UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PCMC/Pacific Crane Maintenance Co., Inc. and/or Pacific Marine Maintenance Co., LLC, a single employer, and/or PCMC/Pacific Crane Maintenance Co., LP, their successor
and
International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 190, Local Lodge 1546, and District Lodge 160

CASE NOS. 32-CA-021925,
32-CA-021974
(formerly 19-CA-029645),
32-CA-021977
(formerly 19-CA-029692),
32-CA-023613,
32-CB-005932

International Longshore and Warehouse Union (Pacific Crane Maintenance Co., Inc.)
and
International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 190, Local Lodge 1546

PACIFIC CRANE'S MOTION TO REOPEN THE RECORD AND MOTION FOR RECONSIDERATION

Respondents Pacific Crane Maintenance Company, L.P. and Pacific Marine Maintenance Company, LLC ("PMMC") (collectively, "Pacific Crane"[1]) hereby move to reopen the record and for reconsideration of the Board's decision dated June 17, 2015, and reported at 362 NLRB No. 120. Reopening the record and reconsideration is warranted under Section 102.48(d)(1) of the Board's Rules and Regulations because new evidence has become available since the trial

[1] Pacific Crane Maintenance Company, L.P. submits this motion on its own behalf and as successor to Pacific Crane Maintenance Co., Inc.

before the ALJ that was held between September 2007 and June 2008, which requires a different result than the one reached under the Board's recent decision.

I. INTRODUCTION/SUMMARY OF ARGUMENT

That new evidence that should be considered in accordance with Section 102.48(d)(1) includes the following:

- A decade has expired since the purported unfair labor practices occurred.
- The Board has taken 10 years to process the alleged unfair labor practices.
- There has been extensive employee and managerial turnover among the two groups of employees at issue in this action.
    - Two years ago Pacific Crane closed its operations at the Port of Oakland, laying off all of its employees, including those formerly employed by PMMC at that site.
    - Another dozen former PMMC employees no longer work at the Port of Tacoma, and the remaining PMMC employees in Tacoma make up only 20 percent of Pacific Crane's workforce in Tacoma and only 5 percent of Pacific Crane's current overall unionized workforce.
- For years Pacific Crane has performed only minimal work for Maersk Line ("Maersk"), and the former PMMC employees still employed in Tacoma now perform work for multiple other Pacific Crane clients at various terminals at the Port of Tacoma.
- Pacific Crane believes the ALJ correctly concluded that a lawful accretion of the former PMMC employees into the coastwide ILWU unit had occurred pursuant to Pacific Crane's well-defined plan. But in any event, under *Northland Hub, Inc.*,

304 N.L.R.B. 665 (1991), *aff'd, N.L.R.B. v. Northland Hub, Inc.*, 29 F.3d 633 (9th Cir. 1994), Pacific Crane is entitled now to present evidence that accretion has occurred over the last decade.

For these reasons, Pacific Crane hereby moves to reopen the record to allow evidence of the aforementioned changed circumstances and for reconsideration of the Board's June 17, 2015 decision and order, in light of such new evidence.

II. RELEVANT BACKGROUND

The history of this case spans well over a decade.

- Between January and April 2005, Maersk transitioned its maintenance and repair work at the Ports of Oakland and Tacoma from PMMC to Pacific Crane; PMMC laid off its workers (represented by the IAM); and Pacific Crane hired around 80 of the approximately 100 former PMMC employees in Oakland and Tacoma, recognizing the union of its terminal-based mechanics, the ILWU, as the bargaining representative for the newly hired workers. *See PCMC/Pac. Crane Maint. Co., Inc. et al.*, 2009 NLRB LEXIS 39, at *50-52, *60-63, *70 (ALJD Feb. 12, 2009).
- Between February and April 2005, District Lodge 160 and District Lodge 190 of the IAM filed charges with Regions 19 and 32 of the Board against PMMC, Pacific Crane, and the ILWU. *Id.* at *2-3.
- Based on the above charges, in May 2007, the Regional Director issued a consolidated complaint against PMMC, Pacific Crane, and the ILWU. *Id.* at *3-6.
- Between September 2007 and June 2008, the ALJ heard the consolidated case in trial in Oakland, California and Seattle, Washington. *Id.* at *2.
- In February 2009, the ALJ dismissed the consolidated complaint's principal allegations that Pacific Crane acted unlawfully by withdrawing recognition from

the IAM, extending recognition to the ILWU, and applying its existing collective-bargaining agreement with the ILWU to the unit employees. *Id. at *192-197.*

- In June 2013, the Board reversed the ALJ. *PCMC/Pac. Crane Maint. Co. et al.*, 359 NLRB No. 136, 2013 NLRB LEXIS 457, *4-5 (N.L.R.B. June 24, 2013).
- In June 2014, in light of the Supreme Court's decision in *Noel Canning,* the Board issued an order setting aside the June 2013 decision and order. *PCMC/Pac. Crane Maint. Co., Inc. et al.*, 2014 NLRB LEXIS 500, at *1 (N.L.R.B. June 27, 2014).
- In June 2015, a Board panel summarily adopted the decision issued two years earlier. *See PCMC/Pac. Crane Maint. Co., Inc. et al.,* 362 NLRB No. 120 (N.L.R.B. June 17, 2015).

III. NEW EVIDENCE RELATED TO THE PASSAGE OF TIME, EMPLOYEE AND MANAGERIAL TURNOVER, AND ACCRETION OF THE PMMC EMPLOYEES MANDATES A DIFFERENT RESULT.

Section 102.48(d)(1) of the Board's Rules permits a party to move for reopening of the record after the expiration of the specified period based on "newly discovered evidence." 29 C.F.R. § 102.48(d)(1). Since the purported unfair labor practices committed by Pacific Crane occurred in early 2005—over 10 years ago—evidence of changed circumstances, i.e., passage of time, employee and managerial turnover, and integration of the PMMC workforce, has arisen that could not have been presented to the ALJ seven or eight years ago. On numerous occasions, the Board has reviewed the type of evidence being presented in connection with this motion and reconsidered the enforceability of a bargaining order.

Here, the Board should follow its precedents in cases such as *Research Federal Credit Union* and *Smithfield Foods*, discussed below, that would allow Pacific Crane to present the new evidence of changed circumstances, and give such evidence fair consideration.

A. <u>The Bargaining Order Is Not Tenable Due To The Passage Of Time.</u>

The Board has recognized that excessive delays in the processing of a matter may render a bargaining order unenforceable. In *Smithfield Foods, Inc.*, 347 N.L.R.B. 1225 (2006), even though the Board conceded that the nature of the employer's violations were "repeated and pervasive," it was troubled by the Board's "'long and unjustified delay in processing the case.'" *Id.* at 1232. Based purely on the delay in processing the case, the Board determined that the bargaining order would likely be unenforceable and did not issue the order. *Id.* at 1233 n.31; *see Regal Recycling, Inc.*, 329 N.L.R.B. 355, 357 (1999) (delay by the Board exceeding five years rendered *Gissel* bargaining order unenforceable); *Wallace Int'l de Puerto Rico, Inc.*, 328 N.L.R.B. 29, 29 (1999) (declining to issue a bargaining given the unjustified delay of the case at the Board for almost four years).

In addition, the D.C. Circuit, where the appeal of this matter would be heard, has repeatedly instructed the Board to consider the passage of time in connection with issuing a bargaining order. *See Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996) (citing cases from the 1st, 3rd, 4th, 5th, 6th, 7th, 11th, and D.C. Circuits holding that the passage of time must be considered in determining whether a bargaining order is an appropriate remedy); *Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1172 (D.C. Cir. 1998) (Board's decision reversed and remanded because it ignored judicial decisions by calling "such passage of time "regrettable" but "unavoidable" and not a sufficient basis to deny a bargaining order"); *Skyline Distribs. v. NLRB*, 99 F.3d 403, 410-12 (D.C. Cir. 1996) (reversing Board and noting that Court has repeatedly instructed the Board to determine the appropriateness of a *Gissel* bargaining order in light of the passage of time).

A delay of more than a decade is substantial and aligned with similar delays that the Board and D.C. Circuit have previously found to render a bargaining order inappropriate. The delay in this case is just one fact that should lead the Board to reconsider and reverse its decision regarding the propriety of its current bargaining order and remedy.

B. <u>The Bargaining Order Is Not Tenable In Light Of Employee And Managerial Turnover.</u>

In addition to the excessive passage of time between the alleged unfair labor practices and the Board's decision, there is considerable evidence of employee and managerial turnover that occurred during this long delay, further diminishing the propriety of the bargaining order.

The Board has in numerous cases deferred to the occurrence of employee and managerial turnover to deem a bargaining order not tenable. In *Research Federal Credit Union*, 327 NLRB 1051 (1999), the respondent filed a motion to reopen the record and for reconsideration of the Board's decision and order, arguing the bargaining order was inappropriate, in part, because there had been significant employee and managerial turnover since the purported unfair labor practices. *Id.* at 1051. On remand from the D.C. Circuit, the Board decided it was "constrained to give substantial weight" to the employee and managerial turnover at issue in that case. *Id.* at 1052. Specifically, the Board highlighted that in the 4-year interim between the unlawful conduct and its initial decision, there had been approximately a 75-percent turnover of unit employees and managerial personnel. *Id.* Further, by the time the Board reconsidered its decision on remand, 9 years had passed since the unlawful conduct. *Id.* As a result, it deleted the bargaining provision from its order. *Id.*; *see also Audubon Reg'l Med. Ctr.*, 331 N.L.R.B. 374, 377-78 (2000) (granting motion to reopen the record to introduce evidence in light of evidence showing that none of the supervisory or managerial employees who perpetrated the unfair labor practices was still employed by or associated with the respondent).

The D.C. Circuit has similarly emphasized the importance of considering evidence of employee turnover. *See Douglas Foods Corp. v. NLRB,* 251 F.3d 1056, 1066 (D.C. Cir. 2001) ("[T]he Board is not free to disregard employee turnover when issuing a bargaining order unless it finds that the employer's practices are particularly flagrant." (internal quotation marks omitted)); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 937 (D.C. Cir. 1991) ("'[W]e hold that before issuing a category II bargaining order, the Board must carefully consider employee turnover.'"); *Somerset Welding & Steel, Inc. v. NLRB*, 987 F.2d 777, 781 (D.C. Cir. 1993) (finding no

adequate justification for *Gissel* Order because ""the Board did not adequately consider changes in management and employee turnover at the Company since the time of the election.'').

In this case, there has been extensive turnover among the PMMC employees working at the Ports of Oakland and Tacoma as of March 30, 2005.

On or around March 30, 2005, when PMMC closed its operations in Oakland, Pacific Crane hired 34 of PMMC's employees working at the Port of Oakland. Declaration of Lisa M. Petrovic, ¶ 4. Not one of those former PMMC employees Pacific Crane hired in 2005, however, has worked for Pacific Crane for the last two years. *Id.*, ¶ 5.

Sometime between March 2005 and the end of July 2010, APMT took over the terminal previously occupied by Maersk in Oakland. *Id.* Then, in July 2010, Ports America took over the terminal from APMT. *Id.* During these years, there was substantial employee turnover. *Id.* Specifically, between 2007 and 2010, approximately a dozen of the former PMMC employees voluntarily left Pacific Crane's employment to retire or transfer to another ILWU-represented employer pursuant to their rights under the coastwide ILWU collective bargaining agreement. *Id.* Finally, in July 2013, Pacific Crane lost all of its business in Oakland, closed its operations there, and laid off all of its employees in Oakland. *Id.* To date, Pacific Crane has no operations or employees at the Port of Oakland. *Id.*

On or around March 30, 2005, Pacific Crane hired 48 of PMMC's employees working at the Port of Tacoma. *Id.*, ¶ 4. In May 2009, Maersk moved almost all of its work to the Port of Seattle, and APMT took over its terminal at the Port of Tacoma. *Id.*, ¶ 6. Through these transitional years, the employee and managerial turnover in Tacoma, like Oakland, has been substantial. Pacific Crane currently employs a total of 182 individuals at the Port of Tacoma. *Id.* Only 37 of the former PMMC employees remain in Tacoma, representing only about 20 percent of Pacific Crane's current workforce at that location. *Id.* In addition, 9 of the 10 employees who manage the workers at the Tacoma terminal today did not manage any of the PMMC employees in March 2005. *Id.*

A more detailed disposition of the former PMMC population is illustrated below:

Oakland	
Disposition	**Number**
Hired by Pacific Crane, but left years prior to 7/13 Oakland shutdown	11
Hired by Pacific Crane, but laid off with Oakland shutdown	23
Total	**34**

Tacoma	
Disposition	**Number**
Hired by Pacific Crane, but since retired	6
Hired by Pacific Crane, but have since been laid off	4
Hired by Pacific Crane, but now deceased	1
Hired by Pacific Crane, and currently active employees	37
Total	**48**

In sum, the Board should reopen the record to review the new evidence of employee and managerial turnover, which should lead the Board to reconsider and reverse its current bargaining order.

C. **The Bargaining Order Is Not Appropriate Because The Remaining Former PMMC Workers Have Been Fully Integrated Into the Pacific Crane Workforce.**

In its June 2013 decision and order, the Board reversed the ALJ's findings that the IAM bargaining unit did not survive the transfer of the unit work from PMMC to Pacific Crane and that the PMMC mechanics were lawfully accreted into the ILWU unit. The Board acknowledged that "some interchange occurred" between the two units of employees, but that at least up to 9 months after the consolidation, the requisite functional integration had not yet occurred given that "the majority of the work performed by the unit employees continued to be unrelated to, and functionally distinct from, the work of PCMC's preexisting complement of employees." *PCMC/Pac. Crane Maint.*, 2013 NLRB LEXIS 457, at *30.

But there is a vast gap between 9 months and 10 years. While the Board may not have concluded integration was yet achieved at 9 months, the evidence shows full integration has since been achieved. Pursuant to *Northland Hub*, the Board's initial determination at 9 months of no accretion does not foreclose a subsequent determination that accretion has been achieved. Indeed, *Northland Hub* confirms the propriety of evaluating new evidence of accretion.

In *Northland Hub,* there was a relocation of employees from a Teamsters-represented facility to a UFCW-represented facility. 304 N.L.R.B. at 665. In response to charges that the employer acted unlawfully by withdrawing recognition from, and repudiating its collective-bargaining agreement with, the Teamsters, the employer claimed that the Teamsters-represented employees were accreted into an existing UFCW-represented unit after their facility was closed and they were relocated. *Id.* at 676-77. The ALJ found that there was neither an integration of operations at the time of the relocation nor a plan in place to merge them. *Id.*

Nonetheless, the ALJ went on to conclude that within a year or so of the unlawful withdrawal of recognition of the Teamsters, the employer's operations merged and the work of the former Teamster-represented employees had been fully integrated with that of other UFCW-represented employees. *Id.* at 678. The ALJ observed: "They have the same skills, work in the

same area, perform the same job functions, share the same lunchroom and restrooms, and have the same day-to-day supervision." *Id.* Accordingly, the ALJ concluded the former Teamsters "retained no separate group identity and they share an overwhelming community of interest with the other employees at the [new] facility," and therefore, the ALJ further concluded "it [is] inappropriate to issue a prospective bargaining order in said unit to remedy the refusal to bargain." *Id.*

The Board agreed with the ALJ's findings that "because of the integration of the Respondent Employer's operations, a prospective bargaining order to remedy its refusal to bargain is inappropriate." *Id.* at 665 n.1. In addition, the Board concluded that "back pay should he tolled as of the effective date when full integration . . . was achieved." *Id.*

In *Northland Hub*, not even a year had passed between the time when the ALJ concluded there was no accretion and the time when accretion had been achieved. Here, by contrast, 10 years have passed since the alleged unfair labor practices by Pacific Crane. Pacific Crane is entitled to show how much has changed over the course of a decade.

1. <u>The former PMMC employees and other Pacific Crane employees are governed by common day-to-day supervision and management.</u>

Today, the former PMMC workers and the other 145 Pacific Crane employees working at the Port of Tacoma are subject to common day-to-day supervision and management. *Id.*, ¶ 7. Ten different individuals oversee the operations at the Port of Tacoma and supervise all 182 employees across the various terminals as a single entity. *Id.* Subject to the terms of the controlling collective bargaining agreement, these 10 individuals are involved and responsible for all aspects of the operation, including establishing staffing levels, overseeing compliance with standards for employee accountability and evaluation, managing work schedules and assignments, and monitoring the manner in which jobs are performed. *Id.* Thus, centralized supervision and management of the former PMMC and current Pacific Crane employees is established. *See Pergament United Sales, Inc.*, 296 N.L.R.B. 333 (1989) (approving accretion

where both groups of employees under common management), *Nave, Inc.*, 306 N.L.R.B. 926 (1992) (accretion appropriate where managers' duties included overseeing both facilities and disciplining both groups of employees).

2. The former PMMC and other Pacific Crane employees interchange responsibilities and duties at the terminals within geographic proximity to each other.

In 2004, the former PMMC employees worked for Maersk on the Maersk terminal at the Port of Tacoma. Since May 2009, however, Pacific Crane has performed minimal work for Maersk. Petrovic Decl., ¶ 8. Since that time, all of Pacific Crane's employees at the Port of Tacoma, including the former PMMC workers, have performed work for various other entities. *Id.* While PMMC employees worked at a single terminal, today those former PMMC employees work for a number of different Pacific Crane customers out of the Port of Tacoma and are distributed across several different terminals, where they work interchangeably with each other and the other 145 Pacific Crane employees. *Id.* The work assignments of the former PMMC employees place them among the general Pacific Crane employee population, and there is no differentiation between the 37 former PMMC employees and other 145 Pacific Crane employees in Tacoma. *Id.* There is a substantial, ongoing and interactive employee interchange among the various terminals, customers, and assignments performed at the Port of Tacoma. *Id.*; *see, e.g., Mercy Health Servs. N.*, 311 N.L.R.B. 367, 368 (1993) (stating "factors in favor of accretion" include "daily telephone contact between the employee groups").

3. The employees in Tacoma share common skills, education and training.

The employees have similar skills, similar education and comparable training. Both groups have the same or similar educational background. Petrovic Decl., ¶ 9. Each group receives training to perform their job functions. *Id.* This factor also weighs in favor of accretion.

See, e.g., Jos. Schlitz Brewing Co., 192 N.L.R.B. 553 (1971) (looking to similarity of skills and functions to determine whether an accretion appropriate).

4. The employees share the same conditions of employment.

The working conditions of the employees are similar. They gain access to the terminal the same way. Petrovic Decl., ¶ 10. They use the same procedures for checking in and taking breaks. *Id.* They are subject to the same job code and safety standards. *Id.* They receive common health and welfare benefits; are paid comparable hourly rates. *Id.* Indeed, nearly all of the former PMMC employees in Tacoma who have retired from Pacific Crane have done so with ILWU pensions and all of the remaining former PMMC employees at the Port of Tacoma are fully vested in the ILWU pension. *Id.* In all these ways, the former PMMC employees cannot be meaningfully differentiated from other Pacific Crane employees. *See St. Mary's Med. Ctr.*, 322 N.L.R.B. 954, 955 (1997) (accretion valid based in part on fact that employees sought to be accreted worked at the same location, worked with unit employees, had common supervision and the same uniform); *U.S. W. Commc'ns, Inc.*, 310 N.L.R.B. 854 (1993) (accretion proper where employees used same equipment, had same benefits, and were subject to the same policies).

5. The totality of circumstances favors a finding of accretion has occurred since the ALJ issued his order in 2007.

Based upon the post-trial evidence regarding the working circumstances of the former PMMC employees, the ILWU is the only appropriate unit. The findings and conclusions of the ALJ, Board, and Ninth Circuit in *Northland Hub* apply to the current case now before the Board: the former PMMC employees and the other Pacific Crane employees have the same skills, work in the same areas, perform the same job functions, work on the same terminals, share the same lunchroom and restrooms, enjoy the same terms and conditions of employment, and have the same day-to-day supervision. These changed circumstances that have occurred since early 2005 have destroyed the previous separate identities of the two units as of March 2005. Now, both

groups of employees are performing similar functions under common terms and conditions of employment.

Further, Pacific Crane's total ILWU-represented workforce currently numbers 752 employees. Petrovic Decl., ¶ 11. With only 37 former PMMC employees still remaining 10 years later, the former PMMC employees represent just under 5 percent of the much larger ILWU-represented population. *Id.* Within these parameters, and considering the totality of the evidence, the former PMMC employees do in fact share an overwhelming community of interest with the ILWU-represented employees and have been properly accreted.

In light of the foregoing, in accordance with *Northland Hub*, the record should be reopened to consider the new evidence of accretion. The new evidence should lead the Board to conclude that a bargaining order is not proper ***and*** that back pay to the affected workers should be tolled as of the effective date of full integration.

IV. CONCLUSION

The Board's current order mandates bargaining with the IAM as to the former PMMC workers (i.e., Paragraph 1(a)-(f), (h)-(j); Paragraph 2(a)-(d)). But a decade later, only a minority of those individuals remains employed with Pacific Crane. And to the extent few remain, they have been completely and successfully integrated into Pacific Crane's ILWU workforce, not only making the bargaining order improper but justifying a tolling of back pay from the date of the integration (i.e., Paragraph 2(e)-(h), (j)-(n)). Lastly, to the extent the order relates to Oakland-specific obligations, e.g., posting the notice attached as Exhibit A (i.e., Paragraph 1(g); Paragraph 2(o)-(p)), it is entirely moot given that Pacific Crane no longer has a presence at the Port of Oakland.

For all of the above-stated reasons, Pacific Crane respectfully requests that the Board reopen the record to admit and consider the new evidence of changed circumstances, and reconsider its bargaining order because of such evidence and determine that the order is no longer tenable (if it ever was) in light of the aforementioned changed circumstances. Further, the

Board should toll the award of back pay as of the date of full integration, a date to be determined at a future date by the Board upon the reopening of the record.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Los Angeles, State of California. I am over the age of eighteen years old and not a party to the within action; my business address is 515 S. Flower Street, 25th Floor, Los Angeles, CA 90071.

On July 15, 2015, I served the foregoing document(s) described as:

PACIFIC CRANE'S MOTION TO REOPEN THE RECORD AND MOTION FOR RECONSIDERATION

on the interested parties by placing a true and correct copy thereof in a sealed envelope addressed as follows:

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I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice such sealed envelope(s) would be deposited with the U.S. postal service on July 15, 2015 with postage thereon fully prepaid, at Los Angeles, California.

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VIA UPS Overnight Delivery: By delivering such document(s) to an overnight mail service or an authorized courier in a sealed envelope or package designated by the express service courier addressed to the person(s) on whom it is to be served.

☒ **VIA ELECTRONIC MAIL:**

By personally emailing the aforementioned document in PDF format to the email address designated for the above listed counsel.

I certify under penalty of perjury that the foregoing is true and correct. Executed on July 15, 2015 at Los Angeles, California.

Arlene Figueroa

Arlene Figueroa