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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 32

PACIFIC MARINE MAINTENANCE CO. AND PACIFIC CRANE MAINTENANCE COMPANY Respondents, AND INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, Respondent INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL. Charging Party.	)	Case No. 32-CA-21925, et al. **EXCEPTIONS OF CHARGING PARTY**

EXCEPTIONS

No.	Reference To Decision	Exceptions Taken And Brief In Support Of Exceptions
1.	8: 18-22	To the implication that PCMC and PMMC made their responses independently and not as part of a plan to steer business from PMMC to PCMC.
2.	8: 30-34	To the implication that PCMC and PMMC agents were not agents of the same entity, operating for a single purpose.
3.	9: 6	To the statement that "PMMC discontinued operations". Operations were not discontinued, but continued under a different name. Further, PMMC continued – and continues to this day – to exist, servicing other customers. RT 250:2-16
4.	9: 43 and 34:48	To the statement that the parties stipulated "mid-trial" that PCMC and PMMC were a single employer. The stipulation occurred at the beginning of a trial, before the first witness was called. RT 103; GC Exh. 5.
5	9: 45-46	To the statement that "Conceptually it is easier for portions of the. . . analysis to retain the earlier distinctions between PCMC and PMMC as actors." Since, in actual fact and by stipulation, they were a single actor, separate analysis, while it may be "easier", leads to incorrect results.
6.	Passim	To the ALJ's repeated failure to treat the employer as a single employer
7.	Passim	To the ALJ's failure to note that throughout its dealings with the IAM and with its customers, the employer repeatedly and falsely misrepresented itself as separate and independent entities.
8.	18: 25 -26	To the statement that "Without exception. . . when new work was obtained by PCMC and new employees were hired to do the work, recognition was extended to the ILWU. . ." In fact, when the employer obtained the Maersk work in 1999, it continued to recognize the IAM.
9.	19: 35 -38	To the statement that there "*might* have been contract/labor law issues" if PCMC had hired Maersk workers and continued to recognize the IAM. PCMC was signatory to a multi-employer CBA that *required* its employees to be represented by the ILWU. GC Exh. 9, Sections 1, 1.7, and 1.71. PCMC created PMMC entirely for the purpose of evading that obligation. The PMMC – PCMC distinction was, from first to last, a labor law dodge. RT 205:6-11; 492:2-4.
10.	20: 30-31	To the statement that "PCMC, in late 2004, obtained a Maersk contract for all its crane M&R work at its Port of Tacoma terminal." In fact, PCMC obtained non-crane Maersk work in Tacoma as of March 31, 2005. It has never had the Maersk crane work there. RT 3177:4-14; 3286:23-3287:14; 4010:23 – 4011:3; 5958:2-10.
11.	20: 43 to 23: 2	To the relevancy of any discussions concerning TSTR, unless they were embodied [as they were not] in a timely, formal request to negotiate the terms of a collective

		bargaining agreement.
12.	23: 16-17 and passim	To the implication that Maersk's termination of PMMC was a decision made independently of the manipulations and misrepresentations of the Employer.
13.	23: 16-17 and passim	To the ALJ's failure to note that Maersk erroneously believed that PCMC and PMMC were different companies. RT 1622:10-21.
14.	27:32-37 and 27:44-47	To the ALJ's statement "Board cases in which the actions of the employer. . . are designed to defeat or avoid union recognition by undertaking an overall strategy designed and intended to dislodge the union" are distinguishable from the present situation. The distinction, according to the ALJ, is that the parties stipulated to a single employer, rather than an alter ego. The distinction, however, is without a difference. The shift from PMMC to PCMC (i.e., to different names for the same employer) was precisely a "strategy to dislodge the union". Cases so holding are on point.
15.	29:45 and passim	To the ALJ's repeated reference to Maersk's solicitation of "bids" from PCMC and PCMC and to PCMC's and PMMC's making of "bids" to Maersk. First, PCMC and PMMC were the same entity. Their supposed separate existence was only a ploy by the employer to manipulate the situation – in particular, to divert work from the IAM to the ILWU. Secondly, there was no formal "bid" process, but merely verbal discussions from time to time.
16.	30:10-11	To the ALJ's that PMMC's lay-off of its employees "was simply not a voluntary action by PMMC, but rather was a necessary reaction to Maersk's refusal to extend the PMMC contract." That is exactly backward. Maersk's "refusal to extend the PMMC contract" was a necessary reaction to the Employer's decision to offer better terms to Maersk under an ILWU contract, which the Employer could accomplish by laying off IAM workers and re-hiring them as ILWU workers.
17.	31:26 et seq.	To the ALJ's analogy to the pricing of labor services to the price of a manufactured product. A manufacture product typically has many cost components and a manufacturer typically has many customers. In the present case the price of labor (and its availability at certain hours, etc.) was, as a practical matter, the *only* component of the employer's cost. Furthermore, the Employer here offered two different prices to Maersk for the very same labor services: one (higher) price for work under an IAM contract and another (lower) price for work under an ILWU contract. It is absurd to abstract this "pricing" strategy from the employer's duty to recognize the union of its employees' choice.
18.	33:23-24	To the ALJ's statement that "PMMC was not in any legal sense herein liable for the Maersk decision to award the contract to another." The statement is circular in that it assumes PMMC's non-liability as the basis for finding that PMMC is not liable. Secondly, Maersk did not award the contract to "another". It awarded the contract to the single employer.

19.	34:5 to 35:33	To the ALJ's refusal, based on the absence of an 8(a)(3) allegation, to recognize that the shift of unions was motivated by the Employer's desire to rid itself of the IAM, thereby lowering labor costs. Anti-union animus is not technically an element of an 8(a)(5) charge – but when the Employer claims that its purpose in laying off its workers was innocent, or merely responsive to a customer's decision, or was "entrepreneurial", then the employer's motivations are relevant. And here they were plainly anti-IAM.
20.	35: 21-33	To the ALJ's rejection of *Blumenfeld Theaters*, 240 NLRB 206, 217 (1979) – a case which is very apt: "The discharge of all bargaining unit employees and their replacement with nonunion employees can only be viewed as part of [the employer's] overall strategy to dislodge the unions. . ."
21.	36: 14-15	To the ALJ's statement that "There is no contention that the Respondent Employers bear some responsibility for the award of the contract by Maersk to PCMC." The ALJ's statement is unclear. Read literally it is incorrect. There is indeed a contention, by the General Counsel and the Charging Party, that the Employer does bear some responsibility for the award of the contract by Maersk to PCMC.
22	36: 29-41	To the ALJ's rejection of the General Counsel's treatment of the Respondent employers as a single employer and the ALJ's refusal to make a "unitary analysis" of the facts. This is contrary to the parties' stipulation.
23.	38:49-50	To the ALJ's finding that "there is an insufficient relationship between the 'costs' involved herein to apply the Copurt's labor costs analysis to the instant facts." Again, the statement is unclear. However, the costs to the employer and the price to the customer were based *entirely* on the contract price for labor and other matters, such as hours of work and overtime, that were subject to collective bargaining.
24.	38:50 to 39:2	To the ALJ's statement that from the outset of the case he "viewed the series of events herein as involving far more attenuation of causal factors than a direct Respondent Employer decision to make unilateral changes. . ." And again, we find the statement unclear. There was no "attenuation" between the costs imposed by the IAM and ILWU agreements (both in wages and other terms, such as hours of work, work assignments, etc.) and the price charged to Maersk, which was determined immediately and literally by the amount and cost of labor service delivered by the employer. Where is the "attenuation"?
25.	39: 4-6	To the ALJ's statement that "I agree with the Respondents that the importance of costs herein applied to Maersk, the Respondent Employer's customer, and only indirectly to the Respondent Employers themselves." Respectfully, the statement is beyond unclear – it is incomprehensible. How could an

		employer's costs be only "indirectly" important to the employer? An employer's costs are directly and vitally important to *any* employer. In the present case, they were not only directly and vitally important to the employer, but they could all be addressed through collective bargaining. That is precisely why the employer wanted to replace the IAM with the ILWU.
26.	67:42-43	To the ALJ's failure to find 8(a)(1) and 8(a)(5) violations in the Employer's refusal to bargain with the IAM (except on effects), the Employer's withdrawal of recognition of the IAM, and in the Employer's unilateral change of wages, hours and working conditions.
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No.	**Exceptions Taken**	**Reference To ALJD**	**Record Relied On**	**Grounds For Exception**
41.	To the ALJ's accretion analysis. The ALJD omitted evaluation of certain relevant factors in the accretion analysis, misapprehended other factors, and weighed irrelevant factors in favor of accretion.	53-63 passim	ALJD passim	The ALJ misapplied Board precedent on accretion.
42.	To the ALJ's failure to appropriately weigh the long, successful bargaining history between PMMC and IAM.	53:32-38; 55:44-47.	GC Ex 15, p. 4; RT 1893;3722; 3727-8; 3851; 4012-4; 4163; 4187; 4190; 4219; 4325.	Board precedent dictates that bargaining history is the most important factor in the accretion analysis. The ALJ's failure to properly consider this factor was highly prejudicial to the Charging Party.
43.	To the ALJ's finding that there was no historic bargaining unit.	55:44-52; 56:1-3	GC Ex. 15, p. 4; RT 1893; 3722; 3727-8; 3838-9; 3851; 4012-4; 4163; 4187; 4190; 4219; 4325.	This is contrary to the record evidence.
44.	To the ALJ's failure to note that there was no hiatus in the March 31, 2005 transition of work from PMMC to PCMC.	53-63 passim	ALJD	Failure to accord substantial weight to this uncontested fact was highly prejudicial to the Charging Party.

45.	To the ALJ's conclusion that there was no continuity between actual supervision for the former PMMC mechanics before and after the March 31, 2005 transition date, and ALJ's failure to note separate de facto supervision after March 30, 2005.	47-48 passim	RT 278-9; 258; 516-7; 549; 610; 864; 922; 958-993; 1007; 1042-3; 1047-8; 1049-50; 1056; 1331-6; 3206; 3290; 3219.	The record is at odds with the ALJ's conclusion.
46.	To the ALJ's conclusion that there was significant integration between the units.	49-62 passim	RE Exs. 11, 12, 17 and 18; RT 1081; 1154-5; 1294; 2783; 3002; 3075; 3190-1; 3197-8; 3727-8; 4117.	The ALJ relied on Employer exhibits to find an accretion notwithstanding numerous errors and vagaries in those documents.
47.	To the ALJ's complete failure to address the systemic pattern of demonstrable errors in Employer documents proffered to support an accretion, and the ALJ's finding that the Employer's descriptions were "plausible."	55:6-20	N/A	A finding that the Employer's evidence is plausible is not enough to meet the high evidentiary standard.
48.	To the ALJ's failure to articulate what he considered a short-term transfer, and his failure to specify the number of such short-term transfers that the Employer had doubled counted in the exhibits that were the essence of Respondents' asserted accretion defense.	27 passim	N/A	Board precedent weighs permanent and temporary transfers very differently when making accretion analyses.
49.	To the ALJ's mischaracterization of the evidence that significant interchange did occur.	49-62 passim	RT 1081; 1154-5; 1294; 2783; 3002; 3075; 3190-1; 3197-8; 4117.	Board precedent considers employee interchange to be a major factor in the accretion analysis, and here the ALJ failed to properly address or analyze the data on that subject.

50.	To the ALJ's conclusion that the former IAM-represented mechanics ceased to have any legally cognizable community of interest after March 30, 2005.	62:35-36	RT 1893; 3722; 3727-8; 3851;4012-4; 4187; 4190; 4219; 4325; 680-3; 914; 917-8; 1295; 2840; 4203-4; 4109; 2840; 2726; 3075; 2802;278-9; 516-7; 549; 610; 864; 922; 958-993; 1007; 1042-3; 1047-8; 1049-50; 1056; 1331-6; 3206; 3290;3219; 2051-2; 2660; 2672; 2676; 2678; 2682-4; 3729; 3734-5; 3515;2733; 3013; 4127; 4190; 4220; 3161-2; 3517; 3153-5; 3192; 3143-4; 3873; 3797-8; 1007; 1017; 1042-3; 1047-8; 1103;1301-2; 3075; 3024; 4164; 3495; 3491; 3508;1294; 1297-8;2818-20; 4231-2; 4235; 4226; 3035; 3039-41; ALJD at 16; 1394-5;1297-8; 4231; 4235; 4226; 4239-40;4234; 1157; 1291; 2789; 2790; 2794-5; 2814; 2917; 2964;	The record displayed a dramatic disparity of interests between the IAM employees and the ILWU employees after March 30, 2005, and the day-to-day job of the former IAM employees did not change significantly after March 30, 2005.

			3005-6; 4228; 3397; 3560; 1109; 1111-3; 1155-7; 1196-8; 1303-5; 2688; 2832-3; 2964-6; 2972; 2982; 3002; 3495; 1140-1; 2766; 3483; 4038; 1967-8; 1297; 3489-90; 3485-6; 1970-1; 3484-6; 3546-7; 3686; 1159-60; 2913-4; 1076; 3630; 3680; 1294; 4039; 4056; 4216; 3661; 3651; 3658; 4216; 4308-9; 4097; 4079-80; 4085; 1130-2;1175; 1196; 3664; 4351; 4058; 683-6; 1962-6; 683-6; 4026; 2966; 2972; 1109-12; 1129; 1155-7; 1181; 1196-8; 2688; 2832-3; 2982 3002;2882; 3495; 3165;
51.	To the ALJ's reliance upon language in *A.G. Communications,* 350 NLRB 168 (2007) that an accretion does not have to be measured as of the initial day of the transition in the circumstances of this case.	46 passim	ALJD at 46.	The record does not support the conclusion that the Employer had such a plan to effectuate a complete integration of operations. Further, no such integration ever transpired.

52.	The ALJ's failure to identify which "Employer's" mechanics' terms and conditions were to be analyzed.	11 passim	The entirety of the ALJD.	The terms and conditions of both the coast-wide Longshore unit and the terms of the historical IAM unit must be compared before and after the PCMC takeover.
53.	To the ALJ's consideration of stranger west coast marine terminal bargaining units (i.e., those other than PCMC or PMMC) in determining whether the historical Machinists unit was accreted into PCMC's Longshore unit.	10 passim	ALJD at 10.	The overarching question to the successor analysis is whether the decades-old Machinists unit became so inextricably intertwined with PCMC's Longshore unit such that the Machinists unit could no longer be considered a rational unit. Such has nothing to do with how other west coast employers operate.
54.	The ALJ's conclusion that the demand for M&R mechanics work was unstable due to seasonal cycles.	16:44-51, 17:2	The entire ALJD and RT 1150; 1289; 2653; 2939; 2998; 3034; 3077; 3615; 3718; 3734; 3721; 3725-6;3834-6; 3840-2; 3847-8; 3867-8; 4005-6; 4125-6; 4166-9; 4187; 4191.	The ALJ would justify the use of the ILWU hiring hall to smooth out alleged "cycles or spikes" in mechanics' work, which really did not exist.
55.	To the ALJ's failure to distinguish whether 10 transfers from PCMC's Evergreen-Tacoma terminal to PCMC's new work at the Tacoma Maersk terminal were permanent or temporary transfers.	26:45, 27:1-12	N/A	The Board weighs permanent and temporary transfers very differently when making accretion analyses.

56.	To the ALJ's conclusion that the Employer did not violate the law by withdrawing recognition from the IAM and placing the employees formerly represented by IAM under ILWU recognition.	39:16; 54: 47-49	ALJD at 62, 63, 67.	The ALJ ignores relevant facts relating to community of interest and the ALJD applies incorrect legal standards.
57.	To the ALJ's conclusion that PMMC's M & R mechanics were "…often transferred on a temporary basis…" between terminals after March 30, 2005.	45:11-13 n. 33.	RE Exs. 11, 12, 17 and 18; RT 1294; 1297-8; 2818-20; 4231-5; 4226; 2962-3; 553; 3036-7; 3165; 3003; 3196; 3163; 1394-5; 4725; 1187; 1289; 1304; 2423-4; 3033; 4126; 4163; 4166.	The degree of such temporary interchange is important to the accretion analysis and it is mischaracterization to conclude such happened often.
58.	To the ALJ's conclusion that the time to evaluate the claimed accretion was in the "days and weeks" following March 30, 2005, notwithstanding that it was at all material times "perfectly clear" that PCMC would hire a majority of the employees formerly represented by IAM in order to staff PCMC's new work at the Oakland/Tacoma Maersk terminals.	46:47-48	ALJD at 46; RT citations in Exception 50.	A "perfectly clear" successor's bargaining obligation begins at the time it is clear that a majority of its employees will come from a previously represented unit.

59.	To the ALJ's conclusion that "some" former PMMC mechanics in Oakland worked a "significant number of hours on cranes" in 2005.	52:16-28	RE Exs. 17 and 18; RT 129-5; 1297-8; 2818-20; 4231-4235; 4226; 2962-3; 553; 3063; 3163-5; 3196; ALJD at 48; 3003; 3196; 1394-5; 4234.	There is no evidence to show how many hours any such employee "worked on cranes" in the cited time period, nor even that those employees actually worked on cranes in any meaningful way.
60.	To the ALJ's finding an accretion because crane mechanics, found by the ALJ to be a "technical mechanic specialization with a separate bargaining history of both representation and mechanic careers…" was a career "…not beyond all comparison with the non-crane mechanic positions involved herein."	56:27-38	ALJD at 56 and RT citations in Exception 50.	Finding an accretion based on a conclusion that there is some remote connection between specialized crane mechanics and other mechanics is contrary to logic, common sense and Board precedent.
61.	To the ALJ's reliance in support of an accretion, on PCMC's solicitation for employees including a self-serving statement that employees may be moved between terminals or ports.	58:7-12	ALJD at 58 and the complete lack of record evidence that any employee was ever forced to transfer between ports.	The Employer's solicitation statement is completely self-serving, and was not in fact how the Employer actually conducted its operations after the March 31, 2005 takeover of PMMC by PCMC.
62.	To the ALJ's conclusion that an accretion is supported because PCMC at all times "regarded" the former PMMC mechanics as part of PCMC's coast wide ILWU unit.	58:14-22	ALJD at 58.	The proper analysis of the possible accretion of a formerly existing unit is to be judged from the employees' point of view rather than from the Employer's point of view.

63.	To the ALJD's failure to note the continued commonality of supervision among the former PMMC employees after March 30, 2005.	58:42-47	RT 258; 278-9; 516-7; 549; 610; 864; 922; 958-993; 1007; 1042-3; 1047-50; 1056; 1331-6; 3206; 3290; 3219; 3278; 3289; 2051-2; 2660; 2672; 2676; 2678; 2682-4; 3729; 3734-5; 3515; 2733; 3013; 4127; 4190; 4202; 4220; 3539; 3647;3838; 4111;3161-2;3517; 3153; 3192; 3143-4; 3873; 3797-8; 1007; 1017;1042-3; 1047-8; 1103; 1301-2; 3075; 3624; 4164; 1017; 1060-1; 1174; 1294; 3001; 3075-6.	The ALJD fails to give proper weight to both the degree of continuity of supervision after March 30 for the former PMMC employees, and to the degree of separateness in their supervision from that of the ILWU members.
64.	To the ALJ's conclusion that applying the terms and conditions of the ILWU-PCMC collective bargaining agreement to former PMMC employees supports an accretion.	58:14-22	N/A	The Employer cannot prove an accretion, under Board authority, by placing the disputed employees under another unit's collective bargaining agreement.
65.	To the ALJ's implied finding that the former PMMC mechanics were entitled to participate as equals under the PCMC-ILWU hiring hall.	58 passim	RT 658; 3664; 4351.	The former PMMC employees did not have equal use of the hiring hall, and they did not make equal use of the hiring hall.

66.	To the ALJ's finding that accretion was supported because labor relations "at the highest level" were handled by the Employer's Long Beach headquarters.	58:36-39.	N/A	Board authority looks to on-site, day-to-day supervision in assessing whether a bona fide accretion exits.
67.	To the ALJ's relying on the claim that leads had little DIRECT role in discipline.	58:42-44	RT 3148-9; 3184; 3278; 3289; 610; 636; 679; 3153-5.	Those who are statutory supervisors are not normally on the scene and de facto first line supervision comes from leads, and there is no evidence that discipline is often an issue.
68.	To the ALJ's conclusion that the PMMC contract expired on March 31, 2005.	20:6	GC Ex. 29, p. 31	The PMMC contract with the IAM for Tacoma/Oakland was set to expire after March 31, 2005.
69.	To the ALJ's conclusion that PCMC's M & R manager for the Employer's Tacoma operations regularly visited the Tacoma site.	47:42-49	RT 3148-9; 3184	The record reflects that the manager only makes short visits once or twice a week.
70.	To the ALJ's implied finding that PCMC's "lean staffing model" was more flexible and efficient than was the method of work assignment formerly used at PMMC.	55 passim	RT 1289; 2262—3; 2721; 2854; 3615; 2939; 3357-3362; 2998; 4298-9; 3718; 3721; 3725-6; 3734-5; 4006; 4102-5; 4125-6; 4187; 4116; 4191; 4266; 4270.	This finding is not supported by the record beyond the self-serving and subjective testimony of the Employer's principals.
71.	To the ALJ's failure to note that Employer exhibits that failed to reveal what employees really did during the time they were being billed to different departments.		RT 553:2-7, 2803:10.	The record did not reflect anything but billing charges.

72.	To the ALJ's giving importance to the Employer's subjective point of view of what it intended to do following March 30, 2005.	46:36-37, 45-46	N/A	This is an error of law. How an Employer feels is not properly a part of the accretion analysis.
73.	To the ALJ's failure to address the Employer's de facto admission that the former IAM represented mechanics were not a proper accretion to the ILWU coast-wide unit.	ALJD Passim	GC Ex. 161	The ALJD considers Respondents' argument that the former PMMC employees must be in a coast-wide unit after March 30, 2005, yet the Employer, itself, petitioned for an election in a unit confined to Tacoma and Oakland employees, on June 17, 2005.
74.	To the ALJ's conclusion that the Employer had a "well-defined plan" which allowed an accretion to be found notwithstanding a lack of integration at the time of the March 31, 2005 takeover of PMMC work by PCMC,	46:36-47 55:33-38	RT 1057-8; 697; 1599; 1055-7;1013-5; 3190; 3197-8; 3206; 3219;1600; 3197-8; and all the transcript citations in Exception No. 46 which relates to the minimal degree of actual interchange of employees between the two historic units.	There was no such formal plan, that the putative "plan" involved no more than minimal changes in the conditions for the IAM represented employees within any reasonable period.
75.	To the ALJ's failure to provide remedies for the unfair labor practices referred to in the previous Exception	67:47 to 69:3	N/A	The ALJ made significant errors of law in his accretion analysis and based many of his findings on speculative facts not found in the record.
76.	To the ALJ's finding an accretion.	61 passim	All record citations set forth above.	The ALJ erroneously applied Board precedent and misconstrued record evidence by failing to thoroughly analyze the documents the Employer presented in aid of its case.

Dated: June 22, 2009

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Dated: June 22, 2009

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109286/534929

PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On June 22, 2009, I served upon the following parties in this action:

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copies of the document(s) described as:

EXCEPTIONS OF CHARGING PARTY

[X] **BY FACSIMILE** I caused to be transmitted each document listed herein via the fax number(s) listed above or on the attached service list.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on June 22, 2009.

_/s/ Katrina Shaw_____
Katrina Shaw