UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

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DISTRICT OF COLUMBIA CIRCUIT

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LITIGATION SERVICES
WASH., D.C.

International Longshore & Warehouse Union Petitioner v. National Labor Relations Board, Respondent.	Case No. 15-1336

ORIGINAL

PETITION FOR REVIEW OF DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

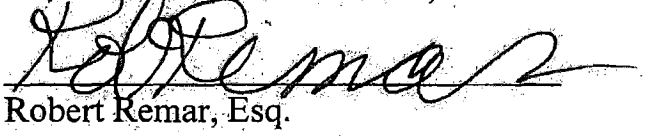
Petitioner, International Longshore & Warehouse Union , hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the decision and order of the respondent National Labor Relations Board entered on June 17, 2015 at 362 NLRB No. 120, which incorporated by reference parts of the Board's decision and order entered on June 24, 2013 at 359 NLRB No. 136, in cases 32-CA-021925, 32-CA-021974 (formerly 19-CA-029645), 32-CA-021977 (formerly 19-CA-029692), 32-CA-023613, and 32-CB-005932. A copy of both Board decisions and orders is attached hereto. This petition is proper under 29

U.S.C. §160(f) and Rule 15 of the Federal Rules of Appellate Procedure,

Respectfully submitted,

Dated: September 22, 2015

LEONARD CARDER, LLP

By: 

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UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

International Longshore & Warehouse Union Petitioner v. National Labor Relations Board, Respondent.	Case No. _____

ORIGINAL

RULE 26.1 DISCLOSURE STATEMENT BY PETITIONER ILWU

Pursuant to Circuit Rule 26.1, Petitioner, International Longshore & Warehouse Union discloses that it is an unincorporated, voluntary, labor organization, whose purpose is to represent employees in collective bargaining with employers. Petitioner is a "trade association," as broadly defined by Circuit Rule 26.1, and thus is not required to identity the names of its members.

Respectfully submitted,

Dated: September 22, 2015 LEONARD CARDER, LLP

By: _____
Robert Remar, Esq.

LEONARD CARDER, LLP
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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years old and not a party to the within action; my business address is 1188 Franklin Street, Suite 201, San Francisco, CA, 94109. On **September 22, 2015**, I served a true and accurate copy of the foregoing document(s):

RULE 26.1 DISCLOSURE STATEMENT BY PETITIONER ILWU

on all interested parties in this action as follows:

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///

☑ **BY MAIL**: I enclosed the document(s) above in a sealed envelope or package addressed to the persons at the addresses above. Following ordinary business practices, the envelope was sealed with postage fully prepaid and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date at San Francisco, CA.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **September 22, 2015** at San Francisco, California.

Nicole Bridges

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NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

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

International Longshore and Ware-House Union (Pacific Crane Maintenance Company, Inc.) *and* International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 190, Local Lodge 1546. Cases 32–CA–021925 and 32–CA–021974 (formerly 19–CA–029645), 32–CA–021977 (formerly 19–CA–029692), 32–CA–023613, and 32–CB–005932

June 17, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On June 24, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 136. Thereafter, the Respondents filed petitions for review in the United States Court of Appeals for the Ninth Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order only to the extent consistent with the Decision and Order reported at 359 NLRB No. 136, which is incorporated herein by reference. The judge's recommended Order, as modified herein, is set forth in full below.

AMENDED REMEDY

Having found that the Respondent Employer and the Respondent Union have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent Employer shall be ordered to withdraw recognition from the Respondent Union as the collective-bargaining representative of the unit employees unless and until the Respondent Union has been certified by the Board as their collective-bargaining representative. In addition, the Respondent Union shall be ordered to cease accepting the Respondent Employer's recognition unless and until it is so certified. Both Respondents will be ordered to cease and desist from applying the PMA-ILWU Agreement, including its union-security provisions, and any extension, renewal, or modification thereof, to the unit employees.

The Respondent Employer also will be ordered to recognize and, on request, bargain with Machinists District Lodge 190, Local Lodge 1546, and District Lodge 160, affiliated with the International Association of Machinists and Aerospace Workers, AFL–CIO (the Machinists) as the joint bargaining representative of the unit employees with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document. As discussed below, we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent Employer's unlawful withdrawal of recognition. The Respondent Employer shall also be required to rescind, on the Machinists' request, any or all of the unilateral changes to the unit employees' terms and conditions of employment made on or after March 31, 2005, and to make the unit employees whole for any loss of earnings

[1] Accordingly, the pending motions for reconsideration filed by the Respondent Employer and the Charging Parties are moot. However, we have considered the additional remedies proposed by the Charging Parties in their motion for reconsideration. It is firmly established that remedial matters are traditionally within the Board's province and the Board has "broad discretionary" authority to fashion appropriate remedies. See *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969); *Schmadig Corp.*, 265 NLRB 147, 147 (1982). Except as provided in the "Amended Remedies" section below, we do not find it appropriate to modify the Order or notices or to impose the additional remedies requested by the Charging Parties.

[2] Member Miscimarra is recused and took no part in the consideration of this case.

and other benefits attributable to its unlawful conduct.[3] The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

In a supplemental letter filed on February 5, 2015, pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Machinists urge the Board to order the Respondent Employer to reimburse the Machinists for all union dues that were not checked off as a result of the Respondent Employer's unlawful conduct, citing *A. W. Farrell & Son, Inc.*, 361 NLRB No. 162, slip op. at 1 (2014). The Board customarily directs that dues owed to a union be deducted from employees' backpay. *Ogle Protection Services*, 183 NLRB at 682. However, when an employer has unlawfully repudiated a collective-bargaining agreement, the Board will require the employer to reimburse the union for dues payments that it failed to make where employees signed valid dues-deduction authorizations. See *A. W. Farrell*, supra, slip op. at 1, and cases cited therein. Accordingly, we shall modify the Order to require the Respondent Employer to reimburse the Machinists for any dues not deducted and remitted from the time of the unlawful withdrawal of recognition until the collective-bargaining agreement expired on March 31, 2005, on behalf of its employees who executed dues authorizations prior to or during the period of the Respondent Employer's unlawful conduct, at no cost to the employees.

The Respondent Employer additionally will be required to offer reinstatement to all employees laid off from PMMC on March 30, 2005, and not reemployed by PCMC, and to make them whole for any loss of earnings and other benefits suffered as a result of their unlawful layoff. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. The Respondent Employer also will be required to remove from its files and records any and all references to the unlawful layoffs and notify the affected employees in writing that this has been done and that the discharge will not be used against them in any way.

The Respondent Employer also will be required to make all contractually required contributions to the Machinists benefit funds that it failed to make, including any additional amounts due the funds on behalf of the unit employees in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and to make the employees whole for any expenses they may have incurred as a result of the Respondent Employer's failure to make such payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.[4]

The Respondent Employer additionally shall be ordered to compensate affected employees for any adverse tax consequences of receiving a lump-sum backpay award and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee, as set forth in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

Further, the Respondent Employer and the Respondent Union will be ordered jointly and severally to reimburse all present and former unit employees who joined the Respondent Union on or since March 31, 2005, for any initiation fees, periodic dues, assessments, or any other moneys they may have paid or that may have been withheld from their pay pursuant to the PMA-ILWU Agreement, together with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

We also shall order the Respondent Employer and the Respondent Union to post the Board's standard notice to employees and notice to employees and members, respectively. In addition, in light of the close factual connection between the unfair labor practices committed by the Respondent Employer and the Respondent Union, we will further order each Respondent to post a signed copy

[3] The Order shall not be construed as requiring or authorizing the Respondent Employer to rescind any improvements in the terms and conditions of employment unless requested to do so by the Machinists.

[4] At compliance, the Respondent Employer may litigate the issue of whether the contributions due the Machinists benefit funds may be offset by payments the Respondent Employer may have made on behalf of the unit employees to the ILWU benefit funds. We observe, however, that employees have a stake not only in receiving agreed-upon benefits, but also in the viability of the benefit funds administered by their own chosen collective-bargaining representative. Diverting contributions from those funds "undercut[s] the ability of those funds to provide for future needs." *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983); see *Active Transportation Co.*, 340 NLRB 426, 426 fn. 2 (2003), enfd. 112 Fed. Appx. 60 (D.C. Cir. 2004).

To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent Employer will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent Employer otherwise owes the fund.

of the other Respondent's notice, which will be provided by the Region, in the same places and under the same conditions as each posts its own notice.

Additionally, we shall order the Respondent Employer to mail the notices to any unit employee employed by the Respondent Employer between January 26, 2005, and March 31, 2005. We shall require such mailing because of the lengthy passage of time since the unfair labor practices were committed and because some of the employees who were unlawfully laid off from PMMC on March 30, 2005, were not rehired and therefore would not see the notices physically posted at the facilities of the Respondent Employer or the Respondent Union.

Finally, as stated above, for the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent Employer's unlawful withdrawal of recognition. The Board has consistently held that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos. Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, supra at 738, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: '(1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.'"

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, supra, we have examined the particular facts of this case and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining through their designated representative by the Respondent Employer's withdrawal of recognition, its resultant refusal to bargain collectively with the Machinists, and its recognition of the ILWU, and by the ILWU's acceptance of that recognition. It is particularly appropriate here, where the Respondent Employer not only laid off the unit employees and significantly changed their terms and conditions of employment without notice to or bargaining with the Machinists, but also overrode the unit employees' exercise of their Section 7 rights by their choice to be represented by the Machinists, and further conditioned their continued employment on their acceptance of representation by the ILWU. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Machinists' continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued representation by the Machinists. The duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. It is only by restoring the status quo ante and requiring the Respondent Employer to bargain with the Machinists for a reasonable period of time that the employees will be able to fairly assess the Machinists' effectiveness as a bargaining representative in an atmosphere free of the Respondent Employer's unlawful conduct. The employees can then determine whether continued representation by the Machinists is in their best interest, in light of the changed circumstances resulting from the transfer of the unit work to PCMC.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. It removes the Respondent Employer's incentive to delay bargaining in the hope of discouraging support for the Machinists. It also ensures that the Machinists will not be pressured by the Respondent Employer's withdrawal of recognition and its readiness to recognize a different union to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and the issuance of a cease-and-desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent Employer's and the Respondent Union's violations, because it would allow a challenge to the Machinists' majority status before the taint of the Respondent Employer's unlawful withdrawal of recognition and subsequent recognition of the Respondent Union has dissipated. Such a result would be particularly unfair in circumstances such as those here, where the nature of the Respondent Employer's unfair labor practices likely created a lasting negative impression of the Machinists in the bargaining unit, and where the Respondent Employer immediately recognized a replacement union that has been able to develop relationships with bargaining unit employees while the Machinists litigated its charges. We find that those circumstances outweigh the temporary impact the affirmative bargaining order will have on the

rights of employees who oppose the Machinists' continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case.[5]

ORDER

A. The Respondent Employer, PCMC/Pacific Crane Maintenance Company, Inc. and/or Pacific Marine Maintenance Co., LLC, a single employer, and PCMC/Pacific Crane Maintenance Company, LP, as a successor to PCMC/Pacific Crane Maintenance Company, Inc., Oakland, California, and Tacoma, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively, on request, with Machinists District Lodge 190, Local Lodge 1546, and Machinists District Lodge 160, affiliated with International Association of Machinists and Aerospace Workers, AFL–CIO (collectively the Machinists) as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit (the unit) concerning wages, hours, and other terms and conditions of employment:

> All employees performing work described in and covered by "Article 1, Section 2. Work Jurisdiction" of the April 1, 2002 through March 31, 2005 collective-bargaining agreement between the [Machinists and Pacific Marine Maintenance Co., LLC (PMMC)] .; excluding all other employees, guards, and supervisors as defined in the Act.

(b) Withdrawing recognition from the Machinists as the exclusive collective-bargaining representative of the unit employees.

(c) Granting assistance to International Longshore and Warehouse Union (ILWU or the Respondent Union) and recognizing it as the exclusive collective-bargaining representative of the unit employees at a time when the ILWU did not represent an unassisted and uncoerced majority of the employees in the unit, and when the Machinists was the exclusive collective-bargaining representative of the unit employees.

(d) Applying the terms and conditions of employment of the collective-bargaining agreement between the Respondent Employer and the ILWU (the PMA-ILWU Agreement), including its union-security provisions, to the unit employees at a time when the ILWU did not represent an unassisted and uncoerced majority of the employees in the unit, and when the Machinists was the exclusive collective-bargaining representative of the unit employees.

(e) Notifying the Machinists and the unit employees that the unit employees would be laid off and that they could continue performing unit work only if they were hired as employees of Pacific Crane Maintenance Company, Inc. (PCMC) and were represented by the ILWU.

(f) Bypassing the Machinists and directly offering unit employees continued employment in the unit on the basis of terms and conditions of employment different from those set forth in PMMC's 2002–2005 collective-bargaining agreement with the Machinists (the Machinists Agreement) and on condition that they be represented by the ILWU.

(g) Unilaterally modifying the Bulletin Board Provision of the Machinists Agreement by imposing new restrictions concerning what materials could be placed on the bulletin board located in its Oakland, California facility.

(h) Laying off unit employees without first notifying the Machinists and giving it a meaningful opportunity to bargain regarding the decision to lay off unit employees.

(i) Altering the unit employees' terms and conditions of employment without first notifying the Machinists and bargaining to agreement or impasse regarding such changes in the wages, hours, and working conditions of the unit employees.

(j) Assigning unit employees to nonunit positions and locations, or assigning nonunit employees to perform unit work, without first notifying the Machinists and giving it a meaningful opportunity to bargain about such assignments and the effects of such assignments.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from the ILWU as the exclusive collective-bargaining representative of the unit employees, unless and until that labor organization has been certified by the National Labor Relations Board as the exclusive representative of those employees.

(b) Refrain from applying the terms and conditions of employment of a collective-bargaining agreement with the ILWU, including its union-security provisions, to the unit employees, unless and until that labor organization has been certified by the National Labor Relations Board as the exclusive representative of those employees.

[5] We shall substitute new notices in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

(c) Recognize and, on request, bargain with the Machinists as the exclusive collective-bargaining representative of the unit employees concerning wages, hours, and other terms and conditions of employment.

(d) Notify the Machinists in writing of all changes made to the unit employees' terms and conditions of employment on and after March 31, 2005, and, on request of the Machinists, rescind any or all changes and restore terms and conditions of employment retroactively to March 30, 2005.

(e) Make the unit employees whole, with interest, for any losses sustained due to the unlawfully imposed changes in wages, hours, benefits, and other terms and conditions of employment in the manner set forth in the remedy section of this decision.

(f) Within 14 days from the date of this Order, offer full reinstatement to all employees laid off from PMMC on March 30, 2005, and not reemployed by PCMC, to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(g) Make whole all employees laid off from PMMC on March 30, 2005, and not reemployed by PCMC on March 31, 2005, for any loss of earnings and other benefits suffered as a result their unlawful layoff, in the manner set forth in the remedy section of this decision.

(h) Compensate the unit employees for any adverse income tax consequences of receiving their backpay in one lump sum, and file a report with the Social Security Administration allocating the unit employees' backpay to the appropriate calendar quarters.

(i) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs and, within 3 days thereafter, notify the affected employees in writing that this has been done and that the unlawful layoffs will not be used against them in any way.

(j) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Make all delinquent contributions to the Machinists benefit funds on behalf of the unit employees that have not been paid since March 31, 2005, including any additional amounts due the funds, in the manner set forth in the remedy section of this decision.

(l) Make the unit employees whole for any expenses ensuing from the failure to make the required contributions to the Machinists benefit funds, in the manner set forth in the remedy section of this decision.

(m) Jointly and severally with the ILWU, reimburse all unit employees for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA-ILWU Agreement, with interest.

(n) Reimburse the Machinists for all dues that, following the unlawful withdrawal of recognition, it failed to deduct and remit pursuant to the dues-checkoff provision of the collective-bargaining agreement before it expired on March 31, 2005, in the manner set forth in the amended remedy section of this decision.

(o) Rescind the unlawfully imposed restrictions concerning what materials could be placed on the bulletin board located in its Oakland, California facility.

(p) Within 14 days after service by the Region, post at its facilities in Oakland, California, and Tacoma, Washington, copies of the attached notice marked "Appendix A."[6] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent Employer and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent Employer customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent Employer has gone out of business or closed the facilities involved in these proceedings, the Respondent Employer shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent Employer at its Oakland and Tacoma facilities at any time since January 26, 2005.

(q) Within 14 days after service by the Region, post at the same places and under the same conditions as in the preceding subparagraph signed copies of the Respondent Union's notice to employees and members marked "Appendix B."

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(r) Within 14 days after service by the Region, duplicate and mail, at its own expense, after being signed by the Respondent Employer's authorized representative, copies of the attached notices marked "Appendix A" and "Appendix B" to the last known addresses of all current and former unit employees employed by the Respondent Employer at its Oakland or Tacoma facility between January 26, 2005, and March 31, 2005.

(s) Furnish the Regional Director with signed copies of the Respondent Employer's notice to employees marked "Appendix A" for posting by the Respondent Union at its facilities where notices to employees and members are customarily posted. Copies of the notice, to be furnished by the Regional Director, shall be signed and returned to the Regional Director promptly.

(t) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Employer has taken to comply.

B. The Respondent Union, International Longshore and Warehouse Union, Oakland, California, and Tacoma, Washington, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting assistance and recognition from Respondent Pacific Crane Maintenance Company, Inc. or its successor Pacific Crane Maintenance Company, LP (collectively PCMC) as the exclusive collective-bargaining representative of the employees in the unit described below (the unit) at a time when the Respondent Union did not represent an uncoerced majority of the employees in the unit, and when the Machinists District Lodge 190, Local Lodge 1546, and Machinists District Lodge 160, affiliated with International Association of Machinists and Aerospace Workers, AFL–CIO (collectively the Machinists) was the exclusive collective-bargaining representative of the employees in that unit:

> All employees performing work described in and covered by "Article 1, Section 2. Work Jurisdiction" of the April 1, 2002 through March 31, 2005 collective-bargaining agreement between the [Machinists and Pacific Marine Maintenance Company, LLC (PMMC)] .; excluding all other employees, guards, and supervisors as defined in the Act.

(b) Maintaining and enforcing the PMA-ILWU Agreement, or any extension, renewal, or modification thereof, including its union-security provisions, so as to cover the unit employees, unless and until it has been certified by the Board as the collective-bargaining representative of those employees.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Decline recognition as the exclusive collective-bargaining representative of the unit employees, unless and until ILWU has been certified by the National Labor Relations Board as the exclusive representative of those employees.

(b) Jointly and severally with the Respondent Employer, reimburse all present and former unit employees for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA-ILWU Agreement, with interest.

(c) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its headquarters and at its offices and meeting halls in Oakland, California, and Tacoma, Washington, copies of the attached notice marked "Appendix B."[7] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent Union customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 14 days after service by the Region, post at the same places and under the same conditions as in the preceding subparagraph signed copies of the Respondent Employer's notice to employees marked "Appendix A."

(f) Furnish the Regional Director with signed copies of the Respondent Union's notice to members and employees marked "Appendix B" for posting by the Respondent Employer at its facilities where notices to employees are customarily posted. Copies of the notice, to

[7] See fn. 6, supra.

be furnished by the Regional Director, shall be signed and returned to the Regional Director promptly.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Union has taken to comply.

Dated, Washington, D.C. June 17, 2015.

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively, on request, with Machinists District Lodge 190, Local Lodge 1546, and Machinists District Lodge 160, affiliated with International Association of Machinists and Aerospace Workers, AFL–CIO (collectively the Machinists) as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit (the unit) concerning wages, hours, and other terms and conditions of employment:

All employees performing work described in and covered by "Article 1, Section 2. Work Jurisdiction" of the April 1, 2002 through March 31, 2005 collective-bargaining agreement between [the Machinists and Pacific Marine Maintenance Company, LLC (PMMC)] .; excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT withdraw recognition from the Machinists as the exclusive collective-bargaining representative of the unit employees and thereafter fail and refuse to recognize the Machinists as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT grant assistance to the International Longshore and Warehouse Union (the ILWU) or recognize it as the exclusive collective-bargaining representative of the unit employees at a time when the ILWU does not represent an unassisted and uncoerced majority of the employees in the unit, and when the Machinists is the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT apply the terms and conditions of employment of our collective-bargaining agreement with the ILWU (the PMA–ILWU Agreement), or any extensions, renewals, or modifications of that agreement, including its union-security provisions, to the unit employees unless and until the ILWU has been certified by the National Labor Relations Board as the collective-bargaining representative of those employees.

WE WILL NOT notify the Machinists or the unit employees that the unit employees will be laid off and that they can continue performing bargaining unit work only if they are hired as employees of Pacific Crane Maintenance Company, Inc. or Pacific Crane Maintenance Company, LP (collectively PCMC) and are represented by the ILWU.

WE WILL NOT bypass the Machinists and directly offer unit employees continued employment in the unit on the basis of terms and conditions of employment different from those set forth in our 2002–2005 collective-bargaining agreement with the Machinists (the Machinists Agreement), or on the condition that they be represented by the ILWU.

WE WILL NOT unilaterally modify the Bulletin Board Provision of the Machinists Agreement by imposing new restrictions concerning what materials can be placed on the bulletin board located in our Oakland, California facility.

WE WILL NOT lay off unit employees without first notifying the Machinists and giving it a meaningful opportunity to bargain regarding the decision to lay off the unit employees.

WE WILL NOT change the unit employees' wages, hours, or other terms and conditions of employment without first notifying the Machinists and giving it a meaningful opportunity to bargain about such changes.

WE WILL NOT assign unit employees to nonunit positions and locations, or assign nonunit employees to perform unit work, without first notifying the Machinists and giving it a meaningful opportunity to bargain about such assignments and the effects of such assignments on the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL withdraw and withhold all recognition from the ILWU as the exclusive collective-bargaining representative of our employees in the unit described above, unless and until the ILWU has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

WE WILL refrain from applying the terms and conditions of employment of a collective-bargaining agreement with the ILWU, including its union-security provisions, to the unit employees, unless and until that labor organization has been certified by the National Labor Relations Board as the exclusive representative of those employees.

WE WILL recognize and, on request, bargain with the Machinists as the exclusive collective-bargaining representative of our employees in the unit described above concerning wages, hours, and other terms and conditions of employment.

WE WILL notify the Machinists in writing of any changes made on and after March 31, 2005, in the rates of pay, hours of work, job benefits, and other terms and conditions of employment of the unit employees, and WE WILL, on the Machinists' request, rescind any or all of our unlawfully imposed changes and restore the terms and conditions of employment that existed as of March 30, 2005.

WE WILL make the unit employees whole, with interest, for any losses sustained due to our unlawfully imposed changes in wages, benefits, and other terms and conditions of employment.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to all unit employees laid off from PMMC on March 30, 2005, and not reemployed by us, to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole all unit employees laid off from PMMC on March 30, 2005, and not reemployed by us on March 31, 2005, for any loss of earnings and other benefits suffered as a result of their unlawful layoff, less any net interim earnings, with interest.

WE WILL compensate the unit employees for any adverse income tax consequences of receiving their backpay in one lump sum, and WE WILL file a report with the Social Security Administration allocating the unit employees' backpay to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the March 30, 2005 layoffs of the unit employees, and WE WILL, within 3 days thereafter, notify the affected employees in writing that this has been done and that we will not use the unlawful layoffs against them in any way.

WE WILL make all delinquent contributions to the Machinists benefit funds on behalf of the unit employees that we have not made since March 31, 2005, with interest.

WE WILL make whole the unit employees for any expenses ensuing from our failure to make required contributions to the Machinists benefit funds, with interest.

WE WILL, jointly and severally with the ILWU, reimburse all unit employees for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA-ILWU Agreement, with interest.

WE WILL reimburse the Machinists for all dues that, following our unlawful withdrawal of recognition, we failed to deduct and remit pursuant to the dues-checkoff provision of the Machinists Agreement before it expired on March 31, 2005.

WE WILL rescind the restrictions that we unlawfully imposed concerning what materials could be placed on the bulletin board located in our Oakland, California facility.

PCMC/PACIFIC CRANE MAINTENANCE COMPANY, INC. AND/OR PACIFIC MARINE MAINTENANCE CO., LLC, A SINGLE EMPLOYER; AND PCMC/PACIFIC CRANE MAINTENANCE COMPANY, LP, AS SUCCESSOR TO PCMC/PACIFIC CRANE MAINTENANCE COMPANY, INC.

The Board's decision can be found at www.nlrb.gov/case/32-CA-021925 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations

Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT accept assistance or recognition from Pacific Crane Maintenance Company, Inc. or its successor Pacific Crane Maintenance Company, LP (collectively PCMC), as the exclusive collective-bargaining representative of the employees in the following appropriate unit (the unit), at a time when we do not represent an uncoerced majority of the employees in the unit, and when Machinists District Lodge 190, Local Lodge 1546, and Machinists District Lodge 160, affiliated with International Association of Machinists and Aerospace Workers, AFL–CIO (collectively the Machinists) is the exclusive collective-bargaining representative of those employees:

All employees performing work described in and covered by "Article 1, Section 2. Work Jurisdiction" of the April 1, 2002 through March 31, 2005 collective-bargaining agreement between the [Machinists and Pacific Marine Maintenance Co., LLC (PMMC)] . . ; excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT maintain or enforce our collective-bargaining agreement with PCMC (the PMA-ILWU Agreement), or any modifications, renewals, or extensions of that agreement, including its union-security provisions, so as to cover the unit employees, unless and until we have been certified by the National Labor Relations Board as the collective-bargaining representative of those employees.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL decline recognition as the exclusive collective-bargaining representative of PCMC's employees in the unit described above, unless and until we have been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

WE WILL, jointly and severally with the Respondent Employer, reimburse all present and former employees in the unit described above for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA-ILWU Agreement, with interest.

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION

The Board's decision can be found at www.nlrb.gov/case/32-CA-021925 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

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

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. Cases 32–CA–021925, 32–CA–021974 (formerly 19–CA–029645), 32–CA–021977 (formerly 19–CA–029692), 32–CA–023613, and 32–CB–005932

June 24, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

This case arises as a result of a transfer of work and the unit of employees who performed that work from one company to a related company, the two of which, it was stipulated at the hearing, constituted a single employer. After the transfers, the single employer withdrew recognition from the union that had represented the employees for over 40 years and recognized a different union as their representative.

The employees were permanently laid off by Pacific Marine Maintenance Co., LLC (PMMC) and hired the next day as new employees by Pacific Crane Maintenance Co., Inc. (PCMC) (together, the Respondent Employer or Employer) when their work was contemporaneously transferred from PMMC to PCMC. At the same time, the Respondent Employer withdrew recognition from the Machinists District Lodge 190, Local Lodge 1546, and Machinists District Lodge 160, affiliated with the International Association of Machinists and Aerospace Workers, AFL–CIO (collectively, the Machinists or Union), the employees' representative, and recognized in its place the International Longshore and Warehouse Union (ILWU or Respondent Union), the representative of PCMC's preexisting complement of employees.[1]

The Acting General Counsel alleged that the Respondent Employer acted unlawfully when it withdrew recognition from the Machinists, extended recognition to the ILWU, and applied its existing collective-bargaining agreement with the ILWU to the unit employees. Correlatively, the Acting General Counsel alleged that the ILWU acted unlawfully when it accepted that recognition and agreed to apply the existing collective-bargaining agreement to the unit employees. The judge dismissed all of those allegations.

We reverse. Based on the parties' stipulation that PMMC and PCMC were at all times material a single employer, we find that the Respondent Employer was obligated to bargain with the Machinists over the layoff of the unit employees from PMMC and the terms and conditions under which they would be offered continued employment with PCMC.[2] We further find that the bar-

[1] On February 12, 2009, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Acting General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent Employer and the Respondent Union filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The Acting General Counsel and the Machinists have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We grant the Machinists' motion to take administrative notice of the complaint filed in a class action lawsuit (the Coudriet suit) in the United States District Court for the Western District of Washington. We do not, however, give any weight to the assertions of fact contained in the complaint. We deny the ILWU's motion to strike certain statements of fact from the Machinists' brief on the ground that they are not supported by record evidence. We shall, however, adopt the ILWU's suggested alternative and give no consideration to these purported statements of fact. See *Sunshine Piping, Inc.*, 351 NLRB 1371, 1372 fn. 12 (2007).

The Respondent Employer urges the Board to disregard certain of the Acting General Counsel's exceptions because they fail to comply with Sec. 102.46 of the Board's Rules and Regulations. We find that the Acting General Counsel's exceptions are in substantial compliance with the Board's Rules, and we have therefore considered them.

We have amended the judge's conclusions of law, and substituted a new remedy, Order, and notice to conform to the violations found. We have modified the judge's recommended Order to provide for posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

[2] Upon the parties' entering into that stipulation, counsel for the Acting General Counsel withdrew a complaint allegation that PCMC was PMMC's successor under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and thereafter relied solely on a single-employer theory to establish the violations. Nonetheless, the judge included a successorship analysis in his decision. The Acting General Counsel excepts to the judge's inclusion of that analysis. We find merit in the exception and therefore do not rely on the judge's successorship analysis. However, we shall rely on the facts included there insofar as they are relevant in determining whether the former PMMC unit remained appropriate for bargaining following the transition to PCMC. See below.

gaining unit retained a distinct community of interest upon the transfer of unit work and unit employees to PCMC, and that the Respondent Employer therefore violated Section 8(a)(5) and (2) by withdrawing recognition from the Machinists, extending recognition to the ILWU, and applying its collective-bargaining agreement with the ILWU to the unit employees. In addition, we find that the ILWU violated Section 8(b)(1)(A) and (2) by accepting recognition as the unit employees' representative and agreeing to apply its collective-bargaining agreement, including the union-security provisions, to the unit employees.[3]

I. BACKGROUND

a. Underlying facts

PCMC was incorporated in 1990 to perform marine terminal maintenance and repair (M&R) work at shipping terminals on the West Coast. After joining the Pacific Maritime Association (PMA), a multi-employer association, PCMC agreed to honor the PMA's contract with the ILWU (PMA-ILWU Agreement). PCMC grew over the years. By the end of its first decade in business, it was performing M&R work for various companies at terminals in ports up and down the West Coast. It performed a significant portion of that work for Maersk, a shipping company.[4]

In 1999, Maersk acquired the assets and operations of another shipping company, Sealand, at terminals in Long Beach and Oakland, California, and Tacoma, Washington. To acquire this work, Maersk agreed to continue to use Sealand's M&R mechanics, whom the Machinists had represented since the 1960s. But Maersk did not want to employ the former Sealand M&R mechanics directly; it sought a contractor to employ those mechanics and perform the M&R work at the three terminals. To fill that need, PCMC entered into a partnership in late 1999 with another company, Marine Terminals Corp., to form PMMC and to bid on the work.[5]

Thereafter, Maersk and PMMC entered into a contract under which PMMC began performing the former Sealand work. PMMC retained Sealand's Machinists-represented M&R mechanics, recognized the Machinists as their bargaining representative, and adopted Sealand's collective-bargaining agreement with the Machinists. In 2002, PMMC and the Machinists renewed that agreement (the Machinists Agreement). That same year, Maersk and PMMC renewed their contract but, at Maersk's insistence, on a month-to-month basis.

Over time, Maersk became dissatisfied doing business with PMMC, deeming it too expensive owing to the labor costs of the Machinists Agreement. In late 2004, Maersk asked PMMC to submit a new bid in order to retain the work. PMMC told Maersk that PMMC could not do the work for less than the current contract rate, with any labor cost increases incurred under a new Machinists collective-bargaining agreement to be passed through to Maersk per industry practice. Maersk also contacted PCMC. Maersk informed PCMC that the PMMC-Machinists collective-bargaining agreement was set to expire in early 2005 and that the labor costs under that agreement were expected to rise by 12 percent; it asked if PCMC could perform the work at a lower cost than PMMC. PCMC responded that it could do so, because its M&R employees were covered by the lower cost PMA-ILWU Agreement, which would not expire until 2008.

On January 6, 2005,[6] Maersk representatives met with principals of both PMMC and PCMC to discuss the situation. Maersk representatives opened the meeting by announcing that Maersk expected to reduce its costs by transferring the work to PCMC. Maersk, PMMC, and PCMC then discussed how they could transition from a PMMC/Machinists to a PCMC/ILWU work force and the allocation of costs that would be incurred in such a transition. They then worked out the details of a new contract between Maersk and PCMC for the work. Shortly after the meeting, Maersk emailed the meeting participants to document its decision to terminate the PMMC contract and transfer the work to PCMC.

On January 25, Maersk terminated its month-to-month contract with PMMC effective the end of March and awarded the work to PCMC. On January 26, PMMC sent a letter to the Machinists (and posted it at the PMMC Maersk worksites) announcing the loss of the Maersk work and estimating that the unit employees would be laid off about April 1. PMMC also enclosed (and posted) a memo from PCMC, explaining how PMMC's Oakland and Tacoma mechanics could apply

[3] In August 2007, Pacific Crane Maintenance Co., LP purchased the business and assets of PCMC and continued to operate the business essentially in the same form. Prior to the purchase, Pacific Crane Maintenance Co., LP was put on notice of PCMC's potential liability in this case. Pacific Crane Maintenance Co., LP is a named respondent and a stipulated successor employer in this proceeding under both *Burns*, supra, and *Golden State Bottling v. NLRB*, 414 U.S. 168 (1973). Accordingly, Pacific Crane Maintenance Co., LP is jointly and severally liable for the Respondent Employer's unfair labor practices.

[4] "Maersk" refers to Maersk, Inc., North America and/or its business units Maersk Pacific/APM Terminals and Maersk Equipment Services, Inc.

[5] PMMC was headed by a four-member policy committee; the policy committee's chairman and one of its committee members were, at the same time, PCMC's chief executive officer and chief operating officer, respectively.

[6] All subsequent dates are in 2005 unless otherwise stated.

for employment with PCMC.[7] The memo announced that PCMC would begin performing the PMMC unit work at the Oakland and Tacoma ports about April 1, and that PCMC was "seeking qualified applicants to join our existing work force in each of these ports."

On February 4, the Machinists sought immediate negotiations with PMMC over, among other things, the decision to cease work and the effects of that decision on the unit employees. The Machinists also requested detailed information regarding the relationship between PMMC and PCMC. On February 17, PMMC agreed to bargain with the Union over the effects of the layoffs, but asserted that the decision itself was effectively made by Maersk, not PMMC, when Maersk decided to use another contractor. PMMC denied that a single-employer relationship existed between itself and PCMC,[8] and it refused to furnish the information that the Machinists requested.

On March 1, PCMC sent employment offers to 75-80 of the approximately 100 unit employees at Oakland and Tacoma. The offer identified their work as belonging to PCMC's ILWU-represented bargaining unit and covered by the PMA-ILWU Agreement. On March 9, PCMC sent wage schedules and other information to those PMMC employees who had accepted employment, and it initiated new hire screening for them. By letter the next day, the Machinists demanded that PCMC recognize it as the representative of the PMMC unit employees. PCMC refused to recognize the Machinists, explaining that it had recognized the ILWU as the representative of its "new employees" and that they were covered by the PMA-ILWU Agreement. PMMC laid off the Machinists represented mechanics on March 30 when its contract with Maersk expired.[9]

On March 31, PCMC hired 76 of the former PMMC employees (and 6 more shortly thereafter), purportedly as new employees, on condition that they be represented by the ILWU, and it included them in the coastwide ILWU bargaining unit and applied the PMA-ILWU Agreement to them. PCMC permanently placed six of the former PMMC Tacoma employees at the terminal of another company, Evergreen, to perform nonunit work. At the same time, PCMC permanently transferred 10 of its Evergreen based mechanics to Maersk's Tacoma terminal to perform unit work.

After the unit employees began working for PCMC, they continued to perform essentially the same work, at the same locations, and in the same organizational units as before. The only significant changes in their terms and conditions of employment resulted from the application of the PMA-ILWU Agreement and PCMC's "lean staffing" model of operations. Under its lean staffing model, PCMC maintained steady employee complements at each of its terminal operations that were just large enough to perform the M&R work at the terminal during slack periods. It temporarily expanded its work force during periods of heightened workload by transferring mechanics from other terminals and using the ILWU hiring hall.[10] Commencing on March 31, PCMC assigned unit employees nonunit work and nonunit employees unit work, in accordance with its lean staffing model.[11]

b. The complaint

The final amended consolidated complaint alleged in relevant part that PMMC and PCMC were a single employer (the Respondent Employer) and that the Respondent Employer violated Section 8(a)(5) and (1) by announcing to unit employees that they would be laid off from PMMC and any potential reemployment would be as members of the existing PCMC ILWU-represented work force; engaging in direct dealing with unit employees by offering them employment under the terms and conditions of the PMA-ILWU Agreement; unilaterally laying off unit employees; unilaterally changing terms and conditions, including by assigning nonunit work to unit employees and unit work to nonunit employees; and withdrawing recognition from the Machinists. In addition, the complaint alleged that the Respondent Employer violated Section 8(a)(2) and (1) by recognizing the Respondent Union as the representative of the unit employees and applying the PMA-ILWU Agreement, including its union-security provisions, to the unit employees. The complaint further alleges that the Respondent Union violated Section 8(b)(1)(A) and (2) by accepting recognition from the Respondent Employer and agreeing to apply the PMA-ILWU Agreement, including its union-security provisions, to the unit employees.

The Acting General Counsel's theory of the case, as litigated at the hearing and argued to the judge, was that

[7] By this time, PMMC was no longer performing the former Sealand work at Long Beach. In 2002, that work had been consolidated at a new Los Angeles terminal and PCMC was performing the work.

[8] The stipulation that PMMC and PCMC constituted a single employer was reached only after the hearing was underway.

[9] Several PMMC managers transferred to PCMC management positions on or about the same date.

[10] As members of the ILWU, the unit employees became eligible to use the ILWU hiring hall to obtain additional shifts with the Respondent Employer and other signatories to the PMA-ILWU Agreement that requested employees through the hiring hall.

[11] In contrast, while working for PMMC, unit employees performed unit work at a single terminal (Oakland or Tacoma) with a stable work force composed of other unit employees who were permanently assigned to the same terminal.

the change in the paper identity of the unit employees' "employer" from PMMC to PCMC did not, in and of itself, alter the Respondent Employer's preexisting obligation to bargain with the Machinists as to those employees because PMMC and PCMC were, for labor law purposes, the same entity. Thus, the single-employer stipulation meant that PMMC and PCMC together constituted a single employing enterprise and thereby foreclosed any argument that the change from PMMC to PCMC as the "employer" provided an opportunity for a change in the status of the unit employees' bargaining representative. The Acting General Counsel argued further that the Respondent Employer has failed to establish that its conduct was privileged because the historical unit lost its separate identity and was lawfully merged into the ILWU coastwide unit.

c. The judge's decision

Despite the parties' single-employer stipulation, the judge rejected the Acting General Counsel's single-employer theory. As he saw it, PMMC and PCMC acted independently of one another in bidding for the unit work, and Maersk's decision to award the work to PCMC caused PMMC to lose the work. The judge explained, further, that PMMC's loss of all unit work and all prospects for obtaining unit work necessitated the layoff of its employees. The judge reasoned that PMMC did not violate Section 8(a)(5) by refusing to bargain about a decision over which it had no control.

The judge additionally found that PCMC did not succeed to PMMC's bargaining obligation because the historical unit lost its distinct identity and was lawfully merged with the larger ILWU coastwide bargaining unit. In reaching this conclusion, the judge primarily relied on the interchange of unit and nonunit employees that resulted from application of the lean staffing model and from hiring hall usage practices under the PMA-ILWU Agreement. The judge found that the lean staffing model was "a fundamental change in the employer's choice in business model that has permanent and significant consequences to the unit employees whose loyalties and orientation would shift, in part, from the PMMC model of the single employer who provides all the work the employee does in a single place, to the larger multi-facilities perspective of the multi-terminal employer and—to the extent the employee registers for his or her own dispatch employment [through the hiring hall], to the far wider perspective of the PMA-ILWU coastwide unit."

The judge rejected the Acting General Counsel's contention that the Respondent Employer's unilateral application of the lean staffing model and the PMA-ILWU Agreement (including its hiring hall provisions) were themselves violative of Section 8(a)(5) and, therefore, could not be relied upon in determining whether the historical bargaining unit remained appropriate. Citing *First National Maintenance*[12] and *AG Communication Systems*,[13] the judge found that PCMC's decision to integrate the two historically separate units and thereafter apply the business model in place at all of its other terminal operations constituted an entrepreneurial decision not amenable to collective bargaining.

Having found that the PMMC mechanics were subsumed within the larger ILWU coastwide unit, the judge dismissed the unfair labor practice allegations that were premised on the continuing representative status of the Machinists, including those related to the unilateral changes in the unit employees' terms and conditions of employment; the withdrawal of recognition from the Machinists and recognition of the ILWU as the collective-bargaining representative of the unit employees; and the application of the PMA-ILWU Agreement, including its union-security provision, to the unit employees.

The Acting General Counsel asserts that the judge erred by discounting the single-employer stipulation and, in consequence, erroneously treating PMMC and PCMC as separate, independent actors in his analysis. Looked at properly, the Acting General Counsel asserts, the Respondent Employer, as a single employer, violated Section 8(a)(5) by laying off and rehiring the unit employees without bargaining with the Machinists, and by its subsequent unilateral changes to their terms and conditions of employment. The Acting General Counsel further contends that the historical unit survived the transition to PCMC and the Respondent Employer was therefore obligated at all relevant times to recognize and bargain with the Machinists.

For the reasons set out below, we find merit in the position of the Acting General Counsel. We therefore reverse the judge's decision and find the violations alleged.

II. ANALYSIS

As stated, the parties stipulated that PMMC and PCMC together constituted a single enterprise, the Re-

[12] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679–680 (1981) (core entrepreneurial decisions regarding the scope and direction of the employer's business are subject to bargaining "only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business" and "a desire to reduce labor costs" is "peculiarly suitable for resolution within the collective-bargaining framework").

[13] *AG Communication Systems Corp.*, 350 NLRB 168, 171–172 (2007), affd. sub nom. *Electrical Workers Local 21 v. NLRB*, 563 F.3d 418 (9th Cir. 2009) (employer did not violate Sec. 8(a)(5) by failing to provide union with notice and an opportunity to bargain over decision to fully integrate separate bargaining units, because the decision involved a change in the scope and direction of the enterprise within the meaning of *First National Maintenance*, supra).

spondent Employer. Board and court precedent therefore dictates that the Respondent Employer be held responsible to bargain with the Machinists regardless of which of its corporate manifestations nominally employed the bargaining unit employees.[14] In other words, the Respondent Employer could not escape its bargaining obligation by the simple device of laying off the Machinists-represented employees from PMMC on March 30 and then rehiring them as "new" employees of PCMC on March 31, given that PMMC and PCMC were, for labor law purposes, the same entity.

Accordingly, if the Respondent Employer desired to cooperate with Maersk in effecting the transfer of the unit work and unit employees from PMMC to PCMC, it was first obligated to bargain (to agreement or impasse) with the Machinists about any changes in the unit employees' terms and conditions of employment, including the layoff of the unit employees' from PMMC, whether they would be reemployed by PCMC, and what their initial terms and conditions would be upon reemployment.[15] The judge found that the Respondent Employer had no obligation to bargain about these matters because, first, they were the direct result of Maersk's decision to award the unit work to PCMC, a decision outside of the Respondent Employer's control and, second, they were exempt from bargaining under *First National Maintenance*, supra. The layoff, reemployment, and unilateral changes, however, were not an inevitable consequence of Maersk's decision, but were only "one of a number of responses to changed circumstances."[16] Thus, the Respondent Employer could have bargained with the Machinists over the transfer of the unit employees to PCMC without an intervening layoff and loss of seniority. Alternatively, it could have maintained the unit employees' terms and conditions while it negotiated with the Machinists over cost saving concessions.

Contrary to the judge's findings, the layoff and unilateral changes did not constitute a core entrepreneurial decision exempt from bargaining under *First National Maintenance*, supra. The basic nature of the Respondent Employer's operation remained the same, as did the work of the unit employees. Indeed, the judge found that "[g]enerally the same employees, now PCMC employees, were doing the identical work at the same facility and locations within the facility using the same tools and equipment to do so."

The overwhelming record evidence establishes, moreover, that the decisions at issue were motivated by a desire to reduce labor costs. Although, as the judge found, Maersk was focused on its costs during the bidding process, the Respondent Employer's focus was on the manner in which it would achieve the cost-savings that Maersk sought and incorporated into the Maersk-PCMC contract. The record shows in this regard that PMMC charged Maersk a contract rate of approximately $74 an hour for the Oakland and Tacoma M&R work, while PCMC's contract rate was approximately $65 an hour. It is undisputed that the difference in the contract rates charged by PMMC and PCMC was attributed by Maersk and the Respondent Employer to the higher labor costs associated with operating under the Machinists Agreement as compared to the PMA-ILWU Agreement. Accordingly, when Maersk awarded the contract to PCMC, the Respondent Employer laid off the entire bargaining unit of approximately 100 employees and rehired fewer of them (approximately 80) to perform the same work as members of its ILWU-represented work force and under the terms and conditions of the PMA-ILWU Agreement. It also increased the percentage of employees on the day shift in order to reduce shift differentials and overtime, and it applied its lean staffing model.

Those changes, all of which ultimately affected labor costs, were amenable to bargaining with the Machinists. Thus, the Respondent Employer could have bargained with the Machinists to see if it would make concessions on wages, hours, benefits, and staffing levels. Further, although PCMC, unlike PMMC, used a lean staffing

[14] *Pathology Institute*, 320 NLRB 1050, 1050 (1996) ("an employment transfer of represented employees from one to another of [the] entities [constituting a single employer] will not, of itself, obliterate a historic unit and whatever obligations have arisen as a result of its existence"), enfd. mem. 116 F.3d 482 (9th Cir. 1997), cert. denied 522 U.S. 1028 (1997); *Hahn Motors, Inc.*, 283 NLRB 901 (1987); *Blumenthal Theatres Circuit*, 240 NLRB 206, 217 (1979).

[15] See, e.g., *Naperville Jeep/Dodge*, 357 NLRB No. 182, slip op. at 2–3 and fn. 7 (2012); *Blumenthal Theatres Circuit*, 240 NLRB at 217.

[16] *Holly Farms Corp.*, 311 NLRB 273, 277–278 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996). In *Holly Farms*, the Board found that the respondent employer's decision to integrate its operations and merge two bargaining units with a history of separate representation was insulated from bargaining under *First National Maintenance*, supra. But the Board found that the employer violated Sec. 8(a)(5) by failing to bargain about "the various ways in which the integration might affect the employment status and wages and benefits of [the represented employees]." Id. at 278. The Board emphasized that the terms under which the employees were offered employment with the surviving entity were not an inevitable consequence of the functional integration of the employer's operations, but "were only one of a number of responses to changed circumstances." Id. See also *Naperville Jeep/Dodge*, 357 NLRB No. 183, slip op. at 2–3 and fn. 7, in which the Board found that when the respondent employer closed one of two entities comprising a single employer and merged the represented employees of the closed entity into the larger group of unrepresented employees of the surviving entity, it was obligated to bargain with the union that represented the employees of the closed entity over such matters as layoffs, preferential hiring, wages, work locations, schedules, carryover of seniority, and other terms and conditions of employment.

model, the Respondent Employer could have bargained with the Machinists for a comparable arrangement, perhaps including the temporary transfer of Machinists-represented mechanics from other terminals to assist as needed when there was an increase in work at the Oakland and Tacoma terminals. By bargaining over these issues, the Respondent Employer might have won concessions from the Machinists that would have allowed it to perform the work profitably at the bid price accepted by Maersk. Although such an outcome was not assured, that did not nullify the Respondent Employer's obligation to notify and, upon request, bargain with the Machinists over any changes in the terms and conditions of employment of the unit employees. By failing to do so, the Respondent Employer violated Section 8(a)(5) of the Act.

We also reverse the judge's findings that the historical bargaining unit did not survive the transfer of the unit work from PMMC to PCMC on March 31 and that the PMMC mechanics were lawfully merged into the ILWU-PMA bargaining unit. The Board considers the traditional community-of-interest factors to determine whether a unit remains appropriate for bargaining in light of changed circumstances, see, e.g., *Safeway Stores*, 256 NLRB 918 (1981), but gives significant weight to the parties' history of bargaining in separate units: "compelling circumstances are required to overcome the significance of bargaining history."[17] Given that the Machinists had represented the historical bargaining unit for nearly 40 years, the Respondent Employer, as the party asserting that a merger occurred, has the burden of establishing that such "compelling circumstances" exist.[18] We find that it has failed to satisfy that burden.[19]

As of March 31, there were no significant changes to the former PMMC unit employees' terms and conditions of employment that might warrant a finding of "compelling circumstances."[20] On that date, as discussed above, the unit employees generally continued to perform the same work at the same location, with the same tools and equipment as they had before the merger, working under separate immediate supervision from the ILWU-represented employees.

The only significant changes in the unit employees' terms and conditions resulted from the Respondent Employer's application of the PMA-ILWU Agreement to the unit employees and its assignment of unit employees to perform nonunit work at nonunit locations and of nonunit employees to perform unit work. We do not consider these changes in determining whether the former PMMC unit lost its separate identity. By failing to bargain with the Machinists over the terms and conditions under which the PMMC employees would be offered employment with PCMC, the Respondent Employer violated the Act. Accordingly, it cannot now rely on the results of those unfair labor practices to establish an integration of operations requiring the merger of bargaining units.[21]

The judge, citing *AG Communication*, supra, 350 NLRB 168, found that the Respondent Employer had a "well-defined plan" in place—its lean staffing model—when it merged the two units and withdrew recognition from the Machinists. The judge therefore deemed it appropriate to consider the interchange of unit and nonunit employees that occurred on and after March 31, in determining whether the former PMMC unit retained a distinct community of interest. We find the judge's reliance

[17] *Naperville Jeep/Dodge*, 357 NLRB No. 183, slip op. at 2 (quoting *ADT Security Services*, 355 NLRB 1388, 1388 (2010), and *Radio Station KOMO-AM*, 324 NLRB 256 (1997)). See also *Serramonte Oldsmobile*, 318 NLRB 80, 104 (1995), enfd. in relevant part 86 F.3d 227 (D.C. Cir. 1996); *Children's Hospital*, 312 NLRB 920, 929 (1993) ("Both the Board and the courts have long recognized not only that the traditional factors, which tend to support the finding of a larger or single unit as being appropriate, are of lesser cogency where a history of meaningful bargaining has developed, but also that this fact alone suggests the appropriateness of a separate bargaining unit and that compelling circumstances are required to overcome the significance of bargaining history.") (internal quotation marks omitted), enfd. sub nom. *California Pacific Medical Center v. NLRB*, 87 F.3d 304 (9th Cir. 1996).

[18] See *Naperville Jeep/Dodge*, 357 NLRB No. 183, slip op. at 2.

[19] The judge found that the 2002 loss of the non-crane maintenance and repair work at Maersk's Long Beach terminal and the consequent layoff of about 70 unit employees had effectively destroyed the historical bargaining unit. We view the facts differently. The fact that, in 2005, approximately 100 unit employees remained at the Oakland and Tacoma locations demonstrates that the historical bargaining unit remained intact. See *Pathology Institute*, 320 NLRB at 1051 (multilocation bargaining unit retained its separate identity when it was reduced in scope and composition).

[20] In determining whether circumstances exist that warrant the merger of bargaining-unit employees into a larger unit or employee group, the Board examines the nature of the operations "at the time of the withdrawal of recognition unless there is a well-defined plan or timetable for achieving fuller functional integration." *Comar, Inc.*, 339 NLRB 903, 910 (2003). PMMC effectively withdrew recognition from the Machinists, and PCMC refused to recognize it, on March 31. For the reasons explained below, the evidence falls short of establishing that the Respondent Employer had a "well-defined plan or timetable for achieving fuller functional integration" after that date. Id. Thus, we consider whether changed circumstances existed as of March 31.

[21] See *Naperville Jeep/Dodge*, 357 NLRB No. 183, slip op. at 2 ("In determining whether an established bargaining unit retains its distinct identity, we do not consider the effects of the Respondent's unlawful, unilateral changes to the existing unit employees' terms and conditions of employment, as giving weight to such changes would reward the employer for its unlawful conduct."); *Comar, Inc.*, 349 NLRB 342, 357–358 (2007); *Deaconess Medical Center*, 314 NLRB 677, 677 fn. 1 (1994); *Holly Farms*, 311 NLRB at 277–278.

on *AG Communication* to be misplaced, as that case is factually distinguishable. In *AG Communication*, the Board, distinguishing *Holly Farms*, supra, found that the employer did not violate Section 8(a)(5) by integrating separate bargaining units without bargaining with the union that represented the smaller unit and subsequently withdrawing recognition from that union, because it acted pursuant to a "well-defined plan or timetable for achieving full functional integration of operations at the time the withdrawal of recognition occurred." 350 NLRB at 172, fn. 8. In so finding, the Board emphasized that the employer's integration decision was not animated by a desire to reduce labor costs; rather, it was part of a large-scale organizational restructuring that reflected a core change in the scope and direction of the enterprise contemplated by *First National Maintenance*, supra. Id. at 172.

By contrast, the Respondent Employer's decision to merge the two historically separate units was based predominantly on labor costs and was not accompanied by the full functional integration of the units or a large-scale organizational restructuring within the ambit of *First National Maintenance*. Indeed, even 9 months after the consolidation, the bargaining units were not integrated to such a degree as to negate the separateness of the PMMC unit. Although some interchange occurred, 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. These facts confirm that when the Respondent Employer withdrew recognition from the Machinists on March 31, it had no plans to fully integrate the former PMMC unit into its existing operations. The Respondent Employer therefore was not entitled to rely on its unilateral changes in the unit employees' terms and conditions of employment on or after March 31 to justify refusing to bargain with the Machinists. *Comar, Inc.*, 339 NLRB at 910–911; *Holly Farms*, 311 NLRB at 279.

In sum, having found, by virtue of the single-employer stipulation, that the Respondent Employer had a continuing obligation to recognize and bargain with the Machinists as the exclusive bargaining representative of the unit employees and that the Machinists bargaining unit remained an appropriate unit after the transfer of the Oakland and Tacoma M&R work to PCMC, we further find, as alleged in the complaint, that the Respondent Employer violated Section 8(a)(5) and (1) of the Act by engaging in the following conduct: (1) announcing to employees on January 26 that, after March 31, they would be laid off from PMMC and offered reemployment with PCMC contingent upon their agreeing to representation by the ILWU; (2) bypassing the Machinists and engaging in direct dealing by offering employment to the unit employees under the terms and conditions of the PMA-ILWU Agreement; (3) refusing to bargain with the Machinists on request; (4) unilaterally laying off the unit employees effective March 30; (5) on and after March 31, employing the unit employees under terms and conditions of employment different from those set out in the Machinists Agreement; (6) on and after March 31, assigning unit employees to perform nonunit work and assigning nonunit employees to perform unit work without notifying the Machinists or giving it an opportunity to bargain over the assignments; and (7) withdrawing recognition from the Machinists.

We also find, as alleged, that the Respondent Employer violated Section 8(a)(2) by granting assistance and recognition to the ILWU as the exclusive collective-bargaining representative of the unit employees, and by applying the PMA-ILWU Agreement, including its union-security provisions, to the unit employees at a time when the ILWU did not represent an unassisted and uncoerced majority of the employees in the unit. Finally, we find that the ILWU violated Section 8(b)(1)(A) and (2) by accepting such recognition and applying the PMA-ILWU Agreement, including its union-security provisions, to the unit employees at a time when it had not demonstrated that it had exclusive majority representative status.[22]

AMENDED CONCLUSIONS OF LAW

1. PCMC/Pacific Crane Maintenance Company, Inc. and Pacific Marine Maintenance Co., LLC, a Single Respondent Employer, and PCMC/Pacific Crane Maintenance Company, LP, as a successor to PCMC/Pacific Crane Maintenance Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. District Lodge 190, Local Lodge 1546, and District Lodge 160, affiliated with the International Association of Machinists and Aerospace Workers of America, AFL–CIO (Machinists or the Union), and the International Longshore and Warehouse Union (ILWU or the Respondent Union) are labor organizations within the meaning of Section 2(5) of the Act.

3. The Machinists is, and at all material times has been, the exclusive joint bargaining representative for the following appropriate unit:

[22] There were no exceptions to the judge's findings that the Respondent Employer violated Sec. 8(a)(5) by modifying the Bulletin Board Provision of the Machinists Agreement by imposing new restrictions concerning what materials could be placed on the bulletin board at its Oakland facility, and that it did not unlawfully modify the Union Access Provision of the Machinists Agreement at the Tacoma facility.

All employees performing work described in and covered by "Article 1, Section 2. Work Jurisdiction" of the April 1, 2002 through March 31, 2005 collective-bargaining agreement between the Union and PMMC, herein called the Agreement; excluding all other employees, guards, and supervisors as defined in the Act.

4. The Respondent Employer violated Section 8(a)(5) and (1) of the Act by notifying the Machinists and the unit employees that the unit employees would be laid off from PMMC and employees interested in continuing to perform unit work could do so only if they were hired as employees of PCMC under ILWU representation.

5. The Respondent Employer violated Section 8(a)(5) and (1) of the Act by bypassing the Machinists and directly offering unit employees continued employment in the unit on the basis of terms and conditions of employment different from those set forth in the Machinists Agreement, including its wage and fringe benefit provisions, and on condition that they be represented by the ILWU.

6. The Respondent Employer violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively, on request, with the Machinists as the exclusive collective-bargaining representative of the unit employees concerning wages, hours, and other terms and conditions of employment.

7.The Respondent Employer violated Section 8(a)(5) and (1) of the Act by unilaterally modifying the Bulletin Board Provision of the Machinists Agreement by imposing new restrictions concerning what materials could be placed on the bulletin board located in its Oakland, California facility.

8. The Respondent Employer violated Section 8(a)(5) and (1) of the Act by laying off unit employees without first notifying the Machinists and giving it a meaningful opportunity to bargain regarding the decision to lay off unit employees.

9. The Respondent Employer violated Section 8(a)(5) and (1) of the Act by altering the unit employees' terms and conditions of employment without first notifying the Machinists and bargaining to agreement or impasse regarding such changes in the wages, hours, and working conditions of the unit employees.

10. The Respondent Employer violated Section 8(a)(5) and (1) of the Act by assigning unit employees to nonunit positions and locations, and by assigning nonunit employees to perform unit work, without first notifying the Machinists and giving it a meaningful opportunity to bargain about such assignments and the effects of such assignments.

11. The Respondent Employer violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit employees and thereafter continuously failing and refusing to bargain with the Machinists as the exclusive collective-bargaining representative of the unit employees.

12. The Respondent Employer violated Section 8(a)(2) and (1) of the Act by granting assistance to the Respondent Union and recognizing it as the exclusive collective-bargaining representative of the unit employees, and by applying the terms and conditions of employment of the PMA-ILWU Agreement, including its union-security provisions, to the unit employees, at a time when the Respondent Union did not represent an unassisted and uncoerced majority of the employees in the unit, and when the Machinists was the exclusive collective-bargaining representative of the unit employees.

13. The Respondent Union violated Section 8(b)(1)(A) and (2) by accepting recognition from the Respondent Employer as the exclusive collective-bargaining representative of the unit employees, and by agreeing to the application of the PMA-ILWU Agreement, including its union-security provisions, to the unit employees, at a time when it did not represent an uncoerced majority of the employees in the unit and the Machinists was the exclusive collective-bargaining representative of the employees in that unit.

AMENDED REMEDY

Having found that the Respondent Employer and the Respondent Union have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent Employer shall be ordered to withdraw recognition from the Respondent Union as the collective-bargaining representative of the unit employees unless and until the Respondent Union has been certified by the Board as their collective-bargaining representative. In addition, the Respondent Union shall be ordered to cease accepting the Respondent Employer's recognition unless and until it is so certified. Both Respondents will be ordered to cease and desist applying the PMA-ILWU Agreement, including its union-security provisions, and any extension, renewal, or modification thereof, to the unit employees.

The Respondent Employer also will be ordered to recognize and, on request, bargain with Machinists District Lodge 190, Local Lodge 1546, and District Lodge 160, affiliated with the International Association of Machinists and Aerospace Workers, AFL–CIO (Machinists), as the joint bargaining representative of the unit employees

with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document. As discussed below, we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent Employer's unlawful withdrawal of recognition. The Respondent Employer shall also be required to rescind, on the Machinists' request, any or all of the unilateral changes to the unit employees' terms and conditions of employment made on or after March 31, 2005, and to make the unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Respondent Employer additionally will be required to offer reinstatement to all employees laid off from PMMC on March 30, 2005, and not reemployed by PCMC, and to make them whole for any loss of earnings and other benefits suffered as a result of their unlawful layoff. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. The Respondent Employer also will be required to expunge from its files and records any and all references to the unlawful layoffs and notify the affected employees in writing that this has been done and that the discharge will not be used against them in any way.

The Respondent Employer also will be required to make all contractually required contributions to the Machinists benefit funds that it failed to make, including any additional amounts due the funds on behalf of the unit employees in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and to make the employees whole for any expenses they may have incurred as a result of the Respondent Employer's failure to make such payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.[23]

The Respondent Employer additionally shall be ordered to (1) compensate the unit employees for any adverse income tax consequences of receiving their backpay in one lump sum and (2) file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters, as set forth in *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

Further, the Respondent Employer and the Respondent Union will be ordered jointly and severally to reimburse all present and former unit employees who joined the Respondent Union on or since March 31, 2005, for any initiation fees, periodic dues, assessments, or any other monies they may have paid or that may have been withheld from their pay pursuant to the PMA-ILWU Agreement, together with interest as prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

We also shall order the Respondent Employer and the Respondent Union to post the Board's standard Notice to Employees and Notice to Employees and Members, respectively. In addition, in light of the close factual connection between the unfair labor practices committed by the Respondent Employer and the Respondent Union, we will further order each Respondent to post a signed copy of the other Respondent's Notice, which will be provided by the Region, in the same places and under the same conditions as each posts its own Notice.

Finally, as stated above, for the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent Employer's unlawful withdrawal of recognition. The Board has consistently held that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C.

[23] At compliance, the Respondent Employer may litigate the issue of whether the contributions due the Machinists benefit funds may be offset by payments the Respondent Employer may have made on behalf of the unit employees to the ILWU benefit funds. We observe, however, that employees have a stake not only in receiving agreed-upon benefits, but also in the viability of the benefit funds administered by their own chosen collective-bargaining representative. Diverting contributions from those funds "undercut[s] the ability of those funds to provide for future needs." *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983); see *Active Transportation Co.*, 340 NLRB 426, 426 fn. 2 (2003), enfd. 112 Fed. Appx. 60 (D.C. Cir. 2004).

To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent Employer will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent Employer otherwise owes the fund.

Cir. 2000); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, supra at 738, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: '(1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.'"

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, supra, we have examined the particular facts of this case and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining through their designated representative by the Respondent Employer's withdrawal of recognition, its resultant refusal to bargain collectively with the Machinists, and its recognition of the ILWU, and by the ILWU's acceptance of that recognition. It is particularly appropriate here, where the Respondent Employer not only laid off the unit employees and significantly changed their terms and conditions of employment without notice to or bargaining with the Machinists, but also overrode the unit employees' exercise of their Section 7 rights by their choice to be represented by the Machinists, and further conditioned their continued employment on their acceptance of representation by the ILWU. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Machinists' continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued representation by the Machinists. The duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. It is only by restoring the status quo ante and requiring the Respondent Employer to bargain with the Machinists for a reasonable period of time that the employees will be able to fairly assess the Machinists' effectiveness as a bargaining representative in an atmosphere free of the Respondent Employer's unlawful conduct. The employees can then determine whether continued representation by the Machinists is in their best interest, in light of the changed circumstances resulting from the transfer of the unit work to PCMC.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. It removes the Respondent Employer's incentive to delay bargaining in the hope of discouraging support for the Machinists. It also ensures that the Machinists will not be pressured by the Respondent Employer's withdrawal of recognition and its readiness to recognize a different union to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and the issuance of a cease-and-desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent Employer's and the Respondent Union's violations, because it would allow a challenge to the Machinists' majority status before the taint of the Respondent Employer's unlawful withdrawal of recognition and subsequent recognition of the Respondent Union has dissipated. Such a result would be particularly unfair in circumstances such as those here, where the nature of the Respondent Employer's unfair labor practices likely created a lasting negative impression of the Machinists in the bargaining unit, and where the Respondent Employer immediately recognized a replacement union that has been able to develop relationships with bargaining unit employees while the Machinists litigated its charges. We find that those circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose Machinists' continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case.

ORDER

A. The Respondent Employer, PCMC/Pacific Crane Maintenance Co., Inc. and Pacific Marine Maintenance Co., LLC, a Single Employer, and PCMC/Pacific Crane Maintenance Co., LP, as a successor to PCMC/Pacific Crane Maintenance Co., Inc., Oakland, California, and Tacoma, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively, on request, with Machinists District Lodge 190, Local Lodge 1546, and Machinists District Lodge 160, affiliated with International Association of Machinists and Aerospace Workers, AFL–CIO (collectively the Machinists), as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit (the unit) concerning wages, hours, and other terms and conditions of employment:

> All employees performing work described in and covered by "Article 1, Section 2. Work Jurisdiction" of the April 1, 2002 through March 31, 2005 collective-

bargaining agreement between the [Machinists and Pacific Marine Maintenance Co., LLC (PMMC)] .; excluding all other employees, guards, and supervisors as defined in the Act.

(b) Withdrawing recognition from the Machinists as the exclusive collective-bargaining representative of the unit employees.

(c) Granting assistance to International Longshore and Warehouse Union (ILWU or Respondent Union) and recognizing it as the exclusive collective-bargaining representative of the unit employees at a time when the ILWU did not represent an unassisted and uncoerced majority of the employees in the unit, and when the Machinists was the exclusive collective-bargaining representative of the unit employees.

(d) Applying the terms and conditions of employment of the collective-bargaining agreement between the Respondent Employer and the ILWU (the PMA-ILWU Agreement) including its union-security provisions, to the unit employees at a time when the ILWU did not represent an unassisted and uncoerced majority of the employees in the unit, and when the Machinists was the exclusive collective-bargaining representative of the unit employees.

(e) Notifying the Machinists and the unit employees that the unit employees would be laid off and that they could continue performing unit work only if they were hired as employees of Pacific Crane Maintenance Company, Inc. (PCMC) and were represented by the ILWU.

(f) Bypassing the Machinists and directly offering unit employees continued employment in the unit on the basis of terms and conditions of employment different from those set forth in PMMC's 2002–2005 collective-bargaining agreement with the Machinists (the Machinists Agreement) and on condition that they be represented by the ILWU.

(g) Unilaterally modifying the Bulletin Board Provision of the Machinists Agreement by imposing new restrictions concerning what materials could be placed on the bulletin board located in its Oakland, California facility.

(h) Laying off unit employees without first notifying the Machinists and giving it a meaningful opportunity to bargain regarding the decision to lay off unit employees.

(i) Altering the unit employees' terms and conditions of employment without first notifying the Machinists and bargaining to agreement or impasse regarding such changes in the wages, hours, and working conditions of the unit employees.

(j) Assigning unit employees to nonunit positions and locations, or assigning nonunit employees to perform unit work, without first notifying the Machinists and giving it a meaningful opportunity to bargain about such assignments and the effects of such assignments.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from the ILWU as the exclusive collective-bargaining representative of the unit employees, unless and until that labor organization has been certified by the National Labor Relations Board as the exclusive representative of those employees.

(b) Refrain from applying the terms and conditions of employment of a collective-bargaining agreement with the ILWU, including its union-security provisions, to the unit employees, unless and until that labor organization has been certified by the National Labor Relations Board as the exclusive representative of those employees.

(c) Recognize and, on request, bargain with the Machinists as the exclusive collective-bargaining representative of the unit employees concerning wages, hours, and other terms and conditions of employment.

(d) Notify the Machinists in writing of all changes made to the unit employees' terms and conditions of employment on and after March 31, 2005, and, on request of the Machinists, rescind any or all changes and restore terms and conditions of employment retroactively to March 30, 2005.

(e) Make the unit employees whole, with interest, for any losses sustained due to the unlawfully imposed changes in wages, hours, benefits, and other terms and conditions of employment in the manner set forth in the remedy section of this decision.

(f) Within 14 days from the date of this Order, offer full reinstatement to all employees laid off from PMMC on March 30, 2005, and not reemployed by PCMC, to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(g) Make whole all employees laid off from PMMC on March 30, 2005, and not reemployed by PCMC on March 31, 2005, for any loss of earnings and other benefits suffered as a result their unlawful layoff, in the manner set forth in the remedy section of this decision.

(h) Compensate the unit employees for any adverse income tax consequences of receiving their backpay in one lump sum, and file a report with the Social Security Administration allocating the unit employees' backpay to the appropriate calendar quarters.

(i) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs and, within 3 days thereafter, notify the affected employees in writing that this has been done and that the unlawful layoffs will not be used against them in any way.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Make all delinquent contributions to the Machinists benefit funds on behalf of the unit employees that have not been paid since March 31, 2005, including any additional amounts due the funds, in the manner set forth in the remedy section of this decision.

(l) Make the unit employees whole for any expenses ensuing from the failure to make the required contributions to the Machinists benefit funds, in the manner set forth in the remedy section of this decision.

(m) Jointly and severally with the ILWU, reimburse all unit employees for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA-ILWU Agreement, with interest.

(n) Rescind the unlawfully imposed restrictions concerning what materials could be placed on the bulletin board located in its Oakland, California facility.

(o) Within 14 days after service by the Region, post at its facilities in Oakland, California, and Tacoma, Washington, copies of the attached notice marked "Appendix A."[24] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent Employer and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent Employer customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent Employer has gone out of business or closed the facilities involved in these proceedings, the Respondent Employer shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent Employer at its Oakland and Tacoma facilities at any time since January 26, 2005.

(p) Within 14 days after service by the Region, post at the same places and under the same conditions as in the preceding subparagraph signed copies of the Respondent Union's notice to members and employees marked "Appendix B."

(q) Furnish the Regional Director with signed copies of the Respondent Employer's notice to employees marked "Appendix A" for posting by the Respondent Union at its facilities where notices to members and employees are customarily posted. Copies of the notice, to be furnished by the Regional Director, shall be signed and returned to the Regional Director promptly.

(r) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Employer has taken to comply.

B. The Respondent Union, International Longshore and Warehouse Union, Oakland, California, and Tacoma, Washington, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting assistance and recognition from Respondent Pacific Crane Maintenance Company, Inc. or its successor Pacific Crane Maintenance Company, LP (collectively PCMC) as the exclusive collective-bargaining representative of the employees in the unit described below (the unit) at a time when the Respondent Union did not represent an uncoerced majority of the employees in the unit, and when the Machinists District Lodge 190, Local Lodge 1546, and Machinists District Lodge 160, affiliated with International Association of Machinists and Aerospace Workers, AFL–CIO (collectively the Machinists) was the exclusive collective-bargaining representative of the employees in that unit:

> All employees performing work described in and covered by "Article 1, Section 2. Work Jurisdiction" of the April 1, 2002 through March 31, 2005 collective-bargaining agreement between the [Machinists and Pacific Marine Maintenance Company, LLC (PMMC)] .; excluding all other employees, guards, and supervisors as defined in the Act.

(b) Maintaining and enforcing the PMA-ILWU Agreement, or any extension, renewal, or modification thereof, including its union-security provisions, so as to

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

cover the unit employees, unless and until it has been certified by the Board as the collective-bargaining representative of those employees.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Decline recognition as the exclusive collective-bargaining representative of the unit employees, unless and until ILWU has been certified by the National Labor Relations Board as the exclusive representative of those employees.

(b) Jointly and severally with the Respondent Employer, reimburse all present and former unit employees for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA-ILWU Agreement, with interest.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its headquarters and at its offices and meeting halls in Oakland, California, and Tacoma, Washington, copies of the attached notice marked "Appendix B."[25] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent Union customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 14 days after service by the Region, post at the same places and under the same conditions as in the preceding subparagraph signed copies of the Respondent Employer's notice to employees marked "Appendix A."

(f) Furnish the Regional Director with signed copies of the Respondent Union's notice to members and employees marked "Appendix B" for posting by the Respondent Employer at its facilities where notices to employees are customarily posted. Copies of the notice, to be furnished by the Regional Director, shall be signed and returned to the Regional Director promptly.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Union has taken to comply.

Dated, Washington, D.C. June 24, 2013

Mark Gaston Pearce,	Chairman
Richard F. Griffin, Jr.,	Member
Sharon Block,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively, on request, with Machinists District Lodge 190, Local Lodge 1546, and Machinists District Lodge 160, affiliated with International Association of Machinists and Aerospace Workers, AFL–CIO (collectively the Machinists) as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit (the unit) concerning wages, hours, and other terms and conditions of employment:

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

All employees performing work described in and covered by "Article 1, Section 2. Work Jurisdiction" of the April 1, 2002 through March 31, 2005 collective-bargaining agreement between [the Machinists and Pacific Marine Maintenance Company, LLC (PMMC)] .; excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT withdraw recognition from the Machinists as the exclusive collective-bargaining representative of the unit employees and thereafter fail and refuse to recognize the Machinists as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT grant assistance to the International Longshore and Warehouse Union (the ILWU) and recognize it as the exclusive collective-bargaining representative of the unit employees at a time when the ILWU does not represent an unassisted and uncoerced majority of the employees in the unit, and when the Machinists is the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT apply the terms and conditions of employment of our collective-bargaining agreement with the ILWU (the PMA–ILWU Agreement), or any extensions, renewals, or modifications of that agreement, including its union-security provisions, to the unit employees unless and until we have been certified by the National Labor Relations Board as the collective-bargaining representative of those employees.

WE WILL NOT notify the Machinists or the unit employees that the unit employees will be laid off and that they can continue performing bargaining unit work only if they are hired as employees of Pacific Crane Maintenance Co., Inc. or Pacific Crane Maintenance Co., LP (collectively PCMC) and are represented by the ILWU.

WE WILL NOT bypass the Machinists and directly offer unit employees continued employment in the unit on the basis of terms and conditions of employment different from those set forth in our 2002–2005 collective-bargaining agreement with the Machinists (the Machinists Agreement), or on the condition that they be represented by the ILWU.

WE WILL NOT unilaterally modify the Bulletin Board Provision of the Machinists Agreement by imposing new restrictions concerning what materials can be placed on the bulletin board located in our Oakland, California facility.

WE WILL NOT lay off unit employees without first notifying the Machinists and giving it a meaningful opportunity to bargain regarding the decision to lay off the unit employees.

WE WILL NOT change the unit employees' wages, hours, and other terms and conditions of employment without first notifying the Machinists and giving it a meaningful opportunity to bargain about such changes.

WE WILL NOT assign unit employees to nonunit positions and locations, or assign nonunit employees to perform unit work, without first notifying the Machinists and giving it a meaningful opportunity to bargain about such assignments and the effects of such assignments on the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL withdraw and withhold all recognition from the ILWU as the exclusive collective-bargaining representative of our employees in the unit described above, unless and until the ILWU has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

WE WILL recognize and, on request, bargain with the Machinists as the exclusive collective-bargaining representative of our employees in the unit described above concerning wages, hours, and other terms and conditions of employment.

WE WILL notify the Machinists in writing of any changes made on and after March 31, 2005, in the rates of pay, hours of work, job benefits, and other terms and conditions of employment of the unit employees, and WE WILL, on request, rescind any or all of our unlawfully imposed changes and restore the terms and conditions of employment that existed as of March 30, 2005.

WE WILL make the unit employees whole, with interest, for any losses sustained due to our unlawfully imposed changes in wages, benefits, and other terms and conditions of employment.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to all unit employees laid off from PMMC on March 30, 2005, and not reemployed by us, to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole all unit employees laid off from PMMC on March 30, 2005, and not reemployed by us on March 31, 2005, for any loss of earnings and other benefits suffered as a result of their unlawful layoff, less any net interim earnings, with interest.

WE WILL compensate the unit employees for any adverse income tax consequences of receiving their backpay in one lump sum, and WE WILL file a report with the Social Security Administration allocating the unit employees' backpay to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the March

30, 2005 layoff of the unit employees and WE WILL, within 3 days thereafter, notify the affected employees in writing that this has been done and that we will not use the unlawful layoffs against them in any way.

WE WILL make all delinquent contributions to the Machinists benefit funds on behalf of the unit employees that we have not made since March 31, 2005, with interest.

WE WILL make whole the unit employees for any expenses ensuing from our failure to make required contributions to the Machinists benefit funds, with interest.

WE WILL, jointly and severally with the ILWU, reimburse all unit employees for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA-ILWU Agreement, with interest.

WE WILL rescind the restrictions that we unlawfully imposed concerning what materials could be placed on the bulletin board located in our Oakland, California facility.

PCMC/PACIFIC CRANE MAINTENANCE CO., INC. AND PACIFIC MARINE MAINTENANCE CO., LLC, A SINGLE RESPONDENT EMPLOYER; AND PCMC/PACIFIC CRANE MAINTENANCE CO., LP, AS SUCCESSOR TO PCMC/PACIFIC CRANE MAINTENANCE CO., INC.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT accept assistance or recognition from Pacific Crane Maintenance Co., Inc. or its successor Pacific Crane Maintenance Co., LP (collectively PCMC), as the exclusive collective-bargaining representative of the employees in the following appropriate unit (the unit), at a time when we do not represent an uncoerced majority of the employees in the unit, and when Machinists District Lodge 190, Local Lodge 1546, and Machinists District Lodge 160, affiliated with International Association of Machinists and Aerospace Workers, AFL–CIO (collectively the Machinists) is the exclusive collective-bargaining representative of those employees:

> All employees performing work described in and covered by "Article 1, Section 2. Work Jurisdiction" of the April 1, 2002 through March 31, 2005 collective-bargaining agreement between the [Machinists and Pacific Marine Maintenance Co., LLC (PMMC)] . ; excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT maintain and enforce our collective-bargaining agreement with PCMC (the PMA-ILWU Agreement), or any modifications, renewals, or extensions of that agreement, including its union-security provisions, so as to cover the unit employees, unless and until we have been certified by the National Labor Relations Board as the collective-bargaining representative of those employees.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL decline recognition as the exclusive collective-bargaining representative of PCMC's employees in the unit described above, unless and until we have been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

WE WILL, jointly and severally with the Respondent Employer, reimburse all present and former employees in the unit described above for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA-ILWU Agreement, with interest.

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION

Valerie M. Hardy-Mahoney, Esq., Kathleen C. Schneider, Esq., and *Ryan E. Connolly, Esq.*, for the General Counsel.

Howard C. Hay, Esq. (Paul Hastings, Janofsky & Walker), of Costa Mesa, for Respondents California for Pacific Crane Maintenance Company, Inc., and Pacific Crane Maintenance Company, LP.

J. Al Latham, Esq. (Paul Hastings, Janofsky & Walker), of Los Angeles, California, for Respondent Pacific Marine Maintenance Co., LLC.

David A. Rosenfeld, Esq. (Weinberg, Roger & Rosenfeld), of Alameda, California, for District Lodge 190, Local Lodge 1546 affiliated with the International Association of Machinists and Aerospace Workers of America, AFL–CIO.

Terry C. Jensen, Esq. (Robblee Brennan & Detwiler), of Seattle, Washington, for District Lodge 160 affiliated with the International Association of Machinists and Aerospace Workers of America, AFL–CIO.

Matthew D. Ross, Jacob F. Rukeyser, and *Robert S. Remar Esqs. (Leonard Carder)*, of San Francisco, California, for the International Longshore and Warehouse Union.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the above-captioned consolidated case in trial in Oakland, California, and Seattle, Washington, over the period September 2007 to June 2008. Posthearing briefs were timely submitted.[1]

The matter arose as follows. On March 14, 2005, District Lodge 190/Local Lodge 1546 and District Lodge 160, affiliated with the International Association of Machinists and Aerospace Workers of America, AFL–CIO (sometimes collectively the Charging Party, the IAM, or the Machinists) filed a charge with Region 32 of the National Labor Relations Board (the NLRB or the Board), docketed as Case 32–CA–21925, against Pacific Crane Maintenance Company, LP (Respondent PCMC or PCMC) and amended that charge on March 16, 2005. The amended charge alleged violations of Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act (the Act).

On February 15, 2005, Charging Party District Lodge 160, affiliated with the International Association of Machinists and Aerospace Workers of America, AFL–CIO (Charging Party District Lodge 160) filed a charge with Region 19, docketed as Case 19–CA–29645, against Pacific Marine Maintenance Co, LLC (Respondent PMMC or PMMC) and amended that charge on March 18, 2005. The charge was subsequently transferred from Region 19 to Region 32 and renumbered as Case 32–CA–21974. The charge alleged violations of Section 8(a)(1), (2), (3), and (5) of the Act.

On March 18, 2005, District Lodge 160 filed a charge with Region 19, docketed as Case 19–CA–29692, against Pacific Maritime Maintenance Co., LLC (PMMC) and PCMC (sometimes collectively Respondent Employers) and amended that charge on April 4, 2005. The charge was subsequently transferred from Region 19 to Region 32 and renumbered as Case 32–CA–21977. The amended charge alleged violations of Section 8(a)(1), (2), (3), and (5) of the Act.

Based on the above charges, on May 31, 2007, the Regional Director issued a consolidated complaint against Respondent Employers which was, on August 15, 2007, and subsequently, amended on various occasions. The Respondent Employers filed or made appropriate on record answers to the complaint and all subsequent amendments to the complaints.

On November 5, 2007, the Charging Party filed a charge with Region 32, docketed as Case 32–CA–23613, against PCMC/Pacific Crane Maintenance Company, LP. On December 14, 2007, the Regional Director issued a complaint regarding Case 32–CA–23613 and, on December 18, 2007, the General Counsel moved that I consolidate that complaint with the instant consolidated matter. At trial on January 14, 2008, I granted the unopposed motion. A timely answer was filed to the complaint.

On April 7, 2005, District Lodge 190 filed a charge with Region 32 docketed as Case 32–CB–5932 against the International Longshore and Warehouse Union (the ILWU or Respondent Union). The charge alleged violations of Section 8(b)(1)(A) and (2) of the Act. On May 31, 2007, the Regional Director for Region 32 issued a complaint against Respondent Union. The Respondent Union filed a timely answer to the complaint.

The final amended consolidated complaint against Respondent Employers, as variously amended during the proceeding, alleges that Respondents PMMC and PCMC, in engaging in the actions alleged in the complaints, acted as a single, integrated business enterprise and a single employer. Further, it alleges PMMC maintained a collective-bargaining relationship with the Machinists respecting unit employees located in Seattle/Tacoma, Washington, and Oakland, California, reflected in a collective-bargaining agreement entered into with the Machinists in 2002. In early 2005, PMMC notified the Machinists that unit employees would all be laid off effective April 1, 2005; that PMMC would no longer do the Maersk work on which the unit employees had heretofore been employed; that PCMC would from that time forward undertake the unit work employing employees represented by the ILWU, and that if PMMC's unit employees wished to work for PCMC doing the Maersk unit work under an ILWU contract, they should apply to PCMC for new employment.

The final amended consolidated complaint against Respondent Employers alleges that Respondent Employers, in mid-February through mid-March 2005, restricted contractually-established Machinist agent access to one of the unit employees' work areas and ceased the provision of contractually agreed upon on-premises bulletin board space to the Machinists—all without prior notice to or bargaining with the Machinists respecting such limitations, the effects of such limitations and without obtaining the Machinist's consent to such changes.

The final amended consolidated complaint against Respondent Employers further alleges that Respondent Employers, in late March 2005, withdrew recognition of the Machinists as the unit employees' representative effective with the employees' discharge by Respondent PMMC and further alleges that Respondent PMMC in fact discharged the unit employees, effective on or about March 30, 2005, without bargaining with the Machinists respecting the discharges or unit terms and conditions of employment following the discharges, and without obtaining the Machinists' consent to such changes. The complaint also alleges that Respondent Employers granted the ILWU recognition as the representative of employees in the bargaining unit on or about March 31, 2005, and applied the terms and conditions of a preexisting collective-bargaining agreement with the ILWU to unit employees including the contract's union-security clause, all at a time when the ILWU did not represent an uncoerced majority of the employees in the unit.

The complaint in Case 32–CA–23613 against Respondent PCMC/Pacific Crane Maintenance Company, LP (sometimes PCMC, LP) additionally alleges that various purchases and changes of ownership and changes in business organization and legal form occurred at relevant times respecting Respondent Employers, and that these new entities and participating individuals have at all times material been kept informed of Respondent Employers' potential liabilities under the instant complaints, and that Respondent PCMC, LP has continued the employing entity of Respondent PCMC and is a successor to Re-

[1] I granted an all-party motion at trial allowing submission of reply briefs, which briefs were timely submitted on November 10, 2008.

spondent PCMC. Further the complaint in Case 32–CA–23613 alleges that Respondent PCMC LP granted the ILWU recognition as the representative of employees in the bargaining unit, on or about August 15, 2007, and applied the terms and conditions of a preexisting collective-bargaining agreement with the ILWU to unit employees; including the contract's union-security clause, all at a time when the ILWU did not represent an uncoerced majority of the employees in the unit.

The above-recited allegations of the final complaint against Respondent Employers are also alleged to violate Section 8(a)(1), (2), and (5) of the Act. The complaints do not allege, as was alleged in the Charging Party's charges, that Respondent Employers violated Section 8(a)(3) of the Act or that Respondent Employers were alter egos of one another.[2]

The allegations of the complaint against Respondent ILWU allege that on or about March 31, 2005, the ILWU accepted recognition from Respondent PCMC as the representative of unit employees and applied the terms and conditions of a preexisting collective-bargaining agreement with PCMC to unit employees including the contract's union-security clause, all at a time when the ILWU did not represent an uncoerced majority of the employees in the unit and at a time when the ILWU did not properly represent unit employees. This conduct is alleged in the complaint to violate Section 8(b)(1)(A) and (2) of the Act.

FINDINGS OF FACT

Upon the entire record herein, including very helpful briefs from each of the parties, I make the following findings of fact.[3]

I. JURISDICTION

Respondent PCMC is, and has been at all material times, a California State corporation, with an office and place of business in Long Beach, California, and has been engaged in the maintenance and repair of waterfront terminal cranes and other stevedoring equipment, including at terminals located in the ports of Long Beach, Los Angeles and Oakland, California, and Seattle and Tacoma, Washington.

The pleadings establish that Respondent PCMC, during the period immediately following the issuance of the complaint against it herein, derived gross annual revenues in excess of $50,000 from its business operations and provided services valued in excess of $50,000 to customers located outside the state of California.

Based on the above, there is no dispute and I find Respondent PCMC is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent PMMC is, and has been at all material times, a California limited-liability company, with offices and places of business in the ports of Long Beach, California, and Tacoma, Washington, and has been engaged in the maintenance and repair of waterfront terminal containers and other stevedoring equipment, including at terminals located in the ports of Long Beach, and Tacoma, Washington.

The pleadings establish that Respondent PMMC, during the period immediately following the issuance of the complaint against it, herein, derived gross annual revenues in excess of $50,000 from its business operations and provided services valued in excess of $50,000 to customers located outside the State of California.

Based on the above, there is no dispute and I find Respondent PMMC is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

The pleadings establish, there is no dispute, and I find each of the following institutions are labor organizations within the meaning of Section 2(5) of the Act:

1. Local Lodge 1546 affiliated with District Lodge 190 and the International Association of Machinists and Aerospace Workers of America, AFL–CIO.

2. District Lodge 190 affiliated with the International Association of Machinists and Aerospace Workers of America, AFL–CIO.

District Lodge 160, affiliated with the International Association of Machinists and Aerospace Workers of America, AFL–CIO.

The International Association of Machinists and Aerospace Workers of America, AFL–CIO.

The International Longshore and Warehouse Union.

III. THE ALLEGED UNFAIR LABOR PRACTICES

This case involves issues and allegations and a series of events of some complexity. To facilitate understanding, the circumstances and issues are initially summarized below and are thereafter followed by a more complete development of the facts, events, party positions, argument, analysis, and conclusions.

A. Grossly Simplified Initial Statement of Facts, Allegations, Issues, and Positions

1. Abbreviated facts

For many years PMMC had contracted with shipping entity Maersk[4] to provide maritime terminal-based longshore and shipping equipment maintenance and repair services at Maersk

[2] For that reason the references to "alter ego" in the various complaint case captions have been removed.

[3] The parties submitted pretrial statements of position, posthearing briefs, and reply briefs. I granted an unopposed posthearing motion of the General Counsel to receive into evidence certain inadvertently omitted evidence.

As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

[4] Maersk, a major international shipping company, has various international and United States divisions and subdivisions. The specific organizational units of Maersk that employed particular agents of Maersk involved, herein, are not material to the issues herein. Accordingly all corporate subentities and their employees are generically referred to simply as Maersk or Maersk employees or agents.

terminals[5] along several West Coast ports. Charging Party Machinists represented a bargaining unit of employees of Respondent PMMC who undertook the contracted work at Maersk terminals in the ports of Tacoma, Washington, and Oakland, California. The Machinists and PMMC's most recent collective-bargaining agreement (sometimes PMMC-IAM contract) covering the noted employees was effective, by its terms, from April 1, 2002, through March 31, 2005. The contract sets forth the following language in article 1 [spelling and capitalization as in the original]:

Section 2—Work Jurisdiction

> This agreement shall cover but not be limited to, all following types of work: Maintenance, Body and Fender Work, Painting, Rebuilding, Dismantling, Assembling, Repairing, Installing, Erecting, Welding and Burning (or grinding processes connected therewith), Inspecting, Diagnosing, Cleansing, Preparing or Conditioning of all units and auxiliaries (includes refrigeration and air conditioning (units) related to passenger cars, buses, pickups, motor cycles, tractors, trucks, trailers, cargo containers, generator sets, refrigeration units, dollies, forklifts, shovels, trench digging and excavating equipment) and all work historically being performed under this contract.
>
> This Agreement shall also cover terminal maintenance, lubricating, fueling, washing, cleaning, polishing, steam rack operations, tire repairing, tire service operations, parts and stockroom operations, shop and yard cleanup, stock and parts pick-up and delivery as presently and hereafter being performed by employees represented by the Union.
>
> This Agreement shall apply to all facilities and operations where the Employer does business and has commercial control.
>
> Section 3. EMPLOYEES COVERED: Employees covered by this Agreement shall include, but not be limited to: Mechanics, Apprentices, Painters, Maintenance Employees, Body and Fender Mechanics, Fuelers, Washers, Tiremen, Partsmen and such other employees as may be presently and hereafter represented by the Union.
>
> Section 6. SINGLE BARGAINING UNIT: The common problems and interests with respect to the basic terms and conditions of employment of the employees covered hereby have resulted in the establishment of this Agreement. Accordingly, the Unions and the Employer covered by this Agreement acknowledge that the employees covered by this Agreement constitute a single employer multi-union collective bargaining unit.

For many years PCMC also contracted with Maersk and other shippers and stevedore companies, to provide maritime terminal-based longshore and shipping equipment maintenance and repair services at many West Coast ports. The Respondent ILWU represented the mechanic employees of Respondent PCMC who undertook the noted contracted work at West Coast terminals as part of a large, multiemployer contract covering longshore and mechanic employees on the West Coast docks. The multiemployer association signatory to this agreement, and of which PCMC is a longtime member, is the Pacific Maritime Association (PMA). The relevant contract covering the noted PCMC/ILWU employees was effective by its terms from July 1, 2002, through July 1, 2008. That agreement, at section 1, defines the work covered to include longshore work of signatory employers in West Coast ports in various particulars and addresses maintenance and repair in part at sections 1.7, et seq.:

> 1.70 This Contract Document shall apply to the maintenance and repair of containers of any kind and of chassis and the movement incidental to such maintenance and repair.
>
> 1.71 This Contract Document shall apply to the maintenance and repair of all stevedore cargo handling equipment.
>
> 1.8 Any type of work assigned herein in Sections 1.7 and 1.71 to longshoremen that was done by nonlongshoremen employees of an employer or by subcontractor pursuant to a past practice that was followed as of July 1, 1978, may continue to be done by nonlongshoremen employees of that employer or by subcontractor at the option of said employer.
>
> 1.81 This Contract Document shall apply to all movement of containers and chassis under one of the following conditions: (a) when containers or chassis are moved on a dock from a container yard to or from a storage area adjacent to a maintenance and repair facility or from a storage area adjacent to a maintenance and repair facility from the same dock.

At all relevant times, the Parties stipulated Respondents PMMC and PCMC have been involved in the events in contention as a single employer under Board decisional standards.

Maersk was aggressive in managing its costs and pressured its contractors to reduce their charges to it: indicating that it reserved the option to bring the contracted terminal work in-house or to obtain another vendor. It placed such pressure on PMMC in 2004. In late 2004, Maersk agents contacted PCMC and solicited a bid by it for the work then being done by PMMC. Maersk also contacted PMMC respecting the cost of its contract work in Oakland and Tacoma. PCMC responded that it would do the Oakland and Tacoma work, as it was then doing the other Maersk work it then had, in the same manner and at the same cost. PMMC informed Maersk that it would continue the work at the rate then in place, with the rate to adjust upon the negotiation of the new IAM/PMMC contract to replace the one expiring on March 31, 2005.

While the evidence is in dispute as to the extent communication occurred between their agents, PMMC did not formally inform the Machinists of the position Maersk was taking with respect to the terminal mechanics contract nor formally seek to reopen the current IAM/PMMC contract to lower labor costs

[5] The two Maersk terminals involved herein also served another shipping entity; Horizon, which obtained essentially the identical services Maersk did, albeit on a far smaller scale, in essence in a "me too" contract relationship with PMMC and PCMC for the similar but lesser volume of service required by that shipper.

which could be passed through to Maersk or ask for concessions in any renewal agreement.

At a meeting with Maersk agents on January 6, 2005, in Charlotte, North Carolina, attended by Maersk, PCMC, and PMMC agents, Maersk announced that effective the end of March 2005, the work then performed by PMMC for Maersk in Tacoma and Oakland would be done by PCMC. The details of the transition were discussed and arranged.

Thereafter, PMMC told its unit employees that PMMC would terminate its unit employees effective on or about March 31, 2005, and also informed the Machinists that as of the unit employees discharge the Machinists would no longer be recognized as the representative of PMMC's unit employees. The unit employees were informed they could apply for employment with Respondent PCMC who would be performing the Maersk work lost by PMMC under a collective-bargaining agreement Respondent PCMC had with Respondent ILWU.

PMMC mechanic employees applied to PCMC for employment. By about March 1, 2005, PCMC determined to hire approximately 75–80 PMMC employees and sent them employment offer letters which were accepted. By March 9, PCMC had sent the new employees information regarding ILWU contract terms and other initial employment protocols which were being implemented.

As part of this series of events, the Machinists demanded PCMC recognize it as the mechanics employees' representative, which demand was refused. PCMC at all times from before the hire of employees[6] recognized the ILWU as the representative of its new mechanics employees which it and the ILWU treated as an accreted part of the Coastwide bargaining unit to which the Coastwide collective-bargaining agreement, including the union-security provisions, applied.

On March 30, 2005, PMMC discontinued operations. On March 31, 2005, PCMC took over the operations previously undertaken by PMMC having hired the great bulk of the terminated PMMC Machinist-represented bargaining unit employees, who in turn constituted the great majority of the mechanic employees who had been actually doing the work lost by PMMC. This work and the employees working for PMMC doing it were considered by both PCMC and the ILWU to be accreted into and an inseparable part of the ILWU PMA/Coastwide unit and covered by the West Coast ILWU PMA/ Coastwide longshore collective-bargaining agreement. Both PMMC and PCMC refused to recognize the Machinists after PMMC's discontinuance of the Maersk contract mechanic work as the representative PMMC's former employees or of the employees now doing the work for PCMC that PMMC had previously undertaken.

2. Allegations of the complaints in contention

Charging Party Machinists filed the previously noted charges with the Board which were found to be meritorious in part by the General Counsel and were included in the complaints described above. Essentially, the General Counsel's complaints make three types of allegations. First, the Government contends that PMMC[7] in its conduct both in its affirmative actions, and in its omission to take certain actions, all in the first quarter of 2005, failed in its duty to bargain in good faith with the Machinists respecting the termination of its unit employees[8] and wrongfully withdrew recognition of the Machinists as the representative of the PMMC and PCMC unit employees. In so doing, the complaints allege the Respondent Employers violated Section 8(a)(1) and (5) of the Act.

Second the Government's complaints allege that, even if PMMC is not found to have violated the Act as described above, when PCMC hired the great majority of the PMMC unit employees who then constituted the great majority of the bargaining unit doing its new Maersk maintenance and repair work in Oakland and Tacoma, PCMC was a legal successor to PMMC and became obligated to recognize the Machinists as the representative of those employees in a Tacoma and Oakland M&R mechanics' bargaining, and in consequence, could not properly withhold recognition of the Machinists as those employees' representative and also could not recognize the ILWU as the representative of the employees by asserting they had accreted into the much larger coastwide bargaining unit. By undertaking the described acts and omissions, the Government further alleges, PCMC violated Section 8(a)(1), (2), and (5) of the Act. Respondent ILWU, in accepting such improper recognition from PCMC as the representative of the mechanics unit employees and in enforcing the union-security clause of the Coastwide ILWU contract as to these employees, the complaints allege, violated Section 8(b)(1)(A) and (2) of the Act.

Third, the Government contends that in the final month of its employment of unit employees in Oakland and Tacoma, PMMC improperly restricted contractually-provided Machinist union agent access to the jobsites and limited the unit employees' contractual rights to use a bulletin board on site for union business. This conduct is alleged by the complaints to have been done without bargaining with the Machinists or obtaining their consent and therefore violates Section 8(a)(1) and (5) of the Act.

The Respondents oppose all of these arguments and allegations and deny in any way violating the Act. They contend that there was no statutory obligation for Respondent Employers to bargain over the decision to lay off the PMMC unit employees and that the PMMC bargaining unit employees hired by PCMC, along with all other employees hired to undertake the duties previously undertaken by PMMC, were properly accreted into

[6] PCMC inquired of the ILWU about the availability of mechanic applicants through the ILWU/PMA hiring hall before any hires occurred.

[7] The parties stipulated that PCMC and PMMC were a single employer mid-trial. The earlier complaint allegations were directed individually against either PCMC or PMMC, but later amendments merged Respondent Employers as actors under a single-employer theory. Conceptually, it is easier for portions of the factual presentation and analysis to retain the earlier distinctions between PCMC and PMMC as actors.

[8] The counsel for the General Counsel made clear in her Position on the Issues and Statement of Position, at 5, that PMMC engaged in effects bargaining regarding the termination of its Oakland and Tacoma Maersk operations. She also noted the General Counsel did not allege failure and refusal to provide information to the IAM because the information issues were subsumed by and in the complaints' single-employer allegations.

the PMA-ILWU Coastwide bargaining unit at the very onset of their employment for PCMC. Thus, PMMC's discontinuance or withdrawal of recognition of the Machinists as the mechanics unit representative and PCMC's granting of recognition to the ILWU as the representative of the mechanic employees who undertook PCMC's Tacoma and Oakland Maersk M&R operations was proper. Finally, they contend the argued restrictions of union agent access and bulletin board use did not occur as alleged, and further, would not have violated the Act in all events in as much as the employee activity involved was not union activities of the type the union was contractually entitled to engage in.

3. Issues and the Parties' positions

In greatly simplified form, the first set of allegations respecting PMMC's bargaining obligation during the events at issue requires consideration of the bargaining and contractual relations of the parties and the events leading to the termination of PMMC unit employees for purposes of determining if Respondent PMMC had a bargaining obligation with respect to any or all of its decisions taken in the period preceeding the discharges and, if it had such bargaining obligations under the Act, whether or not it met its obligations and/or whether or not it could present defenses to those alleged obligations. Both, the details of the events themselves and their legal consequences are in dispute and the parties perceive the bargaining obligations of an employer under the Act in the circumstances presented very differently. The implications and general consequences of the single employer status of PCMC and PMMC on these questions is also an important issue.

The second group of allegations, as set forth above, dealing with the bargaining rights and obligations of PCMC in hiring PMMC mechanics also requires consideration of the relations of the parties and the events. Part of the issue of representation rights of PMMC employees deals with the facts and statutory presumptions respecting employee representational preferences. Critical to that determination is a decision respecting what bargaining units were appropriate under Board law at relevant times. This latter question brings into issue unit appropriateness and most importantly accretion issues applicable to the employees in contest. That consideration includes a broad consideration of: (1) the West Coast marine terminal bargaining units as they are relevant to the work of maintenance and repair of marine terminal-based loading and container-related equipment; (2) the organizational structure and practices of PCMC respecting its mechanics; and (3) the practices of PMMC respecting its mechanics; and, finally, (4) a close consideration of the terms and conditions of employment of Respondent Employer's mechanics at relevant times.

The Charging Party and the General Counsel argue that the appropriate Oakland and Tacoma Maersk terminals PCMC mechanic unit, on and after March 31, 2005, is a unit of employees identical to, or very similar to PMMC unit of mechanic employees terminated in March 2005. They argue that that bargaining unit is favored by the Board and, considering that unit in particular, there is no question the Machinists under Board law must be held to have at all times represented a majority of unit employees under both PMMC and PCMC. The Charging Party and the General Counsel argue that Respondent PCMC was obligated to recognize the Machinists as the unit employees' representative and to fulfill their statutory duty to bargain with the Machinists respecting it. Consequently, the Charging Party and the General Counsel further argue, the recognition of the ILWU and the application to unit employees of the ILWU/PMA contract and its union-security provisions were also improper.

The Respondents argue to the contrary that PCMC, in adding the Maersk mechanic work in question on March 31, 2005, to its own already significant coastwide complement mechanic employees engaged in operations for Maersk and other marine shippers, from the onset, accreted the newly-awarded mechanics work and the newly-hired M&R mechanics employees into its West Coastwide mechanics operations—all of which employees had both historically and at all relevant times been covered by the West Coast longshore contract between PCMC and other employers as members of the PMA multiemployer association, and the ILWU. The Respondents argue that the record in this case supports a finding that no other bargaining unit remained appropriate at the time PCMC assumed the Maersk Tacoma and Oakland operations and, therefore, the Respondents' conduct in regards thereto was permitted under the Act.

Respecting the third category of allegations concerning PMMC's alleged restrictions on Machinists agents' access to the workplace and use of jobsite bulletin boards, Respondent Employers challenge the version of events offered by the Charging Party and the General Counsel and further argue additional events and circumstances rendered the restrictions, such as actually occurred, benign and nonviolative of the Act.

B. Background

1. The West Coast Longshore industry[9]

Those who work along the shore to load and unload ships are commonly referred to as longshore employees.[10] As the title conveys, there is both a geographical element and an occupational element to the term. As used in modern times, the term longshore industry includes not just the employees and employers who actually load and unload ships, but the entire "along shore" or marine terminal-based panoply of employee occupations and equipment utilized in the loading and unloading of ships in the broader sense.

The United States ships and receives goods coming from or going to eastern and transpacific areas generally at its West Coast ports. By the early part of the 20th century significant ports had evolved in Southern California, the San Francisco Bay Area, the Portland, Oregon area, the Puget Sound, Washington area, and in various smaller locales. Those locations have become ever more active shipping locations. The West Coast longshore industry has had a colorful organizational history which is set forth in detail in the Board's decision, *Shipowners' Association of the Pacific Coast*, 7 NLRB 1002 (1938), certifying the ILWU as the longshore employees' representative in an essentially coastwide marine terminal bargaining unit. Over the following half century, what had been essentially but not entirely, a coastwide unit became even more so as various union locals and West Coast ports not originally part of the 1930s bargaining unit joined thereafter. So, too, additional West Coast employers came together into a single-multi-employer association which in recent times has been titled the Pacific Maritime Association (sometimes the PMA). Later ILWU M & R mechanics, the employees who undertake the on terminal maintenance and repair of stevedoring equipment, containers and associated equipment, were added to the Coastwide stevedore bargaining unit.

Two powerful post-World War II trends have been contributory causes of profound change in the longshore industry over the years. First has been the extraordinary and continuing growth in the volume of materials shipped through the ports of the world and the West Coast ports of the United States in particular and, second has been the important and ongoing technological changes in the shipment of goods by means of container systems which move goods in large containers carried on purpose built container ships.

Containers of ever larger size carried in ever larger numbers by ever larger container ships has caused repeated rebuilding and/or replacement of shipping terminals to facilitate faster unloading of large ships and to provide significantly larger land areas to receive and process the very large numbers of containers involved in loading or unloading large modern container ships. Part and parcel of this process has been a fantastic increase in the size, complexity, and number of machines and devices in use at terminals in the increasingly mechanized loading and unloading process. All of these things have had important consequences for the employment mix at marine terminals over time.

Essentially, the technological changes described have massively increased the amount of equipment in operation in the loading and unloading process. The maintenance and repair of this equipment has significantly increased the on-terminal needs for maintenance and repair mechanics to keep the mechanical aspect of the loading and unloading process in good order.

For the shipping terminal engaged in the loading and unloading of commercial cargo ships, efforts focus on the times when a ship or ships is docked at the terminal to be loaded and/or unloaded. With a ship's departure, i.e., when no ship is at the dock, terminal work and personnel needs plummet and all is in anticipation of the next ship's arrival. Loading and unloading ships is classically intermittent work for longshore employees. Longshore employment for this reason has historically involved—to a significant proportion—episodic or casual employment by individual longshore employees or gangs of employees at multiple terminals over time as opposed to steady or full time employment with a single employer at a single marine terminal. Longshore employees generally work for many of the local area shipping or stevedore companies, and at many terminals in the local port or ports to be fully employed.

This need of longshore employers for significant numbers of longshore employees for repeated short periods of casual employment supported the historic staffing technique of the "shapeup" wherein labor applicants were chosen from the crowd of soliciting applicants seeking casual longshore work. The West Coast longshore industry, as part of the 1930s organization process discussed by the Board in *Shipowners' Association of the Pacific Coast*, supra, rejected that earlier method of longshore "shapeup" hire and created, and thereafter has utilized a joint hiring hall process in which the employer association and the ILWU jointly controlled the number of experi-

[9] Current definitions relevant to the U.S. Longshore industry may be found in U.S. Department of Labor, Occupational Safety and Health Administration Safety and Health standards concerning the marine terminal and longshoring industries, Set forth at *Title 29 Code of Federal Regulations (CFR) Part 1917* (June 30, 2000) which states in part:

§1917.1—Scope and applicability

The regulations of this part apply to employment within a marine terminal as defined in §1917.2, including the loading, unloading, movement, or other handling of cargo, ships' stores, or gear within the terminal or into or out of any land carrier, holding or consolidation area, any other activity within and associated with the overall operation and functions of the terminal, such as the use and routine maintenance of facilities and equipment. All cargo transfer accomplished with the use of shore-based material handling devices shall be regulated by this part.

§1917.2—Definitions

. . . .

Marine terminal means wharves, bulkheads, quays, piers, docks, and other berthing locations and adjacent storage or adjacent areas and structures associated with the primary movement of cargo or materials from vessel to shore or shore to vessel including structures which are devoted to receiving, handling, holding, consolidating, and loading or delivery of waterborne shipments or passengers, including areas devoted to the maintenance of the terminal or equipment. The term does not include production or manufacturing areas nor does the term include storage facilities directly associated with those production or manufacturing areas.

[10] Or, similarly, but from Latin origins, "stevedores."

enced unit members using the hiring hall and provided for the dispatch of hiring hall registrants to employers on a short term basis allowing the employers to smoothly meet their short-term longshore employment loading and unloading requirements as ships arrived and departed. In an important sense, the pool of longshore hiring hall registrants were employees of the PMA-ILWU joint hiring hall rather than employees of any particular employer member of the PMA.

Over time, the various technological changes in shipping described above have driven the physical growth of the terminals, the size of terminal employers' employment complements and the amount, size, and complexity of the machinery used on the docks to load and unload ships and move about and otherwise handle the cargo, i.e., containers, to be loaded or that have been unloaded. Further these changes have to a degree changed the composition of the skill set of longshore employees in the bargaining unit. As the amount and complexity of equipment in use in loading and unloading ships has increased, the number of mechanics and other specialized terminal longshore employees has also grown. Because many of these specialized workers work on specialized terminal equipment rather than being directly or exclusively involved with the loading or unloading of ships, these specialized employees have been increasingly employed by terminal employers on a full-time basis, i.e., as steady hands, rather than as dispatch employees who are employed for traditionally brief periods, being dispatched out of the hiring hall and returning again to the hall at the end of the short period of employment to obtain another dispatch for like employment for a like period.[11]

Highly relevant to the issues herein, maritime shippers or their terminal contractors, have over time hired more and more maintenance and repair (M&R) mechanics to maintain and repair the myriad machines and equipment used in the container shipping processes.

Since the 1930s, as noted supra, the West Coast longshore workers have been represented essentially exclusively by the ILWU and that representation has evolved into a single, all-encompassing, multiemployer/multiport, coastwide unit. The union representation of the various specialized trades and occupations on the dock has not been so monolithic. M&R mechanics on the West Coast docks have a history of representation by both the ILWU and by the IAM with each labor organization continuing to represent these individuals and clearly desirous to this day of continuing to represent these individuals. The M&R mechanics who work on the large land-based container cranes which unload the containers historically have been separately represented by a variety of labor organizations including the ILWU.

[11] Herein, a full-time employee of a single employer is a "steady" employee and a request for the hiring hall to dispatch an employee for full-time employment is a request for a steady hand. A casual employee employed for a single work shift or other short period often related to the duration of the task of loading or unloading a particular vessel, is a hall hand and a request for the dispatch of such an employee would be a request for a "hall" dispatch. Respecting M&R mechanics in the hiring hall process, the terms applied herein are similar: hall mechanics and steady mechanics.

While the ILWU represented and now represents a number of terminal M&R mechanics coastwide, including both crane and noncrane mechanics, individually or collectively for various employers at various locations, credible Machinists witness testimony suggests that the IAM-represented terminal M&R mechanic employment is of like or superior numbers and has had a similar long history. Particular West Coast areas, ports, or even individual terminals or carriers have differing histories of mechanic representation by particular labor organizations. Some areas or ports employ a mixture of ILWU and IAM represented mechanics. Other areas such as the Puget Sound had a history of greater IAM representation of mechanics. See the Board's discussion in *Machinists District 160, Local 289 (SSA Marine)*, 347 NLRB 549 (2006). PMA agents credible testimony herein suggested the port of Tacoma did not have ILWU represented mechanics until PCMC ILWU represented mechanic employees obtained employment at the port as described herein.

Rivalry between the ILWU and the IAM in representing this craft arose in part because of the technological changes described which, over time, has caused mergers between differently represented units. Various efforts over the years to reach agreement or accommodation between the ILWU and the Machinists respecting these employees have not always been successful. See, e.g., *Machinists District 160, Local 289 (SSA Marine)*, supra.

This evolution and conflict between the ILWU and the IAM respecting the representation of terminal-based M&R mechanics is not new and has been discussed in earlier Board decisions. Of particular value for its background discussion is the Board's decision in *Pacific Maritime Assn.*, 256 NLRB 769 (1981), which describes earlier arrangements and circumstances involving the ILWU and Machinists and shipping companies and terminals that are predecessors to the terminals involved herein, Sealand for example. By the time of the events in contention here, at least generally and at the terminals at issue herein, M&R mechanic work in any given location was not divided between the ILWU and Machinists on the basis of a jurisdictional division of the work. Rather, as will be discussed in detail below, different terminals utilized M&R mechanics in essentially similar ways with some shipping companies, or their contractors employing Machinist-represented mechanics on a single employer or single terminal basis and other shipping companies, or their contractors, at other terminals employing ILWU-represented M&R mechanics. Generally, the ILWU mechanics were in the West Coast bargaining unit under the PMA-ILWU Coastwide contract. The IAM-represented employees were in single-employer units and not under any multiemployer agreement. The ILWU unit had the hiring halls described. The Machinist units did not operate hiring halls.

2. The nature and organization of terminal maintenance and repair work[12]

In order to understand the work of mechanics engaged in terminal maintenance and repair, the nature of container shipping must be briefly considered. Container ships essentially load and carry large metal containers which are not stuffed or unstuffed at the terminal. During the shipping process full containers arrive at the terminal and are stored awaiting loading. Containers are constructed to be able to be stacked up to six containers high and terminal equipment is able to select, move, carry, stack, and unstack containers as part of the loading and unloading process. Once loaded, containers are secured on the vessel and the reverse applies for unloading ships with the containers taken off the vessel and stored on site during unloading to await removal from the dock.

The containers are designed to be transported by truck by being mounted on a chassis which in essence is rather like a flatbed truck trailer, i.e., an arrangement of road-ready wheels and associated load bearing and drivability equipment comprising a custom structure on which the shipping container may be safely mounted and the entire apparatus pulled by tractor truck on roads to its intended destination. What may seem to be the body of a truck on our freeways is often a container from a ship mounted on a container chassis pulled by a tractor truck. Many containers are simply inert storage containers but others are for refrigerated cargo and are constructed for that purpose and equipped with onboard refrigeration equipment and onboard power generation equipment, to power the refrigeration equipment when other power is not available.

Generally, an arriving vessel will require container offloading before loading. Very large—often up to 180-feet high—terminal-based, rail-mounted stationary cranes off load a ship's containers and the containers are sorted and stacked in great number and to great heights at the shippers facility in anticipation of their being mounted on chassis and taken away from the terminal to their destination by tractor truck or by rail.

Loading is essentially the reverse. In anticipation of shipping, containers have been loaded with material away from the terminal and then hauled on container chassis by tractor trucks to the terminal grounds. There the containers are separated from their chassis and the containers are sorted and stacked to great heights and in great numbers anticipating vessel loading. When loading of the vessel begins, containers are selected in their proper order from the stacks and are delivered to the stationary crane areas and loaded aboard the vessel.

The above delicate description does not do justice to the actual process which involves skilled employees and large numbers of large pieces of equipment moving thousands of containers in an organized choreography under tight time constraints and often conducted essentially without break around the clock in all weather. During this process equipment malfunctions, is damaged, or is discovered to be damaged or dysfunctional. As necessary and possible, the things that do not work are repaired or set aside and the process goes on till the loading is concluded and the ship disembarks. Then the process turns to putting things again in order, dispersing off loaded containers, collecting containers to be shipped in future and anticipating the next vessel's arrival, loading and unloading.

The various container moving and loading equipment must regularly be maintained and repaired as needed. The heavy stationary cranes must be tended to as appropriate and are often handled by mechanics in their own department with separate onsite facilities. The remaining noncrane M&R mechanics are often considered as a separate noncrane single unit. This group may have several departments although skills and training often allow transfer and interchange between and among them. Generally, the large and very large devices—often able to straddle and stack or carry away containers from or to high stacks of containers—are maintained and repaired where they are normally located at the terminal. Smaller equipment is normally taken to maintenance buildings with multiple bays allowing mechanics ready access to the mechanics equipment and tools necessary for specialized tasks.

Mechanics involved with the power or drive train elements of equipment work in the terminal M&R power department. Refrigeration equipment maintenance and repair respecting containers which are able to carry refrigerated contents occurs in the reefer (refrigeration) department. On board power generation equipment allowing container refrigeration to be self-sustaining when away from auxiliary power connections is maintained and repaired in the gen-set (generator sets) department. Maintenance and repair of chassis is undertaken in the chassis department. The roadability department insures that the arriving and or departing containers and associated equipment is safe and legal for road hauling by tractor trucks.

The short ship arrival/departure cycle with its varying labor demands for both longshore employees and mechanics has been described. M&R mechanics also experience additional cycles or spikes of work duties: some predictable some by chance. Thus for example, seasonal cycles may change the number of refrigerated containers in use: exported seasonal fruits, imported Alaska frozen seafood, at a terminal with concomitant increase in mechanic work hours necessary to handle the maintenance and repair of the refrigerated containers and power sets in use. Changes in product demand may change the volume and type of freight with implications for maintenance and repair at the terminal. These and other circumstances—not least a tradition of contractors quickly dealing with the terminals M&R needs quickly—produce a less than stable or predictable workload for the M&R mechanic work force.

3. The history of Respondent Employers

a. The Pacific Crane Maintenance Company (PCMC)

In 1990 two individuals, Steven McLeod, PCMC's chief executive officer, and Joe Gregorio Sr.,[13] PCMC's chief operating officer, incorporated Pacific Crane Maintenance Company, Inc. with the intention to contract marine terminal shipper maintenance and repair work. Soon thereafter, PCMC obtained a con-

[12] Dispute specific discussion of the relationship and comparison of the PMMC and post-PMMC PCMC operation is discussed separately in detail infra. The instant presentation is simply descriptive for background purposes.

[13] The two remained its owners and corporate officers through the events in controversy herein.

tract to do some of a shipping company's port of Long Beach marine terminal-based equipment maintenance and repair. To fulfill its contractual obligations it hired terminal-based M&R mechanics.

PCMC's initial terminal-based mechanics were soon organized by the ILWU, and, in 1991, based on presentation of authorization cards, PCMC recognized the ILWU and soon joined the Pacific Maritime Association and adopted the Coastwide PMA—ILWU agreement known as the Pacific Coast Longshore Contract Document or PCLCD which covered among others both longshore employees and marine terminal M&R mechanics. In mid-1992, PCMC acquired an additional contract from a second shipper to do some of the shippers port of Los Angeles terminal-based equipment maintenance and repair work. The work was very similar to the work earlier won and the two terminals, while at different Southern California ports, were within commute distance.[14]

From the onset of performing work at multiple terminals, PCMC did not maintain separate personnel inflexibly assigned to particular terminals but rather treated its M&R mechanics as flexible in their place of work and transferred full-time or steady mechanics and supervisory staff as needed between its terminal operations, and also utilized the ILWU hiring hall to augment its full-time or steady M&R complement with dispatched or hall mechanics for short period as necessary to meet short term staffing needs.

The transfers of PCMC's full-time M&R employment staff took place by assignment and were not voluntary or employee initiated. McLeod testified PCMC from its inception used a "Lean Staff Model"[15] which involved minimum staffing of full-time or "steady" staff on individual terminals. Such a permanent or steady full-time employee complement was deliberately kept to a limited size just sufficient to undertake nonpeak or bottom cycle M&R mechanic workloads. As was inevitable and expected, work demands would exceed the capacity of the lean staff at specific terminals. As necessary the terminal work force would, through temporary interterminal transfers of PCMC mechanics and augmented by hall mechanics obtained through hiring hall dispatch calls. Thus, the work force could be expanded as necessary to fulfill temporary business spikes at one terminal or another or during cyclical or other business peaks in work force needs and could then be quickly contracted when the demand reduced. Thus, by utilizing the hiring hall dispatch system and interterminal transfers as needed, PCMC could maintain a smaller permanent or "steady" unit complement which was sufficient for slower periods and expand rapidly, if temporarily, at any necessary location when the press of business required it. McLeod testified that this staffing model and its great flexibility was efficient and kept labor costs to a minimum—allowing more competitive bidding for the work.

Over the years, the business prospered. PCMC took on more work under contract with shippers to do equipment maintenance and repair at marine terminals at the ports of Los Angeles and Long Beach. In some cases the M&R mechanic work on stationary cranes was included in the contracts awarded to PCMC. In other cases at other terminals, stationary cranes were handled by other providers whose crane mechanic employees may or may not have been represented by the ILWU. As the West Coast Longshore industry terminals and business volumes grew, the maintenance and repair work for shippers also grew and PCMC grew as well. PCMC grew both by acquiring work at new or expanded terminals and by acquiring existing work done by others. In some cases, PCMC took over work done by the contracting shippers own employees and in other cases replaced contractors who, like PCMC, did the work under contract for a terminal shipper.

On various occasions, the work PCMC undertook had been previously done by employees represented by the IAM and on other occasions by the ILWU. PCMC regularly offered employment to some—although not all—of the mechanics of the previous service provider at the terminals where the work was to be done. Without exception, however, when new work was obtained by PCMC and new employees were hired to do the work, recognition was extended to the ILWU respecting the employees doing that work and the PMA-ILWU Coastwide agreement was applied to the new mechanic employees as it was to all PCMC's mechanics.

PCMC at all relevant times has provided marine terminal equipment maintenance and repair services to terminal operators and shippers. It has continuously maintained its membership in the Pacific Maritime Association and, through that association, its contractual relationship with the ILWU respecting all its maintenance and repair mechanics. Over the years, it expanded from the Southern California ports into Northern California and into the Puget Sound. The volume of its business and its employee complement grew. A significant portion of its business was done for the Maersk shipping line.

b. The Pacific Marine Maintenance Company (PMMC)

In 1999, Maersk was in discussions with Sealand, a marine shipper and an early user of containerized shipping on the West Coast, concerning possible acquisition of assets and operations at Sealand's West Coast terminals located in Long Beach, Oakland, and Tacoma.[16] Sealand had since the 1960s recognized the IAM as the exclusive representative of its employees in a single multiterminal unit of mechanics engaged in M&R work at these three terminals. Apparently, as part of the general discussions, PCMC was informed by Maersk of the possibility of Maersk contracting out the M&R work at these terminals should it acquire the Sealand West Coast operations.

[14] The California ports of Long Beach and Los Angeles are physically close and in many ways are treated as a single workplace. The situation is similar in the Washington ports of Seattle and Tacoma.

[15] Much of the business model testimony was from McLeod and Gregorio Sr. Charging Party Machinists took umbrage at what it believed and argued, on brief, was PCMC's self-characterized, posthoc, recently designed, litigation-based, "lean" model. PCMC's 2002 correspondence with the PMA makes it clear however, that in fact from its beginnings, PCMC intended its operations to utilize both mechanic bargaining unit inter-terminal transfers and short term hiring hall dispatch mechanic unit work force augmentation.

[16] Before 1984 the Puget Sound, Washington Sealand terminal was located in Seattle.

It was apparently also required as part of the Sealand acquisition by Sealand that any and all M&R work acquired by Maersk was to be done by IAM-represented employees. McLeod testified without contradiction that, in order to "have an entity to respond to a proposal to do maintenance work" PCMC and Marine Terminals Corporation, a separate M&R contractor, created a partnership, Respondent PMMC.[17] In due course PMMC bid on and was awarded the Maersk contract for M&R work at the former Sealand terminals,[18] hired the former mechanics, recognized the IAM as the unit's representative and thereafter undertook the M&R work. At all times thereafter to the events in controversy, PMMC and the IAM had a single-employer contract covering the unit employees doing this work. There was no pattern or practice of interchange between PMMC unit employees at different ports or between other employers' IAM-represented M&R mechanics and PMMC's mechanics.

C. The Events[19]

In the beginning of 2002, PMMC was performing work for Maersk at its Long Beach, Oakland, and Tacoma operations, which had previously been Sealand. PMMC was working under the previously assumed Sealand-IAM collective-bargaining agreement which was to expire on March 31, 2002. PCMC was also performing work for Maersk at a separate location it had long maintained at the port of Los Angeles at pier J. PCMC was performing that work with mechanics represented by the ILWU, in the coastwide unit and under the PMA-ILWU Coastwide agreement.

PMMC and the IAM prepared for the 2002 contract negotiations in early 2002 aware that Maersk was involved in preparations to consolidate its Southern California operations at a new port of Los Angeles terminal: pier 400 and that the consolidation would involve moving and consolidating work that was at that time being done both by mechanics employed by PCMC represented by the ILWU and PMMC mechanics represented by the IAM.

At the first bargaining session held on March 5, 2002, with the IAM, PMMC's lead negotiator, Captain John McNeill, confirmed the planned Maersk consolidation in Southern California and informed the IAM that PMMC had not been awarded a Maersk contract to do any work at the consolidated terminal. He stated further that Maersk had also put its continuing contract with PMMC for its remaining work in Tacoma and Oakland on a month-to-month basis.

Negotiations for the new agreement extended to over a dozen bargaining sessions in March and April 2002 and included a brief extension of the existing contract and a strike vote of unit employees. The final contract was agreed upon at the final May 1, 2002 session and was ratified by employees and went into effect in April. By its terms it was effective from April 1, 2002, to March 31, 2005.

Maersk consolidated its Southern California terminal operations in two stages in September and October 2002, initially transferring its pier 400 operations to its new terminal pier 400 in Los Angeles and following with the transfer of its' Long Beach Sealand terminal operations. The new pier J operations consolidated the Maersk shipping and M&R mechanic work into a single terminal. The mechanic work at pier 400 was given by Maersk to PCMC. The mechanics who had worked at the pre-consolidation terminals—both IAM and ILWU represented units—were melded into a single force at the pier and were included in the ILWU-PMA coastwide unit and covered by the ILWU-PMA coastwide contract. All PMMC M&R mechanics who were laid off by PMMC when the Long Beach operations were discontinued were employed by PCMC. The ratio of PCMC mechanic employees transferred to the new operation to the PMMC mechanic employees transferred was about three to one. No grievances were filed under any contract: ILWU or IAM. No unfair labor practice charges were filed by any party.

In December 2003, Maersk awarded PCMC the M&R crane mechanic contract for the large stationary container cranes at the Maersk terminal at the port of Oakland.[20] At the time PMMC was doing the noncrane M&R mechanic work at the terminal. The crane mechanic work areas were separately located at the terminal and the two types of mechanics work: crane and noncrane mechanics work on the dock had had a history of separate bargaining units and representation by separate labor organizations. No interchange occurred between the PCMC ILWU crane and PMMC IAM noncrane operations at the terminal.

PCMC, in late 2004, obtained a Maersk contract for all its crane M&R work at its port of Tacoma terminal and at about the same time also obtained crane and noncrane M&R work for Evergreen[21] at the Pierce County terminal in the port of Taco-

[17] There might have been contract/labor law issues arising from a M&R contractor signatory to the PMA-ILWU agreement recognizing the IAM as representative of a unit of M&R mechanics doing terminal based work at West Coast terminals. See, e.g., *Pacific Maritime Assn.*, 256 NLRB 769 (1981). Such IAM represented mechanics work being done by a contractor with no representational relationship with non-IAM labor organizations would likely have presented fewer ancillary difficulties.

[18] Sealand's terminals had a shipping company tenant, Horizon Lines (formerly CSX), who essentially carried on a "me-to" relationship with the master shipper at the terminals and who also contracted with PMMC. Horizon represented approximately 20 percent of the M&R work involved on Maersk terminals done by PMMC at relevant times. Other terminals on the west coast and mentioned herein may also have had primary/control shippers and second, smaller shipper tenants/passive shippers. These essentially passive me-to tenant shippers did not have independent roles in the circumstances described herein and generally have been omitted from the presentation of events where not independently relevant.

[19] Where not specifically noted, the evidence relied on in this portion of the decision is from uncontested credible testimony or from uncontested credible documentary evidence. Certain specific events and circumstances are discussed in detail later in the decision.

[20] PCMC has obtained an M&R crane contract from a separate employer at a separate Oakland terminal, Hinjin, a year or two earlier. The crane work awarded at the Oakland Maersk terminal has previously been done by a separate entity: SSA—Stevedoring Service of America.

[21] PCMC had for some years performed work for Evergreen at a terminal or terminals at the port of Los Angeles.

ma (hereinafter sometimes referred to as the Evergreen terminal). The former Evergreen noncrane work at the old terminal had been done by IAM-represented employees of Tacoma-Seattle Trailer Repair (TSTR) whose bid on the work at the new terminal was not accepted.

Seemingly at all times, but specifically by early 2004, Maersk was rigorously cost conscious respecting its M&R mechanic contracts and constantly made PMMC's agents and principals aware that it wished the lowest possible contract cost and was not adverse to seeking a new contractor or bringing the work in house to obtain savings. Despite this apparent unhappiness, Maersk negotiated the PMMC contract labor rate in April 2004 at the scheduled contract opening, but kept up complaints respecting costs.

A separate employer, TSTR, employed repair mechanics performing contract repair services off dock in Tacoma under a contract with the IAM. Darrin Del Conte, then PMMC vice president, testified that in mid-September 2004 he telephoned James Beno, the directing business representative of District Lodge 190. Del Conte testified:

> It was a phone conversation and it started off about there was some work that was being taken away from our Maersk facility up in Tacoma, and it was being done by an off dock vendor called TSTR, and I was upset that they were letting that work go off dock, because I felt that was work that our mechanics should have been doing, and clearly could have been doing. So, I brought that to his attention but then also in the context of the meeting, I told him that I wanted the same contract, the TSTR contract, otherwise I indicated to him that I felt that we['']d be out of business come March, if I didn't t get that contract.
>
> Q. What did Mr. Beno say?
>
> A. He kind of chuckled.
>
> Q. You didn't ask for another meeting with him to renegotiate the contract, did you?
>
> A. Not at the time I did not.

Mr. Beno did not recall the conversation nor its specifics or context but did not deny the conversation took place.

IAM Area Director Donald Crosatto testified he had received a phone call from Del Conte regarding a change in an arbitration date. After the date was changed, Del Conte told Crosatto that he had looked at the TSTR contract with the IAM which he viewed as more favorable to TSTR than the PMMC contract was to PMMC and asked Crosatto why PMMC did not receive the same favorable terms. Del Conte said that PMMC would be more competitive if it had a deal like TSTR. Crosatto testified he told Del Conte that TSTR's contract applied only to the Puget Sound and that TSTR was primarily an off-dock employer doing off-dock work. Crosatto told Del Conte that he regarded PMMC's competition as on dock stevedoring contractors and that PMMC's contract was very competitive with those entities. Del Conte did not testify respecting this conversation.

Gregorio Sr. testified that in late 2004 he was telephoned by Maersk representatives in a conference call asking if PCMC could perform the PMMC work more cheaply than PMMC was performing it. He testified that the Maersk representatives noted the PMMC-IAM agreement was going to expire in 2005 and they expected a 12-percent raise in IAM labor costs, but that the PCMC/PMA-ILWU contract did not expire until 2008. Gregorio informed the Maersk agents that PCMC could perform the work at its then current contract rate with Maersk. No other witness testified regarding this conversation.

Del Conte testified that in the same period he, on behalf of PMMC, received a telephone conference call from Maersk agents regarding his best bid on PMMC's current work for Maersk. Del Conte testified that, in this conversation and others at about this time, he told Maersk that PMMC could not do the work for less than its current contract rates with any labor increases incurred under a new IAM contract also being included as per industry practice.

An all-day meeting was held at Maersk's offices in Charlotte, North Carolina, on January 6, 2005, between various agents of Maersk and agents and principals of PCMC and PMMC. The meeting opened with the announcement by Maersk that they expected to reduce their costs by transferring the Tacoma and Oakland work to PCMC and the ILWU work force.

Gregorio Sr. testified that Darrin Del Conte and McLeod spoke at the meeting on behalf of PMMC:

> Darrin Del Conte was trying to convince them to, you know, leave the work with Pacific Marine.
>
> Q. What did he say?
>
> A. He said that he had tried to get a concession from the IAM, a cheaper contract, and that the IAM pretty much laughed at him. And that he wasn't sure where he could go from here, but, he wanted to retain the business. Steve McLeod then spoke up and said whatever the increase is in the IAM contract in 2005 March, will only pass through the increase, we won't put a burden on the rate increase. So, if it's [sic] two dollars, you'll just pay the two dollars, but that's the best we could do. That he looked internally inside the company and they couldn't come up with any cheaper way to do the business than the rate they were currently charging them. And that they couldn't get any concessions out of the IAM at this time, and couldn't guarantee that the cost was not going to increase in March of 05.

This testimony was not corroborated by other meeting participants who testified.

The meeting proceeded to an exchange in which PCMC and PMMC agents talked about relative costs and efficiencies of operation and the uncertainty of the rates that would be negotiated in the upcoming IAM negotiations. No suggestion was offered that the IAM might offer concessions which would significantly change PMMC's estimated operating costs. Maersk agents made it clear that they wished to avoid any labor difficulties, but they preferred the ILWU contract to the IAM and expected costs to decrease as a result of a contract change. The remainder of the meeting involved discussing the specifics of the transition from a PMMC/IAM to PCMC/ILWU work force as well as an allocation of costs between the parties for expenses incurred as part of the noted transition and the scope of the work. These details and additional details of the new contract for this work between Maersk and PCMC were discussed. Soon after the meeting adjourned, Maersk issued an e-

mail to the meeting participants communicating its decision to terminate the PMMC contract and transfer the work to PCMC. In due course a transition plan was put in place.

PMMC's Del Conte and Terry Murphy testified respecting a meeting held in Oakland on January 14, 2005, with IAM representatives Beno and Crosatto. Del Conte testified:

> A. [The meeting] was to resolve some outstanding grievances and in that meeting also I once again asked for the TSTR contract.
>
> Q. What did [Beno] say when you asked for the TSTR contract?
>
> A. A similar response, a chuckle.
>
> Q. That was the entirety of his response to that subject?
>
> A. It was to my best recollection, it was kind of a chuckle kind of scoffed at the notion that we'd ask for a reduced labor rate like that.

Del Conte testified he did not mention to Beno and Crosatto the January 6 meeting held with Maersk or what was said at that meeting. Murphy corroborated Del Conte respecting the meeting. Del Conte testified that he did not tell the Machinists of PMMC's loss of the contract or PCMC's gain of the Maersk Tacoma and Oakland work considering it a confidential matter as of that time.

Beno and Crosatto denied that any meeting such as that described by Del Conte and Murphy ever took place or that a telephone call in lieu of such a meeting ever occurred. Substantial documentary evidence was introduced by the parties establishing that Del Conte and Murphy were in fact in Oakland on January 14 and also suggesting that neither Beno nor Crosatto had any scheduled meeting with Del Conte and Murphy on that date or concerning that subject.

On January 25, 2005, Maersk officially terminated the PMMC contract effective the end of March 2005. The following day PMMC Vice President Terry Murphy sent a letter to the various IAM representatives which PMMC also posted at the PMMC Maersk worksites. The letter announced PMMC's loss of the Maersk/Horizon work and estimated the permanent layoff of all unit employees as occurring on or about April 1, 2005. The letter further asserted: "Please contact the undersigned regarding any questions or any issues you want to discuss." The letter also noted it was attaching a "memorandum from the new contractor explaining how our employees may apply for employment with them." The attached memorandum was from PCMC and directed to PMMC mechanics in Oakland and Tacoma. It announced that PCMC had been awarded the work to begin on or about April 1, 2005, and that PCMC was seeking "well qualified applicants to join our existing work force in each of these ports, where we already do this kind of work for other companies at other terminals and hope you will apply with us." The memorandum described the application procedures and set a February 3, 2005 deadline for receipt of applications.

By letter dated February 4, 2005, James Beno wrote Darrin Del Conte an answering letter acknowledging PMMC's January 26 letter. It sought immediate negotiations over the effects of the closures on unit members and demanded to negotiate over the decision to stop work. The letter further requested a very extensive list of information directed to a complete and detailed disclosure of the business and financial relationship between PCMC and PMMC.

On February 17, 2005, Terry Murphy responded to Beno's letter of February 4 with copies to other IAM agents: Hursey, Crosatto, and Kucera. The letter agreed to negotiate over the effects of the closures, asserted that Maersk not PMMC made the decision to use another contractor, and denied any single-employer relationship existed between PCMC and PMMC without answering the detailed questions propounded by Beno in his earlier letter.

PCMC determined that it would fulfill its Tacoma and Oakland M&R staffing needs from PMMC applicants. On March 1, 2005, PCMC sent employment offer letters to 75–80 PMMC unit members from the two sites. The jobs on offer were specifically identified as included in the ILWU represented bargaining unit and covered by the PCMC/PMA-ILWU coastwide collective-bargaining agreement. The letters specified the positions offered giving the recipients to March 7, 2005, to accept the employment offers. On March 9, 2005, PCMC sent ILWU wage schedules and other employment information to those who had accepted the job offers. It also initiated PMA new hire screening, physical fitness and agility/strength examinations for those who accepted the employment offers.

On March 10, 2005, Beno sent PCMC a letter demanding recognition as the representative of its Maersk based Tacoma and Oakland M&R mechanics. He also did so on several subsequent occasions including March 18 and 23, 2005. PCMC refused to recognize the IAM by letter dated March 25, 2005, indicating it had recognized the ILWU as the employees' representative and that they were covered under the ILWU/PMA coastwide contract.

The then current PMMC-IAM contract, inter alia, contained the following two provisions:

> Article 6—Visitation
>
> Authorized Representatives of the [IAM] shall have access to the [PMMC's] establishments during working hours for the purpose of adjusting disputes, investigating working conditions, collection of dues, and ascertaining that the Agreement is being adhered to; provided, however, there is no interruption of the firm's working schedule.
>
> Article 10—Bulletin Boards
>
> The Employer agrees to furnish and maintain a bulletin board on which the [IAM] will be allowed suitable space.

The Tacoma unit employees of PMMC worked inside a fenced secure area at the terminal which had guard controlled access. IAM Directing Business Representative Don Hursey, in the period before February 2005, regularly visited the unit members on site gaining access to the facility by presenting his driver's license to the guard, indicating he was present on official business, and being immediately waived through. Hursey testified he had never been restricted to particular times of day or days of the week and had never announced a visit in advance or sought permission to visit the site.

Hursey testified that on January 27, 2005, he arrived at the Tacoma site early in the morning in response to telephone calls from the job steward seeking his presence. He was granted access in the usual manner and met with various unit employees who were very concerned about their future given that they had received notification that they were to be laid off by PMMC but might be able to obtain employment from PCMC. Given the strong interest of the employees he returned—in the same unrestricted manner as earlier—at the lunch period and held lunchroom meetings with unit members. As part of the meetings, unit employees reported ILWU solicitations had occurred on site. Hursey supplied the unit members blank IAM authorization cards and he solicited and collected signed IAM authorization cards.

Hursey next drove to the site on February 15, 2005, at about 3:30 p.m. He testified he attempted to pass through the access gate to visit unit members but was turned down by the gate guard: "I showed him my ID, told him who I was, I wanted to go see the guys and he looked at a list and said ['']you're not allowed on the premises['']." After unsuccessfully arguing with the guard, Hursey used his cell phone. He testified:

> I called Terry Murphy at his office at the facility and he wasn't there. So, I got a hold of [PMMC Tacoma Terminal Manager] Lyle Kagey and had an argument with Lyle that, you know, I had every right to be in there, what's going on, how come you're not allowing me on the terminal?
>
> Q. What did Lyle said?
>
> A. Lyle said that I was disruption and was not allowed on the terminal.

In high dudgeon, Hursey drove to his office where a short time later he received a telephone call from Terry Murphy. Hersey testified Murphy told him:

> That there must have been some type of a misunderstanding, that there didn't seem to be a problem. He just asked me if I would try to contact him ahead of time before I came down there. I said I didn't have any problem with that.

Sometime in the next few days, Hursey received a letter from Murphy dated February 17, 2005, with the following text:

> On Tuesday, 2/15/05, terminal security at APM Terminals in Tacoma denied you access to the PMMC work site portion of the terminal.
>
> I called you at your office shortly after hearing of the situation and asked that you simply call the PMMC manager in advance of your visit, stating the time and purpose of your visit, which you agreed you would do for future visits to the worksite. I understood you will come at employee lunch time to hold eliminate any disruption to operations.
>
> With all that is currently happening, it is imperative that disruption in meeting our customer's needs be minimized as much as possible.

Hursey replied to Murphy by letter of February 23, 2005, with the following text:

> I received your letter today dated February 17, 2005, wherein you have asked me to simply advise the manager of my visit in advance and to list the nature of my visit.
>
> When you contacted me shortly after the incident on February 15th, it seemed reasonable to notify you in the future of my intent to visit my membership. This is not uncommon in many of my contracts.
>
> After reviewing the current PMMC contract, I have no requirements to notify you in advance or to advise you of the intent of my visit. I still do not have a problem being courteous in letting you know of my intent to visit your facility, but in no way am I giving up my rights per the labor agreement nor am I limiting my access to anything other than the established past practice that has been recognized by both parties today.
>
> Let this serve as notice that I do not intend to change my rights of visitation.

On March 11, 2005, Hursey heard reports that the ILWU steward from the PMMC Tacoma jobsite and ILWU union representatives were on site soliciting ILWU membership authorization cards from the PMMC mechanics. At the conclusion of an unrelated meeting in the morning, Hursey drove to the jobsite arriving at about 11 a.m. Arriving at the guard shack and presenting his identification, Hursey was told by the guard, in his memory: "You know you're not allowed here."

Following some argument, Hursey called the PMMC supervisor, Lyle Kagey. Hursey testified:

> I called Lyle and say what's going on? I've got every right to be in here, why are you not letting me in there? And he said that you can't come in.
>
> Q. Did he tell you why?
>
> A. Yeah. He said it was just orders. He told me that—first he told me that I didn't give them advance notice. Then he said that was his orders.

Hursey was not allowed entrance, left the site, and testified he did not thereafter attempt to enter the facility. The IAM's site chief, Steward Dennis Wolff's calendar, however, indicated Hursey did in fact visit the facility again later that month.

At relevant times, the PMMC area at Maersk's Oakland terminal had one bulletin board, a corkboard, and a glass wall outside the foremen's office that was for IAM use. Union materials had, at all times before the events in issue, regularly been posted on each surface by unit members and shop stewards without difficulty or incident. On March 10, 2005, the IAM sent by facsimile transmission to the parts room at the site a copy of Beno's letter to PCMC demanding recognition as the bargaining representative of its Oakland M&R mechanics. The letter was posted by the IAM on both bulletin locations. On the same day, without notifying the IAM, PMMC Vice President Del Conte directed the removal of the postings under the theory that the matters concerned PCMC and not PMMC. The IAM's site shop steward, Randy Castillo, testified that he was told by a PMMC agent, by way of explanation regarding the removal of the posted document, that it had been removed at the direction of Del Conte, that it did not concern PMMC but rather PCMC and, if the IAM had a problem with its removal, to call Del Conte.

Following an exchange of scheduling letters, bargaining took place between PMMC and the IAM on March 15, 2005. The bargaining session encompassed discussions of PMMC's future business intentions, whether or not lower IAM/PMMC contract rates would have allowed PMMC to retain Maersk's custom with a better bid, and various other matters. The possible hire of the 25 or so PMMC laid-off employees not as yet hired by PCMC was also discussed.

Hursey testified he complained of having problems obtaining access to the PMMC worksite in Tacoma and that he had filed unfair labor practice charges as a result. Del Conte told him he would have to first telephone the jobsite and schedule an appointment if he wished to enter the facility. At the meetings end, in Crosatto's memory, Del Conte said to the IAM representatives that if they would give PMMC the contract rates in the TSTR contract, PMMC could still go back to Maersk and try to see if Maersk would accept the deal. Hursey recalled that he took the remark as sarcastic and responded that the IAM would get back to Del Conte. In the event, the IAM later considered the matter in house and decided not to respond to Del Conte's remarks.

On March 30, 2005, PMMC completed operations at the Maersk terminals in Tacoma and Oakland and all its unit employees at those locations were laid off. On March 31, 2005, PCMC commenced operations at the Maersk terminals in Tacoma and Oakland.[22] Initially 79 PMMC unit employees reported as PCMC employees with 3 more reporting by April 6. Six of the former PMMC but now PCMC employees were placed at the Evergreen terminal in Tacoma a few miles away from the Maersk terminal where PCMC also had an M&R mechanic contract. At the same time 10 of the PCMC Evergreen based mechanics were transferred to Maersk's Tacoma terminal.

In August 2007, PCMC, LP purchased the business and assets of PCMC and continues to operate the business of PCMC in basically unchanged form. Prior to the purchase PCMC, LP was put on notice of PCMC's potential liability in the instant cases. Further, there is no dispute that, if PCMC is found to be obligated to bargain with the IAM as of August 2007, PCMC, LP is a successor to that obligation under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and a successor to PCMC under *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

D. Analysis and Conclusions

1. The various theories of violations of the Act

a. What is not alleged or in issue

In considering the allegations of the complaints and the arguments of the parties thereon, it is critical to keep in mind the separate theories of violations of the Act advanced and argued by the Government and, perhaps equally important, the theories of and violations of the Act not alleged in the complaint and thus not before me for consideration.

Initially it is important to note that the complaints do not allege a violation of Section 8(a)(3) of the Act: only violations of Section 8(a)(1), (2), and (5) are alleged. Thus, Respondent Employers herein are not—either alone, in a joint effort, or on behalf of others as their agent or agents—alleged to have discriminated against employees or job applicants because of their union activities or affiliations. Such allegations were contained in the charges underlying the complaints, but the General Counsel specifically declined to include those allegations in the complaints underlying this case.

Second, the General Counsel does not allege in his complaints that Respondents PCMC and PMMC were at any time alter egos of one another, limiting the "relationship" complaint allegation to the proposition—now a stipulated matter—that the two entities at relevant times were a single employer. Again the underlying charges contained such "alter ego" allegations but these allegations were not included in the complaints herein. The Board holds that the term "alter ego" commonly describes a relationship where one entity ceases operations and a second entity begins the same or similar operation to defeat union representation, See, e.g., *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 8 (2007). The Board also holds that a motive to evade labor law obligations is an important factor to consider in determining alter ego status even if not a required element. *Park Maintenance*, 348 NLRB 1373 fn. 3 (2006).

The fact that these contentions are absent from the instant case essentially distinguishes those Board cases in which the actions of an employer, or employers, acting as a single employer, are designed to defeat or avoid union recognition or a union contract by undertaking an overall strategy designed and intended to dislodge the union. Such cases explicitly find the employer's actions violate Section 8(a)(1) and (3) of the Act thereby and the analysis of the associated 8(a)(5) allegations in the same complaint take place in that context. In the instant case, the Government makes no contention that the actions of the Respondents is informed by union animus, but rather bases its theories of violation entirely on Section 8(a)(1), (2), and (5) contentions.[23]

Further, although the Charging Party argues in part that there are two separate IAM represented bargaining units: one involved at each of the two facilities, Tacoma and Oakland, the General Counsel has consistently pled a single IAM/PMMC bargaining unit and the IAM/PMMC contract also refers to a single bargaining unit including all PMMC locations. I find the Charging Party is foreclosed by the General Counsel's complaint and the Government's position at trial from arguing to the contrary.

b. The principal bargaining theories

The complaints allege two essentially independent theories to ascribe to Respondent Employers an obligation to recognize and bargain with the IAM respecting a unit of M&R mechanics employed at the Maersk Tacoma and Oakland terminals on and after March 31, 2005. The first theory is described in the General Counsel's Reply Brief at 3:

[22] A detailed recitation of the work performed by PMMC and the work done by PCMC is set forth, infra.

[23] Prohibited antiunion discrimination may occur against union activity or representation generally or against activities or representation by a particular labor organization or labor organizations.

> [T]he central theory of the instant complaint [is] that a single employer may not unilaterally lay off and rehire its own employees in furtherance of a plan to cast off a collective bargaining relationship in order to acquire a different labor contract with less expensive wages, benefits, and working conditions.

If this contention is correct, argues the General Counsel, then the IAM remains the bargaining representative of a post layoff unit whether employed by PMMC or PCMC. The Charging Party supports the General Counsel's theory and the Respondent's oppose it.

The second or alternate theory of the General Counsel and the Charging Party to ascribe to Respondent Employers an obligation to recognize and bargain with the IAM respecting a unit of M&R mechanics at the Maersk Tacoma and Oakland terminals on and after March 31, 2005, is that PCMC was a successor to PMMC under the Supreme Court's decision in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and was obligated to recognize the IAM as the representative of the continuing unit of M&R mechanics initially employed by PMMC and thereafter by PCMC at the Maersk terminals in Oakland and Tacoma. The Charging Party supports the General Counsel's theory and the Respondents oppose this theory as well.

Either of the two theories, if it successfully obligates Respondent Employers to recognize the IAM as the representative of a unit of M&R mechanics employed by PCMC at the Maersk terminals in Oakland and Tacoma, it also sustains the allegations against Respondent ILWU that it accepted recognition from Respondent PCMC as the representative of unit employees and applied the terms and conditions of a preexisting collective-bargaining agreement with PCMC to unit employees, including the contract's union-security clause, at a time when the ILWU did not properly represent unit employees.

c. The separate contract workplace access denial allegations

Finally as separate allegations of 8(a)(1) and (5) violations of the Act, the complaints allege that Respondent PMMC improperly unilaterally discontinued or fatally limited and hampered its provision of contractually-established access and bulletin board posting rights to the IAM at a time when PMMC still recognized the IAM as the representative of its M&R contract employees and the IAM contract was in effect in violation of Section 8(a)(5) the Act. Respondent Employers dispute these allegations.

d. The allegations against Respondent ILWU

The allegations of the complaint against Respondent ILWU allege that the ILWU accepted recognition from Respondent PCMC as the representative of PMMC's former employees as part of the ILWU/PMA Coastwide unit of employees and applied the terms and conditions of the coastwide ILWU/PMA collective-bargaining agreement, including the contract's union-security clause, to PMMC former unit employees: all at a time when the ILWU did not represent an uncoerced majority of those former PMMC employees This conduct is alleged in the complaint to violate Section 8(b)(1)(A) and (2) of the Act.

There is no dispute that Respondent ILWU accepted recognition from Respondent PCMC as the representative of unit employees and applied the terms and conditions of a preexisting collective-bargaining agreement with PCMC as a member of the PMA to unit employees including the contract's union-security clause. As noted supra, the essential issue on which the ILWU allegations turn is that which is also in issue respecting Respondent Employers: under Board law, were Respondent Employers obligated to recognize and bargain with the IAM respecting a unit of M&R mechanics at the Maersk terminals in Oakland and Tacoma on and after March 31, 2005? If there was no such obligation, recognition of the ILWU was proper and the relevant complaint allegations are without merit. If the former PMMC unit remained viable into those employees' PCMC employment a *Burns* successorship bargaining obligation would attach and the employees in that continuing unit would at all times have been represented by the IAM. If this were true, the ILWU's conduct in accepting recognition as these employees representative and applying the contract and its union-security provisions to the employees was improper and violative of Section 8(b)(1)(A) and (2) of the Act.

2. The General Counsel's theory that Respondent Employers violated Section 8(a)(1) and (5) of the Act in terminating PMMC's unit employees on or about March 30, 2005, by failing to bargain with the IAM respecting that unit of employees, and by withdrawing recognition from the IAM as the representative of those employees

There is no dispute that the IAM represented PMMC's Maersk-based Tacoma and Oakland M&R mechanics at least till March 30, 2005, under an IAM/PMMC contract due to expire by its terms on March 31, 2005. There is also no dispute that Maersk, ever cost conscious and anxious to obtain the best possible terms from its subcontractors, announced to PMMC and PCMC, as set forth in greater detail supra, that it was soliciting bids from each for a M&R contract to replace that then held by PMMC. The counsel for the General Counsel proceeds from this point with her theory:

> [C]ounsel for the General Counsel concedes that there is no obligation on the part of Respondent Employer to have prevented Maersk's decision to seek lower labor rates. However, Respondent-Employer is still responsible for the actions it took and those it failed to take, in response to Maersk's request for lower IAM labor rates.[24]

Respondent Employers emphasize that they did not decide to end PMMC's contract with Maersk: rather Maersk did. PCMC and PMMC had each bid for the reopened contract at its previous contract rate. It was only when informed by Maersk, Respondent Employers argue, that the Maersk contract had been awarded to PCMC that PMMC, having no other employment for unit employees, announced the unit employees would be laid off and, at the end of the contract, in fact did lay them off. This was simply not a voluntary action by Respondent PMMC, but rather was a necessary reaction to Maersk's refusal to ex-

[24] The GC Reply Br. at 4.

tend the PMMC contract for the work the unit was employed by PMMC to do.

The General Counsel alleges that when faced with the fact that Maersk desired lower contract costs and was calling for a new bid on the contract and the further fact that PCMC was also going to bid on the contract, Respondent PMMC had an obligation to notify the IAM of this state of affairs and offer to bargain with the IAM to provide the IAM an opportunity to negotiate contract concessions which would allow PMMC to place a more competitive bid with Maersk respecting a new M&R contract to replace the existing contract held by PMMC to do the work. In failing to notify the IAM of the situation and provide the IAM offer to bargain concessions, the General Counsel argues, the Respondent PMMC violated Section 8(a)(5) of the Act when it failed to notify the IAM or offer to bargain and rather simply rebid its current contract rate with Maersk and lost the Maersk contract in consequence. In such a situation, argues the General Counsel and the Charging Party, PMMC, or Respondent Employers could not terminate the unit employees without violating Section 8(a)(5) of the Act.

The General Counsel with the concurrence of the Charging Party argues its theory is supported by the line of Board cases following the lead decision, the Supreme Court's holding in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). In that seminal case, the Court held that an employer could not make a determination to subcontract out maintenance operations done by the represented unit to subcontractors—with the consequence of laying off the unit employees who had done the work heretofore—based on a desire to achieve lower labor costs without notifying the representing union and providing it an opportunity to bargain concessions which might achieve the lower labor costs the employer needed and preserve the unit work for the represented employees. The Court held that a desire to reduce labor costs was a matter peculiarly suitable for resolution within the collective-bargaining framework and that the Board could require employers to provide such notice and offer to bargain to unions representing their employees if they were considering contracting out unit work in an effort to lower labor costs. Employers who failed to make the required provisions could not properly lay off their own employees in order to save labor costs.

Respondent Employers deny the validity under the cases of the General Counsel's theory and offer a myriad of defenses should the threshold theory of a *Fibreboard* violation be sustained.[25]

[25] These defenses include, inter alia: The complaints do not support the violations asserted, that Respondent Employers' provided an opportunity to the IAM to bargain at relevant times and the Union refused to do so, that the IAM waived any right to bargain by the terms of its collective-bargaining agreement and past bargaining history, that the violation is inconsistent with the Courts decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and that it is inconsistent with the Board's decision in *AG Communication Systems*, 350 NLRB 168 (2007).

a. Initial consideration of PMMC's bargaining obligation absent single-employer status

The instant case presents a complicated confluence of various theories in an unusual factual context which, for purpose of analysis, makes it initially useful to deconstruct the General Counsel's case against the Employers and consider its constituent parts.

Assuming for purposes of this initial analysis, that PMMC was a independent employer, stranger to PCMC, and that no bargaining or contract defenses to a *Fibreboard* violation apply, what if any bargaining obligation was raised by PMMC's actions and omissions in response to the Maersk rebid circumstances? Put another way, to what extent does a *Fibreboard* type bargaining obligation arise under the posited facts? Since the Government makes no contention that Maersk's actions or motives may be attributed to Respondents through some agency theory, the action of PMMC at issue herein is its placing of a bid on the Maersk M&R contract without notifying the IAM of the situation and providing it an opportunity to make concessions in wages and benefits which would have allowed PMMC to make a more competitive bid on the Maersk contract.

Putting the issue another way: Was PMMC making a bid on a contract to provide mechanics work to Maersk which was the basis for employment of PMMC's unit employees a mandatory subject of bargaining under the Act as was found by the Court in *Fibreboard* with regard to employer subcontracting? In my view a service providing enterprise or labor contractor making a bid to perform labor services to a client is akin to a manufacturing employer offering its products for sale at a given price to a customer. If this is a correct analogy, the question may be put more broadly: Is an employers pricing of its products to its customers a mandatory subject of bargaining? Must an employer inform its represented employees' union, when considering bidding on an important sales contract the loss of which could impact on the bargaining unit, of the risks involved and provide the union with an opportunity to make concessions that would allow the employer to offer its product at a more competitive price to its clients or customers? And, if it fails to do so and because its price is not accepted, is it impermissible to lay off employees no longer needed to manufacture the products or supply the services which are now not being sold? No party cites post-*Fibreboard* cases on the subject, but in my view the General Counsel's *Fibreboard* argument must start with that fundamental question.

Chief Justice Warren writing for the majority in *Fibreboard* concluded that "contracting out" unit work was a mandatory subject of bargaining. Initially he noted that the subject was of importance to unit employees and that their employment was clearly at stake. He noted further at 379 U.S. at 211–212:

> The inclusion of "contracting out" within the statutory scope of collective bargaining also seems well designed to effectuate the purposes of the National Labor Relations Act. One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation. The Act was framed with an awareness that refusals to confer and negotiate had been one of

the most prolific causes of industrial strife.[4] *Labor Board v. Jones & Laughlin Steel Corp.*, 30 U.S. 1, 42–43. To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.

The conclusion that "contracting out" is a statutory subject of collective bargaining is further reinforced by industrial practices in this country. While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining.[5] *Labor Board v. American Nat. Ins. Co.*, 343 U.S. 395, 408. Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process. Experience illustrates that contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework.[6] Provisions relating to contracting out exist in numerous collective bargaining agreements,[7] and "[c]ontracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators," *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 584.

[4] See declaration of policy set forth in 1 and 101 of the Labor-Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. 141, 151 (1958 ed.).

[5] See Cox and Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv. L. Rev. 389, 405–406 (1950).

[6] See Lunden, Subcontracting Clauses in Major Contracts, Pts. 1, 2, 84 Monthly Lab. Rev. 579, 715 (1961).

[7] A Department of Labor study analyzed 1,687 collective bargaining agreements, which applied to approximately 7,500,000 workers (about one-half of the estimated work force covered by collective bargaining agreements). Among the agreements studied, approximately one-fourth (378) contained some form of a limitation on subcontracting. Lunden, supra, at 581.

Applying the Courts analysis to PMMC's bidding on the Maersk contract, as in *Fibreboard*, unit jobs were clearly at stake. Indeed since PMMC was in effect a "one customer" employer at the time, essentially all unit jobs were at stake if PMMC's bid was unacceptable to Maersk. Unlike subcontracting however, employer pricing of its products does not meet the further analysis undertaken by Chief Justice Warren in the quoted portion of *Fibreboard* above. Thus, following the Courts analysis, bargaining about the employer's pricing decisions has not been a common or even infrequent industrial practice. Collective-bargaining contracts do not commonly address pricing and pricing is clearly not the grist in the mills of the arbitrators.

Beyond *Fibreboard* there have been no cases cited or found by me which hold that employer pricing of its products or services for sale is a mandatory subject of bargaining under the Act. I find therefore that there is no law which makes an employer's pricing strategies a mandatory subject of bargaining however risky or consequential to the terms and conditions of employment of that employer's represented employees. I find that PMMC's decision on how much to bid on the Maersk contract in January 2005 was such a pricing decision and not a *Fibreboard*-type subcontracting decision which is a mandatory subject of bargaining.

I find based on the above, on the paucity of authority offered, and on the basic notion in Board jurisprudence that an administrative law judge must follow Board law rather than make new law, that PMMC's bidding on the Maersk contract in early 2005 was a pricing decision which was not a mandatory subject of bargaining and therefore PMMC did not have to notify and provide an opportunity to the IAM to bargain concerning concessions which had the potential to effect PMMC's bid[26] on the Maersk contract and the likelihood that PMMC unit employees would continue to do Maersk's Oakland and Tacoma terminals M&R mechanics work. Therefore, I would find no PMMC failure to bargain.

That finding having been made, I further find there were no Board remedial consequences to PMMC for its bidding on the Maersk contract without notification to and provision of an offer to bargain to the IAM. More specially, PMMC's loss of its contract and loss of all the unit work the contract provided, when Maersk ended its relationship with PMMC, were not a consequence of any failure to bargain with the IAM. Simply put: no wrong no remedy.

The consequence of this latter conclusion is that PMMC also had no duty to engage in "decision" bargaining over the layoff of its unit employees at the conclusion of its Maersk contract.[27] PMMC was not in any legal sense herein liable for the Maersk decision to award the contract to another. And, PMMC did not decide to lay off the unit employees: the loss of all unit work commanded it. Further, with the loss of all unit employment and the consequential termination of all unit employees, PMMC no longer employed employees represented by the IAM and on that basis it permissibly withdrew recognition of the IAM.

All of the above being so in the artificial factual circumstances propounded, no violation of the Act under the General Counsel's initial theory of a violation would have occurred were PCMC an independent employer with no connection to PMMC. And, it would then not be necessary to consider the various Respondents asserted bargaining and contract defenses to the General Counsel's prima facia case alluded to above.

b. Does the fact that PMMC and PCMC were single employers at all relevant times change the analysis immediately above that PMMC had no obligation to

[26] Respondents argue a variant of this analysis: that the decisions taken by PMMC to bid on the Maersk contract, if mandatory subjects of bargaining, were exempt because the decisions went to PMMC's relationship to its customer - a matter at that heart of its management plan and not a matter of its evaluation of its own costs and hence not bargainable under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). See discussion of that doctrine, infra.

[27] This analysis does not address effects bargaining which is not an issue herein. See the General Counsel's Statement of Position quoted, supra at fn. 8.

offer to bargain with the IAM before terminating its employees?[28]

(1) An important narrowing of the issue and argument

For counsel for the General Counsel, the fact that PCMC and PMMC were single employers at all relevant times virtually carries her theory of a violation. Thus, she argues at page 7 of her Statement of Position:

> As [a single employer, PMMC and PCMC] are but divisions of a single enterprise, and PCMC, therefore was not entitled to abandon its bargaining relationship with the [IAM]. Thus, as a single employer, PCMC was obligated to respond to the [IAM's] pre-March 31 bargaining requests and to bargain to impasse regarding all changes in terms and conditions of employment, including layoffs, wages, benefits, and temporary transfers to non-unit positions and temporary assignments of non-bargaining unit employees to bargaining unit positions [footnote omitted].

There is no doubt that the Board has regularly addressed a variety of settings and circumstances where alter ego employers and single-employer entities engage in a course of wrongful conduct which begins with one entity's employees being represented by a union and ends with the other entity engaging in essentially the same business without union representation. It is not atypical for alter ego employers to engage in a course of conduct motivated by union animus and designed to end union representation while continuing—often in disguised form—the initial business whose employees were originally represented but are not thereafter. In such a setting where alter ego relationships are established, or where union animus motivates conduct and/or where disguised continuance may be a factor, the Board regularly finds the continuing entity responsible to bargain with the representing union concerning both the original discontinuance of operations and the renewal of operations. Further, traditional remedies for actions in violations of 8(a)(1) and (3) of the Act also frequently apply which includes reinstatement and, in some cases, restoration of the status quo ante.

The instant case, however, is not a case of the type noted. Thus, as discussed supra, the Charging Party's alter ego contentions contained in the original charges involved herein were rejected by the General Counsel and not included in the complaints. So, too, antiunion or animus allegations of violations of Section 8(a)(1) and (3) of the Act were also set forth in the Charging Party's charges but rejected by the General Counsel and not included in the complaints. And, importantly, the General Counsel made it clear that the Government was not alleging that Maersk's conduct was alleged as a violation of the Act or that any Respondent herein had actual or constructive control respecting or responsibility for Maersk's conduct herein.

And, further, again as discussed above, the actions of PCMC as a part of the single employer in hiring PMMC employees conditioned on their accepting employment as ILWU represented employees working under the coastwide ILWU/PMA/PCMC contract, and as part of that bargaining unit, and in refusing at all times to recognize or bargain with the IAM respecting those employees, did not take place in the context of or as part of a course of conduct initiated in wrongful failure to bargain by PMMC were it acting as a separate and independent employer in laying off the IAM-represented employees.

The point of all the above is simply that the instant actions of the PCMC as part of the single-employer entity in the above-described events are not per se violative of Section 8(a)(5) of the Act as a follow-on to earlier wrongful action or as a continuing part of an illegally motivated pattern and practice or scheme to defeat union representation. This being so, the arguments marshaled by the General Counsel and the Charging Party in support of the allegations at issue here must be considered only to the extent the cases cited and arguments made do not rely on such precursor conduct and/or earlier findings of violations of Section 8(a)(1) and (3) of the Act.

Thus, for example, the General Counsel's case citation in her initial posthearing brief for the proposition that the single employer, Respondent Employers herein, had an obligation to retain the unit employees is *Blumenfeld Theaters Circuit*, 240 NLRB 206 (1979), a Board case that also found that the employees discharged had been discharged in violation of Section 8(a)(3) of the Act and were discharged as part of a course of anti-union conduct. Thus the Board noted:

> The discharge of all bargaining unit employees and their replacement with nonunion employees can only be viewed as part of its overall strategy to dislodge the Unions from the theater. By discharging the bargaining unit employees on September 6, 1977, when the theater temporarily closed and by refusing to reinstate them on September 28, when the theater reopened, BTC and the Roxie Partnership violated Section 8(a)(3) and (1) of the Act. [240 NLRB at 217.]

(2) The single-employer Respondent Employers' obligation, if any, to bargain about PMMC's decision to bid on the Maersk contract and decision to terminate the PMMC unit employees and withdraw recognition of the IAM

The General Counsel and the IAM argue that Respondent Employers, as a single employer, were obligated to bargain with the IAM before PMMC placed its bid on the Maersk contract and, when, PMMC failed to do so; and when it lost the Maersk contract and PCMC won the Maersk work, PCMC became obligated to bargain with the IAM respecting the transition of employee employment from PMMC to PCMC and PCMC was obligated to recognize the IAM as the representative of the former PMMC unit as a separate PCMC bargaining

[28] While necessary to fully understand the contentions of the parties, it is not fair to the counsel for the General Counsel's case or her theory of a violation to suggest she made the arguments rejected above. Rather, in her pretrial statement of position counsel for the General Counsel explicitly indicated that her initial theory of a violation required or was dependent on a finding of single employer status for PMMC and PCMC. Were that not to be found, she argued in her statement of position, her alternative theory also referred to herein as the second theory of a violation or "*Burns*" successor theory would apply. Indeed the complaint was originally explicitly pled in "alternative theories of violation." Following the midtrial stipulation of the parties that PCMC and PMMC were a single employer at all relevant times, the complaint was amended to dispense with the alternate theory structure.

unit independent of and apart from the ILWU/PMA/PCMC unit and contract.

Turning initially to the decision of PMMC as a single employer with PCMC to bid on the Maersk contract, I find no reason to deviate from my earlier conclusion that PMMC simply did not have an obligation under the Act to notify and bargain with the labor organization that represented its employees concerning the pricing of its product to its client/customer. Whether or not PMMC was a single employer with PCMC or a free-standing employer with no relation to PCMC does not, in my view, make a represented employer's decision to bid on a customers work—conceptually identical to setting the price on the employer's product—more or less a bargainable subject under the Act. Extending the analysis set forth above, I find no obligation on the part of the single-employer Respondents to notify and bargain with the IAM concerning PCMC's decision to bid on the Maersk contract.

The question of whether or not the PCMC/PMMC single employer could in effect end the PMMC/IAM bargaining relationship by terminating all PMMC unit employees and immediately thereafter hiring the great bulk of those terminated employees the following day as PCMC/ILWU-represented employees is a different issue. It is one not addressed supra in considering PMMC's bargaining obligation.

I have found there was no obligation to bargain with the IAM by either PMMC or PCMC concerning their bids on the Maersk contract. There is no contention that Respondent Employers bear some responsibility for the award of the contract by Maersk to PCMC. Given that the decision that PMMC would no longer be doing the Maersk work was taken by Maersk, disregarding effects bargaining with the IAM which occurred, it is not apparent to me given the fact that no earlier unfair labor practices had occurred, how PMMC had a noneffects bargaining obligation respecting the terminations or had an obligation to continue to recognize the IAM as the representative of the discharged employees.

The counsel for the General Counsel argues:

> [R]espondent Employer could not lawfully withdraw recognition from the union and advise it and its employees that in order for them to continue to perform bargaining unit work, they would all have to be laid off, and rehired as longshoremen. [GC Reply Br. at 5.]

In effect, the Government treats the single employer as an undivided whole—or an alter ego—in making its analysis and argument. On the facts of this case, however, with its independent actions of PMMC and PCMC and the unchallenged, unalleged, actions of the independent party Maersk influencing and causing important outcomes, the two Respondent Employers, even though a single employer by stipulation, are not alter ego employers undertaking with common purpose a coordinated if disguised anti-IAM course of conduct. Single employers are liable for one another's unfair labor practices in many cases, but they are not to be simply per se, without more, considered a single entity for issues of continuity of bargaining obligations under the Act.

At this stage of the analysis, in evaluating the post-Maersk bid conduct of PCMC and PMMC, I do not find the record supports a unitary analysis. I therefore will here consider, to at least some extent, the General Counsel's arguments against considering the two Respondent Employers actions separately.

Thus, to the extent the General Counsel's argument addresses PMMC's actions, i.e., the termination of employees as opposed to PCMC's statements and actions respecting PMMC's employees I reject the argument and find the Act was not violated by PMMC. As set forth above, PMMC had no obligation to notify and bargain with the IAM respecting it bid. When it lost its bid, it lost all unit work effective March 31, 2005. This cessation of work was not as a result of its wrong doing or as a result of its decision to abandon the work and, setting aside effects bargaining not at issue here, created no bargaining obligation on PMMC's part with respect to the IAM concerning the bargaining unit. Further, and on the same basis, I find that PMMC, on and after March 31, 2005, having neither unit employees nor evident prospects of obtaining work to offer such employees, could terminate its employees effective March 31, 2005. See also the discussion of *AG Communication Systems*, 350 NLRB 168 (2007), infra.

In summary, I have found that PMMC did not violate the Act under the General Counsel's first theory of Respondent Employers' failure to meet their bargaining obligations to the IAM. PMMC as one part of the single-employer Respondents is therefore not liable for any conduct alleged to have been undertaken by it and which was a violation of Section 8(a)(5) under this theory. These findings, however, have addressed only the PMMC conduct, not the PCMC's subsequent conduct described supra which is also alleged by the complaints as a violation of Section 8(a)(5) which are addressed immediately below.

What remains under the first theory of bargaining violation of the General Counsel is the conduct of PCMC. Thus, before PMMC's discontinuance of services for Maersk while the unit was still employed on the job by PMMC, PCMC solicited the PMMC/IAM bargaining unit members to apply for employment with PCMC doing Maersk's M&R mechanics work at the same locations with the explicit condition that the work done would be covered by the PMA/PCMC-ILWU Coastwide contract and the unit employees would be represented by the ILWU. Thereafter Respondent PCMC hired the great bulk of the PMMC bargaining unit, applied the terms and conditions of the PMA/PCMC-ILWU Coastwide contract to those employees, declined to recognize the IAM as representative of the Tacoma and Oakland mechanics and recognized the ILWU as the representative of its new Oakland and Tacoma mechanic employees as part of the PMA/PCMC-ILWU Coastwide multiemployer unit.

Under this first theory[29] Respondent Employers, because they are a single employer and were at all relevant times, may not destroy the IAM's representative status respecting the M&R mechanics performing work at the Maersk terminals by the conceit or device of simply having PMMC discharge the unit employees at the end of March 30, 2005, and then have

[29] The General Counsel's alternative theory or second theory of finding Respondent PCMC bound to recognize and bargain with the IAM is the *Burns* successorship theory which has been briefly described, supra, and will be discussed in greater detail separately below.

PCMC simply hire them for the same tasks to commence the following morning of March 31, 2005.

The conduct at issue in this portion of the analysis may not be so easily dismissed as conduct that could be considered as undertaken by one of the single-employer Respondents independently because the actions were in response to prior decisions and actions taken by outsiders. Here, the PCMC solicitation of PMMC's employees to apply to PCMC and the subsequent hire by PCMC of essentially all of the PMMC unit employees is a connected train of events—a nexus that from the perspective of PCMC's actions places the two Respondent Employers actions in tandem and suggests the employment of the PMMC unit employees was essentially continuous through the transition to PCMC employment. And from this continuation of representation theory, the General Counsel further alleges that the various unilateral changes in unit employees terms and conditions of employment put in place by PCMC[30] in changing the PMMC terms and conditions of employment applied to its unit employees to the ILWU contract terms and conditions as PCMC employees as well as their refusal to recognize and bargain with the IAM as representative of PCMC employees are additional violations of Section 8(a)(5) of the Act.

On this point the parties discussed the Board's recent case: *AG Communication Systems*, 350 NLRB 168 (2007). Respondent Employers rely heavily on *AG Communication* for the proposition that single employers have no obligation to bargain with a labor organization representing a bargaining unit consolidated with a bargaining unit of the other member of the single employer concerning the decision to consolidate the units or to recognize that union as representing any part of the consolidated unit. The General Counsel and the Charging Party argue the case is distinguishable. *AG Communication* is recent law and worthy of discussion both for itself and for its discussion of *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

In *AG Communication Systems*, supra, the Board found that two entities AG Communication and Lucent Technologies were a single employer at relevant times. The two entities made and implemented a decision to integrate a bargaining unit of AG employees represented by an IBEW local into a bargaining unit of Lucent employees represented by a CWA local treating the employees thereafter as represented by the CWA and withdrawing recognition from the IBEW. The respondent in that case argued, and the Board agreed, that its decision to purchase AG in its entirety, close AG operations and completely integrate all aspects of the two companies, including the two bargaining units, was a core entrepreneurial management decision exempt for bargaining under *First National Maintenance Corp. v. NLRB*, supra. The General Counsel and the Charging Party distinguish the case based on the fact that the initial decision to consolidate the operations was sheltered under *First National Maintenance*. It is necessary to first address that issue.

In *First National Maintenance Corp.*, the Court had reasoned that an employers decision to shut down a part of its business represented a significant change in the scope and direction of the enterprise which is akin to the decision of whether to be in business at all. The Court held that bargaining over such management decisions should be required "only if the benefit, for labor management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." 452 U.S. at 679.

In disputing the application of *First National Maintenance Corp.* to the instant case, the General Counsel and the Charging Party argue that the process involved herein: Maersk's unhappiness with the PMMC contract, Maersk's initiation of a new bidding process, PMMC's loss of the Maersk contract and the award of the contract to PCMC, the discharge of the PMMC unit employees, the hire by PCMC of those employees and the initiation of PCMC's operation—in their totality, deal with labor costs which could have been successfully addressed in bargaining with the IAM. The Respondents argue that in the sequence of events in this case the Respondents' costs were not a matter of concern to Respondent Employers and were not a determining factor herein. Rather, the bid costs to Maersk under the contract to provide Maersk mechanic services and nature of the relationship between Respondent Employers and Maersk was involved. Thus, Respondent Employers argue that the benefits of bargaining were only indirectly related to the Maersk issues and could not and did not outweigh Respondent Employers right to make core entrepreneurial management decisions in dealing with Maersk.

In resolving the *First National Maintenance* issue posed by the parties above, I accept the arguments of the Respondents and reject the arguments of the General Counsel and the Charging Party respecting the relationship of the Court's meaning of "labor costs" to the bid costs from Maersk's perspective. I find there is an insufficient relationship between the "costs" involved herein to apply the Court's labor costs analysis to the instant facts. From the outset, as described above respecting the application of the *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), decision to the instant case, I have viewed the series of events herein as involving far more attenuation of causal factors than a direct Respondent Employer decision to make unilateral changes to unit employees' terms and conditions of employment, or their ultimate discharge because of labor costs which might have been resolved in bargaining with the IAM. I agree with the Respondents that the importance of costs herein applied to Maersk, Respondent Employers' customer, and only indirectly to Respondent Employers themselves. Second, the transcendent decision, the decision ending the business relationship of PMMC with Maersk, was taken by Maersk, and—critically—not taken by Respondent Employers.

Having found that *AC Communication*, supra, and the instant case are similar in that the initial decision to consolidate the units in *AC Communication* and the decision herein to transfer the work from PMMC to PCMC were not violations of the Act, the attempts to distinguish it fail and its holding is applicable to the instant case. That holding is that it is not per se improper and a violation of the Act for respondents acting as single employers to consolidate separately represented bargaining units and thereafter, as otherwise appropriate, continue or withhold

[30] Elements of this argument are also discussed in the *Burns* successorship arguments, infra.

recognition of labor organizations under normal representation standards. I apply that decision here to conclude that, given there was no decision bargaining obligation on the part of PMMC to bid on the Maersk contract or to lay off its unit employees, there was no automatic violation to be found in PCMC hiring those employees and—at least if Respondent Employers prevail on the *Burns* contentions to be discussed below—withdrawing recognition of the IAM, and recognizing the ILWU.

Thus, having considered the entire record and the positions of the parties, I find PMMC's decision to place a bid on the Maersk contract and the decision of PMMC to lay off its employees when their work was lost did not in either case present a mandatory subject of bargaining (effects bargaining not at issue or addressed herein). This finding is not changed by the fact that PCMC and PMMC are a single employer. That being so, I further find that *AG Communication Systems*, 350 NLRB 168 (2007), also applies to the instant case and that Respondent Employers did not have any per se or non-*Burns* statutory bargaining obligation to recognize the IAM as the representative of the former PMMC unit employees when they were hired as PCMC employees or to bargain with the IAM respecting their terms and conditions of employment independent of the *Burns* successorship issues to be discussed infra. I find therefore that the General Counsel's allegations under her initial bargaining theory are without merit and the complaint allegations dependent on that theory will be dismissed.

c. Summary and conclusion respecting the General Counsel's theory that Respondent Employers were obligated to bargain about the decisions to bid on the Maersk contract and the decision to terminate the PMMC unit employees and end its relationship with the IAM[31]

As set forth in detail above, I have found that Respondent Employers did not have an obligation to notify and offer to bargain with the IAM concerning the bargaining unit of M&R mechanics performing work at the Maersk terminals in Tacoma and Oakland in regards to any element of the bidding process with Maersk in early 2005, or in making its decision to terminate the PMMC unit employees or the decision to hire those same employees by PCMC. Therefore, there was no violation of the Act nor a remedy for a violation of the Act applicable to these events save as may be independently found in the *Burns* analysis—"the General Counsel's alternate theory." The General Counsel's complaint allegations dependent on the validity of this initial General Counsel theory of a bargaining violation shall therefore be dismissed. The General Counsel's complaint allegations which may be sustained by prevailing in her alternate theory of a violation—a successorship relationship established under *NLRB v. Burns Security Services*, supra, are not addressed here but in separate sections, infra.

[31] The Governments theory and associated complaint allegations predicated on or consistent with a bargaining obligation arising from a successorship under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), are not addressed here but in a separate section, infra.

3. The General Counsel's successorship theory under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972)

a. The basic law of successorship and accretion and the general positions of the Parties

The Board has at all times since the issuance of the Court's decision in *NLRB v. Burns Security Services*, supra, applied its terms in what are now known as *Burns* sucessorship cases. *Burns* held essentially that a succeeding employer, who hires a predecessor's unit employees in sufficient number to comprise a majority of unit employees in the relevant unit in its new operations, when there is continuity in operations, is bound to recognize the labor organization which represented the predecessor's unit employees.

From the issuance of the initial complaint and the General Counsel's submitted statement of position to the parties' stipulation of the single-employer status of PMMC and PCMC, the General Counsel maintained a separate "*Burns* Successor Alternate Theory" as a backup to the "single-employer theory" discussed, supra. Thus, the General Counsel argued, in her Statement of Position at 8:

> Under this theory, PCMC, as a *Burns* successor to PMMC, had an obligation to recognize and bargain with the [IAM], since an overwhelming majority of its employees in Oakland and Tacoma were former [IAM]-represented employees of PMMC. In addition the General Counsel will demonstrate that there was a substantial continuity in operations between the two enterprises. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41–43 (1987).

In Fall River Dyeing v. NLRB, 482 U.S. 27 (1987), the Court noted at 43–44:

> In *Burns*, we approved the approach taken by the Board and accepted by courts with respect to determining whether a new company was indeed the successor to the old. 406 U.S. at 280–281 and fn. 4. This approach, which is primarily factual in nature and is based upon the totality of the circumstances of a given situation, requires that the Board focus on whether the new company has "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations." *Golden State Bottling Co. v. NLRB*, 414 U.S. at 184. Hence, the focus is on whether there is "substantial continuity" between the enterprises. Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. See *Burns*, 406 U.S. at 280 fn. 4; *Aircraft Magnesium, Division of Grico Corp.*, 265 NLRB 1344, 1345 (1982), enfd, 730 F.2d 767 (CA9 1984); *Premium Foods, Inc.*, 260 NLRB 708, 714 (1982), enfd, 709 F.2d 623 (CA9 1983).
>
> In conducting the analysis, the Board keeps in mind the question whether "those employees who have been retained will understandably view their job situations as es-

sentially unaltered." See *Golden State Bottling Co.*, 414 U.S. at 184; *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 464 (9th Cir. 1985). This emphasis on the employees' perspective furthers the Act's policy of industrial peace. If the employees find themselves in essentially the same jobs after the employer transition, and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest. See *Golden State Bottling Co.*, 414 U.S. 184.

The Respondents do not contest the sucessorship doctrine as such, rather they argue it does not apply to the instant case because the PMMC bargaining unit of IAM-represented M&R mechanics at the time PCMC took over the Maersk terminal M&R operations in Tacoma and Oakland was accreted into the far larger coastwide ILWU-represented unit covered by the PMA-ILWU Coastwide contract. Thus, the Respondents argue that there is no continuity of operations and that the predecessor's unit employees, hired at the commencement of PCMC's Oakland and Tacoma Maersk terminals M&R noncrane mechanic operations, do not constitute a majority of unit members either in an all PCMC mechanic employees unit or in the Coastwide PMA-ILWU unit.

The Respondents emphasize that *Burns* by its own terms does not find a sucessorship appropriate where the original predecessor bargaining unit is no longer appropriate. Thus, *Burns* noted at 406 U.S. 280–281:

> It would be a wholly different case if the Board had determined that because Burns' operational structure and practices differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one.[4] Likewise, it would be different if Burns had not hired employees already represented by a union certified as a bargaining agent [footnote omitted] and the Board recognized as much at oral argument. [Footnote omitted.] But where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of 8(a)(5) and 9(a) by ordering the employer to bargain with the incumbent union. This is the view of several courts of appeals and we agree with those courts. *NLRB v. Zayre Corp.*, 424 F.2d 1159, 1162 (7th Cir. 1970); *Tom-A-Hawk Transit, Inc. v. NLRB*, 419 F.2d 1025, 1026–1027 (7th Cir. 1969); *S. S. Kresge Co. v. NLRB*, 416 F.2d 1225, 1234 (6th Cir. 1969); *NLRB v. McFarland*, 306 F.2d at 220 [10th Cir. 1962)].

[4] The Court of Appeals was unimpressed with the asserted differences between Burns' and Wackenhut's operations: "All of the important factors which the Board has used and the courts have approved are present in the instant case: 'continuation of the same types of product lines departmental organization, employee identity and job functions.'. . . Both Burns and Wackenhut are nationwide organizations; both performed the identical services at the same facility; although Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors; and finally, and perhaps most significantly, Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42." 441 F.2d 911, 915 (1971). Although the labor policies of the two companies differed somewhat, the Board's determination that the bargaining unit remained appropriate after the changeover meant that Burns would face essentially the same labor relations environment as Wackenhut: it would confront the same union representing most of the same employees in the same unit.

The Parties recognized that under the sucessorship theory of the General Counsel's case and the Respondents defenses to the sucessorship allegations, the critical question is essentially whether or not the PMMC, IAM-represented M&R mechanic bargaining unit remained an appropriate unit under PCMC or, whether the PMMC group was accreted into the far larger ILWU-represented unit.

The General Counsel and the Charging Party emphasize that the party challenging the appropriateness of an historical bargaining unit bears a heavy burden to establish the contrary. Counsel for the General Counsel noted *Children's Hospital*, 312 NLRB 920, 929 (1993), holding: "Compelling circumstances are required to overcome the significance of bargaining history," and she further noted "units with extensive bargaining history remain intact unless repugnant to Board policy" citing *P. J. Dick Contracting*, 290 NLRB 150, 151 (1988). Counsel for the General Counsel argues at page 116 of her posthearing brief:

> The Board applies a "restrictive policy" regarding accretions in order to safeguard employee freedom of choice. See, e.g., *Super Valu Stores*, 283 NLRB 134, 135 (1987). An accretion will not be found unless a newly-created or acquired group of employees shares an overwhelming community of interest with employees in a pre-existing unit. *Gitano Distributing Center*, 308 NLRB 1172, 1174 (1992).

The Respondents agree that the Board generally finds an accretion only when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted. The Respondents argue strenuously however that, considering the traditional factors in accretion analyses, the instant factual situation meets the Board's tests. The General Counsel notes, and the Charging Party agrees, that the issue of accretion involves fact-intensive balancing of multiple factors including bargaining history, functional integration of operations, employee skills and training, common control of labor relations, day-to-day supervision and physical proximity citing *Ryder Integrated Logistics, Inc.*, 329 NLRB 1493 (1999); *Gould, Inc.*, 263 NLRB 442, 445 (1982). And, not surprisingly, the General Counsel and the Charging Party argue that no accretion may be found in the instant case.

The *Frontier* decision: *Frontier Telephon of Rochester, Inc.*, 344 NLRB 258, 259 (2005), contains a recent discussion of the issues in accretion analysis:

> The fundamental purpose of the accretion doctrine is to "preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made." *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 473 (2d Cir. 1985). How-

ever, because accreted employees are absorbed into an existing bargaining unit without an election or other demonstrated showing of majority status, the accretion doctrine's goal of promoting industrial stability places it in tension with the right of employees to freely choose their bargaining representative. Accordingly, the Board follows a restrictive policy in applying the accretion doctrine. *Safeway Stores*, 256 NLRB 918 (1981); *Wackenhut Corp.*, 226 NLRB 1085, 1089 (1976). One aspect of this long-standing restrictive policy, which was recently restated in *E. I. Du Pont de Nemours, Inc.*,[5] has been to permit accretion "only when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted." Supra at 608 quoting *Ready Mix USA, Inc.*, 340 NLRB 946, 954 (2003).[6] In determining, under this standard, whether the requisite overwhelming community of interest exists to warrant an accretion, the Board considers many of the same factors relevant to unit determinations in initial representation cases, i.e., integration of operations, centralized control of management and labor relations, geographic proximity, similarity of terms and conditions of employment, similarity of skills and functions, physical contact among employees, collective bargaining history, degree of separate daily supervision, and degree of employee interchange. *E. I. Du Pont*, supra at 608; *Compact Video Services*, 284 NLRB 117, 119 (1987). However, as stated in *E. I. Du Pont*, the "two most important factors"—indeed, the two factors that have been identified as "critical" to an accretion finding—are employee interchange and common day-to-day supervision.[7] *Super Valu Stores*, 283 NLRB 134, 136 (1987), citing *Towne Ford Sales*, 270 NLRB 311, 312 (1984).

[5] 341 NLRB 607 (2004).

[6] This test is different than the traditional community-of-interest test that the Board applies in deciding appropriate units in initial representation cases. In that context, the Board will certify any unit that is *an* appropriate unit, even if it is not the most appropriate unit. *Bartlett Collins*, 334 NLRB 484 (2001). In the accretion context, however, "[a] group of employees is properly accreted to an existing bargaining unit when they have such a close community of interests with the existing unit that they have no true identity distinct from it." *NLRB v. St. Regis Paper*, 674 F.2d 104, 107–108 (1st Cir. 1982). Thus, the issue here is not whether an RC petition could properly be processed in a unit consisting of CSRs and techs. Such a unit could be an appropriate unit and, if so, an election would be held.

[7] As noted below, the absence of these two factors will ordinarily defeat a claim of lawful accretion. This is not to say that the presence of these factors will establish a claim of lawful accretion.

And the Board has used the noted approach as recently as December 17, 2008, in *Professional Janitorial Service of Houston, Inc.*, 353 NLRB No. 65 (2008), in which the Board adopted the decision of an administrative law judge who rejected the defense of a successor that the predecessor unit had been accreted into the successor's existing multi-facility unit. The judge noted the relevant law and the holding of the Board in *Trane*, 339 NLRB 866, 870 (2003), as follows:

> . . . *Trane*, 339 NLRB 866, 870 (2003), a representation case, the Board stated that it has long held that a petitioned-for single-facility unit is presumptively appropriate ". . . unless it has been so effectively merged into a more comprehensive unit, or it is so functionally integrated, that it has lost its separate identity." The party opposing the single location unit bears a heavy burden of rebutting its presumptive appropriateness. The factors that the Board examines to determine whether this burden was satisfied include (1) central control over daily operations and labor relations, including the extent of local autonomy; (2) similarity of employee skills, functions and working conditions; (3) the degree of employee interchange; (4) the distance between the locations; and (5) bargaining history, if any exists. (*Professional Janitorial Service of Houston, Inc.*, 353 NLRB No. 65, JD slip op.at 8 (December 17, 2008).

Given all the above, it is appropriate to turn to the continuity/unit elements of the PMMC/PCMC transition at issue here. Initially the evidence respecting the two operations will be set forth and thereafter the Board's teachings will be applied to the operations involved.

b. The PMMC and PCMC operations at the Maersk Oakland and Tacoma terminals[32]

(1) Basics

As discussed supra, PCMC began operations in 1990 as a supplier of M&R mechanics to clients, initially, at terminals at the ports of Southern California and over time to clients at West Coast ports generally. PCMC from its early times recognized the ILWU as representative of its unit employees, joined the PMA and was signatory to the PMA-ILWU Coastwide contract. PCMC also did work for Maersk at its Los Angeles terminal in the 1990s. In 1999, Maersk was in the process of acquiring Sealand's operations at its three terminals at the ports of Long Beach, Oakland, and Tacoma. The terms of the Sealand acquisition apparently called for any acquirer to recognize the IAM as representative of the three terminals IAM-represented M&R mechanics. Maersk expected to contract out the terminal M&R work at any acquired facilities as it did at its other West Coast operations. PCMC was informed of the potential work opportunity and, as McLeod testified, in order to "have an entity to respond to a proposal to do maintenance work," PCMC and Marine Terminals Corporation, a separate West Coast M&R contractor, created a partnership: Respondent PMMC. In due course PMMC bid and was awarded the Maersk contract for M&R work at the former Sealand terminals, hired the former Sealand mechanics, recognized the IAM as their representative, and thereafter undertook the M&R work. Since PMMC had no other unit work and the IAM had no hiring hall or other employment referral systems in place in the relevant areas, there was essentially no interchange of unit employees between and among the Maersk terminals.

As discussed supra, the PMMC-IAM M&R mechanic bargaining unit had existed since 1999 under PMMC and for many years previous to that under Sealand. The PMMC unit initially included all PMMC M&R mechanic employees working on the

[32] See also the earlier discussions at sec. II,B. Background my decision which will not be repeated in detail here.

three formerly Sealand, but subsequently Maersk, terminals located in Long Beach, Oakland, and Tacoma. In 2002, with the consolidation of Maersk facilities in Southern California into a new facility and the consequent loss of the IAM-represented employees work at the closed Long Beach Maersk facility, the PMMC IAM bargaining unit was reduced to the remaining two locations at the ports of Oakland and Tacoma.

More generally, the IAM and the ILWU have both long represented significant numbers of M&R mechanics employed on the West Coast docks at various ports and terminals. Individual West Coast ports have had historically different proportions of IAM or ILWU representation of those employees. As noted supra, neither union historically or currently does so on the West Coast exclusively.

(2) Comparison of operations

PMMC unit employees were terminated with the end of PMMC's contract with Maersk at Tacoma and Oakland on March 30, 2005. PCMC hired 32 of the PMMC Oakland unit mechanics, and employed them at the Maersk Oakland terminal. It also on an interim basis employed 11 other mechanics at the Maersk and Hajin terminals who worked on the Maersk and Hajin cranes at the Oakland Port. These individuals comprised the total nonsupervisory work force used by PCMC initially in replacing PMMC in Oakland.

On or within a few days of March 31, 2005, PCMC hired 48 of PMMC unit mechanics in Tacoma. Upon their arrival at the Maersk terminal, six former PMMC unit employees were permanently[33] transferred to the Evergreen terminal in Tacoma where PCMC had an M&R contract. At the same time 10 PCMC Evergreen based mechanics were permanently transferred to the Maersk terminal doing unit work. These individuals comprised the initial total nonsupervisory work force used by PCMC initially in replacing PMMC in Tacoma.

The former PMMC unit members hired by PCMC represented a majority of M&R mechanic employees hired by PMMC to do the newly begun contract work at the Maersk terminals in Tacoma and Oakland. The former PMMC unit members hired by PCMC did not represent a majority of PCMC's M&R mechanic employees Coastwide at all ports. Indeed, they were but a minor portion of that larger whole whose number was roughly half a thousand. Nor did they represent a majority of the employees in the many West Coast bargaining unit covered by the PMA-ILWU contract whose complement ran into the thousands.

The essential job content of the PMMC and PCMC Maersk terminal work in Oakland and Tacoma was very similar. Generally, the same employees, now PCMC employees, were doing the identical work done under PMMC at the same facility and locations within the facility using the same tools and equipment to do so. New coveralls were issued to unit members by PCMC, the manner of documenting time worked changed from timeclock recordation to the submission of time report to lead employees. Hours of shifts were adjusted from those established under the IAM protocols to the hours established under the PMA-ILWU contract. Facility maintenance and inbound roadability inspection—functions comprising a small percentage of the PMMC units work under the PMMC Maersk contract—were no longer performed by PCMC unit employees under the PCMC Maersk contract, but were handled by others.

(3) PCMC's integration of operations, centralized control of management and labor relations, geographic proximity, similarity of terms and conditions of employment, similarity of skills and functions, physical contact among employees, collective-bargaining history, degree of separate daily supervision, and degree of employee interchange

(a) An initial matter—When in time are the listed characteristics to be measured and considered?

The parties disputed and the case law discusses at some length the date at which the argued successors operational circumstances should be measured and considered. This is of importance because the employers under scrutiny are starting a new operation and the very initial arrangements of the operation change rapidly. The new employers may have very different staffing, supervisory organization, and other circumstances initially which evolve rapidly over time. So, too, certain aspects of PCMC's unit employees' rights and privileges become available under the ILWU contract and hiring hall rules only after employees accrue significant qualifying hours of employment and hence could and did not ripen in the initial period of PCMC's new operations.

The Court in *NLRB v. Burns Security Services*, 406 U.S. 272, 294 (1972), noted that when it was "perfectly clear" that an argued successor was going to take certain action at the onset of its operations, there the hiring of a majority of the predecessors represented employees, the successorship analysis could go forward as if that action had occurred at the onset of operations.

The ILWU posthearing brief argues that a predetermined well defined plan must be considered as executed in considering the argued successor's operations. Counsel for the ILWU cites in support, the decision of the Board in *AG Communication Systems*, 350 NLRB 168 fn. 8 (2007), where the Board noted the implementation of a "well-defined plan" and distinguished a contrary case: *Holly Farms Corp.*, 311 NLRB 273, 279 (1993), and also cites *Northland Hub, Inc.*, 304 NLRB 665 (1991), as further support for the need to consider the changes implemented as part of a well-defined plan. Respondent Employers agrees. The General Counsel and the Charging Party challenge any application of a well-defined plan analysis to Respondent PCMC's implementations in assuming the Maersk contract.

In my view the cases support the Respondents. I find on the facts of this case that PCMC did in fact have a well-defined plan: its standard historically-implemented practices in place at its other terminal operations. Thus, on the facts of this case and relying on the implementation of the noted plan, it was perfectly clear in the period well before the actual commencement of

[33] As noted earlier, PCMC M&R mechanics are hired and employed specifically as multisite employees who will be transferred from terminal to terminal as needed. None the less, the record establishes that, if even only on an informal basis, mechanics are based at one terminal on an at least semipermanent basis, and often are transferred on a temporary basis from there. It is in this sense that the term permanent is used here.

operations that PCMC was going to not only hire a majority of its Tacoma and Oakland Maersk mechanic employees from among PMMC's laid-off employees, but that PCMC was also going to shape its new operations consistent with its other M&R terminal-based operations under the ILWU/PMA contract on the West Coast, i.e., conform its new operations to its business model as it had without exception in assuming other M&R service contracts at other marine terminals. Even though the initial startup of PMMC's operations in its initial days had not put that model completely into effect, I find that it had intended to do so and that in short order it did so. Given this conclusion, I further find it is appropriate to consider the evolving circumstances of the PCMC startup operation in the following days and weeks to determine the nature of PCMC's operations. In applying this determination, I will also consider the evidence introduced concerning the terms and conditions of employment of PCMC's Maersk-based Tacoma and Oakland M&R mechanics which ripened as they accumulated enough hours to qualify for certain privileges under the PMA-ILWU hiring hall regulations such as unit employees becoming eligible under hiring hall regulations to register for extra mechanic work shifts with both PCMC and other PMA/ILWU contract signatory employers.

(b) Common control of labor relations

PCMC, with its origins and the bulk of its current unit employee complement in Southern California, maintains its headquarters in Long Beach, California. CEO McLeod and COO Gregorio testified that PCMC operations are integrated and from its earliest days have run based on consolidated rather than terminal-specific operational planning. Terminal manning charts for all terminals and other staffing plans are prepared by headquarters staff rather than by worksite staff.

The PCMC operations organizational chart for April 1, 2005, indicates that area terminal M&R managers or general managers and port managers report to Long Beach located vice presidents who in turn report to COO Gregorio Sr. The vice president of labor relations, safety, and security also reports to Gregorio.

Joe Gregorio Sr. testified, and was corroborated by numerous collateral witnesses, that respecting labor relations under the contract, he retains active control of all hiring and discipline including in Oakland and Tacoma operations and makes most other labor relations decisions in conjunction with the vice president and the director of labor relations located in Long Beach. He specifically testified he personally hired each of the M&R mechanics for Tacoma and Oakland. He also makes decisions on permanent employee transfers but not temporary ones. He testified further that he preferred to limit onsite layoff and discipline authority and actions by his onsite supervision to avoid subjective decision making and personality conflicts where possible. As a member of the PMA and signatory to the West Coast longshore agreement, PCMC in larger contract and union matters deals with the PMA as the employers' representative who in turn deal with the ILWU or the various contractual committees that deal with ILWU and or other employers in matters of policy.

The general managers at both Oakland and Tacoma regularly visit the area terminals. They decide whether or not additional hall mechanics should be called from the ILWU hiring hall for any of the terminals under their supervision.

As of March 31, 2005, the Oakland Maersk terminal PCMC operations—comprising both Maersk and Horizon M&R noncrane contract work—was supervised onsite by General Manager Al Adams who reported to Gregorio. Adams also supervised the crane employees who were separately located at the site. Reporting to Adams were the M&R manager and the crane manager. Under them were the nonsupervisory departmental leads to whom the mechanics directly reported.

As of March 31, 2005, the Tacoma Maersk terminal PCMC operations were supervised onsite by Tacoma General Manager Kagey who, at least by April 2005, reported to Tacoma-Seattle Area Manager McGonegle. McGonegle was responsible for three terminals: Hanjin in Seattle for cranes, Evergreen in Tacoma for M&R mechanics and cranes and Maersk in Tacoma for M&R mechanics. His offices were located in the Puget Sound. McGonegle reported to Long Beach Crane Manager Evans on Crane matters and to Vice President Del Conte on Maersk M&R matters. Under them were the nonsupervisory departmental leads to whom the mechanics directly reported.

(c) Common day-to-day supervision

The Maersk terminal at the port of Oakland has a physically separate crane department at the terminal. Since 2002, its crane mechanics, who also work on Hanjin terminal cranes a mile away, have been PCMC employees represented by the ILWU under the West Coast agreement. PMMC did not ever have the crane maintenance contract with Maersk at Oakland. That work had been done by other unions until its assumption by PCMC in 2002. The Maersk terminal at the port of Tacoma does not have a crane department. The Evergreen terminal is some 3-to-4 miles distant from the Maersk Tacoma terminal.

The PMMC Oakland and Tacoma Maersk terminal M&R mechanics worked under direction of nonsupervisory lead employees in the various departments: i.e., power, reefer, gen set, etc. The departmental leads reported to the M&R or site managers who reported to the general managers. The general managers at both Oakland and Tacoma regularly visit the area terminals. They decide whether or not additional hall mechanics should be called from the ILWU hiring hall for any of the terminals under their supervision and whether or not temporary transfers of mechanics to and from other local terminals should occur.

The initial Oakland Maersk terminal general manager was Al Adams who had held the position for PMMC. Under PCMC, he supervised both the crane and noncrane mechanics at the terminal. He issued discipline and on one occasion he reduced a M&R manager-proposed termination to suspension, and appointed an initial lead carrying over a PMMC foreman. Adams reported to the executive vice president who in turn reported to Gregorio.

Initially, the Tacoma Maersk PCMC operations were managed onsite by Tacoma General Manager Lyle Kagey who soon commenced reporting to Puget Sound Area Manager Brian McGonegle who in turn reported to headquarters staff. Under

Kagey was an M&R manager and under him were the department leads to whom the mechanics reported.

M&R managers are generally the full-time onsite mechanic supervision; they meet with leads on a daily basis and discuss work needs and priorities which are then the basis for lead assignments matching employees' skills to needed work. Generally, they do not participate in decisionmaking regarding formal complaints or the issuance of written warnings but do report on underlying circumstances and events that may be the basis for discipline. They also meet with the client and thereafter with the lead staff to discuss the days work requirements. In response to instructions received at these meetings the leads assign the days work to the mechanics. During the day, the M&R managers, one of the leads or even a representative of the client may request the assignment of a mechanic. The managers decide how the request is to be addressed. M&R managers however, by explicit workplace rule, do not directly instruct the mechanics. All assignments, instructions and directions issued to mechanics are made by the leads.

The leads are not supervisors but monitor and report time and attendance, provide mechanics all their assignments and instructions, and the leads receive and pass on information from supervision. They also report to supervision regarding safety, employment, and labor relations matters onsite and can investigate and gather information concerning problems or untoward events which is then transmitted to general managers, who may act on matters initially either resolving them or passing them on to headquarters. As noted supra, COO Gregorio plays a very large role in hiring, firing, and discipline of all PCMC employees and headquarters and the managerial staff there are in charge of staffing other than temporary transfers and contract and human relations issues.

(d) Interchange and transfer

(i) General description

Following the loss of the Southern California Maersk terminal work, PMMC's entire M&R mechanic unit complement was located at the Maersk Oakland and Tacoma terminals that are over 700 miles apart. PMMC unit employees did not transfer to, or interchange between these two PMMC locations; nor did PMMC unit employees in any significant way transfer or interchange with any other employers' employees.[34] Finally, the IAM had no hiring hall available to PMMC who, at least on this record, did not regularly use casual or short time M&R mechanic hires.

PMMC's unit employees did transfer and interchange between the various departmental unit tasks at the terminal where they worked on an as-needed-basis. Thus, a particular mechanic might be regularly assigned to the reefer department, but be transferred to another department on a temporary basis if his or her skills were needed there. Or permanent transfers between departments might occur.

So, too, PMMC mechanic employees regularly worked on both Maersk and Horizon equipment interchangeably at each terminal. The work content between the carriers was the same. The equipment was the same, the tasks undertaken were essentially identical, the on terminal locations where the work took place were the same. Similar practices were in place at PMMC operation at the Southern California Maersk terminal. There was no transfer from the terminal but mechanics moved between departments as needed.

As discussed supra, PCMC had a uniform practice of considering M&R mechanics as transferrable; moving them on an as-needed-basis between terminals that were is reasonable proximity and in augmenting steady staff with hall mechanics. PCMC's managerial witnesses credibly testified that PCMC as a fundamental business goal worked to establish practices and procedures which would allow maximum staffing flexibility between and among PCMC work sites in their terminals in the Southern California, Northern California, and Puget Sound ports. The professed benefits obtained from such a model, they testified, was that being able to regularly transfer staff from one area terminal to another on short notice and, for short periods as necessary to meet business needs, allowed PCMC to maintain smaller work complements, i.e., its "lean staff" model, with concomitant cost savings to it and the client.

PCMC's transfer practices at the Maersk Tacoma and Oakland terminals matched the practices applied to the former PMMC terminal mechanics respecting internal transfers and its general interchange between and among the mechanics doing the various types of work that the unit undertoo,[35] but also had the additional components PCMC used generally. The situation in the Southern California ports of Long Beach and Los Angeles, with their multiple terminals employing many PCMC mechanics and a hiring hall system that had available hall mechanics was not duplicated in either the port of Oakland or the port of Tacoma. In Tacoma, while PCMC had other PCMC mechanics at other terminals who could interchange with the Maersk Tacoma terminal mechanics, there was apparently no ready supply of hall dispatch mechanics. In Oakland, while hall dispatches were obtainable, the only other PCMC steady mechanics in the area were few in number and were crane mechanics.

More specifically, the PCMC Tacoma Maersk terminal unit employees at relevant times were geographically proximate to other PCMC M&R mechanics working at the Tacoma Evergreen terminal. At the onset of PCMC's Tacoma Maersk operations when it was hiring PMMC mechanics, a dozen or so PMMC mechanics were hired and then immediately permanently assigned to the Evergreen operations and a like number of PCMC Evergreen mechanics were similarly transferred to the Tacoma PCMC Maersk operation. Thereafter, PCMC Maersk mechanics were temporarily transferred to similar work at the Evergreen terminal and Evergreen terminal mechanics were temporarily transferred to similar work at the Maersk terminal. Very few hall dispatches were utilized.

[34] For a period of months prior to the March 30, 2005 layoffs, i.e., during the period when PMMC had the TRAPAC contract and PMMC was still working at Maersk, PMMC from time to time lent an indeterminate few of its mechanics to TRAPAC for work at that terminal for apparently brief periods.

[35] As discussed, supra, the PCMC mechanics operating under a different contract with Maersk did not assume certain tasks done by the PMMC mechanics.

In Oakland, at relevant times PCMC did not have other M&R noncrane mechanic contracts. It did, however, perform the crane mechanic work at the Maersk terminal and at two other terminals: TRAPAC and Hanjin. When PCMC took over the PMMC work at the Oakland Maersk terminal, PCMC's noncrane terminal mechanics were called upon to assist PCMC crane mechanics working on these terminal cranes and vice versa. The quantum, nature and significance of the assistance involved is disputed and is discussed infra.

In addition to the transfer and exchange of the "steady" or full-time mechanic employees employed by PCMC and transferred between and among PCMC's employment sites, including the Oakland and Tacoma Maersk terminals, PCMC has historically and at relevant recent times utilized the contractually-established PMA/ILWU joint hiring halls which are located in the relevant ports in several ways. Initially, it is important to keep in mind the difference between the request for the dispatch of, dispatch, and hire of a permanent full-time mechanic employee, also known as a "steady" employee, and the request for the dispatch of, dispatch, and hire of a temporary mechanic employee for a period of a few work shifts—a temporary or "hall" mechanic. For purposes of this discussion, the focus is on the employment of temporary or "hall" mechanics.[36]

PCMC's witnesses credibly testified that, when PCMC determines it needs additional mechanics at a particular facility for a temporary period, it puts in a request for the requisite number of temporary mechanics at the relevant hiring hall. Dispatched hall mechanics work for a limited number of shifts for PCMC and then their work for PCMC ends and they return to the hall. In some cases, if qualified mechanics are not available for dispatch at the hall at the time of request, other hall registrants with mechanics skills may seek dispatch and may be accepted by PCMC for temporary employment. These dispatched registrants are often far less skilled than PCMC's steady mechanics and do not arrive at the job with the complete and substantial sets of mechanics tools than many steady mechanics maintain onsite. Nonetheless, these individuals—or at least those held sufficiently qualified after onsite interview—can be and are assigned mechanic positions with the least technical skill requirements allowing the PCMC steady mechanics normally assigned to that work to be assigned to other positions.

Thus, the staff of mechanics at any PCMC area on a West Coast terminal may be augmented on a quick, short time basis through use of the PMA/ILWU joint hiring hall dispatch process. Implicit in this process, of course, is the existence at relevant times and places of a sufficiency of hiring hall registrants with the necessary skills who are available to answer a dispatch request from PCMC or other employers for the dispatch of temporary mechanics. As noted earlier, historically the ILWU in the Tacoma area had not represented M&R mechanics until the events involved herein and at relevant times had not had a ready supply of qualified hiring hall mechanic registrants to supply requests for dispatch in that area or to make obtaining mechanics on short notice a certain matter as would be the case in other ports.

The hiring hall dispatch process impacted the PCMC M&R mechanics in another way: it provided employment opportunities for those mechanic employees who wished to obtain it. The PCMC steady mechanics at all terminals, including the Oakland and Tacoma Maersk terminals under the ILWU/PMA contract and, with the requisite qualifying time of employment sufficient to obtain registrant status, may register at a hiring hall to obtain dispatches to other mechanics work, with limitations, while remaining steady PCMC mechanics.

(ii) Quantification of PCMC mechanic transfer and interchange at relevant times

While Respondent Employer's witnesses in a variety of circumstances uniformly characterized the various types of interchange and transfers described above as a frequent and common occurrence between and among PCMC worksites including the Oakland and Tacoma Maersk terminals, the actual evidence respecting the extent of those transfers that occurred during the relevant period was hotly disputed both at trial and in very detailed briefs.[37]

As noted, the transfer/interchange involved after initial staffing of the two Maersk terminals by PCMC is between the Tacoma area facilities and hiring hall and, separately, between the Oakland area facilities and hiring hall. Transfers did not occur between Tacoma and Oakland. Not discussed here as transfers/interchange are either the shift of work for a mechanic between one carrier's equipment to another's at a given terminal: a mechanic working on a Maersk item and then a Horizon item is not relevant here. Further, when measuring transfers from one PCMC Tacoma Maersk terminal mechanic position to a Tacoma non-Maersk position or vice versa for a few days with the transferee then returning to the original jobsite, such a short "go and return" cycle is regarded as one temporary transfer not two. Additionally, Maersk noncrane mechanic transfer for crane mechanic assistance at any terminal and crane me-

[36] Temporary employees dispatched from the hiring hall may come to be offered and accept continued employment as full-time or steady mechanics and did in a few cases involved herein.

[37] Respondent Employers entered into evidence substantial summaries of work record evidence respecting employee transfers and further summarizations of those initial entered summaries. The Charging Party on brief strenuously contested the accuracy and efficacy of Respondent Employers' secondary summaries of Respondent Employers' primary summary evidence and provided its own voluminous counter secondary summaries in opposition as an appendix to its brief. Counsel for PCMC in his reply brief at p. 13, fn. 1, took umbrage to the Charging Party's brief's appendix and argued the Charging Party's objections to Respondent Employers' summaries "should be rejected as untimely efforts to raise objection or introduce new exhibits after the record was closed."

I construe PCMC's quoted objection as a motion to strike and I deny the motion. The evidence under contest here is the original summaries of individual employee events. Respondent Employers' further summarization of the facts set forth in the original summaries as well as the Charging Party's reworking of the same original summaries from its point of view are each simply argument and are not independent evidence. Since the Charging Party has not submitted new evidence nor attempted to do so, and since advocacy is the purpose of briefs, I shall not strike or reject the arguments of the Charging Party's appendix to its brief as described.

chanic transfers to, from or between terminals has been separately noted.

(aa) Oakland

The initial PCMC Oakland Maersk terminal noncrane mechanic employee group staffed by mechanics hired from PMMC on or immediately after March 31, 2005, comprised 33 employees. The entire PCMC Oakland work of all kinds during relevant times was the Maersk terminal noncrane work, the Maersk terminal crane mechanical work, the Trapac terminal crane mechanical work and the Hanjin terminal crane mechanical work. The PCMC crane mechanics employees involved in the crane work noted comprised a dozen employees.

During the part of 2005 that PMMC worked under the Maersk contract for noncrane work in Tacoma and Oakland—a 9-month period from March 31 to December 31, 2005, the 33 Maersk Oakland terminal noncrane M&R mechanic employees worked primarily at their traditional noncrane work at the Maersk terminal work. Eighteen of the 33—over half—worked on cranes at the Maersk, Trapac, or Hanjin terminals or some combination of them. Some of these employees worked a significant number of hours on cranes, others few or very few. Trapac and Hanjin work hours in evidence were clearly crane work since only crane work was done by PCMC at those locations. Only evidence showing total hours worked per employee during the period is in evidence—not the number of times a given employee might be assigned to undertake crane work. The data in evidence does not distinguish between hours worked at crane or noncrane work at the Maersk terminal so it is not possible to isolate the two. In 2005, the 33 undertook 2662 hours of paid hours of employment at the Hanjin terminal or, assuming 8-hour days, 334 days of employment. In the same period, the 33 undertook 273 hours of paid hours of employment at the Trapac terminal or, assuming 8-hour days, 34 days of employment. Testimony suggested Maersk terminal crane work undertaken by the original PMMC mechanics had at least an equivalent portion of crane work.

In the same 9-month period Oakland PCMC employed some 90-odd employees for various period and amounts of time in addition to the original 33 mechanics. Presumably, this number includes the 12 PMMC crane mechanic employees working on the cranes before the noncrane operation started. Of these hires about half worked some or all their time at the Maersk terminal. Sixty nine of the 90 had obtained a dispatch or dispatches from the ILWU hiring hall. Thirty three of that number were dispatched at least once to the Maersk terminal and 6 of that number in time became PCMC steady employees at that terminal. The records indicate hiring hall mechanics dispatched to Maersk Oakland totaled 33 and they worked a total of 3792 hours or 474 8-hour shifts. Included in that figure are some 2868 hours or 359 shifts undertaken by dispatchees who became steady employees. In 2006, figures varied but were not orders of magnitude different from that set forth above.

(bb) Tacoma

In Tacoma, PCMC took over the PMMC Maersk operation initially hiring 47 PMMC mechanics. As noted supra, PCMC sent a half-dozen PMMC employees to the Evergreen terminal. Of the 47 starting complement of former PMMC mechanics as of March 31, 2005, Respondent Employers' records establish that through the remaining nine months of 2005, the 47 worked at Maersk and Evergreen terminals in varying amounts. Four never worked at Maersk. Nineteen never worked at Evergreen and 5 worked only one shift at Evergreen. The remaining 29 worked both at Evergreen and Maersk with 10 having worked at least 100 hours at each terminal.

Of the 54 non-PMMC mechanics employed by PCMC in the Tacoma port in that 9-month period of 2005, some 44 percent worked at least some time as Maersk. Hiring hall dispatching of mechanics in Tacoma was infrequent. During the period a single dispatchee was sent to Evergreen for one or two shifts and a single individual was dispatched to Maersk.

In 2006, figures varied but were not orders of magnitude different from that set forth above. The total number of dispatched mechanics rose to six, four of whom worked fewer than 10 hours each. The remaining two worked 18 and 90 hours, respectively.

c. Analysis and conclusions respecting accretion

(1) Preliminary matters

The Parties' legal arguments and citations of authority have been presented initially, supra. As noted, the Parties do not differ on the legal standards to apply to determine if PCMC accreted the PMMC unit into a larger unit, so much as they differ respecting the facts at issue and differ in how to apply those facts and the balancing process of the analytical process. Without detracting from the authority marshaled by the parties, the Board's accretion doctrine as it is undertaken in a sucessorship case bears revisiting. The accretion doctrine seeks to "preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made." *Frontier Telephone, Inc.*, 344 NLRB 274 (2005). Since accretion forecloses employees basic right to select a union representative by being absorbed into an existing bargaining unit, historically, the Board has followed a restrictive policy in applying the doctrine. *Towne Ford Sales*, 270 NLRB 311 (1984), enfd. 759 F.2d 1477 (9th Cir. 1985). As a result, the Board finds accretion "only where the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted." *E. I. Du Pont, Inc.*, 341 NLRB 607, 608 (2004), quoting *Ready Mix USA, Inc.*, 340 NLRB 946, 946–948 (2003) (citing *Safeway Stores*, 256 NLRB 918 (1981)).

In applying this standard, the Board examines several factors, including: interchange and contact among employees, degree of functional integration, geographic proximity, similarity of working conditions, similarity of employee skills and functions; supervision and collective-bargaining history. *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001). Though a case will generally necessitate a "balancing of factors,"[38] the

[38] *Great Atlantic & Pacific Tea Co.*, 140 NLRB 1011, 1021 (1963).

"two most important factors,"[39] identified as "critical" to an accretion finding, are employee interchange and common day-to-day supervision.[40]

As applied to accretion, the heightened community-of-interest standard is not the same as the general community-of-interest test used to determine the initial appropriateness of a bargaining unit. Whereas with initial bargaining, a unit need only be appropriate, and not the most appropriate, the Board will only uphold accretion if the community of interest between the existing unit and the employees to be accreted is so closely integrated that the latter employees have "no true identity distinct from" the existing unit. *Frontier Telephone*, 344 NLRB at 259 fn. 6.[41]

Because the Board views the analysis of accretion in the context of a successorship differently than initial representation unit questions or settings, it is of value to consider the Board's discussion of the issue in that context. In *Banknote Corp. of America*, 315 NLRB 1041 (1994), enfd. 84 F.3d 637 (9th Cir. 1996), cert. denied 519 U.S. 1109 (1997), the Board considered the possible accretion of craft units at a printing facility into a larger single unit as part of a successorship allegation. The Board majority found the evidence offered by the employer to establish changes in job duties comprising the "sketchy testimony of the six employees above, as well as several inconclusive documents" was insufficient proof over a dissent arguing the evidence offered was unrebutted and sufficient to establish the original units were now inappropriate.

The Board majority noted in *Banknote Corp. of America*, 315 NLRB at 1043:

> Critical to a finding of successorship is a determination that the bargaining unit of the predecessor employer remains appropriate for the successor employer. [Footnote omitted.] In *Burns*, [406 U.S. 272 (1972)], the Supreme Court found that the successor employer (Burns) was obligated to bargain with the union that represented the employees of the predecessor (Wackenhut). The Court observed however: "It would be a wholly different case if the Board had determined that because Burns' operational structures and practices differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one." Id. at 280. The Board's longstanding policy is that "a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective-bargaining unless the units no longer conform reasonably well to other standards of appropriateness." *Indianapolis Mack Sales & Service*, 288 NLRB 1123 fn. 5 (1988). As noted by the judge, the Board has consistently held that long-established bargaining relationships will not be disturbed where they are not repugnant to the Act's policies. [Footnote omitted.] The Board places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate. See *Columbia Broadcasting System*, 214 NLRB 637, 642–643 (1974) ("compelling circumstances" must be shown before the Board will disturb a historical unit).

In considering the circumstances relevant to the instant case it is important to note several Charging Party's and General Counsel's challenges to Respondent Employers' evidence respecting the PCMC Tacoma and Oakland mechanics following the March 31, 2005 commencement of operations.

First, the General Counsel and the Charging Party argue, the Charging Party most vociferously, that the evidence offered by Respondent Employers regarding PCMC's "lean staffing" business model, the evidence of its history, and the evidence of its application to the locations at issue, comprise an incredible, self serving, after-the-fact concoction designed for the instant litigation which evidence in its totality and individual parts is unbelievable and insufficient to meet the heavy evidentiary burden the Board applies to the evidence of the party seeking to show an accretion.

The evidentiary standard noted is a high one and I have applied it herein to the contentions involved in the analysis below. The Charging Party's skepticism and incredulity regarding the proffered evidence however, in my review of the record and my scrutiny of the multiple Respondents' witnesses who described the model in whole or in part, is insufficient to successfully challenge the claims of the Respondents. The Charging Party is indignant but offers little evidence to support indignation. I found the descriptions offered to be plausible and the witnesses credible. The main witness, Respondent PCMC's CEO, McLeod, was particularly credible in these regards and I specifically credit him. The evidence offered by numerous Respondents' witnesses and the Respondents' documents are mutually corroborative of PCMC's lean staffing and flexible substitution process which the evidence demonstrates has been implemented historically and applied to the sites at issue at relevant times. I credit the evidence without addressing here the sufficiency of that evidence to establish an accretion. Thus, without here finding this evidence sustains the Respondents' accretion case, I find the evidence is not to be rejected as manufactured or concocted. Nor as the Charging Party advances on brief, do I find it simply "business as usual" undertaken by any profit-seeking business.

Second, the General Counsel and the Charging Party contend that Respondent Employers' obligation to bargain with the IAM either: (a) remained viable at all times without discontinuity during the changeover from PMMC to PCMC or, (b) attached at the time of the arithmetic majority hire by PCMC of the PMMC employees. Thus, they argue, under the former continuous bargaining obligation theory, that any and all changes to the PMMC terms and conditions of employment undertaken by PCMC without bargaining with the IAM were wrongful unilateral changes, i.e., were violative of the Act, and can not be considered in any accretion analysis. As noted supra, I did not find a continuous bargaining obligation on the part of Respondent Employers and therefore this argument fails. The latter argument is in essence that the changes to the

[39] *E. I. Du Pont*, 341 NLRB at 608.

[40] *Frontier Telephone*, 344 NLRB at 258–259; see also *Archer Daniels*, 333 NLRB at 675; *Towne Ford Sales*, 270 NLRB at 311–312.

[41] Generally, a historical unit will be found appropriate if the predecessor employer recognized it, even if that unit would not be appropriate under Board standards if it was being organized for the first time. *Indianapolis Mack Sales & Service*, 288 NLRB 1123, 1126 (1988); *Trident Seafoods v. NLRB*, 322 U.S. App. D.C. 1, 22 (D.C. Cir. 1996) (enfg. in part *Trident Seafoods*, 318 NLRB 738 (1995).

working circumstances at the Tacoma and Oakland Maersk terminals that PCMC put in place, after the hire and commencement of employment of the former PMMC mechanics also may not be considered in the accretion analysis. This theory too was rejected, supra. I held and here reaffirm that Respondent PCMC, from the time it became aware it had obtained the Maersk contract to do the work at issue, intended to extend the "lean staffing" model of operations it was then using at all its worksites and therefore had an objectively measurable, clearly determined plan or model it intended to put in place at the time the PMMC mechanics were hired. In such a circumstance, the facts and circumstances leading to the implementation of Respondent PCMC's implemented plan may be considered even though parts of its implementation occurred well after the initial PMMC employee complement was hired and had begun work.

Further, I note that in regards to Respondent Employers' bargaining history, the parties seek to characterize undisputed events and circumstances in different ways. Thus, the Respondents note that while the General Counsel and the Charging Party characterize the PMMC unit at the time of the change in operations as being an historic bargaining unit, it clearly was not. Rather, argue the Respondents, the two-facility unit involved in 2005 was but a rump portion of a three-facility PMMC bargaining unit that in 2002 lost the bulk of its unit employees with the discontinuance of employment of M&R mechanics working at a Maersk terminal in Southern California which was closed in a terminal consolidation. Respondents note further that even during the time the Southern California portion of the unit was employed, the PMMC unit did not do all the Maersk M&R mechanic work on the West Coast. PCMC had long done a portion of the Maersk M&R mechanic work in Southern California with ILWU represented mechanics and that work had grown substantially when the new consolidated Maersk terminal work was given in its entirety to PCMC in 2002.

It is also necessary to resolve the disputes respecting the similarity or comparability of the skills and duties of the terminal-based marine crane mechanics and the M&R noncrane mechanics for purpose of evaluating the Oakland interchange and temporary assignments of former PMMC nonmechanics with the PMMC crane mechanics who worked on the cranes at the three terminals noted above.

As described above from the onset in Oakland, PCMC intended to utilize, and when underway utilized, the noncrane former PMMC mechanics, to the extent noted in the discussion above, to assist crane mechanics in various crane M&R operations and vice versa. The crane operations with which the noncrane mechanics were involved were identified by several witnesses as crane procedures requiring several individual mechanics working as a team to complete some task which involved crane mechanics undertaking the skilled technical aspect of the procedure and the former PMMC noncrane mechanics providing less or even essentially unskilled participation and support. Other assignments of former PMMC noncrane mechanics on cranes involved general assignments utilizing mechanic skills but not technical specialized crane specific skills. At least one mechanic testified to the unique requirements of working at substantial elevations on the marine cranes as presenting an additional requirement for mechanics—he was not comfortable at such heights. Noncrane mechanics, however, or at least some of them, worked on container carrier equipment which moved containers at the terminal and were large enough to straddle long rows of containers stacked six high, i.e., also disconcertingly high in the air.

Having considered the issue, I find based on the record as a whole that the M&R marine crane mechanic position is a technical mechanic specialization with a separate history of both representation and mechanic careers, but may fairly be considered a mechanics position not beyond all comparison with the noncrane mechanic positions involved herein. I find that the crane and noncrane mechanics, or at least some of the specialized noncrane mechanics, who themselves have the earlier discussed specializations and variations of skill and experience, could and did interchange at least on the same basis as earlier described regarding hall mechanics. Thus, the noncrane mechanics could assist or step in at the lesser skill and experience required portions of the work, allowing—like the hall mechanics that may have not had a full panoply of mechanic skills—to free up the more experienced and skilled crane mechanics to undertake the skilled portions of tasks or assignments. So, too, I find that the crane mechanics could interchange on a like basis to assist noncrane mechanics.

The work areas of the crane department at the Maersk terminal had historically been physically separate from the noncrane mechanic areas even as to locker, lunch and cleanup areas. And the cranes the large land-based stationary marine crane mechanics work on, are physically apart from the bulk of the equipment the noncrane mechanics work on. So too separate supervision is both historic and on going. When noncrane mechanics worked on cranes at the Maersk, Trapac, or Hinjin terminals, they were under the general direction of the crane mechanics, leads and supervision of the crane department.

A final preliminary matter is the question of the unit or units involved in the successorship dispute. Both PMMC and PCMC treat the Tacoma and Oakland groups as part of a single unit even though they have no direct interchange between them. The arithmetic arguments respecting successorship majority based on the predecessor unit's numbers is consistent whether or not the two terminals comprise one unit or each is advanced as a freestanding unit. And, as described above and as will be discussed in greater detail below, the two Maersk terminal mechanics groups have quite different patterns of transfer and interchange between staff from other PCMC facilities and the intermingling of short-term hiring hall dispatched employees. Should the successor analysis deal with each location independently alternately as well as a single, two facility unit?

Having considered the matter, I conclude the successorship issues raised by the complaints and litigated by the parties must involve only the single, two-location unit. The two Maersk terminals mechanics in Tacoma and Oakland must stand or fall as successor or accretion together. I reach this conclusion because the complaints in this case—which control the Government's theory of the violations independent of the wishes and hopes of the Charging Party—plead only the single, two-location unit concerning which Respondent Employers are

obligated to bargain. Therefore, there are no half measures at issue. Were it possible for one of the two locations to be considered successor to the single predecessor same location unit, while the other location unit was not such a successor, then the successorship theory undergirding this aspect of the 8(a)(5) violation theory of the General Counsel must fail. Respondent Employers must end up obligated to bargain respecting both Tacoma and Oakland, or they cannot be obligated to bargain for either.

(2) The viability of the PMMC mechanics unit during PCMC's operations

The cases cited make it clear that it is the survival of the predecessor unit within the argued successors' operations which is definitive in successorship accretion analysis. Based upon all the above consideration of the M&R mechanics in the above presentation of the history of the industry and the ILWU and IAM within it, the histories PMMC and PCMC, the discussion of nature of both PCMC and PMMC's operations and the detailed consideration of the control of labor relations and employee interchange, it is possible to paint a rather detailed picture of the Tacoma and Oakland PMMC operations and its IAM M&R mechanics bargaining unit and of the extent to which it continued under PCMC employment at relevant times.

Summarizing portions of the histories and discussion of the industry, supra, it is clear that M&R mechanic work on the West Coast docks, to an extent at least similar to longshore dock work, has on and off again work demands. The terminal-based M&R mechanics experience frequent, cyclic and episodic changes in the volume of work required at a particular terminal and that the variation in workload is in some cases predictable and anticipatable and in other cases seemingly random and unpredictable. Many of these changed work requirements last for very short periods others for longer periods. These changes in the press of work require varying amounts of unit staff which make the efficient use of a fixed employment complement more challenging than a steady work load would.

Selecting portions of and summarizing in part the material addressed above, the two remaining locations in March 2005 of the earlier three locations of PMMC Maersk noncrane M&R mechanics—Tacoma and Oakland—involved skilled hands doing Maersk M&R mechanics work without the occurrence of unit employee transfers or cross terminal interchange with other employers employees. It also did not involve the use of a hiring hall or halls to add staff, and, finally, it occurred without unit interchange or transfer between the Tacoma and Oakland Maersk terminals which together comprised a single, two facility unit covered by a single-IAM/PMMC contract.

At the time of the March 2005 Oakland and Tacoma takeover of the Maersk work by PCMC, the great bulk of PMMC M&R mechanics were hired by PCMC and continued the same work they had done for PMMC at the same places within the same facilities using the same practices and procedures as heretofore. In these regards essentially nothing changed in the nature of operation from the perspective of the working mechanic, save the matters discussed, supra. The changes undertaken by PCMC, however, in taking over the PMMC operations included putting in place its existing, longstanding transfer practices and hiring hall usage practices already long in operation at its numerous other M&R facilities in Southern California.

That set of practices put in place by PCMC included the following. PCMC from the inception of the Tacoma and Oakland operations—i.e., as part of the hiring process for the PMMC mechanics—made it plain to those it offered employment that PCMC mechanics were not hired for a specific job at a specific terminal in a specific port but rather were hired to do work as assigned at the various locations PCMC had work as those mechanics were needed to fulfill the needs of the clients.

Further, as part of the changes implemented, the former PMMC Oakland and Tacoma M&R mechanics from the onset were regarded by PCMC as a part of its overall unit of mechanics who were part of the PMA/ILWU coastwide unit represented by the ILWU and were covered by the coastwise PMA/ILWU collective-bargaining agreement. Thus, from the beginning they were screened for hire, trained under, compensated in accordance with, and otherwise subject to the PMA/ILWU coastwide agreement as well as all PMA employee physical standards, general training, and safety instruction requirements and were entitled to participate—individual criteria otherwise having been met—in the hiring hall process as hiring hall registrants.

A significant portion of the PMMC mechanics hired by PCMC stayed put at their same old Maersk terminal, as noted briefly above, but not necessarily without travelling to help at other locations and not without having others sent or dispatched to help them. In addition to being called to other locations to perform work as needed, the former PMMC mechanic employees also got assistance from other PCMC employees when they needed additional hands to get necessary work completed. This assistance took two forms. First, other PCMC steady mechanics were transferred to the Maersk terminal mechanic worksites—particularly in Tacoma—to assist. Second, dispatch mechanics from the hiring hall—particularly in Oakland—were used on very short-term basis to augment the mechanic work force. Again, the extent of these practices is described above.

The Tacoma and Oakland locations were treated by PCMC the same as other PCMC work locations at other terminals. Labor relations at the highest levels were handled by the Long Beach headquarters or by PMA acting as employers' agents in dealing with the ILWU and with contract issues. PCMC headquarters issued manning charts to worksites setting forth specific employee staffing requirements over the period. As noted, supra, PCMC COO Gregorio took an active and controlling role in hiring, firing, and discipline companywide. There were layers of PCMC management at the port, terminal and, where relevant, within terminals for crane and noncrane mechanics work. M&R mechanics took direction and assignment from workplace-based nonsupervisory leads who, though they had little direct role in discipline or labor relations, assigned mechanics work and were the mechanics connection to supervision. Mechanics working away from their home terminal—such as the Oakland and Tacoma Maersk terminal-based M&R mechanics—worked under the direction of lead and supervision at the place where the work was being done.

All iof the above presents an unusual set of factual circumstances resulting from specialized work in a very specialized industry, perhaps, but do the Board's cases in this area address similar circumstances to those present here in a sucessorship accretion analysis? The broad conceptual analysis undertaken by the Board in the various noted cases in this area has been skillfully cited and argued by the parties at length, the more salient portions of those arguments have been presented above. It is clear, however, the Board requires a fact-intensive balancing of the multiple factors presented and involves the weighing of such factors as the extent or frequency of employee transfer or interchange, the common control of labor relations and common day-to-day supervision in addition to other factors as noted above.

When looking to the Board's decisions for guidance in making sense of the various factual circumstances described, it must be kept in mind that, as a result of earlier findings herein, many Board cases cited by the parties addressing accretion issues are not on point or may be distinguished or at least discounted because they involve circumstances inconsistent with my earlier findings or they involve representation cases rather than successorship cases.

The parties have cited many cases dealing with interchange in representation cases where the single-facility presumption is under challenge. Like many of the cases cited by the parties as discussed supra, the cases are not squarely on point but may be noted. The Board in *Kapok Tree Inn*, 232 NLRB 702, 703 (1977), stated its approach in determining appropriate units considering the single-facility presumption of appropriateness in multifacility operations:

> When dealing with a multifacility operation, the well-established Board policy is to find a single-facility unit presumptively appropriate. This presumption can be overcome, however, by a showing of functional integration so substantial as to negate the separate identity of the single-facility unit. In making determinations on this issue, the Board looks to such factors as prior bargaining history, the geographical proximity to other facilities of the same employer, the degree of day-to-day managerial responsibility exercised by the branch facility management, the frequency of employee interchange, and whether the requested single-facility unit constitutes a homogeneous, identifiable, and distinct employee grouping. [*Haag Drug Co.*, 169 NLRB 877 (1968).]

The interchange language quoted is therefore of some value, but again it must be noted that the instant accretion analysis is more restrictive and the evidentiary burden, as noted supra, is great. Nonetheless, the discussion of the sufficiency of transfers in the cited cases, as the Board has stated, is relevant to the separate identity of the smaller unit compared to the larger.

In *Purolator Courier Corp.*, 265 NLRB 659, 661 (1982), the interchange was judged sufficient to undermine the presumption of a single facility's appropriateness where 50 percent of the work force worked within the jurisdiction of other branches on a daily basis and there existed a greater degree of supervision from supervisors at other terminals than from the supervisors at their own terminals. Similarly in *Dayton Transport Corp.*, 270 NLRB 1114 (1984), the Board found the single-facility presumption rebutted where in 1 year there were approximately 400–425 temporary employee interchanges between terminals among a work force of 87 and the temporary employees were directly supervised by the terminal manager from the point of dispatch. In *Cargill, Inc.*, 336 NLRB 1114 (2001), the Board majority did not view 13–14 instances of interchange among 23 employees over an 8-month period as demonstrating substantial interchange sufficient to overcome the single-facility presumption.

The parties cite numerous other cases which involve representation cases, unrepresented facilities and disputed or unclear evidence of transfers or interchange. Given the unusual factual circumstances of the instant case; hiring hall augmentation of unit composition, crane and noncrane mechanic interchange and both short-term and longer-term transfers—all in different combinations at the two sites, it should not be surprising existing Board cases are not squarely in point.

Having considered the quantative analysis in the cases, I must confess I am in agreement with the counsel for the Charging Party who notes in their reply brief at 8: "It is difficult to discern from this welter of cases a single numerical standard." This being so, it is necessary to conclude the analysis of the continued viability of the PMMC mechanic unit under the guidance of the normative cases cited, supra, being aware that there is a great evidentiary burden on the Respondents to establish the PMMC unit is no longer viable. And as noted earlier, the favored perspective for consideration of all the above is the perspective of the employees involved at the workplace and not other more abstract, attenuated perspectives.

As noted supra, the work done by the employees in contest was identical under PMMC and PCMC, although under PCMC the PMMC mechanics did not perform crane M&R but under PCMC a significant portion of the PMMC former complement assisted PCMC crane mechanics at both Maersk's other terminals. Importantly, however, the PCMC and PMMC unit positions differed significantly in transfers to other locations and in working with employees who had been transferred to the Maersk terminal to help handle a heightened workload. Thus, PMMC mechanics worked at a single worksite and were permanently there. There was no history of nor expectation of leaving the worksite as a PMMC employee: in essence there was no where else to go. And noone came to help them—it was just the full timer staff handling the work load as best they could. Under PCMC work was significantly different.

PCMC hired the PMMC mechanics, as it did all its mechanics, explicitly and in writing in the hiring process, as travelers who would work where assigned at local terminals without a home location save as was convenient for the employer. A PMMC mechanic was in essence by title and certain expectation an Oakland Maersk terminal noncrane mechanic. The PMMC mechanic now hired by PCMC was not by title or expectation any longer exclusively a noncrane mechanic nor permanently located at a Maersk terminal. The mechanic might start or even continue uninterrupted on a long-term cycle as a mechanic who had not worked anywhere but at the Maersk terminal. But the mechanic could neither count on that fact nor realistically consider the place of work permanent. Thus, several PMMC mechanics in Tacoma were immediately placed at

the Evergreen terminal upon hire by PCMC. Others were transferred from time-to-time to assist at the Evergreen terminal. PMMC mechanics hired by PCMC in Oakland immediately undertook crane work at the three terminals described, supra, albeit doing crane work of the helper rather than master journeyman variety.

So too PMMC mechanics worked at their trade without the intrusion or assistance of other than permanent fellow employees. PCMC mechanics, including the PMMC hires, worked at the Maersk Oakland and Tacoma terminals with help from temporary mechanics of two types: other PCMC steady mechanics from other locations and ILWU hiring hall or dispatch mechanics. In Tacoma, other PCMC mechanics from Evergreen terminal were sent over when needed. In Oakland, the crane mechanics from three terminals as described supra gave assistance as necessary and a significant number of hall mechanics were dispatched when needed.

Additionally, I note the fact that the PCMC mechanic had independent rights to the use of the dispatch hall for obtaining not just additional shifts with PCMC but mechanic work for any employer requesting such employees through the hiring hall. Once qualifying hours of employment allowed its use under the hiring hall rules, these rights were both potentially of significant worth to PCMC mechanics desirous of additional employment but also emphasized the multiemployer, multifacility aspects of his or her employment. PMMC mechanics had no such expectation or experience.

These factors of work location and identity of fellow workmates are of no small significance to the mechanic employee in perceiving his or her employment. Thus, as a PCMC mechanic one could expect and self-identify as a traveler in a roving multifacility capacity rather than as a static one facility employee as under PMMC. I find these aspects of PMMC and PCMC employment important and find they comprise an additional multi-facility consciousness as applied to the PMMC Tacoma and Oakland Maersk mechanics which support a finding of accretion which must be added to the evaluation of the extent of transfer and interchange as is described supra.

Lastly, in this litany of factors to consider, I find that the "lean staffing model" of PCMC is more than, as the Charging Party argues on brief, "just business as usual." Rather, I find it an important structural adjustment to deal with the highly unusual and rapidly changing staffing requirements at individual marine shipping terminals. The Board does not list successor employer business structural changes as a separate factor to consider in determining accretion in sucessorship cases. However, the Court in *NLRB v. Burns Security Services,* 406 U.S. 272 (1972), recognized the relevance of operational changes between the argued predecessor and successor at 280–281:

> It would be a wholly different case if the Board had determined that because Burns' operational structure and practices differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one. [Footnote omitted.]

In *Banknote Corp. of America,* 84 F.3d 637, 648 (2d Cir. 1996), enfg. 315 NLRB 1041 (1994), cert. denied 519 U.S. 1109 (1997), the circuit court noted:

> [I]f a [successor employer] were to introduce significant evidence that [the predecessor's] units had been rendered obsolete by industry shifts or developments at [the predecessor], and the Board had applied the presumption in favor of long-established units in disregard of this evidence, we would not hesitate to find the application of the presumption irrational.

Thus, I find that the staffing model of PCMC involving a smaller full-time staff of mechanics augmented periodically as necessary by PCMC mechanic transfers between terminals and the use of the short term dispatch request process to provide additional hall mechanic labor in busy times must be viewed as more significant than simply tallying the number of individuals involved, the sum of hours worked or the rate or pattern of the labor force augmentation and rate of the transfers and dispatches themselves.

The PMMC mechanic unit structure of a single group of full-time "steady" mechanic employees undertaking their work with the same size staff in busy moments and in slower times engenders a specific identification and perspective: I help no one off site and no one comes on site to help me. To the contrary, the PCMC unit structure of a smaller group of full-time "steady" mechanics handling the slow times and, when the quantum of work increases, augmenting the staff by the addition of temporary mechanic extra terminal transfers or hiring hall dispatched temporary or dispatch mechanics or reversing the process and the former PMMC employees themselves going off to assist other mechanics at other locations, engenders a completely different perspective. I go to other terminals to help PCMC mechanics and they or hiring hall hands come to my terminal to help me. This difference in perspective and orientation is not simply made manifest in a rate of transfer, but is a change in how the work is viewed. The one work model is much more dynamic than the other. In my view this is not simply a minor variation in similar ways of doing business or simply doing business a bit differently and this fact is particularly true in my judgment from the unit employees' perspective.

While the latter system of very short duration transfer and hiring hall staffing in response to short-term press of work situations may seem exotic or unusual to most, to those who work on the docks of the West Coast where ships are essentially without exception unloaded by longshoremen who are dispatched to a shipper to handle a vessel for but a few days at a time and then return to the hiring hall to await another employment cycle at a different terminal and on a different ship, such a system is very familiar. It would be easily recognized by the former PMMC mechanics for what it is, a rather fundamental change in the employer's choice in business model that has permanent and significant consequences to the unit employees whose loyalties and orientation would shift, in part, from the PMMC model of the single employer who provides all the work the employee does in a single place, to the larger multi-facilities perspective of the multiterminal employer and—to the extent the employee registers for his or her own dispatch employment, to the far wider perspective of the PMA/ILWU Coastwide unit.[42]

[42] Respondent Union adduced testimony from ILWU officials that use of the hiring hall changed employee perspective from that of sole

that—first he told me that I didn't give them advance notice. Then he said that was his orders."

The General Counsel argues that the IAM-PMMC contract in effect during these events provided the IAM's agents such as Hursey access to the unit's workplace. That right was wrongfully limited, argues the General Counsel, first by the February 11, 2005 instruction of Kagey that advance notice of any visit to the jobsite must be obtained and second by Murphy's letter of February 17, 2005, which seemingly limited Hursey's visits to the lunch hour. Further, the General Counsel argues that in addition to the verbal limits, the fact that access was actually denied as described above, clearly invalidates the contract access provision which was in so doing wrongfully unilaterally changed. Since jobsite visitation is a mandatory subject of bargaining, argues the Government, the unilateral change was a violation of Section 8(a)(5) of the Act.

Respondent PMMC argues that the entire series of events was simply a mistake or, in the words of Respondent Employer's brief at 69, "kafuffle." PMMC makes several more specific arguments. First that, at the very most, what is involved in this aspect of the case is a contract dispute respecting the application of the contract visitation language's "no interruption of the firm's working schedule" clause. PMMC argues most strongly, however, that no violation could possibly lie respecting the events in question because—other than on the first occasion on February 11, for which PMMC apologized to Hursey as a "misunderstanding"—there is simply no doubt that Hursey specifically agreed to a request that he call ahead before visiting the site and that he did not do so on March 11. To the extent that the General Counsel claims that the requests of Hursey to limit his visits were improper, PMMC argues first that requests are not demands and, critically, agreement was reached respecting the visiting procedures which were thereafter followed. Accordingly, Respondent Employers argue, no unilateral changes ever occurred.

Considering the positions and arguments of the parties, I conclude as follows. First, I do not accept the General Counsel's argument that PMMC on February 11, 2005, unilaterally established a requirement that the IAM call in advance of an agent visit to the jobsite. The events of that day were apologized for by Murphy and do not on their own support a violation of Section 8(a)(5) of the Act. Respecting the later events, I agree with the Respondents that Hursey's apparent acquiescence to the request that he call the site prior to a visit constitutes a waiver to the access violations alleged. While it may well be that the IAM did not have to agree to advance notice of Hursey's visits, once having agreed to do so as described above, Hursey's exclusion on March 11, 2005, which he did not pursue further, does not rise to the level of a unilateral change in the contract and a violation of Section 8(a)(5) of the Act. Accordingly, I shall dismiss this allegation of the complaint.[43]

[43] This being so, I do not find it necessary to resolve the inconsistent testimony of Hursey and Wolff respecting whether or not Hursey returned to the workplace after March 11.

b. The Oakland bulletin board allegation

The bulletin board events are quite simple and undisputed. On March 10, 2005, at the Oakland Maersk facility, PMMC caused the removal of copies of the IAM's demand to bargain sent to PCMC and related unfair labor practice charges. Heretofore, the IAM had regularly used the space involved for the posting of IAM material with the consistent acquiescence of PMMC.

The General Counsel notes the earlier quoted contract language giving the IAM a right to the posting space it had historically received. Counsel for the General Counsel argues Respondent PMMC's unilateral limitation of contractually established rights constitutes a unilateral restriction and violation of Section 8(a)(5) of the Act citing *ATC/Vancom of California*, 338 NLRB 1166, 1169 (2003), and *Formosa Plastics Corp., Louisiana*, 320 NLRB 631 (1996).

Respondent Employers argument adopts the de minimus argument earlier proffered respecting the access issue above. They argue further that to show a contract provision has been unlawfully modified, more needs be demonstrated than a simple difference of opinion over contract interpretation or application citing *Bath Iron Works*, 345 NLRB 499 (2005), and *NCR Corp.*, 271 NLRB 212 (1984). And such a simple disagreement of interpretation, the Respondents argue, is precisely what occurred here.

Under normal settings and circumstances, the arguments of Respondent Employers would be correct and the allegation properly dismissed as a contract dispute better handled under the contract. Several factors lead me to a different conclusion here, however. First, the contract, indeed the bargaining relationship in PMMC's view at that time had but a few weeks life remaining. The normal cadences of contract dispute resolution are defeated in such a situation. Second, the categorical rejection by Respondent PMMC of any IAM posting relevant to the near future employment and representation of the PMMC bargaining unit employees by PCMC, took place at a time when PMMC had not disclosed its single-employer status with PCMC and when representational rights and obligations were not definitively established. Essentially, Respondent PMMC's course of conduct here rises to the level of a plan to further the single-employer's plan that the ILWU represent the unit on and after March 31, 2005. Thus, PMMC took steps to limit as much as possible actions by the IAM which might be disruptive of ILWU representation. And PMMC's conduct occurred while ILWU activities were being allowed at the PMMC worksite. When the consideration of the alleged wrongful conduct is informed by the motive revealed and consideration of the entire context of events, I do not view the denial of posting rights to be a matter of contract interpretation, but rather a repudiation or at least change in the terms of the agreement as alleged by the General Counsel. Therefore, I find that, in so doing, Respondent PMMC violated Section 8(a)(5) and (1) of the Act as alleged in the complaint. Accordingly, I sustain the allegation.

5. The allegations against Respondent ILWU

The complaints allege Respondent ILWU, in accepting improper recognition from PCMC as the representative of the mechanics unit employees at a time the IAM-represented the

former PMMC unit, and in enforcing the union-security clause of the coastwide ILWU contract as to these employees, violated Section 8(b)(1)(A) and (2) of the Act. The theory of a violation is predicated on the Government's contention, the basis for other allegations in the consolidated case, that the IAM at material times remained the representative of the former PMMC unit employees.

I have found above that the IAM did not represent any of PCMC's mechanic employees in Tacoma and Oakland. Based on the same facts and analysis supporting those findings, I also made the further finding, supra, that the employees at issue accreted into the PMA/ILWU Coastwide bargaining unit and were at all times material covered by the PMA/ILWU Coastwide contract and its union-security provisions.

Given these findings and conclusions, I further find that the recognition of the ILWU was proper and that accordingly the ILWU did not violate the Act as alleged in the complaints in either accepting recognition or in applying the contract to the employees in question. Accordingly, those complaint allegations shall be dismissed.

6. Additional allegations

The General Counsel's complaint contains allegations regarding successors to PCMC in order to maintain legal continuity to the current time of any bargaining obligation that might be directed to PCMC to recognize and bargain with the IAM concerning a unit of its Tacoma and Oakland Maersk based mechanics. I have found no obligation by PMMC to recognize or bargain with the IAM as the representative of these employees. It is therefore unnecessary to address the continuity allegations regarding such a bargaining obligation.

7. Summary and conclusions

As set forth in detail above, I have considered the various complaint allegations of the General Counsel's consolidated complaints. The complaint allegations may be roughly categorized as follows.

The General Counsel contended that PMMC violated Section 8(a)(1) and (5) of the Act in various particulars respecting its bargaining relationship with the Machinists concerning a unit of M&R mechanics in Tacoma and Oakland and its withdrawal of recognition of the Machinists as the representative of that unit. I have found that Respondent Employers did not violate the Act as alleged in these particulars and I have dismissed these allegations of the complaint save for the two access allegations which are discussed immediately below

The General Counsel contended in two separate complaint allegations that in the final month of its employment of its M&R mechanics in Tacoma and Oakland, PMMC improperly restricted contractually-provided Machinist Union agent access to the jobsites and limited the unit employees' contractual rights to use a bulletin board on site for union business. This conduct was alleged by the Government to have been done without bargaining with the Machinists or obtaining their consent and therefore violates Section 8(a)(1) and (5) of the Act. I dismissed one of these allegations concerning union agent access and sustained the other concerning bulletin board access. The one nonmeritorious allegation shall be dismissed. The remaining allegation is sustained.

The General Counsel contended that PCMC, Respondent Employers and their successors violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize the Machinists as the representative of a unit of M&R mechanics in Tacoma and Oakland and by making changes in that units terms and conditions of employment without bargaining with the Machinists or obtaining their permission to do so. Further the complaint alleges Respondent Employers violated Section 8(a)(1), (2), and (5) of the Act by recognizing the ILWU as the representative of this group of employees through wrongful inclusion in a larger ILWU-represented bargaining unit and applying the existing contract covering that larger unit to these employees, including the union-security provisions of that contract.

I found above that Respondent PCMC, and through it Respondent Employers and the successors to those parties, did not at any time have a bargaining obligation with the Machinists respecting the unit described. Rather, I found that the unit had been accreted into the larger ILWU Coastwide unit and that Respondent PCMC, and through it Respondent Employers and the successors to those parties, properly recognized the ILWU as the employees' representative as part of the coastwide unit covered by the PMA/ILWU Coastwide contract and properly applied the unit-security provisions of that contract to the employees. I therefore dismissed these allegations of the complaint.

The General Counsel alleged that the ILWU, in accepting recognition from PCMC as the representative of the mechanics unit employees at a time the IAM represented the former PMMC unit and in enforcing the union-security clause of the coastwide ILWU contract as to these employees violated Section 8(b)(1)(A) and (2) of the Act. Consistent with my findings respecting Respondent PCMC immediately above, I have found PCMC properly recognized the ILWU as the employees' representative as part of the coastwide unit covered by the PMA/ILWU Coastwide contract and properly applied the unit security provisions of that contract to the employees. Symmetrically, I further found it was appropriate for the ILWU to accept PCMC's recognition of it as representative of these employees as part of the larger unit and to apply the union-security provisions of the contract covering that unit to these employees. I therefore dismissed these allegations of the complaint.

CONCLUSIONS OF LAW

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. Respondent Employers, and each of them, have been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party and Respondent ILWU are, and each of them is, and have been at all relevant times, labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent PMMC violated Section 8(a)(1) and (5) of the Act by removing copies of IAM material posted on a contractually-provided bulletin board at the worksite at the Maersk terminal at the port of Oakland in Oakland, California, which board had been provided to the IAM for the Union's display of information for represented employees without bargaining with

the Machinists concerning the removal or obtaining their permission to do so.

4. The unfair labor practice described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

5. The Respondents did not otherwise violate the Act as alleged in the complaints and all complaint allegations not sustained shall be dismissed.

REMEDY

Having found that the Respondent PMMC violated the Act as set forth above, I shall order that it cease and desist there from. Normally, a Board remedy for violations of the Act provides for the posting of a remedial notice at the workplace where the violation occurred. In the instant case, Respondent PMMC no longer represents employees at the Tacoma and Oakland locations involved and the employees employed there are represented by a separate labor organization. In such circumstances, it is appropriate to have Respondent PMMC mail copies of the notice to the last known address of the unit employees employed at the time of the violation.

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended[44]

ORDER

The Respondent PMMC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Removing copies of IAM material posted on a contractually provided bulletin board at the Oakland, California worksite at the Maersk terminal at the port of Oakland for the information of IAM-represented employees without bargaining with the Machinists concerning the removal or obtaining their permission to do so.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, Respondent PMMC shall post copies of the attached notice marked "Appendix."[45] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents has gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent PMMC at the Maersk terminal facilities at the ports of Oakland and Tacoma at the time of PMMC's discontinuance of work at those sites at any time since March 30, 2005.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

The allegations of the complaint not sustained herein shall be and they are dismissed.

Dated, Washington, D.C. February 12, 2009

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to mail this notice to our former employees who were represented by the International Association of Machinists during their employment with PMMC at the Maersk terminals in the ports of Oakland and Tacoma until PMMC ceased operations at those locations in March 2005.

Accordingly, we give our former employees the following assurances.

WE WILL NOT remove materials from any union bulletin board at the jobsite provided to the International Association of Machinists under the terms of a collective-bargaining agreement with us at a time when they represented a unit of our employees without bargaining with the Union concerning the removal of the material or obtaining the Union's permission to do so.

WE WILL NOT in any like or related manner restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

PMMC/PACIFIC MARINE MAINTENANCE CO., INC.

[44] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

[45] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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SAN FRANCISCO, CALIFORNIA 94109
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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years old and not a party to the within action; my business address is 1188 Franklin Street, Suite 201, San Francisco, CA, 94109. On **September 22, 2015**, I served a true and accurate copy of the foregoing document(s):

PETITION FOR REVIEW OF NLRB DECISION AND ORDER (WITH ATTACHED NLRB DECISION AND ORDER)

on all interested parties in this action as follows:

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///
///

☑ **BY MAIL**: I enclosed the document(s) above in a sealed envelope or package addressed to the persons at the addresses above. Following ordinary business practices, the envelope was sealed with postage fully prepaid and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date at San Francisco, CA.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **September 22, 2015** at San Francisco, California.

Nicole Bridges

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years old and not a party to the within action; my business address is 1188 Franklin Street, Suite 201, San Francisco, CA, 94109. On **September 23, 2015**, I served a true and accurate copy of the foregoing document(s):

PETITION FOR REVIEW OF DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

on all interested parties in this action as follows:

Linda Dreeben
Deputy Associate General Counsel of the
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Counsel for NLRB

☑ **BY E-MAIL**: I caused the documents to be sent to the person at the electronic notification address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☑ **BY PERSONAL SERVICE:** I caused the documents to be personally served by First Legal Network Solutions, by uploading the document(s) to their First Connect system (http://www.firstlegalnetwork.com/first-connect/).

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **September 23, 2015** at San Francisco, California.

Nicole Bridges