

PHMc
Oakland, CA and
Tacoma, WA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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
WAREHOUSE 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
32-CA-021974
(formerly 19-CA-029645)
32-CA-021977
(formerly 19-CA-029692)
32-CA-023613

Case 32-CB-005932

ORDER DENYING MOTIONS¹

On July 15, 2015, Respondents Pacific Crane Maintenance Company, L.P. and Pacific Marine Maintenance Company, LLC (collectively, the Respondent Employer) filed motions to reopen the record and for reconsideration of the Board's Decision and Order reported at 362 NLRB No. 120 (2015). Those motions are denied.² The Respondent Employer has not identified any material error or demonstrated extraordinary circumstances warranting reconsideration or reopening of the record under Section 102.48(d)(1) of the Board's Rules and Regulations.

We reject the Respondent Employer's argument that the bargaining order is "untenable" because more than 10 years have passed since it unlawfully withdrew recognition from Machinists, and because there has assertedly been significant employee and managerial turnover during that time period. In arguing that the passage of time and asserted turnover in this case justify withholding a bargaining order, the Respondent Employer relies exclusively on cases applying *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In *Gissel*, the Supreme Court approved the Board's use of an order requiring an employer to bargain with a previously uncertified and unrecognized union to remedy unfair labor practices

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. Member Miscimarra is recused and took no part in the consideration of this case.

² On January 26, 2016, Charging Party International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 190, Local Lodge 1546, and District Lodge 160 ("Machinists") filed a motion to the Board requesting expedited action on the Respondent Employer's motions. In light of this Order, the Machinists' motion to expedite is moot.

where the employer's unlawful conduct would reasonably have undermined majority strength and impeded a free and fair election. In such cases, the Board has sometimes considered employee and managerial turnover and the passage of time in determining whether such a bargaining order is appropriate. See, e.g., *Audubon Regional Medical Center*, 331 NLRB 374, 377-78 (2000); *Research Federal Credit Union*, 327 NLRB 1051 (1999).

Unlike in the *Gissel* context, the Respondent here violated the Act by withdrawing recognition from an incumbent union. That is, here, the bargaining order directly remedies the Respondent Employer's refusal to comply with its statutory obligation to bargain. The Board, with court approval, has found that a bargaining order is an appropriate remedy for an unlawful withdrawal of recognition or a refusal to bargain with a certified union despite a significant passage of time and/or significant employee or managerial turnover between the unlawful act and the Board's issuance of the order. See *Brusco Tug & Barge*, 362 NLRB No. 115, slip op. at 2 fn. 5 (2015) (citing cases); *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002); *NLRB v. Creative Food Design Ltd.*, 852 F.2d 1295, 1299-1303 (D.C. Cir. 1988) (distinguishing withdrawal-of-recognition situations from *Gissel* situations). And, indeed, the Board has expressly justified the affirmative bargaining order that it issued in this proceeding. See 362 NLRB No. 120, slip op. at 3-4.

Additionally, we reject the Respondent Employer's argument that it is entitled to prove that, after the hearing in this case was closed, it made additional changes to terms and conditions of employment that further integrated the unit

employees into another bargaining unit represented by the International Longshore and Warehouse Union (the Respondent Union, ILWU). As explained in the underlying Decision and Order, we do not consider unlawful, unilateral changes made by the Respondent Employer 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.

359 NLRB No. 136, slip op. at 6, incorporated by 362 NLRB No. 120. See also *Naperville Jeep/Dodge*, 357 NLRB 2252, 2253 (2012) (“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.”) (footnote omitted), *enfd.* 796 F.3d 31, 40 (D.C. Cir. 2015); *Comar, Inc.*, 349 NLRB 342, 357–358 (2007) (same); *Holly Farms Corp.*, 311 NLRB 273, 279 (1993) (same), *enfd.* 48 F.3d 1360 (4th Cir. 1995).

Contrary to the Respondent Employer’s argument, *Northland Hub, Inc.*, 304 NLRB 665 (1991), *enfd.* mem. 29 F.3d 633 (9th Cir. 1994), does not require reopening of the record. In that case, the employer violated the Act by withdrawing recognition from the Teamsters after relocating its Teamsters-represented employees from one facility to another facility where employees were represented by another union. In a footnote, the Board found that a

prospective order to bargain with the Teamsters was inappropriate because the record contained evidence that the employer ultimately integrated its operations. *Id.* at 665 fn. 1. In that case, however, the changes that led to the integration were not found by the Board to be unlawful.³ In contrast, nearly all of the changes that the Respondent Employer cites in its motion as establishing integration are a continuation of, or an effect of, its unlawful and unremedied unilateral changes in the unit employees' terms and conditions of employment.⁴ As explained in our underlying decision, as well as in *Naperville Jeep/Dodge, Comar*, and *Holly Farms*, the Board will not consider the effects of unlawful, unilateral changes in determining whether an established bargaining unit retains

³ Even if the Board in *Northland Hub* had relied on the effects of unlawful, unilateral changes in finding that the employer fully integrated its operations and therefore a prospective bargaining order was inappropriate, we would conclude that the decision was inconsistent with well-established precedent and would not find it persuasive.

⁴ See Motion at pp. 11-12 (asserting that “former PPMC employees and other Pacific Crane employees interchange responsibilities and duties”; that “[w]hile PPMC employees [formerly] worked at a single terminal, today those former PPMC employees . . . are distributed across several different terminals, where they work interchangeably with” other Pacific Crane employees; and that former PPMC employees and other Pacific Crane employees are subject to the same job code and safety standards, receive common health and welfare benefits, are paid comparable hourly rates, and are vested in the ILWU pension fund). See also 359 NLRB No. 136, slip op. at 7-8 (holding that the Respondent Employer violated Sec. 8(a)(5) and (1) of the Act by, among other things, unilaterally assigning unit employees to nonunit positions and nonunit locations, assigning nonunit employees to perform unit work, altering the unit employees' terms and conditions of employment, and applying the terms and conditions of the PMA-ILWU Agreement to the unit employees).

its distinct identity; giving weight to such changes would reward the employer for its unlawful conduct.⁵

IT IS ORDERED, therefore, that the Respondent Employer's motions to reopen the record and for reconsideration are denied.

Dated, Washington, D.C. March 1, 2016.

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

⁵ Given the passage of time since the events that gave rise to this case, the Respondent Employer and the Respondent Union may, in compliance proceedings, present evidence showing that particular remedial provisions are no longer appropriate, insofar as the issues they seek to raise have not already been addressed in this order.