

**UNITED STATES OF AMERICA  
THE NATIONAL LABOR RELATIONS BOARD**

\_\_\_\_\_)  
INTERNATIONAL OPERATING )  
ENGINEERS, LOCAL 18 )  
(Precision Pipeline, LLC) )

Respondent, )

and )

STEPHEN A. WILTSE, AN INDIVIDUAL )

and )

INTERNATIONAL UNION OF )  
OPERATING ENGINEERS, LOCAL 18 )  
(Rockford Corporation) )

and )

GARY LANOUX, AN INDIVIDUAL )  
\_\_\_\_\_)

Case No. 9-CB-109639

Case No. 9-CB-118659

**ANSWERING BRIEF OF INTERVENOR PIPE LINE CONTRACTORS ASSOCIATION  
TO THE GENERAL COUNSEL'S EXCEPTIONS AND SUPPORTING BRIEF**

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Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (“NLRB” or the “Board”), Intervenor Pipe Line Contractors Association (“PLCA”), by and through its counsel, hereby respectfully submits its Answering Brief in response to the Counsel for the General Counsel’s Exceptions and Brief in Support.

**I. Preliminary Statement & Summary of Argument**

The PLCA’s interest in this matter is clear. The PLCA, on behalf of its seventy-plus union contractors, seeks to protect those contractors’ competitiveness vis-à-vis non-union contractors in the pipeline industry. The interest of the International Union of Operating Engineers (“IUOE”) and its local affiliates is understandably aligned with that interest. The IUOE seeks to preserve union jobs for its members by ensuring that union contractors are awarded pipeline projects.

What is entirely unclear is the interest of the Charging Parties in the remedy they seek. Neither the testimony of the Charging Parties at the hearing nor the Counsel for the General Counsel (“CGC’s”) briefings have clearly articulated what benefit is to be gained or harm rectified by disclosing the documents at issue in this case to the Charging Parties. The CGC’s Exceptions and Brief in Support of Exceptions (taken together, “Exceptions”) certainly provide no additional clarity. Rather than elucidating what is at stake for the Charging Parties, the Exceptions rely on pat reassertions of legal conclusions – with absolutely no citation to the record – that were rejected as unsupported and nonsensical by Administrative Law Judge (“ALJ”) David Goldman.

Charging Parties Stephen Wiltse and Gary Lanoux claim that, by denying them access to pre-job forms, minutes, agreements, or reports (“pre-job forms”), Local 18 of the IUOE (the “Union”) has violated its duty of fair representation to them by denying them information regarding their terms and conditions of employment. The PLCA and the Union assert, the record

clearly shows, and ALJ Goldman found, that this is not the case. Charging Parties have been provided with the National Pipe Line Agreement (the “NPLA”), which is the source of all of the Charging Parties collectively-bargained rights. While pre-job forms restate some of Charging Parties terms and conditions of employment, they do not state any new terms of employment or create any enforceable rights. To the extent the Charging Parties believe that the terms set forth in the NPLA are being violated, they need only compare their daily working conditions to the provisions of the NPLA itself.

To be sure, the pre-job forms contain information other than the applicable terms and conditions of employment pulled from the NPLA for that job. The pre-job forms also contain operational information – for example, the type and length of pipe to be used, the equipment with which the job will be manned, and the anticipated duration of the job. This information is based almost entirely upon proprietary and confidential information used by the contractor to bid and prepare for this and other pipeline projects. As witnesses with decades of experience in the pipeline industry testified, a review of the pre-job form, with its combination of workforce and operational information, would allow someone with knowledge of the pipeline industry, such as a non-union competitor, to replicate the employer’s bid. As such, this sensitive information must be kept confidential. The PLCA’s interest in this matter is to ensure that the confidential and proprietary information of its member companies is protected – therefore protecting the competitive positioning of union contractors throughout the industry. The IUOE and the Union, interested in the preservation of union jobs in the pipeline industry, readily agrees.

In short, what we have here are two union members seeking a remedy which is more likely to harm the interests of all the principal parties involved – the IUOE, the Union, the PLCA contractors, and rank and file union members – than to provide the Charging Parties with any

benefit. Pursuant to settled Board and Supreme Court authority, the Union need only provide Charging Parties with a rational, non-arbitrary justification for its decision not to provide the pre-job forms. The Union seeks to preserve unionized pipeline jobs. As ALJ Goldman concluded, “In this case, the claim that [the Union’s] refusal to provide the pre-job reports to Wiltse and Lanoux was arbitrary or irrational is simply unsustainable as a matter of the English language, not to mention precedent.” ALJ Dec., p. 13:27-29.<sup>1</sup>

## **II. Procedural History**

This matter concerns the Union’s refusal to provide pre-job forms in response to a request for these forms by Charging Parties. Charging Parties requested pre-job forms related to conferences held between the Union and several PLCA employers – Precision Pipeline, Inc. (“Precision”), Rockford Corporation (“Rockford”), and CBC, Inc. (“CBC”) – related to pipe line construction projects covered by the National Pipe Line Agreement (the “NPLA”), a nationwide collective bargaining agreement covering pipe line construction. G.C. Ex. 1(n). The Union refused to provide such documents. G.C. Ex. 1(a), (j). In 2013, Charging Parties Wiltse and Lanoux filed separate charges alleging, among other things, that the Union had refused to provide these pre-job forms upon request. G.C. Ex. 1(a), (j). On March 6, 2014, Wiltse’s case was consolidated with Lanoux’s, and a consolidated complaint was issued, alleging that the failure to provide the pre-job forms constituted a violation of Section 8(b)1(A). G.C. Ex. 1(n); Tr. 15. On April 10, 2014, PLCA moved to intervene in the matter. Tr. 15. A hearing was held

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<sup>1</sup> Citations to the record are formatted as follows: Cites to the transcript are indicated by the notation “Tr. \_\_\_.” Citations to joint exhibits are indicated by the notation “J. Ex. \_\_\_.” Citations to Respondent’s exhibits are indicated by the notation “R. Ex. \_\_\_.” Citations to the General Counsel’s exhibits are indicated by the notation “G.C. Ex. \_\_\_.” Citations to the decision of the ALJ Goldman are indicated by the notation “ALJ Dec., \_\_\_.” Citations to the General Counsel’s Brief In Support of Exceptions are indicated by the notation “G.C. Brief, \_\_\_.”

on April 14 and 15, 2014 before ALJ. Goldman. At this hearing, ALJ Goldman granted the PLCA's motion to intervene. Tr. 20, 23.

Following the hearing, briefs were filed by the CGC, the Union, and the PLCA. Having considered the record evidence and the arguments presented by the parties, ALJ Goldman issued a decision on June 25, 2014 dismissing the complaint. ALJ Dec., p. 2:16-18, 20:11.

The PLCA was made aware that the CGC had excepted to the ALJ Goldman's decision on September 3, 2014, when the PLCA was served with the IUOE's answering brief to the exceptions. After receiving the IUOE's brief, the PLCA learned that the CGC had filed its Motion for Extension of Time to File Exceptions on July 11, 2014 and the Exceptions on August 20, 2014. Neither the Motion for Extension of Time by nor the Exceptions was served upon the PLCA. Upon learning that these pleadings had been filed, but not served upon the PLCA, the PLCA moved to strike the CGC's Exceptions. On September 16, 2014, the Board denied the PLCA's motion to strike and ruled that the PLCA may file an answering brief to the CGC's Exceptions.

Detailed factual support for the PLCA's Answer to each of the CGC's Exceptions is cited below the individual Exception.

**III. Argument: The Counsel for the General Counsel’s Exceptions Should be Dismissed and ALJ Goldman’s Decision Affirmed.**

**A. Answer to Exception 1: ALJ Goldman correctly found that the source of the terms and conditions of employment listed in the pre-job forms is the NPLA and that no collective bargaining occurs at the pre-job conferences.<sup>2</sup>**

CGC asserts that wage rates listed on pre-job forms contradict the wage rates listed in the NPLA. This assertion is inaccurate and misstates the record evidence. Moreover, even if such discrepancies exist (and the PLCA disputes there are any discrepancies), they are entirely irrelevant as the record in this matter is “devoid of evidence” that any such differences were the result of collective bargaining occurring at the pre-job conference.

**1. Factual Background**

The NPLA is a nationwide collective bargaining agreement between the PLCA and the IUOE. *See generally* J. Ex. 1. The IUOE negotiates with the PLCA on behalf of both itself and

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<sup>2</sup> In this Answering Brief, the PLCA has provided a response to each of the CGC’s Exceptions. The Board need not engage in this exercise, since the CGC waived its Exceptions by failing to comply with the Board’s Rules and Regulations regarding exceptions.

The Board requires that an exception “designate by precise citation of page the portions of the record relied on” to support its exception. 29 C.F.R. § 102.46(b)(1)(iii). Similarly, if a brief supporting an exception is filed, that brief must contain an argument “presenting clearly the points of fact and law relied on in support of the position taken on each question, *with specific page reference to the record . . .*” *Id.* § 102.46(c)(3). Failure to comply with these rules is more than a technicality, since any exception “which is not specifically urged shall be deemed to have been waived” and any exception which fails to comply with the Board’s regulations “may be disregarded.” *Id.* § 102.46(b)(2).

CGC’s seven-page argument in support of its five exceptions fails to cite the record a single time. *See generally* G.C. Brief, p. 6-12. Instead, CGC relies upon conclusory legal assertions regarding the record. CGC has therefore failed to fulfill the “excepting party’s duty to frame the issues and present its case to the Board.” *James Troutman & Assocs.*, 299 NLRB 120, 121 (1990). Failure to properly support exceptions forces the Board to engage in a “fishing expedition” for which the Board has “neither the obligations nor the resources”. *Id.*; *see also Stagehands Referral Service, LLC*, 356 NLRB No. 152, at \*1 (2011) (failing to review exceptions and upholding ALJ opinion where such exceptions are not stated with sufficient particularity to give notice to other parties). CGC’s failure to adequately support its argument is reason enough for the Board to summarily dismiss the Exceptions and uphold ALJ Goldman’s decision.

the local affiliates. Tr. 64-65. Similarly, the PLCA represents over 70 pipe line contractors, including employers of the Charging Parties – Precision, Rockford, and CBC – in negotiation of industry-wide labor agreements with the international unions that work in the pipe line industry, including the IUOE. Tr. 296-97. The NPLA explicitly states that it supersedes any agreement between a local union and a signatory employer. J. Ex. 1 at I(M). No provision of the NPLA gives any bargaining authority to either a local union or signatory employer. Tr. 71, 325. The NPLA also specifically prohibits any collective bargaining from occurring at a pre-job conference. J. Ex. 1 at II(D). The NPLA, in detail, defines the function of the pre-job conference. *Id.* The NPLA states:

It shall be the purpose of the pre-job conference to agree upon such matters as the length of the work week, the number of Employees to be employed, the applicable wage rates in accordance with the Contract, and any other matters not including any interpretation of the clauses of this [NPLA], it being agreed that interpretation of the [NPLA] should be made between the [PLCA] and the [IUOE] so that proper application thereof may be made on the jobs. No representative of any individual Employer and no representative of the [IUOE] or any of its local unions shall demand, at the pre-job conference, or at any other time during the continuance of the job, any term or condition not covered by this NPLA. . . and no agreement made at any pre-job conference which adds to or modifies, in any way, the terms and conditions of this [NPLA], shall be binding on any individual Employer or the [IUOE] or any of its local unions, unless approved and ratified by the [PLCA] and the [IUOE]. *Id.* (emphasis added.)

The purpose of the pre-job conference is for the representatives of the contractor and local union to discuss job specific items, such as manpower and the applicable wage rates within the NPLA. Negotiation of new collectively-bargained rights, or even interpretation of existing rights, is forbidden. *Id.*

Testimony at the hearing indicates that both local unions and signatory employers adhere to these contractual limitations on pre-jobs. Mack Bennett, the national pipe line director for the IUOE, explained that a pre-job conference results in a completed pre-job form which he described as “an internal document to verify wages in accordance with the [NPLA],” the length

of time the operators would be on the job, and the type of equipment being used on the job, among other things. Tr. 68. Similarly, Don Thorn, president of pipeline company Welded Construction, LP (“Welded”) and a member of the PLCA’s Board of Directors, testified that the pre-job conference allows a union and employer to discuss the details of a particular job, including the type and length of pipe to be laid, the length of the project, the applicable wage rates and benefit fund, the location of the work, and the aggregate number and types of machinery to be used on the job. Tr. 300-311. In the course of this discussion, the application of relevant terms of the NPLA to the job, such as wage rates, is memorialized in the pre-job form. Tr. 300-311. Thorn stated that wage rates would be addressed at the pre-job conference by cross-referencing the wage rates from the NPLA applicable to the categories of employees and/or equipment to be used on the job and marking the same on the pre-job form. Tr. 301, 307, 311.

Thorn also explained that the pre-job conference may also be used to discuss which of employer’s work rules, such as safety requirements or daily work schedules, will apply during the job. Tr. 317. This discussion is consistent with the terms of the NPLA, since the NPLA specifically states that employers are allowed to craft any additional workplace rules without union objection, provided that such rules do not conflict with the terms of the NPLA. J. Ex. 1 at V.D. (“The Union shall place no limitation upon the amount of work which an Employee shall perform during the working day. . . .”), J. Ex. 1 at V.E. (“Employer shall have the right to make and revise, from time to time, working rules which are not inconsistent with the any of the terms and conditions of this Agreement or with existing laws.”); Tr. 335.

## **2. ALJ Goldman’s Decision**

ALJ Goldman found that the NPLA “provides the terms and conditions” of employment prevailing at a broad range of pipeline projects throughout the United States. ALJ Dec., p. 3:45-

48. ALJ Goldman also found that the pre-job forms in question contain some of the NPLA's terms and conditions of employment, as well as additional information. "[P]re-job reports", he stated, "are documents devoted to and containing information about the operational requirements of the specific job." ALJ Dec., p. 13:35-36. The pre-job forms include "a raft" of operational information – "anticipated equipment, labor costs, pipeline materials, and length of the project, much of which is directly transferred from the contractor's project bid document," as well as terms and conditions of employment such as, "wage rates, benefit payments, etc." which are taken from the NPLA. ALJ Dec., p. 13:38-40, 17:30-34. Finally, ALJ Goldman noted that in addition to operational information transcribed from the contractor's bid document and terms and conditions of employment transcribed from the NPLA, the pre-job form provides a space for employer work rules, such as safety and drug policies.<sup>3</sup> ALJ Dec., p. 14:13-20.

Based on the undisputed record evidence regarding the substance of the pre-job conference and the pre-job forms, ALJ Goldman flatly rejected CGC's argument that the pre-job was the source of any collectively-bargained rights. Specifically, ALJ Goldman was not persuaded by the argument that alleged discrepancies in wage rates on the pre-job form evidenced that bargaining occurred since the "record is devoid of evidence suggesting that any of these rates were collectively-bargained or negotiated as part of the pre-job conference." ALJ

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<sup>3</sup> At the hearing and in post-hearing briefs, CGC has argued that the memorialization of other information, such as employer-specific work rules, on pre-job forms evidences that Charging Parties terms and conditions of employment are altered at pre-job conferences. The PLCA asserts that Exception No. 1 does not specifically place this question before the Board, as required by 29 C.F.R. § 102.46. Instead the Exception refers only to "wage rates, benefit payments, 'etc'", and the argument in support of the Exception relies exclusively on an erroneous analysis of wage rates on the NPLA and pre-job forms. To the extent that CGC has specifically stated an argument regarding other information on the pre-job forms by placing quotations around "etc" in Exception No. 1, this argument is easily dismissed for the reasons set out herein.

Dec., p. 13:43-44, 14:4-12. Rather, the ALJ concluded that the alleged discrepancies could have any number of explanations such as a misreading of the NPLA or a clerical error. ALJ Dec., p. 14:8-12. Indeed, ALJ Goldman found that, if there was a dispute between the NPLA and the pre-job forms, the NPLA would control. ALJ Dec., p. 13:1-2, 13:41-43. ALJ Goldman also rejected the assertion that the mere memorialization of employer work rules on a pre-job form indicated that the pre-job was the “source” of any employee rights or “that the pre-job reports represent binding agreements on what work policies the employer will utilize.” ALJ Dec., p. 14:15-20.

### **3. Argument**

In its Exceptions, the CGC asks the following rhetorical question, “How can employees know whether a union is fairly representing them if they don’t know what their rights are?” G.C. Brief, p. 8. However, the CGC’s rhetorical question grossly mischaracterizes what is at issue in this case. The record is clear that the Charging Parties were fully informed of their rights. The NPLA is the singular source of Charging Parties collectively-bargained rights against the pertinent employers in this matter. J. Ex. 1 at I(M) (NPLA supersedes any agreements between PLCA employers and local unions), II(D) (NPLA may not be altered at pre-job), II(G) (IUOE agrees local affiliates must recognize NPLA); Tr. 71, 335. Charging Parties Wiltse and Lanoux are well aware of the contents of the NPLA, as both have been provided with copies. Tr. 227, 229-230 (Lanoux has copy of NPLA); Tr. 131 (Wiltse given copy of NPLA).

If anything, the CGC’s rhetorical question highlights the irrelevance of its first exception. CGC’s first exception implies (without actually stating, evidencing, or arguing) that the Charging Parties have not been fully apprised of their collectively-bargained rights. Exception 1 suggests that the alleged discrepancies in wages on the pre-job forms show that the Union and the employer altered Charging Parties collectively-bargained rights at the pre-job conference. As ALJ Goldman found, however, pointing to the alleged discrepancies themselves proves “exactly

nothing.” ALJ Dec., p. 14:4. CGC has cited no evidence in the record that demonstrates that bargaining occurs at pre-job conferences or that the pre-job form is the source of any new rights. CGC is hamstrung from doing so because the record is “devoid of evidence” that any of the wage rates in this matter were “collectively-bargained or negotiated” at a pre-job conference. ALJ Dec., p. 13:43-44.

The record indicates quite the opposite. The NPLA forbids a pre-job conference from being transformed into a bargaining table. J. Ex. 1 at II(D). Consistent with this provision, Thorn and Bennett agreed that local unions and individual employers have no rights to modify the NPLA at a pre-job conference. Tr. 71, 335. Additionally, the NPLA explicitly permits employers to set work rules. J. Ex. 1 at V.E. Thus, the fact that certain items addressed on a pre-job form cannot be found in the NPLA does not demonstrate that such items were collectively bargained. Terms such as “length of the work week, work days...pay day, truck pay... safety and drug policies” are still a memorialization of what’s permitted in the NPLA in that the employer has the authority to determine these terms. Communication and recordation of an employer’s work rules in no way evidences bargaining occurred.

The alleged discrepancies cited by the CGC “[do] not suggest much less prove that the local union and the employer negotiated the change”, where the record contains no evidence that such negotiation occurred, but instead “militates against” that possibility. ALJ Dec., p. 13:44-14:3, 14:7-8. As ALJ Goldman speculated, the alleged discrepancy, if it existed, would be just as likely if not more likely, to be the result of an error or a misreading of the NPLA. ALJ Dec., p. 14:8-10.

Importantly, whatever the source of the alleged discrepancy (if such exists), Charging Parties may identify and challenge it without access to the pre-jobs forms. Even assuming that

wage rates or other terms and conditions of employment had been renegotiated at the pre-job conference in violation of the NPLA, the pre-job report would not be needed to detect the violation. The employee need only compare the NPLA to his/her actual terms of employment to determine if the NPLA has been violated. For example, an employee can readily ascertain his contractually-required wage rate by reference to the NPLA. The employee could then compare the contractually-mandated wage rate set forth in the NPLA against his pay check to determine whether his rights under the NPLA had been violated, whether at the pre-job conference or elsewhere.

**B. Answer to Exception 2: ALJ Goldman correctly concluded that Charging Parties have articulated no interest in viewing the pre-job forms.**

Charging Parties are entitled to review documents which defines their rights vis-à-vis their employers. The Union fulfilled its obligation to the Charging Parties when it provided them with a copy of the NPLA. As discussed above in response to Exception 1, the pre-job form does not create additional rights for the Charging Parties. CGC has shown no other rationale entitling the Charging Parties to view the pre-job forms.

**1. Factual Background**

As detailed above, the pre-job forms at issue in this case memorialize terms of the NPLA as applied to a particular pipeline project, the specific work rules of the employer conducting that project, and other operational details of the project which are proprietary business information. *See supra* at III. A. 1 & 2. The NPLA makes clear that its terms may only be transcribed from the NPLA to the pre-job forms and may not be re-negotiated or altered at the pre-job conference. J. Ex. 1 at II(D).

Lanoux testified that he routinely asks his steward on each job he works for a copy of the pre-job form. Tr. 210. In keeping with this practice, Lanoux requested the pre-job forms on jobs

he worked on for Rockford and CBC in 2013. Lanoux's reasons for his routine requests was the purely speculative belief that Article XIII ("Special Amendments") of the NPLA permitted changes to the NPLA to be negotiated at the pre-job conference. Tr. 207, 208. Lanoux testified that the "Special Amendments" article in the NPLA is the "only source" of his belief that his wage rates are altered at the pre-job conferences. Tr. 226. The Special Amendments article, however, is intended to provide the IUOE and the PLCA an opportunity to modify wages to allow union contractors to bid more competitively in certain areas of the country. Tr. 325; J. Ex. 1 at XIII (allowing the IUOE and the PLCA to negotiate addendums for certain projects "to be more competitive in certain areas of the country"); ALJ Dec., p. 12:1-5.

Wiltse decided to request a pre-job form on the advice of Charging Party Lanoux. Tr. 208. Specifically, in conjunction with filing a grievance for what he alleged was an unlawful termination, Lanoux, advised him to seek the NPLA and any documents that "might affect" the NPLA, including the pre-job form, in connection with his grievance. Tr. 113.

## **2. ALJ Goldman's Decision**

ALJ Goldman found that neither Lanoux nor Wiltse articulated a clear and justifiable interest in the requested pre-job forms. Specifically, ALJ Goldman rejected the assertion that the "Special Amendments" article of the NPLA permitted negotiations at pre-job conferences. ALJ Goldman found that there was no evidence presented at the hearing to support the assertion that the Special Amendments article led to bargaining at the pre-job conference, and further found that the NPLA specifically provided that only the PLCA and the IUOE (*and not the local union*) may negotiate such special amendments. ALJ Dec., p. 12:7-10. ALJ Goldman noted that Lanoux "does not have any dispute with his employer" but "seeks the pre-job purely on principle, believing that if it concerns his job, he should be able to see it." ALJ Dec., p. 15:17-19.

As to Wiltse, ALJ Goldman found that he had not articulated any basis as to why the processing of his grievance required review of the pre-job forms. While ALJ Goldman speculated that, in certain circumstances, “an employees’ request for the pre-job report could be considered central to his grievance or concern”, such was “not the case here.” *Id.* ALJ Goldman found the pre-job form flatly irrelevant to Wiltse’s dispute. ALJ Dec., p. 15:13-17.

ALJ Goldman concluded that the Charging Parties’ interest in reviewing the pre-job form is “unidentifiable except as an abstract demand to be entitled to any document that might list or mention a term or condition of employment.” ALJ Dec., p. 15:11-12. The pre-job forms in question “had no relationship with – nothing at all to do with – Wiltse’s grievance. . . as for Lanoux, he had no grievance or any explicable reason for wanting the pre-job report, other than his avowed conclusory legal view that he was entitled to it.” ALJ Dec., p. 18:2-5.

### 3. Argument

Charging Parties have articulated no interest in the disputed pre-job forms. As discussed in full above, the pre-job forms are not the source of any rights as to the Charging Parties. Although the pre-job reports reference the Charging Parties’ contractual rights, these rights “are not negotiated as part of the pre-job conference, they are taken from the collectively-bargained agreement –the [NPLA], which the employees have – and then recorded on the pre-job report.” ALJ Dec., p. 17:32-34; *see also* J. Ex. 1 at II(D); Tr. 68, 71, 300-311, 335.

Charging Parties have demonstrated no other right or articulable basis to entitle them to view the pre-job forms. The Board has recognized that employees may have a specific interest in documents other than collective bargaining agreements, for example grievance files. *Branch 529 Nat’l Ass’n of Letter Carriers, AFL-CIO*, 319 NLRB 879, 881 (1995) (employee entitled to grievance documents where the documents pertained the grievance filed by the employee

herself). Charging Parties have no such interest. ALJ Dec., p. 17:38-47 (Charging Parties have articulated no need for pre-job forms).

Lanoux admits as much; he requests the pre-job reports for no particularized purpose, but as a matter of course. Tr. 210. While Wiltse is currently pursuing a grievance, the record contains absolutely no explanation of how the pre-job form is related to that grievance. *Compare* Tr. 108-112 (Wiltse testimony regarding his termination) *and* G.C. Ex. 1(a) (Wiltse's grievance) *with* G.C. Ex. 4 (sealed pre-job forms).

The existence of Wiltse's grievance, standing alone does not entitle Wiltse to any document referencing his terms and conditions of employment. *In re Local 307*, 339 NLRB 93 (2003) (union member lacks an absolute right to documents that relate to his grievance or otherwise refer to or effect his terms and conditions of employment, even where those terms and conditions would not otherwise be available). In fact, as discussed more fully in Section III.C below, Wiltse's interest in the documents were entirely improper and wholly unrelated to an assessment of the Union's duty of fair representation.

**C. Answer to Exception 3: ALJ Goldman correctly concluded that the Union has a substantial reason for failing to provide Charging Parties with the pre-job reports.**

The record clearly indicates that the Union and the PLCA have a substantial interest in the confidentiality of the pre-job forms. Armed with a pre-job form, a person with knowledge of the pipeline industry, such as a non-union competitor, could replicate the contractor's bid and, with that information, effectively underbid the contractor on future projects. In short, the policy established by the PLCA and the IUOE of keeping the pre-job forms confidential protects unionized jobs. Charging Parties are hard pressed to argue that such a policy is not rational.

## 1. Factual Background

Charging Parties requested pre-job forms from the Union, and the Union declined to provide these forms. Tr. 213, 220; G.C. 7(a).

The reasons for the Union's policy of refusing to provide pre-job forms were articulated at the hearing by two witnesses with decades of experience in the pipeline industry, Thorn and Bennett. Pipeline construction is a highly competitive industry, and pipeline projects often generate revenues in excess of \$100 million for the general contractor. Tr. 294. Pipeline projects are typically awarded following a competitive bid process by the energy or utility company commissioning the work. Tr. 76, 186, 303, 321-23. Thorn testified that contractors prepare bids by compiling information about costs, equipment used, wage rates, and manpower needed. Tr. 319-322. This information, in the aggregate, allows the contractor to calculate the labor costs of the project. Tr. 319-320. Labor costs generally constitute 33-40% percent of the overall job costs, which will comprise the bid. Tr. 320. A small change in bid calculation, e.g., slightly different equipment distribution or slightly lower staffing projections, can be the difference between a successful bid and an unsuccessful one. Tr. 321. Thus, seemingly minor details can be the difference between a contractor winning a project valued at several hundred million dollars and losing it. Tr. 294.

Notably, the bid prepared for one job is "very comparable" to the bid prepared for future jobs of similar scope. Tr. 323. In fact, contractors keep records of previous bids to serve as a basis for their next bid. Tr. 323. In short, the bid estimates and calculations for a 50-mile new construction project of 30-inch pipe in Southeast Ohio are substantially similar to the bid estimates and calculations for the next 50-mile new construction project of 30-inch pipe in Southeast Ohio. Tr. 323.

Thorn testified that the information contained on the pre-job forms is very similar to that contained in a contractor's bid. Tr. 304-313, 320-21. Like a bid, a pre-job form often contains information regarding wage rates, aggregate number and types of machinery on a project, the type and length of the pipe to be laid. Tr. 300-311. Bennett similarly testified that the pre-job form is "an internal document to verify wages in accordance with the [NPLA]" that also contains information such as the length of the time the operators would be on the job, and the type of equipment being used on the job, among other things. Tr. 68.

Given this similarity, the data contained on pre-job forms reveals significant and material proprietary information regarding an employer's labor and job costs. Tr. 319-320. Thorn testified that the operating engineer's labor costs are typically 25% of total labor costs within the pipeline industry and that the labor costs are typically one-third to 40% of total job costs on industry projects. Tr. 320. A person with knowledge of the pipe line construction industry with access to a PLCA employer's pre-job form would have direct knowledge of approximately 25% of the company's labor costs and, more importantly, would be able to closely approximate the company's total job costs. Tr. 320-21. Thorn testified that a competing contractor, with access to his labor costs "would have a very good idea of how I estimate my work. And subsequently, a very good idea of what they would need to do to underprice another job somewhere." Tr. 320-21. Bennett also expressed concern about pre-job forms being used to underbid unionized contractors, testifying that any person who had the pre-jobs "could turn around and they could sell the information to a non-Union contractor". Tr. 75

Charging Party Wiltse, who himself operates one or more non-union contracting businesses, agreed with that assessment. Tr. 186, R. Ex. 2-6. Wiltse testified that it is a "no

brainer” that having access to a competitor’s labor costs would allow him to undercut competing contractors and successfully bid on a project. Tr. 186.

Due to the sensitive information that the pre-job forms contain, it is agreed and understood by both the IUOE and PLCA that pre-job forms are to remain confidential.<sup>4</sup> Tr. 75, 323-24. Thorn testified that the issue of confidentiality has been raised during negotiations between PLCA and IUOE that it was agreed that the pre-job forms “should be kept confidential and not shared.” Tr. 324. As a result, both the PLCA and the IUOE have taken steps to ensure the confidentiality of these documents. Tr. 75, 323-24. For example, as evidenced by the fact that this matter is before the Board, union representatives are aware that the pre-job forms are not to be distributed to rank and file members. Tr. 213. In the event PLCA learned that the IUOE was not maintaining the confidentiality of these documents, it could file a grievance under the NPLA. Tr. 324-25.

## 2. ALJ Goldman’s Decision

ALJ Goldman found that a breach of the duty of fair representation occurs only “when a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.” ALJ Dec., p. 13:9-10 (*quoting Vaca v. Sipes*, 386 U.S. 171, 190 (1967)). ALJ

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<sup>4</sup> CGC’s assertion that there is no binding agreement to keep these documents confidential is patently false. The record contains undisputed evidence that the parties have agreed that the documents should be treated as confidential. Such an agreement may be an oral one but it does make it any less binding.

Bennett’s testimony that in his role as a business manager for a local union he allowed a union member to view a pre-job form does not diminish the existence of this agreement. Tr. 75. At most it shows that, when he was a local union’s business manager, he did not enforce the confidentiality policy as rigorously as he should have. As national pipe line director, however, Bennett testified to the risks of dissemination of the information on the pre-job form. Tr. 75-76. Furthermore, even in his role as a local union business manager, he took steps to prevent the dissemination of the confidential information, such as refusing to allow union members to copy the pre-job forms or take notes as to their content. Tr. 75-76.

Goldman found that there was no evidence on the record that the Union acted discriminatorily or in bad faith. ALJ Dec., p. 13:14-16. Furthermore, ALJ Goldman found that the Union's rationale for failing to disclose the pre-job reports was "rational, indeed substantial." ALJ Dec., p. 2:9-10.

In concluding that the Union and the PLCA shared a "substantial" interest in protecting the pre-job forms from disclosure, ALJ Goldman credited the testimony of Bennett and Thorn regarding the need for confidentiality. He found that Thorn testified credibly that, armed with a contractor's labor costs or total job costs, which are reflected in the pre-job forms, a non-union competitor could undercut Thorn's bid on a pipeline project. ALJ Dec., p. 4:35-38, 16, n.8, 19:19-20. Accepting Thorn and Bennett's testimony, ALJ Goldman found that pre-job forms are:

"documents devoted to and containing information about the operational requirements of the specific job. . . [which] contain a raft of information about anticipated equipment, labor costs, pipeline materials, and length of the project, much of which is directly transferred from the contractor's project bid document, and which even the union contractors of the PLCA do not share with one another." ALJ Dec., p. 13:35-40.

ALJ Goldman then reasoned:

"If the unions must disclose pre-job reports, the PLCA and its contractors fear that the PLCA contractors will obtain each other's pre-job reports and be in a position to underbid each other. This is also legitimate concern for the International Union and the local unions too. Moreover, this concern is exacerbated and multiplied for all these parties when one considers the prospect of the pre-job reports being easily obtainable by nonunion contractors through their contact with the union members. With the pre-job report 'bidding' information in hand, nonunion contractors could look to craft their bids to make themselves more attractive to owners and awarders of construction bids. Obviously, this concern informs the local union's policy of not distributing copies of the pre-job reports on request to members. Bidding is, after all, a competitive process. And, indeed, coincidentally (I assume) one of the charging party's here operates a small nonunion construction firm. The local union has an obvious and legitimate interest in taking steps to bolster and protect the competitiveness of the unionized contractors and PLCA members." ALJ Dec., p. 14:30-42.

ALJ Goldman found that the confidentiality interest articulated by Thorn and Bennett to be “credible, in other words I believe it is the reason” the Charging Parties were denied access to the pre-job forms. ALJ Dec., p. 18:25-27

By contrast, ALJ Goldman found that Wiltse “presented as an untrustworthy reporter of the facts.” ALJ Dec., p. 9, n.5. ALJ Goldman discredited Wiltse in part based on his initial prevarication regarding whether he owned or operated a non-union construction company. Wiltse denied owning a non-union contracting company before admitting it when presented with documentation to the contrary. *Id.* ALJ Goldman concluded that Wiltse’s initial denial was “flatly false.” *Id.* More generally, ALJ Goldman found that “as a witness, Wiltse radiated defiance, devoted to jousting with counsel, rather than with truth telling.” *Id.*

ALJ Goldman also rebuffed the application of the precedent relied upon by CGC in this exception, *Branch 529, Letter Carriers*, 319 NLRB 879 (1995), to the case at hand. ALJ Dec., p. 17-19. ALJ Goldman reasoned that Union conduct found arbitrary in *Branch 529* is “not at issue here: the [union] in *Branch 529* offered no reasoned explanation for not providing the employee” with the requested documents. ALJ Dec., p. 18:15-17. By contrast, ALJ Goldman continued, the Union here “has articulated a rational reason why it does not provide pre-job reports upon request” buttressed by “Thorn’s credible testimony” regarding the risk to union contractors if pre-job forms were disclosed. ALJ Dec., p. 18:24-27.<sup>5</sup> Given the sensitivity of the information contained on the forms, ALJ Goldman found that the Union “has an obvious and legitimate

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<sup>5</sup> ALJ Goldman also found that there “is no basis in law or logic for the General Counsel’s implicit argument” that Thorn and Bennett’s testimony regarding the importance of confidentiality of the pre-job forms must be discarded since the stewards who initially denied Charging Parties request did not articulate a specific confidentiality interest. ALJ Dec., p. 19:9-20. “The relevant issue is whether the rationale for not providing the reports that was offered at trial is credible. I believe it was credibly offered.” ALJ Dec., p. 19:19-20.

interest in taking steps to bolster and protect the competitiveness of the unionized contractors and the PLCA members.” ALJ Dec., p. 14:40-42. ALJ Goldman concluded that “there is no basis for the government to override the local union’s judgment that there would be negative consequences for the union, its members, and its relationship with the contractors, if pre-job reports were disclosed upon demand.” ALJ Dec., p. 2:11-14.

### 3. Argument

The CGC’s factored inquiry gleaned from *Branch 529* in this exception is “inapposite.” ALJ Dec., p. 17:47; *see* G.C. Brief, p. 9-11. Instead, the pertinent inquiry is “in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a wide range of reasonableness as to be irrational.” *Branch 529, Letter Carriers*, 319 NLRB at 881. The record undoubtedly supports a rational reason for the Union’s actions in this case. While the Board found that the union in *Branch 529* provided no justification for its refusal to provide documents specifically relevant to the union member’s grievance,<sup>6</sup> the Union and the PLCA have articulated, at length, their substantial confidentiality concerns with the disclosure of the pre-jobs. ALJ Goldman credited this testimony, and it is therefore entitled to deference. ALJ Dec., p. 4:35-38, 16, n.8, 19:19-20; *Standard Dry Wall Prods., Inc.*, 91 NLRB 544, 545 (1950) (ALJ’s determinations as to credibility are given great weight and entitled deference). Furthermore, the Board and the courts have recognized the legitimacy of maintaining the confidentiality of the information contained on the pre-jobs, labor and operating costs, as trade secrets entitled to protection. *See, e.g. Silver Bros. Co., Inc.*, 312 NLRB 1060, 1062 (1993) (employer did not violate the Act by failing to turn over financial and cost

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<sup>6</sup> As discussed above in the PLCA’s Answer to Exception 2, the Charging Parties have presented no evidence of how the pre-job forms sought in this case are specifically relevant to any ongoing disputes Charging Parties have in the workplace.

information to union in light of confidentiality concerns); *Prosonic Corp. v. Stafford*, 539 F. Supp. 2d 999, 1005-1006 (S.D. Ohio 2008) (company’s bidding practices are likely trade secrets under Ohio law); *see also SI Handling Sys., Inc. v. Heisley*, 753 F.2d 1244, 1260 (3d Cir. 1985) (cost and price information, including labor costs, qualify for trade secret protection).

The record here, particularly Thorn’s testimony, fully supports the existence of the confidentiality concern in this case. Individuals with knowledge of the pipeline industry with access to the information contained on the pre-job forms – including the type and length of project, aggregate manpower required, aggregate equipment deployment, wages, benefits, and hours – could easily reconstruct the total labor cost of the contractor. Tr. 319. These individuals are well aware of the relationship between the total labor costs for the operating engineers<sup>7</sup> and a project’s total labor costs. Tr. 320. More importantly, such individuals are also aware of the relationship between total labor costs to total job cost. Tr. 320. Thus, any person with knowledge of the industry and access to a pre-job form “would have a very good idea” of how a contractor had bid the job and “subsequently a very good idea of what they would need to do to underprice another job somewhere.” Tr. 320-21.

Disclosure of pre-job information could directly result in the diminution of an employer’s work if competitors are able to submit more competitive bids. Wiltse perfectly demonstrates the risks posed to employers in the event pre-job forms are made available to Union members. As

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<sup>7</sup> This risk is not limited to operating engineers. A decision in favor of the Charging Parties would also enable a member of any of the other craft unions that work within the pipe line industry – the Teamsters, Laborers, and Pipefitters – to request pre-job forms. A competitor contractor could easily task a union member from each union with requesting a pre-job form and would therefore be able to precisely replicate the contractor’s labor costs. Thus, a decision requiring disclosure of the pre-job forms in this instance is essentially a requirement that contractors must disclose the entirety of their work product (estimates, cost projections, etc.) related to project labor costs.

the owner of a non-union contracting business, Wiltse testified that awareness of a contractor's budget and/or labor costs provides an "obvious benefit" to a competitor. Tr. 186. He further admitted that it is a "no-brainer" that having access to a competitor's labor costs would allow him to undercut competing contractors and successfully bid on a project. Tr. 186. Finally, Wiltse testified that he wishes to expand his non-union contracting company's business. Tr. 168-69, 186. Wiltse's testimony leaves little doubt as the economic harm that an employer would suffer if its pre-job forms are disclosed. Tr. 187. This type of harm is not the only potential harm faced by employers. Union contractors could use their covered employees to request pre-job information regarding competitors or, as Bennett testified, Union members could also take the entrepreneurial initiative of requesting this information and then selling it to a non-Union contractor. Tr. 75.

As the record clearly reveals, there is no shortage of avenues for the competitive disadvantages to undermine and harm an employer's operations. ALJ Goldman therefore correctly concluded that the Union's motivation for failing to disclose the pre-job reports is "substantial."

**D. Answer to Exception 4: ALJ Goldman correctly concluded that acceptance of the Charging Parties' arguments for disclosure of the pre-job forms at issue in this case would require blanket disclosure of any documents referencing terms and conditions of employment to the IUOE's over 30,000 members.**

As discussed above, the record contains no evidence of any specific, individualized need of the Charging Parties to review the pre-job forms. CGC argues only that Charging Parties, as bargaining unit members, are entitled to documents containing their terms and conditions of employment. G.C. Brief, p. 7. Given that the record contains no evidence of a particularized interest of the Charging Parties, the CGC must be asserting that the Union is required to disclose any document that states or otherwise memorializes a negotiated term of employment to a

member upon request. Thus, ALJ Goldman correctly concluded that under the CGC's theory, the reference to certain terms and conditions of employment on the pre-job forms, would result in a universal obligation of the Union to disclose pre-job forms to any of the 30,000 IUOE members in the event they make such a request.

### **1. Factual Background**

The PLCA incorporates by reference the factual background outlined in this brief at III.A.1. and III.B.1. Particularly, the PLCA references the evidence in the record that the pre-job forms are not the source of any collectively-bargained rights of the Charging Parties, J. Ex. 1 at II(D).; Tr. 71, 325, and the lack of evidence in the record that Charging Parties articulated an additional, individualized interest in reviewing the pre-job forms.

### **2. ALJ Goldman's Decision**

The PLCA incorporates by reference the portions of ALJ Goldman's Decision discussed in this brief at III.A.2. and III.B.2. Particularly, the PLCA references ALJ Goldman's conclusion that the pre-job forms contain no independently-enforceable rights against the PLCA employers and therefore are not the source of any rights. ALJ Dec., p. 13:41-14:20. PLCA also incorporates ALJ Goldman's conclusion that Charging Parties had no specific need for the pre-job forms. ALJ Dec., p. 15:18.

### **3. Argument**

The PLCA incorporates by reference the argument contained in III.A.3 and III.B.3. As these sections make clear, Charging Parties have presented no evidence that the pre-job forms requested are the source of any of Charging Parties collectively-bargained rights. Charging Parties have also presented no individualized reason, such as an alleged relationship between the pre-job forms and an ongoing dispute with an employer, such that they are entitled to review the pre-job forms. The whole of the CGC's argument is that the duty of fair representation requires a

union member to have access to any document that lists his terms and conditions of employment. G.C. Brief., p. 7 (“The Act protects the rights of bargaining unit members such as Wiltse and Lanoux to request from their union documents containing their terms and conditions of employment.”) Since this is the argument’s only rationale, ALJ Goldman correctly concluded that it is also the argument’s only limiting principle. ALJ Goldman therefore also correctly concluded that the CGC’s argument, if accepted, would amount to allowing all 30,000 IUOE members to demand review of any document containing that member’s terms and conditions of employment.

**E. Answer to Exception 5: ALJ Goldman correctly concluded that the complaint should be dismissed.**

For all the reasons stated herein, the PLCA agrees with ALJ Goldman’s determination that the complaint should be dismissed, and that no remedy is warranted. To the extent the Board disagrees with this conclusion, however, the PLCA requests that Board fashion a remedy that accommodates the confidentiality interest of the PLCA employers.

**1. Factual Background**

The PLCA’s arguments in support of ALJ Goldman’s decision to dismiss the complaint and deny a remedy to the Charging Parties have been made in answer to the CGC’s first four exceptions. These arguments need not be reiterated here. However, the PLCA incorporates by reference the facts articulated in its Answer to Exception 3, which discuss, in detail, the PLCA and the Union’s confidentiality interest in the pre-job forms.

**2. ALJ Goldman’s Decision**

Based on the entirety of the record, and specifically as discussed herein in the PLCA’s Answer to the Exceptions 1 through 4, ALJ Goldman determined that the complaint should be dismissed, since the Union had fulfilled its duty of fair representation by articulating a rational

reason for denying Charging Parties' request to see the pre-job forms. ALJ Dec., p. 2:6-10. Given the legal standard in this matter, ALJ Goldman determined that it was not necessary to determine the extent or validity of the PLCA's and/or the Union's confidentiality interest in the pre-job forms. ALJ Dec., p. 16:6-13. ALJ Goldman noted, however, that this confidentiality interest was "substantial." ALJ Dec., p. 2:10.

### **3. Argument**

The PLCA's arguments in support of ALJ Goldman's decision to dismiss the complaint without a remedy to the Charging Parties have been made in answer to the CGC's first four exceptions. These arguments need not be reiterated here. However, should the Board determine that the Charging Parties are entitled to the pre-job forms at issue, the PLCA respectfully requests that the Board craft a remedy that accommodates the PLCA and its members' substantial and clearly-stated interest in the confidentiality of the forms.

As discussed above in its Answer to Exception No. 3, the operating and labor costs information contained on the pre-job forms is the type of information which the Board has regularly recognized to be entitled to protection. The Board has recognized that, even where a Union seeking information for bargaining purposes is entitled to such information, the employer's confidentiality interest in the information must still be accommodated. *See, e.g., GTE Cal. Inc.*, 324 NLRB 424, 427 (1997); *Silver Bros. Co., Inc.*, 312 NLRB 1060 at 1062 (employer did not violate the Act by refusing to disclose financial information to a party where it had a legitimate confidentiality interest and union refused to accommodate that interest).

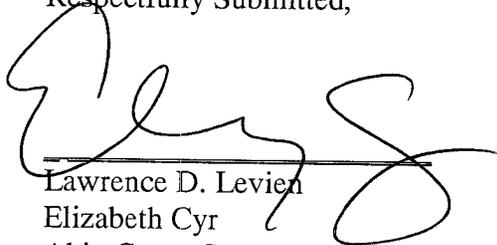
Should the Board determine that a remedy is necessary in this matter, the Board should, consistent with its precedent, accommodate the employer's (and Union's) interest in confidentiality. Such an accommodation could include 1) providing summaries of the pre-job forms that exclude proprietary information; 2) providing summaries of employer-specific work

rules and/or terms of employment discussed at the pre-job; 3) providing redacted copies of the pre-job forms that exclude proprietary and confidential information such as number and types of equipment, number of employees, and similar items; 4) requiring union members to sign a confidentiality agreement with penalties for violation before disclosure is permitted; or some other remedy fashioned by the Board.

#### **IV. Conclusion**

For the foregoing reasons, the PLCA respectfully requests that the Board dismiss the Counsel for the General Counsel's Exceptions and uphold the ALJ Goldman's Decision and Recommended Order

Respectfully Submitted,



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Dated: September 30, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 30th day of September, 2014, I caused copies of the foregoing Answering Brief to be filed electronically with the Executive Secretary and served via e-mail on the following:

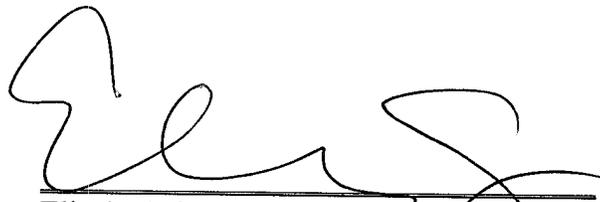
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