an employer facility where the picket line was not in violation of the no-strike clause of the applicable labor agreement, to cease and desist from removing union literature from bulletin boards and to cease threatening employees with adverse consequences for posting such literature. (JD 24-12, pp. 27-28, ll 40-5).

PAWC has filed exceptions to the decision of the Administrative Law Judge, contending that the Administrative Law Judge's determination that the picketing did not violate the no-strike clause of the Outside Districts labor agreement was erroneous (Exception No. 1), that he erroneously determined that the employer improperly removed a letter written by the Union president from a bulletin board (Exception No. 2), and that he ". . . erroneously found that a Company letter to the Union contained a threat of

discipline when it discussed the possibility of future intermittent picketing." (Exception No. 3). It is the Union's position that none of the exceptions are well founded and for the reasons set forth in this brief, they should all be dismissed.

QUESTIONS PRESENTED

DID THE ADMINSTRATIVE LAW JUDGE CORRECTLY DETERMINE THAT THE PICKETING INVOLVED IN THIS CASE DID NOT VIOLATE THE NO-STRIKE LANGUAGE OF THE APPLICABLE COLLECTIVE BARGAINING AGREEMENTS?

DID THE ADMINISTRATIVE LAW JUDGE CORRECTLY DETERMINE THAT THE EMPLOYER'S REMOVAL OF A LETTER FROM BULLETIN BOARDS VIOLATED THE ACT?

DID THE ADMINISTRATIVE LAW JUDGE CORRECTLY DETERMINE THAT THE EMPLOYER'S LETTER OF JANUARY 4, 2011 CONTAINED THREATS OF REPRISAL THAT WERE VIOLATIVE OF THE ACT?

DISCUSSION

THE JANUARY, 2011 PICKETING

The question of whether Local 537 engaged in protected activity in establishing its "primary labor dispute" picket lines and whether its members engaged in protected activity in refusing to cross them are questions to be answered by reviewing both the Act, 29 U.S.C. A., § 151, et seq. and the applicable labor contracts. In every case of picketing, the picketing was done by or on behalf of employees who were working under a labor contract that had expired and that had not yet been renewed because PAWC and Local 537 were not successful in negotiating successor contracts. GC Ex. 10. The picketing employees represented employees covered by the Brownsville, Mechanicsburg/West Shore, Milton (White Deer), Wilkes-Barre/Scranton and Outside Districts contracts. (GC Ex. 10), each of these contracts having been expired for many

months when the picketing began. The only locations picketed were covered by the Pittsburgh and Outside Districts labor agreements, GC Ex. 10, both of which contracts afforded protection to employees who declined to cross primary picket lines. GC Ex. 2, § 2, GC Ex. 3, § 2. It is clear that Section 7 of the Act, 29 U. S. C. A., §157, protects the right to protest with regard to primary labor disputes. It is also clear that the issues extant in the expired Brownsville, Mechanicsburg/West Shore, Milton (White Deer), Wilkes-Barre/Scranton and Outside Districts contracts included wages, sick leave and the right of PAWC to contract out work, (N.T. 54-55), so that the disputes in these cases were all "primary labor disputes". 29 U. S. C. A., § 152(9) defines a "primary labor dispute" as "a controversy concerning, terms, tenure or conditions of employment. . . ." The Act also clearly provides that ". . . nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, <u>any primary strike or primary picketing</u>. . . ." 29 U. S. C. A., § 158(b)(4)(i)(B), emphasis added and primary picketing is picketing directed at the employer with which the labor organization has a bona fide labor dispute. See, e.g., <u>National Labor Relations Board v. Northern California District Council of Hod Carriers</u>, 389 F.2d 721 (9th Cir. 1968), at p. 725 of 389 F.2d. Thus, the contract allows primary picketing <u>without a strike</u>, the Act contemplates both strikes and non-strike primary picketing and in determining if what Local 537 did was violative of the Act, the Board has clearly stated that the contract itself as well as bargaining history and extrinsic evidence must be considered, with the parties' intent being given controlling weight. <u>Indianapolis Power and Light Co.,</u> 291 NLRB 1039 (1988), enfd. 898 F.2d 524 (7th Cir. 1990). The seminal question then becomes whether or not the establishment of these picket lines and the consequent honoring of them was protected activity or was activity violative of the Pittsburgh and Outside Districts labor contracts.

The controlling case in this area is Indianapolis Power & Light Company, supra. It was there held that while the Board would read a contract that prohibits strikes literally, "If, however, the contract or extrinsic evidence demonstrates that the parties intended to exempt sympathy strikes, we shall give the parties' intent controlling weight." 291 NLRB, at p. 1039. After review by the Court of Appeals of an earlier decision to the same effect in the same case, the Board stated as follows:

> ". . . we agree with the concern expressed by both courts that careful consideration be accorded extrinsic evidence bearing on the parties' intent, such as bargaining history and past practice under the no-strike clause. . . . the issue here turn[s] on the parties' *actual* intent. . . . a broad no-strike clause should properly be read to encompass sympathy strikes unless the contract as a whole or extrinsic evidence demonstrates that the parties intended otherwise. . . . the parties' actual intent is to be given controlling weight and extrinsic evidence should be considered as an integral part of the analysis." 291 NLRB, at pp. 1040-1041, emphasis in original.

There are a number of reasons, all well supported by authority, why the Administrative Law Judge's determination that the establishment of the picket lines at issue here and the honoring of them did not violate the parties' labor agreements. The language at issue states that "It shall not be a violation . . . [to refuse] to enter upon any property where a lawful primary picket line is established. . . . (GC Ex. 2, § 2, GC Ex. 3, § 2, emphasis added). This language is clear in the extreme and contains absolutely no inference that it is only the property of other employers that is involved. Furthermore, the author of the language was the PAWC's attorney (Jt. Ex. 1, No. 10). While PAWC argues that application of this language to the kind of activity that occurred here would emasculate the general no-strike language contained in the preceding paragraph of the same section, this is a specious argument since the Administrative Law Judge found that the parties had long ago agreed that the language did not apply to grievable issues (JD 24-12, p. 14, ll.

10-15). because the language of the first paragraph of the "No Strike-No Lockout" paragraph expressly refers to the fact that the no-strike promise in the first paragraph is ". . . in consideration of the adjustment procedures set forth in Section 3 [the grievance and arbitration language] (GC Ex. 2, Sec. 2, p. 2, emphasis added).

PAWC focuses on the "parties' intent" as its reason for taking the position that the Administrative Law Judge decided this issue incorrectly and the employer advances as its reason for its position the fact that the issue that caused the Union to make a request for consideration to add this language at the 1979 negotiations was that an employee had encountered pickets at a "stranger" picket line and ran into some difficulty with Pennsylvania American Water Company over whether or not he had to cross the picket line. (Jt. Ex. 1, Par. 10). While this event is what motivated the Union to make the proposal to add the "primary labor dispute" language to the contract, the reason why the Union made the proposal does not amount to proof of the parties' intent as to the scope of the language. Indianapolis Power, supra, refers to the parties' actual intent, 291 NLRB, at pp. 1040-1041, yet all that the evidence reveals is what the initial reason for the Union making the proposal was. There is absolutely no evidence of record to the effect that the parties discussed the proposal at any length or the any limitation on its scope was brought up. The Union's chief negotiator at the 1979 negotiations testified at the hearing on this matter and the employer was free to inquire as to the Union's intent and the parties' intent as to the application of the language, but it never did so. It is also worthwhile to note that while the parties stipulated that the discussion surrounding the negotiation of the primary picket line language and its insertion in the 1979 Outside Districts labor agreement started because of an event in 1979 where a meter reader was faced with crossing a picket line established by a stranger union, they also stipulated that—

> "The Union, in the 1979 negotiations, indicated that it wanted language placed in the Outside Districts collective bargaining agreement to state that its members did not have to cross picket lines. The Company's chief negotiator, James Matthews, Esq. (now deceased) proposed the "primary picket line" language that is now in the . . . . contracts. . . ." Jt. Ex. 1, Par. 10, p. 3.

This stipulation clearly indicates that there was no agreement by the parties that the language only applied to stranger picket lines and thus there is absolutely nothing in the record to establish that the parties' "actual intent" was to limit the language to stranger picket lines. The concept of "the parties' actual intent" would clearly seem to comprehend that both parties had the exact same understanding of the scope of the language and there is nothing in the record to indicate that. One would clearly expect that the attorney leading the Company's 1979 negotiations would want to make such a distinction if he had any idea that the language was to be so limited, but the record is barren of any indication that he did so. Furthermore, Indianapolis Power, supra, goes to rather detailed lengths to guide the consideration of the issue involved in this case. It establishes that while ". . . the parties' actual intent [is to be determined], . . . extrinsic evidence should be considered as an integral part of the analysis." 291 NLRB, at pp. 1040-1041, emphasis in original. Furthermore, directly contrary to the argument made by PAWC in support of its exceptions, the decision of the Administrative Law Judge specifically relied on the clear textual references in the labor agreement to the distinguishing indicia between picketing over issues covered by the grievance procedure and issues that, while they satisfy the primary labor dispute criteria, do not involve grievable issues. (JD 24-12, p. 16, ll. 10-300). For instance, the Outside Districts contract states in the first paragraph of the no-strike clause that the no-strike prohibition stated in that paragraph is in consideration of the adjustment procedures in Section 3. (GC Ex. 2,

Sec. 2, p. 2). The adjustment procedures set forth in Section 3 state that these procedures, which culminate in binding arbitration, are given ". . . in consideration of the covenants of the parties as are contained in the first paragraph of Section 2 . . . ." (GC EX. 2, Sec. 3, p. 3, emphasis added). Clearly, then, the contract itself contains text that clearly states that the no-strike covenant in the first paragraph of the no-strike clause applies only to grievable issues and not to any other primary picket line situation. This language totally negates PAWC's argument that:

> "To accept the reading that the Union could avoid its contractual no work stoppage commitment by using different bargaining units to effectuate a work stoppage at any one bargaining unit is to have the exception swallow up the rule." Employer Brief In Support of Exceptions, p. 16.

The two paragraphs of the no strike clause in the Pittsburgh and Outside Districts contract can easily be read in pari materia by looking at the language of Section 2, which premises the first paragraph's covenant not to strike on the parties' agreement to engage in arbitration over grievances and by looking at Section 3, where the parties clearly state that in consideration of the adjustment procedures of Section 3, the Union agrees to honor ". . . the covenants of the parties as are contained in the first paragraph of Section 2. . . ." (GC Ex. 2, Sec. 3, p. 3, emphasis added). In reading and construing these clauses, it is clear that the only thing that can occur when the second paragraph is implicated is that, with regard to the Pittsburgh and the Outside Districts contracts, if the Union has a primary labor dispute with a PAWC bargaining unit other than the Pittsburgh or Outside Districts units, picketing over that dispute could properly occur at Pittsburgh or Outside Districts locations. As the Administrative Law Judge clearly stated, the picketers were not engaging in a strike or work stoppage at the facilities covered by the collective bargaining agreement that governed their terms and conditions of employment since they

were not covered by the Outside Districts contract but were picketing in the Outside Districts contract area. In so doing, they were not violating the terms of the labor agreement that covered them-they were advertising their primary labor dispute with PAWC at some other PAWC location not covered by the labor agreement that regulated their terms and conditions of employment. In short, PAWC's argument boils down to an assertion that in retrospect, it made a "bad deal" since all it did was limit the no-strike language in the first paragraph of Section 2 to items that are covered by the grievance procedure and specifically allowed picketing over sympathy strikes and primary labor disputes not covered by the grievance procedure and now it wants this tribunal to relieve it of the decision that it made over 30 years ago.

The Administrative Law Judge did exactly as Indianapolis Power, supra, directed. In addition to reviewing the absolutely clear language of the 1979 Outside Districts labor agreement, he examined in detail the events that followed its execution. The evidence clearly revealed that a little after a year following the execution of that agreement, the Union, while on strike under the Pittsburgh agreement, picketed PAWC facilities under the Outside Districts agreement, where there were no labor issues and where an unexpired agreement was in force. (N.T. 41-44). An arbitration decision was rendered to the effect that the employees in the Outside Districts who refused to cross the picket line did not violate their agreement. (GC Ex. 8). While PAWC attempts to characterize the events that formed the basis of the 1982 arbitration award as different from those existent in the instant case in its attempt to negate the impact of that arbitration award, it is clear that this attempt is unsupported by the facts. A review of the arbitration award reveals that the arbitrator found as follows:

1. He based his decision on the second paragraph of the "No Strike Or Lockout" provision of the 1979 Outside Districts contract. (GC Ex. 8, p.6).

2. He determined that:

> "After listening to the testimony and studying the briefs, the question of whether the picket line was "primary" has been resolved. The Union has always held the picket line was "primary" and the Employer does not contest the position that the picket line was "primary". Nor is there any dispute of the grievants' right to honor the picket line." (GC Ex. 8, p.8)

3. "<u>The Employer and the Union decided that even though the former district level Unions have now merged into one system wide Union, it is in the best interest of both parties to maintain two separate</u> contracts. With separate contracts come all the attendant problems, including the possibility of one portion of the Union having a signed agreement while the other portion of the Union is striking the Employer. Therefore, even though each bargaining unit is represented by the same Union for negotiation purposes, each bargaining unit must be viewed as having a separate relationship with the Employer. The conflict that provided the background for the incidents leading to the arbitration is certainly not unusual or unexpected. <u>The Employer and the Union recognized the separate and distinct relationship that results from the contractual relationships as the now exist</u>. (GC Ex. 8, p. 9, emphasis added).

4. He determined that the refusal of Outside District employees to cross a picket line set up in their jurisdiction by fellow union employees who worked under a different contract with PAWC was not a violation of the Outside District contract and was not a basis for discipline. (GC Ex. 8, p. 9).

5. He held that:

> "While I recognize that lacking the provisions found in this Agreement, employees should not be able to refuse to perform assigned tasks out of sympathy for striking Union members and then be paid for work not performed, I find that the present Agreement, as constructed, requires payment of the grievants in this particular instance." (GC Ex. 8, p. 11).

Furthermore, as the Administrative Law Judge found in the instant case, the picketers were not engaging in an conduct that violated the collective bargaining agreement that governed their employment. (JD 24-12, p. 19, ll. 35). His conclusion is buttressed by the decision of the arbitrator that:

> ". . . even though each bargaining unit is represented by the same Union for negotiation purposes, each bargaining unit must be viewed as having a separate relationship with the Employer. The conflict that provided the background for the incidents leading to the arbitration is certainly not unusual or unexpected. The Employer and the Union recognized the separate and distinct relationship that results from the contractual relationships as the now exist. (GC Ex. 8, p. 9).

Additionally, in 1980, after the picketing that occurred in the Outside Districts that led to the grievance that led to the 1982 arbitration award, PAWC agreed to insert the same language that is found in the second paragraph of Section 2 of the 1979 Outside Districts agreement in the 1980 Pittsburgh agreement. (N.T. 43-44), which was the very agreement that resulted from the strike that gave birth to the picketing. It is mind boggling to think that after that picketing, it did not occur to PAWC to meet again to revise the language before inserting it into the labor contract if in fact the parties' "actual intent" was to limit it to stranger picketing. It also acquiesced in that language being inserted again and again in every Outside Districts agreement and Pittsburgh agreement for the next 30 plus years (N.T. 47), even after another strike and picketing situation in 1991. (N.T. 46-47). All of this more than justifies the conclusion that the Administrative Law Judge arrived at when he concluded that the January, 2011 picketing and the honoring of those picket lines was not violative of any contractual no-strike undertaking. While PAWC repeats again and again in its brief in support of its exceptions that the 1982 arbitration award dealt only with the question of whether or not people represented

by Local 537 under one contract should be paid when they honor a picket line established by Local 537 under another contract and while it raises the "ally" doctrine as its justification for not making the argument in the 1982 arbitration proceedings that the parties' intent did not cover this type of picketing situation, that argument avails it nothing. When the Union sought to have those people who honored the picket line in 1980 paid for the time spent not working and honoring the picket line and when the arbitrator decided that matter in favor of the Union, it is nothing short of disingenuous for PAWC to argue to this tribunal that PAWC's failure for over 30 years to suggest a change in the language should not be considered as strong evidence establishing that it understood since at least 1982 that this language covered a situation such as the one existent here. The decision of the arbitrator in 1982 has now become an integral part of the agreement itself because ". . . we must treat the arbitrator's award as if it represented an agreement between [the employer and the union] as to the proper meaning of the contract's words. . . ." Eastern Associated Coal Corp. v. United Mine Workers, 531 U.S. 57 (2000) at p. 62. Again, one must also consider the Administrative Law Judge's cogent reasoning that the existence of a strike or the lack of one is of no moment since the picketers were not violating any clause of the labor contract they worked under, nor were the individuals who honored the picket line. See, e.g., JD-24-12, pp. 19-20, ll. 35-5 and fn. 12.

While PAWC "hangs its hat" upon the premise that the events in 1980 that led to the 1982 arbitration award involved a strike by one of the units, it is submitted that this is a distinction without a difference, as can be seen from the language in the labor contract. The second paragraph of the No-Strike clause does not limit itself to picketing over strikes-it deals with ". . . any property where a lawful primary picket line is established. .

. ." (GC Ex. 2, Sec. 2, p. 3). This language was authored by the employer's labor counsel. It defies reason to argue that in spite of all of this, the Administrative Law Judge erroneously construed the language at issue. The decided cases that construe language very similar to that at issue here all militate in favor of the Administrative Law Judge's decision. Machinists, Oakland Lodge 284 (Morton Salt Co.), 190 NLRB 208, enf'd. in relevant part and remanded, 472 F.2d 416 (9th Cir. 1972) strongly supports the decision of the Administrative Law Judge. The "no strike" clause in Morton Salt, supra, read, in relevant part, as follows:

> "*SECTION 3.1 NO STRIKE-NO LOCKOUT:*
> During the life of this Agreement, the Union will not cause a strike or production stoppage of any kind. . . provided the Employer follows the grievance procedure. . . .Likewise. . . there shall be no lockouts during the life of this agreement provided the Union follows the grievance procedure . . . . It shall not be considered a violation of this Agreement if employees of the Employer fail to report for work by reason of a legitimate, authorized picket line. . . ."
> 190 NLRB, at pp. 209-210.

The Board in Morton Salt, supra, specifically held that since the right to refuse to cross a picket line was contained in the same clause as the "no strike" covenant, it was an exception to the no strike covenant. The Board in Morton Salt, supra, also placed great reliance on the fact that the collective bargaining agreement tied the no-strike covenant directly to the arbitration and grievance procedure, exactly as in the instant case. The case of Teamsters Local 688 and Frito-Lay, Inc., 345 NLRB 1150, 178 L.R.R.M. 1201 (2005) also supports the Administrative Law Judge's position. In Frito-Lay, the "no strike" clause was contained in one article of the collective bargaining agreement and language virtually identical to the "primary labor dispute" language in the instant case was found in a different article of the agreement. In Frito-Lay, Teamsters Local 688

instructed its members not to cross the primary picket line of a stranger union at a location where the stranger union had a labor dispute with the employer and when three of the members of Local 688 crossed the picket line, they were fined by Local 688. An unfair labor practice charge was filed by the employer against Local 688 alleging that the Union violated Sec. 8(b)(1)(A) of the Act by threatening its members with intraunion disciplinary proceedings. In Frito-Lay, the Board held that the "no strike" clause and the "primary labor dispute" clause were separate and distinct from each other, pointing to the fact that the clauses were found in separate sections of the labor agreement, and that the "primary labor dispute" language gave an employee the option to refuse to cross a primary picket line but it did not give Local 688 the right to force its members to exercise that option. However, the Board's decision did not turn on that rationale-rather, as the Board there stated ". . . [Local 688] has a contractual obligation under article 18 to refrain from authorizing any strikes, including sympathy strikes or work stoppages. . . ." 178 L.R.R.M., at p. 1202, emphasis added. Article 18 was the "no strike" clause of the agreement, which simply stated that during the life of the labor agreement, Local 688 would not authorize any strikes or work stoppages. Article 17 contained the language that dealt with the right of an employee to refuse to cross a primary picket line. In Frito-Lay, supra, the Board held that Article 18 did not contain any exception to the "no strike" commitment and it refused to engraft the language of Article 17 onto Article 18 since the articles were separate. The dissent in Frito-Lay pointed to Machinists, Oakland Lodge 284 (Morton Salt Co.), 190 NLRB 208, enf'd. in relevant part and remanded, 472 F.2d 416 (9th Cir. 1972) as the basis for the dissenter's position that Local 688 did not violate the Act, but the majority in Frito-Lay held that Morton Salt was inapposite because the "no strike" clause in Morton Salt ". . . contained an exception for the circumstance in

which an employee honors the picket line of another union. . . ." Frito-Lay, supra, at p. 1203 of 178 L.R.R.M. The Board in Frito-Lay, supra, accepted this rationale and only ruled against Local 688 in that case because the "no strike" language and the "right to refuse to cross" language were contained in separate clauses. In the case at bar, both sets of language are contained in the same clause, just as they were in Morton Salt, supra. Furthermore, both Frito-Lay, supra and Morton Salt, supra, dealt with situations where a union directed its members not to cross a primary picket line and disciplined them when they did. For those reasons, it is submitted that Frito-Lay, supra, not only does not support PAWC's position, it reinforces the fact that Morton Salt, supra, supports the decision of the Administrative Law Judge and the employer's reliance upon Frito-Lay, supra, is totally misplaced.

It is also interesting to note that while PAWC strenuously argues that the Administrative Law Judge's decision makes a mockery out of the no strike language for holding that the primary picket line paragraph of Section 2 deals with a set of issues different from the general no strike language found in the first paragraph of Section 2, it makes the opposite argument in its attempt to overturn the Administrative Law Judge's decision relative to the January 4, 2011 letter of Carole Dascani. (GC Ex. 13). In its attempt to distinguish two successive sentences in that letter, PAWC argues that ". . . the expression of something in one part of the writing and not in another part shows that it was not intended in the other . . . ." PAWC Brief In Support Of Exceptions, p. 31. If that logic applies to two successive sentences in a letter, one is led to wonder why, in light of Frito Lay, supra and Morton Salt, supra, PAWC does not think it would apply to two separate paragraphs in a collective bargaining agreement.

REMOVAL OF UNION LETTER FROM BULLETIN BOARDS

In the Outside Districts contract and the White Deer contract, Local 537 is given ". . . the privilege of using bulletin boards for notices to members." (GC Ex. 2, Sec. 22, p. 36; GC Ex. 6, Sec. 23, p. 31). When the picketing activity that has been discussed earlier in this brief commenced, it involved various water treatment plants. GC Ex. 10. In each case, as pickets arrived, the plant operators who were on duty called their various supervisors to advise that pickets had arrived at the plant, that it was possible that these pickets would be in place at the time that the shifts of the on-duty operators would end and that the relieving operators might not cross the picket lines so that the plants would not be left unmanned. (N.T. 75-78). The on-duty operators made these calls to alert supervision that it may be necessary to obtain others to act as relief operators if the scheduled oncoming operators decided not to cross the picket lines. (N.T. 75-78). In at least one case, the on-duty operator was not relieved by the oncoming operator, who refused to cross the picket line, and supervision, at least in the view of the on-duty operator, was not making any reasonable effort to provide a relief operator. While on-duty operators advised their supervisors that they would remain beyond the end of their scheduled shifts for a "reasonable time" for supervision to find relief operators, the aforesaid on-duty operator told his supervisor that if a relief operator was not found "within a reasonable time", the on duty operator intended to "shut down the plant" (N.T. 119-121, 122), a process which involved putting the plant out of service so that it could no longer draw water from an external source and purify it for delivery to consumers. (N.T. 123). While shutting down a plant did not necessarily mean the instantaneous shutting off of the customers' water supply, since water was stored in tanks and

distributed through the system, (N.T. 123-124), shutting down of a plant is not something that occurs routinely and is generally sought to be avoided. (N.T. 159-160).

As a result of this statement, Production Director Daniel Hufton caused to be posted on all bulletin boards, including bulletin boards at the New Castle Plant in the Outside Districts and at the White Deer Plant in the White Deer District, a notice dated January 11, 2011 ". . . remind[ing] all production employees of [the] workplace rule regarding shutdowns of . . . plants. . . .", stating that no plant could be shut down without the approval of a supervisor and if a plant must be shut down for any reason, the on duty operator was forbidden to leave the plant until relieved. (GC Ex. 11). Kevin Booth, the President of Local 537, came into possession of this notice and he prepared a letter to Mr. Hufton stating that he never heard of such a "rule", asking for information regarding it and other information relative to plant shutdowns and stating that there was no contractual duty to stay after the end of a work shift, pointing out that in the case of the picketing that occurred on January 8-9, 2011, no effort was made by PAWC to relieve the operator for over two hours after being notified of the picketing and that if this occurred in the future, the on-duty operators would make contact with on duty personnel and supervisors and would wait a reasonable amount of time for relief - if relief was not then forthcoming, the on-duty operator may very will shut down the plant, secure it and leave. (GC Ex. 12). Mr. Booth directed various union officials to post his letter on the bulletin boards next to Mr. Hufton's letter. (N.T. 86). When supervisors saw Mr. Booth's letter, they reported it to Mr. Hufton, who ordered Mr. Booth's letter removed. (N.T. 138). When Mr. Booth heard that this occurred, he advised the Union Vice President of the New Castle District to contact her supervisor to find out why the letter was removed. (N.T. 137). When this was done, the Union Vice President reported to Mr. Booth that her

supervisor told her that if she re-posted the notice, that it would "cause grief for both of us [meaning the Vice President and the supervisor]". (N.T. 137-138). While there was never any explanation as to what the "grief" would be, rather than risk possible discipline to a union member, the union officials did not re-post the letter but instead filed unfair labor practice charges relative to the removal of the letter in the New Castle and White Deer plants. Jt. Ex. 1, No. 13.

Board law is well settled that

> ". . . when an employer permits, by formal rule or otherwise, employees and a union to post personal and official union notices on its bulletin boards, the . . . right to use the bulletin board receives the protection of the Act to the extent that the employer may not remove notices . . . which meet the employer's rule or standard but which the employer finds distasteful." Container Corporation of America, 244 NLRB 318 (1979), at p. 318.

The Board held in Container Corporation of America, supra, that if the posting fell within the contractual language, it could not be removed simply because the employer did not like what the notice said. The test for the notice losing its protected status was to determine if the notice was "offensive, defamatory or opprobrious" rather than merely being intemperate. Container Corporation of America, at p. 320 of 244 NLRB. The notice in Container Corporation of America, supra, referred to a supervisor as treating employees in a "disgraceful" manner and treating them as a "chain gang". The company characterized the notice as "absolutely inflammatory and insulting" and removed it, threatening to discipline anyone who reposted it. In that case, the Board found that the employer committed an unfair labor practice by removing the posting and threatening discipline if the document was reposted. In Illinois Bell Telephone Company, 255 NLRB 380 (1981), union members posted a notice stating that employees had the right to refuse

to work overtime and advising that if they were ordered to work overtime, they should "ask for a union representative to be present". The employer stated that these employees were instigating a refusal among employees to work overtime and it threatened to discipline them if further notices were posted. The Board held that the employees

> ". . . had a protected right to protest Respondent's alleged change in overtime policies. This protection may be lost when the evidence demonstrates that they induced employees to engage in a work stoppage that is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike. Here any such inference is unwarranted." Illinois Bell Telephone Company, supra, at p. 381 of 255 NLRB.

See also Cleveland Pneumatic Co., 271 NLRB 425 (1984), enf'd. 777 F.2d 339 (6th Cir. 1985). The facts in Illinois Bell Telephone Company are virtually identical with the facts of the instant case. Mr. Hufton stated that there was a "workplace rule" regarding plant shutdowns and Mr. Booth disputed it and asked for proof of it. Mr. Hufton stated that a plant operator could never shut a plant down without supervisory permission and must wait until relieved. Mr. Booth simply rebutted these statements by saying that, in effect, plant operators had no right to be forced to remain on duty indefinitely, that the Union had the right to engage in the protected activity of advising its members of what the Union saw as the policy to be followed in case operators were not relieved within a reasonable time and that the Union would follow what the Union had long ago established as its method for dealing with matters of this type, namely calling for relief and waiting a reasonable time for it to arrive. (N.T. 48-49, 75-77). There is nothing "offensive, defamatory or opprobrious" about such a publication, especially when one considers that the factual surroundings of the notice dealt with the right of union employees to honor picket lines and the duty of employees working behind those picket lines to continue to do so after the end of their work shift and after having accorded

reasonable notice to PAWC to provide relief to the on-duty operator. Considering the fact that Mr. Booth's notice dealt with plant operators remaining on duty for a reasonable time after the end of the work shift, his notice was no different than the one given in Illinois Bell Telephone Company, supra, or Cleveland Pneumatic Co., supra, in that both notices dealt with differences of opinion regarding the right to refuse to work overtime. In Illinois Bell Telephone Company, the notice advised that employees had no duty to work overtime. In the instant case, the notice advised that the employees would work only a "reasonable" amount of overtime. In both cases, the notices were protected by the Act.

When PAWC's supervisor advised a union official that she would experience "grief" if she re-posted Mr. Booth's letter, it is submitted that this is a threat of discipline. In fact, the unspecified and ominous connotation of the use of the word "grief" would cause any reasonable person to be fearful of continuing with the activity at hand since the consequences, in addition to being unspecified to the employee, were not even known to the supervisor who used the word. In any event, it is submitted that the statements made by supervision to the employee who desired to re-post Mr. Booth's notice were violations of Section 8(a)(1) of the Act and those statements compounded the violation of the Act inherent in the initial removal of the notice. One must remember that the contractual language in the case at bar was much more permissive relative to posting of notices than the contractual language of the cases cited above and it is submitted that PAWC violated the Act by removing the letter authored by Mr. Booth and also violated the Act by telling others that they would encounter "grief" if the notices were re-posted. In deciding that Mr. Booth's letter was unlawfully removed from the bulletin boards, the Administrative Law Judge clearly followed the above-recited Board precedents. While the

Administrative Law Judge did ". . . not reach the separate question, raised by the Union and the General Counsel, as to whether a rule, such as that advanced by the Employer, that compels employees to remain at work beyond their shift, and therefore precludes them from supporting a picket line that they would otherwise have the right to observe, is violative of the Act" (JD-24-12, p. 25, fn. 14), it is clear that the Employer's rule did so in this case and all that the letter posted by the Union president did was to espouse the Union's position on the same matter. For that reason, removal of the Union letter, in addition to being unlawful for the reasons posited by the Administrative Law Judge, was also unlawful as a smothering of the right of the Union to advertise its position on this matter.

THE EMPLOYER'S LETTER OF JANUARY 4, 2011

After the first instance of picketing occurred on January 2, 2011, PAWC's Human Resources Director, Carole Dascani, sent a letter dated January 4, 2011 to the Union and caused it to be posted on all company bulletin boards. The letter contained the following language:

> "It would be disingenuous for the Union to suggest that this clause should protect employees who are members of the same Union that is "preventing" the employees from working. Whether such employees are working under an active agreement (such as Pittsburgh) or under the terms and conditions of an expired agreement (such as all other PAWC-Local 537 agreements, per correspondence with Mr. Pasquarelli), such refusal would violate the "No Strike or Lockout" provisions of those agreements. In addition, if Local 537 employees repeatedly refuse to cross picket lines manned by Local 537 members, such refusal may constitute an intermittent work stoppage. The Company is, therefore, putting the Union on notice that it reserves the right to take appropriate action, including but not limited to discipline and available legal remedies, against individual employees as well as Local 537." (GC Ex. 13).

The Administrative Law Judge determined that this letter clearly threatened employees who were engaging in lawful activity protected by their contract and Section 7 of the Act. (JD 24-12, p. 25, ll. 20-25). The letter threatened discipline against the employees who would refuse to cross the picket lines even though their refusal was protected by their contract and by the Act, and it threatened discipline against the picketers as well, even though they were off duty and had the protection of those cases decided by the Board that sanction off duty picketing, see, e.g., Thrift Drug Company, 204 NLRB 41 (1973); Edir, Inc., d/b/a Wolfie's, 159 NLRB 686 (1966), even though the picketers were not picketing on facilities covered by the collective bargaining agreement that they worked under. By this letter, PAWC clearly ". . . interfere[d] with, restrain[ed] [and] coerce[d] employees in the exercise of rights guaranteed in section 157 of [the Act]. . . ." 29 U. S. C. A., § 158(a)(1) and for that reason, the Administrative Law Judge was correct in finding that portion of the complaint as established and that PAWC should be held to have committed an unfair labor practice by the posting of General Counsel Exhibit 13.

The argument of PAWC that the disciplinary reference in the letter referred only to possible future intermittent picketing is simply unsupportable. The sentence that precedes the sentence dealing with possible future intermittent picketing states that any ". . . refusal would violate the . . . 'No Strike or Lockout' provisions of those agreements. . . ." GC Ex.13. The very next sentence states that "In addition" if this action occurs repeatedly, it ". . . may constitute an intermittent work stoppage." GC Ex. 13. The letter then concludes with the statement that "The Company is, therefore, putting the Union on notice that it reserves the right to take appropriate action, including but not limited to discipline and available legal remedies, against individual employees as well as Local 537." (GC Ex. 13). PAWC argues through rather convoluted semantics that do violence

to sentence construction that the reference to discipline relates only to the sentence dealing with possible future repeat refusals to cross picket lines. PAWC fails to note that the sentence referring to possible future repeat refusals to cross picket lines begins with the words "In addition" and the following sentence referencing discipline says that "The Company is, therefore, putting the Union on notice that it reserves the right to take appropriate action, including but not limited to discipline and available legal remedies, against individual employees as well as Local 537." (GC Ex. 13, emphasis added). Clearly, the use of the phrase "In addition" is a grammatical link between the sentence that it is in and the preceding sentence and the standards of English grammar and sentence construction teach that the words "In addition" actually link the two sentences and make them one. The fact that the Company is therefore putting the Union on notice regarding discipline relates to both sentences, especially in light of the fact that the first paragraph of the No Strike or Lockout language (GC Ex. 2, Sec. 2, pp. 2-3) specifically states that discipline is a consequence of violating that section and PAWC's thrust in the quoted letter and in this case generally is that the employees violated the first paragraph of the No Strike or Lockout section of the labor contract. The Administrative Law Judge's conclusion that this ". . . letter warned of intermittent picketing but also asserted that any observance of the picket line violated the contract . . . . [and that the] threat of discipline was not limited to the threat of discipline of the picketing continued and was deemed unprotected as intermittent . . . ." (JD-24-12, p. 21, ll. 25-35, emphasis added) is amply supported by the record and his interpretation if it is cogent, well reasoned and supported by logic and the usual rules of English grammar and sentence construction.

The Administrative Law Judge's determination that PAWC also committed an unfair labor practice when it communicated with various employees who inquired about

the consequences of crossing picket lines. Jeffrey Michael Kachurek, Kent Shrontz and Daniel Toth are employees who were talked to by PAWC supervisors. In Mr. Kachurek's case, supervisor Kristin Snyder told him that there would be "ramifications" if he failed to cross the picket line. (N.T. 128-129). In Mr. Shrontz's case, his supervisor told him that he was "required" and "expected" to be at work. (N.T. 211). In Mr. Toth's case, he was also told that he was "expected" to work. (N.T. 179). Additionally, PAWC admitted that it has in effect a work rule that provides for discipline for employees who fail to report for work when scheduled to do so. (N.T. 202). The issue here is whether or not the picketing and the employee refusal to cross the picket lines was protected activity and whether or not the letter of January 4, 2011 (GC Ex. 13) and the statements made by supervisors to individual bargaining unit members who encountered the picket lines violated Sec. 8(a)(1) of the Act. The statements that there would be "ramifications" for failing to cross a picket line (N.T. 128-129) and that employees who were standing on the picket line were "expected" to be at work (N.T. 179, 211) is not only an ample basis for the Administrative Law Judge to conclude that these statements, especially when coupled with the January 4, 2011 letter, constituted threats regarding the exercise of Section 7 rights.

CONCLUSION

Local 537 respectfully submits that the Administrative Law Judge properly found that PAWC committed a number of violations of the Act. Local 537 engaged in protected activity by engaging in primary picketing at the various PAWC sites described in GC Ex. 10 by publicizing labor disputes that it had with PAWC under other labor agreements involving the Union and PAWC. The language in the Pittsburgh District contract and the Outside Districts contract as well as the extrinsic evidence dealing with

how language dealing with primary labor dispute picketing was first inserted in the agreements and with how an arbitrator has interpreted it establishes that the "no strike" language was not in any way intended to prevent Local 537 from engaging in the conduct at issue. In fact, the language added in 1979 and 1980 was proposed and added as a specific modification to a clause captioned "NO STRIKE OR LOCKOUT." This alone, under the Indianapolis Power and Light rule virtually mandates a finding that the picketing was protected and contractually permissible. Thus, the contractual language permitted employees to honor the picket lines that were established and it is submitted that under the cases cited in this brief, both Local 537 and its members engaged in protected activity. When PAWC sent the Human Resources Director's January 4, 2011 letter (GC Ex. 13) to Local 537, PAWC directly threatened discipline to individuals for engaging in that protected activity and when its supervisors told individuals who approached the picket lines and inquired about the situation that there would be "ramifications" for refusing to cross the picket lines or that the employees were "required" and "expected" to cross them, especially in light of the fact that PAWC work rules provide for discipline for failing to report to work when scheduled, PAWC clearly threatened and coerced individuals who sought to exercise their Section 7 rights. It is submitted that all of the Administrative Law Judge's conclusions are amply supported by the record.

It is also well settled that Local 537 and its members had the right to use bulletin boards pursuant to contract language and long standing past practice. When PAWC posted Daniel Hufton's January 11, 2011 memorandum (GC Ex. 11) which supposedly reiterated a "workplace rule" (N.T. 157) that has been in existence "forever" (N.T. 160) but has never been reduced to writing (N.T. 161) even though PAWC characterized the

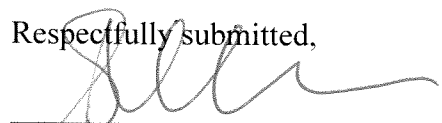
rule as one of extreme importance, it is hardly surprising that Local 537 would dispute PAWC's position and under the rationale of the cases cited above, put up a responsive letter which simply set forth Local 537's position about treatment plant operators having to continue working beyond the end of their shifts when the lawful primary picket lines that were established at their work places were protected activity. For PAWC to remove the letters and to advise a union official that she would experience "grief" if she re-posted the letter is an obvious violation of the Act.

In summary, the arguments of PAWC in support of its position that the Administrative Law Judge's decision should not be adopted are internally inconsistent and in many cases amount to a strained reading of the decision and a glossing over of many of the facts adduced at the hearing. The Administrative Law Judge's decision was based on clearly established, and in many cases stipulated, facts of record. It clearly followed Board precedent and it is respectfully submitted that the decision should be adopted by the Board.

ORAL ARGUMENT

The Union submits that the issues in this cause have been clearly briefed by the parties and that oral argument is not necessary in this matter.

Respectfully submitted,



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STATEMENT OF SERVICE

The undersigned hereby certifies that he did, on July 26, 2012 serve a true copy of the Brief of Utility Workers Union of America, AFL-CIO, System Local No. 537 by electronic mail and by United States Mail, postage prepaid, addressed as follows:

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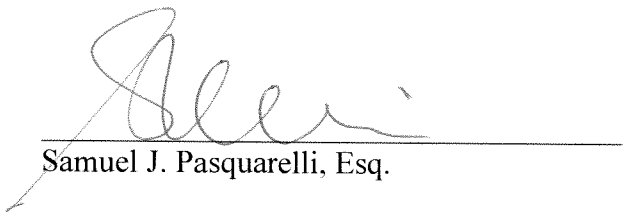

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