



and the extension was granted until August 13, 2012, and the brief was timely filed. PAW had fourteen (14) days to respond with a Reply Brief, making it due August 27. However, PAW counsel inaccurately calendared this date, and marked on the operative calendar that it was due the August 28<sup>th</sup>. As a result, Counsel for PAW filed the brief on August 28<sup>th</sup>, one day after the appropriate due date.

The Rules and Regulations provide for the filing of a late-filed document as follows:

(c) The following documents may be filed within a reasonable time after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undue prejudice would result:

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(2) In representation proceedings, exceptions, requests for review, motions, briefs, and any responses to any of these documents. A party seeking to file such documents beyond the time prescribed by these rules shall file, along with the document, a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts.

Section 102.111(c), NLRB Rules and Regulations.

The Reply brief is appropriate for late filing under this rule. It was filed within a reasonable time period after the due date, being only a single day late. There is no prejudice that would result to any party. In fact, Union Counsel does not oppose this motion. I was unable to reach Counsel Acting for General Counsel to ascertain his opinion on the matter. In point of fact, a single day does not unnecessarily delay the proceedings.

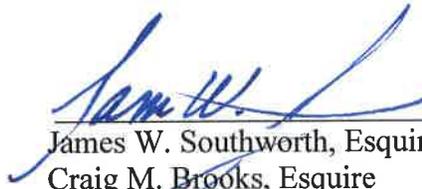
Further, the delay was based upon excusable neglect. As set forth fully in the attached affidavit, due to an error, the brief was incorrectly calendared on the wrong day, that being August 28<sup>th</sup> instead of the 27<sup>th</sup>. (Southworth Affidavit, ¶ 3) The error was

only discovered upon receipt of the letter from Farah Z. Qureshi, dated September 4, 2012, detailing to me that the brief had been filed a day late. (Southworth Affidavit, ¶4) I was out of town on Friday, September 7<sup>th</sup> at a family wedding. I returned on Monday, and have expedited this motion as quickly as possible. (Id.)

For the foregoing reasons, PAW respectfully requests that the Board accept the previously filed and now attached Reply brief for consideration in the above matter.

Dated: September 11, 2012

Respectfully submitted,



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James W. Southworth, Esquire  
Craig M. Brooks, Esquire  
Counsel for Pennsylvania American  
Water Company  
HOUSTON HARBAUGH, P.C.  
401 Liberty Avenue, 22<sup>nd</sup> Floor  
Pittsburgh, PA 15222

ATTORNEYS FOR RESPONDENT

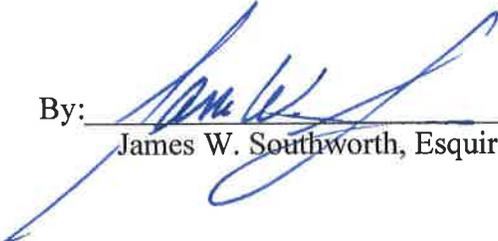
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion for Late Filing of Reply Brief was served on the 11<sup>th</sup> day of September, 2012, by electronic mail upon the following:

David L. Shepley  
Counsel for Acting General Counsel  
NATIONAL LABOR RELATIONS BOARD  
Region Six  
William S. Moorhead Federal Building  
1000 Liberty Avenue, Room 904  
Pittsburgh, PA 15222  
*Shirley.McIntyre@nlrb.gov*

Samuel J. Pasquarelli, Esq.  
Sherrard, German & Kelly, P.C.  
28<sup>th</sup> Floor, Two PNC Plaza  
620 Liberty Avenue  
Pittsburgh, PA 15222  
412-355-0200  
*sjp@sgkpc.com*

By: \_\_\_\_\_

  
James W. Southworth, Esquire

**Affidavit of James W. Southworth, Esquire**

COMMONWEALTH OF PENNSYLVANIA     )  
COUNTY OF ALLEGHENY                 )

I, James W. Southworth, being first duly sworn upon my oath, hereby state as follows:

I reside at 717 Jefferson Drive, Pittsburgh, Pennsylvania, 15229.

My telephone number is 412-288-2264.

I am employed by Houston Harbaugh, located at 3 Gateway Center, 401 Liberty Avenue, 22<sup>nd</sup> Floor, Pittsburgh, Pennsylvania, 15222.

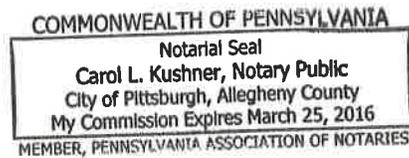
1. I am the Senior Associate Attorney who has been responsible for the drafting of the briefs related to the above referenced matter.
  
2. I did in fact draft the Reply brief to the Answering briefs filed by Union Counsel Sam Pasquarelli and Counsel for the Acting General Counsel, David Shepley.
  
3. Either I, or my legal staff, calendared that the Reply brief was due on August 28th, instead of the correct date of the 27<sup>th</sup>. I relied upon my calendar for the due date for this brief, and filed it on the 28<sup>th</sup>.

4. I was unaware that this date was incorrect until it was brought to my attention by the letter authored by Farah Z. Qureshi, dated September 4, 2012. I was out of town at a family wedding when this letter arrived. I returned on Monday, September 10<sup>th</sup>, and have dealt with this matter as expeditiously as possible.
  
5. I have read this statement, consisting of two (2) pages, and I fully understand its contents, and I certify that it is true and correct to the best of my knowledge and belief.

  
James W. Southworth

Sworn and subscribed to before me  
on this 11 day of September, 2012.

Notary Public







The General Counsel's ("GC") and Union's answering briefs do not provide support for the ALJ's decision in this matter. The answering briefs raise issues, but fail to meaningfully address the issue of drafter's intent, the underlying strikes in 1982 and 1991, and the fact that the Union caused work stoppages in violation of the governing collective bargaining agreements.

- I. **Despite the ALJ's decision, and the opinions of the GC and Union, the only evidence available from which to derive the drafter's intent of the proviso language allowing employees to choose not to cross a primary picket line is what we know to be the genesis of the language. The genesis of the language was the situation involving third party "stranger" picket lines.**

The Union's brief does not remedy what is the inherent problem in the ALJ's decision, namely, that though the ALJ indicated that the intent of the parties was crucial in interpreting the agreement, the ALJ did not significantly address the matter of intent in his decision. The ALJ cites *Indianapolis Power & Light Co.*, 291 NLRB 1039 (1988), *enfd.* 898 F.2d 524 (7<sup>th</sup> Cir. 1990), as follows: "[i]n considering the scope of the rights waived by a contractual no-strike clause the Board gives the *parties' intent controlling weight* and looks to the wording of the contract as well as extrinsic evidence that may shed light on the inquiry." *Id.* (emphasis added). However, the ALJ gives scant attention to the party's intent in his decision. In point of fact, the ALJ's decision rests heavily on his interpretation of the extrinsic evidence. JD – 20: 23-25.

The Union argues that Pennsylvania American Water Company ("PAW") relies too heavily on the fact that the motivation for inclusion of the sympathy strike proviso was an event with a meter reader in the field having to deal with a stranger picket line. The Union argues that this does not "amount to proof of the parties' intent as to the scope of the language." Union Answer, p. 16. The Union goes on to argue that there is "absolutely no

evidence of record to the effect that the parties discussed the proposal at any length or the [sic] any limitation on its scope was brought up.” *Id.* In so saying, the Union strikes upon the crucial issue in this matter. There is no other evidence, contrary or otherwise, to assist in the assessment of the intent of the parties when adding this language to the agreement. The only concrete evidence available is not contested. The genesis of the clause allowing employees to cross a primary picket line was in the context of addressing the situation when a meter reader in the field came upon a third party picket line. (Ex. 1, Stip. 10). The clause allowed the individual employee to decide whether or not to refuse to cross the picket line, and therefore not conduct the business for which they were attempting to enter the work site. All parties agree that this situation was the impetus behind adding this clause to the agreements, and there is no other or contrary evidence.

General Counsel argues that because the language in the proviso does not limit the prohibition to only stranger picket lines the language clearly allows the Union to set up picket lines at its own represented Company facilities and thereby cause work stoppages. GC Answer, p. 17-18. However, the General Counsel fails to understand the import of PAW’s position. PAW argues that, because the drafter’s intent is given controlling weight, it is important to understand the context that led to the drafters to add the proviso language to the contract in the first place. PAW simply argues that it is crucial to understand that the intent was to address a very specific problem, and that the intent was never for the purpose of allowing the Union to subvert the main intent of the agreement’s no strike provision immediately preceding it in the relevant agreements.

**II. Neither the Union nor the General Counsel addressed the merits of the Ally Doctrine argument, instead merely dismissing it as “speculation.”**

The ALJ failed to adequately address the explanation offered by PAW as to why the Company never raised the issue of cross bargaining unit picketing in 1982 or 1991. The Union’s goes so far as to say that the ally doctrine argument “avails nothing.” Union Answer, p. 21. However, in so stating, the Union does not provide a reasoned response to this argument, instead relying on the tried and true argument that it is disingenuous for PAW to argue anything like that because “... it is understood since at least 1982 that this language covered a situation such as the one existent here.” *Id.* Clearly, the Union misses the very crux of the ally doctrine argument -- that being that the circumstances in 1982 and 1991 were very different than the circumstances in 2011 because of the existence of bargaining units in 1982 and 1991 of a full strike following the expiration of the labor agreement.

Further, the Union argues that the Company simply made a “bad deal.” Union Answer, p. 18. Yet such a statement is in and of itself speculative.

The General Counsel dismisses the ally doctrine argument as “mere self-serving speculation.” GC Answer, p. 22. The General Counsel also fails to adequately address the merits of this argument. PAW asserts this as an explanation for why the Company did not contest these issues in 1982 and 1991, and this is a very plausible and defensible explanation. The ally doctrine provides a cogent explanation as to why the Company did not seek to change the contract language to cover a situation, such the 2011 situation involved here, where there was no strike. It also explains why all the Company supervisors and managers, in response to the Union’s January 2011 picketing, could not understand how the Union could engage in work stoppage picketing without being on strike. Merely dismissing the Company’s explanation as

speculative does not address the merits of the statement. The ALJ and the parties are attempting to reconstruct the context of thirty (30) plus year old contract language. This is an inexact science, to be sure. However, PAW's explanation provides a reasoned and cogent explanation as opposed to the murky reasoning that suggests the Company merely accepted a bad deal, and the agreement should ultimately be read in a convoluted fashion. The ally doctrine is based on the evidence of record – e.g., the intent of the parties' in putting the language in the contract and the history of how this language was utilized – i.e., over the prior thirty-plus years this language was in the labor contract it was only utilized in strikes following the expiration of the labor contract (e.g., the 1991 strike). Never in the past did the Union engage in work stoppage picketing during bargaining but prior to engaging in a strike (despite this situation occurring numerous times in the past). The fact that neither the General Counsel nor the Union addressed the merits of this argument, instead only dismissing it as speculative is telling that they have no answer to this argument.

**III. The General Counsel stated in his Answer to the Exceptions that all parties agree that the primary picketing was not a breach of the agreements, while the PAW fervently argues that the primary picketing was a breach of the agreements.**

The primary picketing caused a work stoppage. Work stoppages are prohibited during the life of the relevant collective bargaining agreements. All the labor agreements were in effect, therefore, the agreements' no work-stoppage clauses were breached. This is an important part of the argument that has been put forth by the Company.

The General Counsel states that there is agreement on several salient facts, one of which is that “ ... the primary picketing did not violate the Brownsville District contract or any other

contract.” GC Answer, p. 15. He makes this statement apparently without an understanding of PAW’s position on this matter. Clearly PAW believes the relevant agreements were breached. (*Post-Hearing Brief for the National Labor Relations Board, Region 6* at 12-15, Pennsylvania American Water Company and Utility Workers Union of America, System Local No. 537, AFL-CIO (No. 6-CA-37197, 6-CA-37198, 6-CA-37202, 6-CA-37241, 6-CA-37243)). The breach was caused by the picketing workers who caused the work stoppage, or by the workers who refused to cross the picket line and thereby caused a work stoppage.

Perhaps more to the point, the Union itself, the party to the relevant collective bargaining agreements, and the signatory on the agreements, breached the agreements. The agreements are between the parties of Pennsylvania American Water Company and the Utility Workers Union of America, AFL-CIO Local Union Number 537. The Union affirmed that it, as a party to the agreements, would not cause a work stoppage during the life of the agreements. However, by slight of hand, the Union clearly did exactly that. By using employees from different bargaining units to cause the work stoppages at other bargaining units, the Union eviscerated the agreements.

**IV. Neither the Union nor General Counsel provided sufficient support for the ALJ’s erroneous conclusion that the no strike provision in the relevant collective bargaining agreements is limited to matters covered by the grievance procedure.**

The ALJ argued in his decision that PAW overstated its case by arguing that allowing the right to refuse to cross a picket line clause to allow the Union to breach the no-strike clause defeated the purpose of the no-strike clause. The ALJ argued that the no-strike clause was given in exchange for the arbitration provisions in the relevant collective bargaining agreements. In so arguing, the ALJ relied upon *Machinists, Oakland Lodge 284 (Morton Salt Co.)*, 190 NLRB 208,

enforced in relevant part and remanded, 472 F.2d 416 (9<sup>th</sup> Cir. 1972)<sup>1</sup>. The Union's brief affirms this position.

However, in *Morton Salt*, the language contained in the agreement was much different than the language contained in the PAW/Local 537 agreements. Morton Salt's agreement contained the following:

"During the life of this Agreement, the Union will not cause a strike or production stoppage of any kind, nor will any employee or employees take part in a strike, intentionally slow down the rate of production or in any manner cause interference with or stoppage of Employer's work, *provided the Employer follows the grievance procedure for which provision is made herein.*" Id. at \*3 (emphasis added).

This is very different from the language in the collective bargaining agreements at issue which contain the following language:

"In furtherance of harmonious relations among employees, the Management and the Public, and in consideration of the adjustment procedures set forth in Section 3 of this Agreement, it is mutually agreed by the parties hereto that there shall be no lockout, strike, work stoppage or intentional slowdown during the terms of this Contract." (GC Exh. 2-3, Sec. 2).

The *Morton Salt* language closely ties the prohibition on strikes or work stoppages to the employer's adherence to the grievance procedure. The agreements between PAW and the Union tie the prohibition to the furtherance of harmonious relations, and only mention that this waiver of the right to strike is also consideration for the arbitration provisions. There is certainly no limiting language in the parties' agreements stating that the union will not engage in strikes only concerning subjects covered by the grievance procedure, nor that the Union may engage in a strike if the subject is not covered by the grievance procedure. To argue such is to import language and meaning that is absent in the agreements. *Morton Salt* is clearly distinguishable.

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<sup>1</sup> Interestingly, the Union in the *Morton Salt* case was on strike.

## CONCLUSION

Based on the above, and the preceding Exceptions, PAW requests that the Board grant its Exceptions to ALJ Goldman's Decision and find that there was not a violation of the Act in these matters.

Respectfully submitted,



James W. Southworth

Counsel for Pennsylvania American Water  
Company  
HOUSTON HARBAUGH, P.C.  
401 Liberty Avenue, 22<sup>nd</sup> Floor  
Pittsburgh, PA 15222

ATTORNEY FOR RESPONDENT

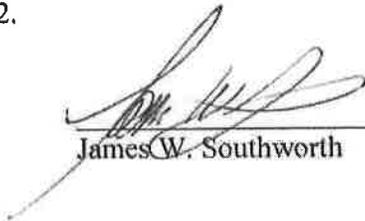
CERTIFICATE OF SERVICE

James W. Southworth, one of the attorneys for Respondent, hereby certifies that he has caused a true and correct copy of the foregoing Brief in Support of Respondent's Exceptions to be served upon:

David L. Shepley  
Counsel for Acting General Counsel  
NATIONAL LABOR RELATIONS BOARD  
Region Six  
William S. Moorhead Federal Building  
1000 Liberty Avenue, Room 904  
Pittsburgh, PA 15222

Samuel J. Pasquarelli, Esq.  
Sherrard, German & Kelly, P.C.  
28<sup>th</sup> Floor, Two PNC Plaza  
620 Liberty Avenue  
Pittsburgh, PA 15222  
412-355-0200  
[sjp@sgkpc.com](mailto:sjp@sgkpc.com)

via electronic mail, on August 28, 2012.

  
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James W. Southworth