

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 150, AFL-CIO,  
Charged Party

and

JACK GRAY TRANSPORT, INC. D/B/A LAKES  
& RIVERS TRANSFER,  
Charging Party

and

INTERNATIONAL LONGSHOREMEN'S  
ASSOCIATION, LOCAL 1969,  
Party-in-Interest

Case No. 25-CD-178156

POST-HEARING BRIEF OF PARTY-IN-INTEREST  
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1969

This case concerns the assignment of work on a single piece of machinery, a hydraulic material handler, used by Jack Gray Transport at the Port of Indiana, Burns Harbor, to load and unload cargo from maritime vessels. Jack Gray Transport should be required to assign this work to the International Longshoremen's Association, Local 1969 because the contractual language, agreements between the unions, and past practice; the skills, economy, and efficiency of operations; and loss of employment if Local 1969 were not awarded the work, amongst other factors, all weigh heavily in favor of awarding the work to Local 1969.

Specifically, the work at issue is covered by Local 1969's contract with Jack Gray, and, consistent with Local 1969's historical jurisdiction, Local 1969 operates every piece of machinery at this location except for the "Manitowoc lattice-boom crawler crane on tracks." The only reason that Local 150 operates the Manitowoc is because the parties agreed that Local 150

would operate these cranes over thirty years ago. This agreement not only applies to Jack Gray, but also with all Local 1969-signatory employers at the Port of Indiana.

In addition to the collective bargaining agreement and historical division of jurisdiction support awarding the work to Local 1969, the members of Local 1969 possess the requisite skills to operate the material handlers. Local 1969 members are trained by operators with at least 20-years' experience and, for the past twenty years, they have operated the same machinery for another employer at the Port of Indiana.

Further, the loss of employment if the work were to be awarded to Local 150 would be a far greater blow to Local 1969 than to Local 150. Local 1969 is a small local whose members work almost exclusively for five employers at the Port of Indiana, while Local 150 has 23,000-plus members working in a dozen industries across three states—Local 150 would not feel any impact if not awarded the work.

Based on all of these and other factors, the Board should award the operation of the hydraulic material handler to the longshoremen represented by ILA Local 1969.

### FACTS

The International Longshoremen's Association ("ILA"), Local 1969 ("Local 1969") represents longshoremen working for the five "stevedore" companies (i.e. companies engaged in loading and unloading cargo from ships) working on the waterfront at the Port of Indiana. (Tr. 18, 153-54) The stevedore companies include Jack Gray Transport, Inc., d/b/a Lakes and Rivers Transfer ("Jack Gray"), Federal Marine Terminals, Tanco, Rogers Green, and NLMK. (Tr. 153). Local 1969 has one collective bargaining agreement ("CBA") with all five employers. (ILA Ex. 5)

In accordance with the CBA, Local 1969 bargaining unit work covers the operation of various waterfront equipment including ship cranes, front-end loaders, conveyors, screeners, Bobcats, payloaders, and forklifts. (Tr. 156) In addition to operating these machines, Local 1969 work also includes all day-to-day maintenance of these machines. (Tr. 50, 157) The ship's cranes, conveyors, and payloaders are used to load or unload cargo from ships and barges. (Tr. 156-57) Indeed, Local 1969 operates and maintains all equipment used to load and unload cargo from ships with one exception—the Manitowoc, which is operated by members of the International Union of Operating Engineers Local 150.

The International Union of Operating Engineers, Local 150 (“Local 150”) is a 23,500 member local, with 4,000 members in Merrillville, Indiana alone. (Tr. 106) Local 150 members work in “a slew of different industries” ranging from “steel mill services, building and construction,” including road, building, highway, bridge, and tunnel construction, to “the drilling and testing industry, the wind tower industry,” stevedoring, and others. (Tr. 69, 106-07) At Jack Gray, pursuant to an agreement between Local 1969 and Local 150, Local 150 members operate and maintain a single piece of machinery: the Manitowoc lattice-boom crawler crane on track (“Manitowoc”). (Tr. 50-1, 158, 197)

Local 1969 was chartered around the time that the Port of Indiana opened in 1972. (Tr. 212) In the beginning, it did not have any members qualified to operate the Manitowoc (Tr. 212). As a result, Local 1969 and Local 150 entered into an oral agreement by which Local 150 would operate the Manitowocs and provide the corresponding maintenance work on the equipment. (Tr. 208, 210, 212-13) Since that time, the parties have respected this agreement and Local 1969 members have operated every piece of machinery used to load and unload cargo at the Port of Indiana except the Manitowoc. (Tr. 158, 197, 212-214) Indeed, even when Local

1969 was approached in the 1990s by Federal Marine Terminals and asked to operate the Manitowocs at the Port, Ray Sierra, now an International Vice President of the ILA, refused to accept the work based on the agreement with Local 150. (Tr. 213-14) To this day and pursuant to that agreement, Local 150 operates the Manitowocs for Federal Marine Terminals, and Local 1969 operates everything else. (Tr. 158, 197, 214) Despite the Manitowoc being the one exception to Local 1969's work, Local 150 is now attempting to force Jack Gray to use its members to operate a new piece of equipment—a material handler—obtained by Jack Gray in early 2016.

The material handler (“Material Handler”) at issue in this case is not a crane, it is a hydraulic material handler that is “an evolution of a hydraulic excavator” (Tr. 28; ILA Ex. 2) (photograph of the Material Handler at Jack Gray). It is used in stevedore operations to unload barges, but cannot unload other larger vessels, including large cargo ships (Tr. 19). It is also utilized in the yards or warehouses adjacent to the docks. (Tr. 28) The Material Handler has an articulated, hydraulic arm with a grab bucket on the end. (ILA Ex. 2; Tr. 28-29) By contrast, the Manitowoc is a friction crane (Tr. 29). *Compare* <http://www.merriam-webster.com/dictionary/hydraulic>, last visited on 7/15/2016 (Defining ‘hydraulic’ as “operated by the pressure of a fluid”) *and* <http://www.merriam-webster.com/dictionary/excavate> (Defining ‘excavate’ as “to uncover [] by digging away and removing the earth that covers it”) *with* <http://www.merriam-webster.com/dictionary/friction>, last visited on 7/15/2016 (Defining ‘friction’ as “the act of rubbing one thing against another”) *and* <http://www.merriam-webster.com/dictionary/friction%20drive>, last visited on 7/15/2016 (Defining ‘friction drive’ as “a power transmission system that transmits motion by surface friction instead of teeth.”) A

Manitowoc has a tall lattice-boom that extends high into the air, with hoist cables dropping down to attach to a grab bucket. (ILA Ex. 1) (photograph of a Manitowoc crane at Jack Gray)

In or about December 2015, prior to the arrival of the Material Handler, Jack Gray approached Local 1969 to discuss assigning the work to its members. (Tr. 159-160, 161, 189) During those meetings, Bryan Ryberg, a consultant hired to manage Jack Gray's operations, noted that the cost to the employer for using Local 1969 members was less than that of Local 150 members, both in wages and in benefit contributions. (Tr. 12-13, 189) Furthermore, Ryberg explained to Local 1969 that he was satisfied with Local 1969's ability to safely operate the Material Handler after observing Local 1969 members operate a hydraulic material handler for NLMK, one of the other Port employers signatory to the CBA. (Tr. 55, 160-61, 189)

Jack Gray acquired the Material Handler in January, 2016. (Tr. 159). Ryberg assigned Larry Lehman, a Local 1969 mechanic, to repair the machine so that it could pass an inspection. (Tr. 52-53, 140, 142) Lehman performed the necessary work including changing the configuration of hoses that had been installed backwards and replacing two broken bolts on the bucket arm. (Tr. 142) On February 23, 2016, Ryberg had Lehman operate the Material Handler in the presence of the inspector. (Tr. 143, 144-45). As a result of Lehman's work, the Material Handler passed inspection. (ILA Ex. 4).

In April of 2016, a member of Local 150 moved the Material Handler from one part of the dock to another. (Tr. 36; ILA Ex. 7). Local 1969 filed a grievance because the operation and maintenance of all machines other than the Manitowoc should be assigned to Local 1969 members. (Tr. 41, 162-63; ILA Ex. 7). During the grievance process, Local 150, through its business representative Jeff Valles, threatened to picket or strike if the Material Handler work was not assigned to its members. (Er. Ex. A). Jack Gray then refused to continue with Local

1969's contractual grievance procedure. (Tr. 162-63) Jack Gray also filed an unfair labor practice charge resulting in this jurisdictional dispute, alleging that Local 150's threats violated Section 8(b)(4)(D) of the Act.

### **ARGUMENT**

The Act grants the Board the power to hear and decide jurisdictional disputes between unions following an unfair labor practice charge under Section 8(b)(4)(D). 29 U.S.C. § 160(k). Section 8 makes it unlawful for a union to force or attempt to force an employer into granting work to its workers rather than to those in another union. 29 U.S.C. § 158(b)(4)(D). The Act and legislative history do not, however, contain any standards for resolving such disputes. *J.A. Jones Contr. Co.*, 135 NLRB 1402 (1962). Instead, the Board considers all relevant factors to determine who is entitled to the work. *Id.* at 1410. These factors include, but are not limited to: prior certifications by the Board; agreements between the unions and employers as well as agreements between the unions disputing the work; the preferences of the employer, including as evidenced by the past and current practice; the industry and area practice; the skills of the workers involved; and economy and efficiency of the employer's operation. *Id.* at 1410-11. The Board has also considered relative sizes of the locals seeking the work and the industries in which they typically work in an attempt to determine who would gain or lose the most by an award. *Albin Stevedore*, 182 NLRB 633, 637 (1970); accord: *Sea-Land Service*, 188 NLRB 241, 243 (1971).

**I. The parties' respective CBAs and the agreement between Local 1969 and Local 150 require an award of the Material Handler work to Local 1969.**

In determining a jurisdictional dispute, the Board will consider agreements between each union and the employer, as well as agreements between the unions claiming the work. *J.A. Jones*

*Contr. Co.*, above at 1410; accord: *Reicher Bldg. Co.*, 223 NLRB 1014, 1015-16 (1976) (work awarded to laborers where jurisdictional clause included disputed work and where laborers and carpenters had agreed to give such work to laborers by 1949 agreement). In this case, the Local 1969 CBA with the Port of Indiana employers covers the Material Handler work, while the Local 150 contract does not. Moreover, Local 150's claim to the work is predicated on an agreement between the two unions to give the Manitowoc work to Local 150—an agreement that is an exception to the rule that Local 1969 operates all machinery on the waterfront. The only contractual support for Local 150 is the contract it forced Jack Gray to negotiate after it unlawfully threatened to strike if not awarded the work.

A. The Collective Bargaining Agreement between Local 1969 and Jack Gray covers the Material Handler.

Local 1969 has a CBA with the Port of Indiana employers, which includes Jack Gray.

The current CBA defines the bargaining unit as including:

employees of the Company and/or Employer in stevedore, transit sheds, warehouses and yard operations such as Longshoremen, Warehousemen, Yard-workers, Light Power Equipment Operators, Checkers, Signal-men, Winch-men, Coopers, Light Pay-loader Operators, Gearmen, Hatch Bosses, Mechanics, Apprentice Crane men, Crane Operators, Scrap-Crane Operator, Bulldozer Operators, Track-Mobile Operators, Walking Bosses, Heavy Pay-loader Operators, Conveyor Maintenance Operators, Container Machine Operators, Carpenters, Welders, Dispatcher, Ship Crane Operator, Linesmen, Tank Farm Operator, Hopper Operator, Hose men, Light and Heavy fork-lift Operators, Drivers, and Shuttle Truck Drivers (CDL) ... who are employed by the Employer to work on wharves, bulkheads; quays, piers, docks and other berthing locations and adjacent storage or contiguous areas and structures associated with the primary movements of cargo or commodities from vessel to dock or dock to vessel, also including structures which are devoted to receiving, handling, holding, consolidation and loading or delivery of waterborne and other shipments, ... including areas devoted to the maintenance of the terminal or equipment, and all work now being performed, and all work that has been historically and traditionally performed by the members of ILA Local 1969.

(ILA Ex. 5 at \*2)

In the most general sense, the CBA covers “employees ... in stevedore ... operations such as Longshoremen.” *Ibid.* Stevedoring is the loading/unloading of vessels in the maritime trade; stevedoring is the only work performed by members of Local 1969. (Tr. 18, 153-54) Because the Material Handler is being used to load and unload vessels, it is necessarily covered by the Local 1969 CBA. *Albin Stevedore*, above at 636 (“The disputed work is in the broadest sense longshore work as it involves the loading and discharging of cargo from vessels.”)

Moreover, Local 1969 members operate a nearly identical material handler for another employer, NLMK, under the same CBA. (Tr. 163-65, 170-71; ILA Exs. 5, 8). Those employees are paid at the “Mobile Track Operator” classification, although NLMK’s material handler is on tires, not tracks. (ILA Exs. 5, 8; Tr. 163-65, 170-71) The Material Handler at Jack Gray, however, *is* on tracks, and so even more plainly falls into Track Mobile classification contained in the CBA. (ILA Ex. 2).

Additionally, the CBA specifically refers to “all work that has been historically and traditionally performed by the members of ILA Local 1969.” (ILA Ex. 5, above). In other major commercial ports across North America, including in Canada and the Caribbean, the “all work” language includes *everything* on the docks, which includes Material Handler-type equipment. (Tr. 219)

B. The Collective Bargaining Agreement between Local 150 and Jack Gray in effect at the time this dispute arose covers only Manitowoc cranes.

Local 150 has a collective bargaining agreement with Jack Gray that covers only crane work, which in this case is limited to the Manitowoc. The agreement in effect at the time this dispute arose covers:

[T]he loading and unloading of ships, barges and vessels and all other crane work when such equipment is used on docks, piers, and in harbor areas handling cargo within the geographical jurisdiction of the Union and the operation and repair of

all cranes and derricks and machines of a like nature regardless of motive power or type of mobility shall come within the occupational jurisdiction of the Union.

(ILA Ex. 3 at \*3)

This language covers “the loading and unloading of ships, barges and vessels” only for cranes. (ILA Ex. 3, above). The loading language is modified by the phrase “all other crane work” and it includes “the repair of all cranes and derricks.” *Ibid.* Nonetheless, Local 150 does not operate, as the above language might suggest, *any and all* cranes. Local 150 admitted that it does not have jurisdiction over all cranes (Tr. 111). In fact, members of Local 1969 operate the shipboard cranes. (Tr. 25, 111, 156-57, 189-90; ILA Ex. 9) (photograph of a ship’s crane at Jack Gray). Local 150 operates Manitowocs for Jack Gray Transport and Federal Marine only, and no other machinery for any other stevedores. (Tr. 158, 197) While Local 150’s contract speaks of cranes only, in context, this means solely the Manitowoc. (Tr. 111, 158, 197)

There is no evidence that the Material Handler is a “crane.” Local 150 admitted that a material handler is not the same as a friction crane, such as the Manitowoc. (Tr. 29, 91) The Material Handler was repeatedly referred to as an “excavator.” (Tr. 28, 125, 128) Indeed, unlike the Manitowoc, the Material Handler cannot load/unload cargo from ships, only from barges. (Tr. 19, 25) One look at the machines side-by-side reveals why: Manitowocs have very long lattice-booms with hoist cables extending back down to the ground, while the Material Handler, evolved from an excavator, is a short machine with a rather short hydraulic arm, and has no hoist cables at all. *Compare* ILA Ex. 1 (photograph of a Manitowoc crane on Jack Gray’s dock) *with* ILA Ex. 2 (photograph of the Material Handler at Jack Gray). Because the Material Handler better fits the general category of machinery used to load and unload cargo from ships rather than a crane, it should be considered Local 1969’s work.

C. The “new” collective bargaining agreement between Local 150 and Jack Gray negotiated after the charge was filed amounts to a self-serving attempt to create support for Local 150’s position in this case.

Local 150’s reliance at the hearing in this matter on a “new” contract that it argues now covers the Material Handler work is nothing more than proof that Local 150’s unlawful threat to strike had the desired effect. Rather than rely on the contract in effect at the time the dispute arose to support its position, Local 150 relies on its new contract—with an effective date of June 1, 2016—that was finalized on or about June 27, 2016 while this charge was pending and *mere days before the hearing was held*. (Tr. 1, 96-97, 98-99, 108; 150 Ex. 1 at \*1, 2). Both the effective date and finalization date of the collective bargaining agreement post-date Local 150’s strike threat letter dated May 12, 2016. (Tr. 96; Er. Ex. A). The Board has held these after-the-fact contracts have no bearing on this dispute and should be given no weight whatsoever. *See Brady-Hamilton Stevedore Co.*, 223 NLRB 1034, 1037 (1976), reconsideration granted and decision rescinded on other grounds 244 NLRB 275 (1979) (“[S]ince the contractual requirement that the work be performed by longshoreman came into existence only after the dispute arose, it could not support a claim for that work made before that [arbitration] award.”). Therefore the new contract fails to support Local 150’s claim for the work.

Moreover, the changes in the jurisdictional language in Local 150’s new contract demonstrate that the work was *not* covered under the contract in effect when the dispute arose. If the Material Handler work was previously covered by the Local 150 contract, no change to the language would have been required. In fact, the language has been broadened to the point that it has lost all meaning. The language now reads:

[T]he loading and unloading of ships, barges, vessels, railcars and all other work when such equipment is used on docks, piers, and in harbor areas handling cargo

within employer boundaries and the geographical jurisdiction of the Union and the operation and repair of all machines of a like nature...

(150 Ex. 1 at \*3).

The first notable difference is the deletion of the word “crane” from the phrase “and all other crane work,” present in the old agreement. (ILA Ex. 3, 150 Ex. 1). This leads to a problem when, later in the sentence, the phrase “when such equipment is used” appears. Because “crane” has been deleted from “crane work”, the phrase “such equipment” *no longer refers to any equipment*. Similarly, and contrary to the testimony of Local 150’s business representative and contract negotiator, the deletion of the words “cranes and derricks” from the provision does not *clarify* the phrase “machines of a like nature.” (Tr. 100-101) The phrase “of a like nature” was in fact referring to “cranes and derricks,” thus the deletion cannot possibly clarify the meaning of the provision. Instead, these modifications are a naked attempt to broaden its jurisdiction and support an argument for stealing the work from Local 1969.

D. For three decades Local 1969 and Local 150 have abided by an agreement that Local 150 will operate Manitowocs and Local 1969 will operate every other machine at Jack Gray.

The historical division of labor in which Local 150 operates machinery on the dock alongside Local 1969 longshoremen is an exception to the general rule that longshoremen do the loading and unloading of cargo from vessels in the Port of Indiana (Tr. 219). The oral agreement between Local 1969 and Local 150 that allows Local 150 to operate and maintain the Manitowoc is the only reason that Local 150 is operating any machinery to load and unload cargo. (Tr. 208, 210, 212-13) Local 1969 has respected that agreement since the early 1980s, despite the work that Local 1969 might have gained from abandoning the agreement like Local 150 is trying to do now. (Tr. 213-214) Local 150’s attempt to expand its jurisdiction to other machines at Jack Gray directly violates that agreement.

The Board should award the disputed work to Local 1969 in accordance with the agreement between Local 1969 and Local 150 and because the CBA between Local 1969 and Jack Gray covers the operation of the Material Handler while Local 150's contract applies only to cranes. *Reicher Bldg. Co.*, 223 NLRB 1015-16.

**II. Jack Gray's preference and practice favor an award to Local 1969; Jack Gray only changed its preference and assignment as a result of Local 150's unlawful threats of work stoppages**

The Board considers the employer's stated preference to be a significant factor, but only when that preference is "representative of a free and unencumbered choice." *J.A. Jones Constr.*, 135 NLRB at 1411; accord: *Brady-Hamilton Stevedore*, above at 1037. Other relevant factors related to the employer's preference include an employer's past practice and current assignment. *J.A. Jones Constr.*, 135 NLRB at 1410-11. In this case, the preference stated by Jack Gray at the hearing was not the free and unencumbered choice required by the Board. However, Jack Gray's actions prior to Local 150's unlawful threat to strike reveals Jack Gray's true preference.

A. Jack Gray preferred to have Local 1969 members operate the Material Handler until Local 150 threatened it with an unlawful strike.

Prior to Local 150's threat to strike, Jack Gray openly expressed its desire to have Local 1969 members operate the Material Handler. (Tr. 159-160, 161, 189) This preference was based in part on the parties' CBA and on the fact that it is more economical for Jack Gray, both in wages and in benefit contributions, to have Local 1969 operators operate the Material Handler, as opposed to those from Local 150. (Tr. 21-22, 160, 189) Indeed, as discussed below, Jack Gray's actions spoke as loud as its words. Jack Gray utilized Local 1969 members to service and operate the Material Handler with respect to the inspection process. Local 1969's operation of the machine would have continued had Local 150 not unlawfully threatened to strike if it was not awarded the work.

Any argument that Jack Gray prefers that Local 150 members operate the Material Handler does nothing more than confirm that Local 150's unlawful threat impacted Jack Gray's preference. Despite Jack Gray's stated preference to Local 1969 that its members operate the Material Handler, Bryan Ryberg testified at the hearing that Jack Gray now prefers to use Local 150 operators. However, Ryberg further explained this preference was based on the employer's desire to avoid the economic impact of a strike. (Tr. 16, 23, 58) (Ryberg testified "the preference would be 150 to operate the machinery to avoid a strike"). He explained that his customers use union pilots to operate their ships and barges and if those pilots refuse to cross a picket line then they "couldn't deliver me material and I am out of business. So is this a serious letter to me as an operator? Absolutely it is." (Tr. 23-24) In fact, this was the only specific reason that Jack Gray offered to support its preference that Local 150 perform the work.

The Board has made clear, a preference that results from unlawful coercion such as this is not a free and voluntary act and must be weighted accordingly. *Brady-Hamilton Stevedore*, above at 1037 (As the Board explained in *Brady-Hamilton Stevedore*:

"Notwithstanding that the Employers now profess a continuing preference for the longshoremen to do the work, in evaluating this factor of employer preference we cannot ignore the circumstances which caused this change in the Employers' past assignment of the work in dispute. . . . We are constrained to treat the Employers' asserted post-work-stoppage preference for longshoremen with a good deal of skepticism because such statements of preference may not be representative of a free and unencumbered choice."

*Brady-Hamilton Stevedore*, above) In that case, because the employer's stated preference was coerced through the threat of an unlawful picket or strike it was not "representative of a free and unencumbered choice." *Brady-Hamilton Stevedore*, above. Similarly, in this case, Ryberg conceded that the unlawful threat was the reason it "prefers" Local 150 operates the Material Handler. When Ryberg was asked if the threat impacted Jack Gray's preference that the

assignment go to Local 150 he responded, “Absolutely it did. Absolutely.” (Tr. 23) Jack Gray’s stated “preference” should not be given any weight at all. (Tr. 16, 23, 58); *Brady-Hamilton Stevedore*, above; accord: *Bert McDowell Co.*, 225 NLRB 1183 (1976).

B. Jack Gray’s past practice has been for Local 1969 to operate every machine except the Manitowoc.

The past practice between and amongst Local 1969, Local 150, and Jack Gray has always been that Local 1969 operates all machinery used to load and unload vessels docked at the Port *unless* it’s a Manitowoc. This includes bulldozers, conveyors, ship’s cranes, payloaders, forklifts, and Bobcats, and includes all kinds of mobility, such as track, tire, rail or, indeed, stationary, such as ship’s cranes. (Tr. 18, 156-58, 192-197, 212-13) This includes machines on the ship or barge, on the dock, or even simply near the water in conjunction with stevedoring operations. This also includes “cranes”. (Tr. 18, 25-26) Therefore, the relevant distinction is the specific *type of machinery* being used to perform the task of loading/unloading ships and barges. Employees represented by Local 150 have only ever operated a *single* type of equipment at the waterfront of the Port of Indiana, including for Jack Gray: the Manitowoc cranes. (Tr. 158, 197, 213) All other equipment operation has historically been within the exclusive jurisdiction of Local 1969. (Tr. 158, 197) This practice must be continued and the Material Handler work must be awarded to Local 1969.

C. Jack Gray’s first assignment of Material Handler work was ordering a 1969 mechanic to fix the Material Handler in February, 2016.

Jack Gray manifested its preference for Local 1969 to operate the Material Handler when it actually assigned Local 1969 members to work on and operate the Material Handler in February of 2016, before any members of Local 150 had any contact with it. (Tr. 140-45) Ryberg testified that Jack Gray’s practice with Local 1969 and Local 150 is for the unions to do the day-

to-day mechanical work on the machines operated by each union; Local 150 mechanics work on the Manitowocs, Local 1969 mechanics work on every other machine because they operate every other machine. (Tr. 50, 146, 212-213) An assignment of the mechanical work to a Local 1969 mechanic is evidence that Jack Gray considered it covered by the CBA with Local 1969.

Jack Gray's use of Local 150 members to move the Material Handler was not an expression of its preference, but rather a matter of convenience. When Ryberg needed to move the machine from one part of the dock to another after it passed inspection, he asked the nearest qualified employee, who happened to be a Local 150 member, to move the machine. (Tr. 36) According to Ryberg, "[n]o cargo operations were performed," nor did he assign a 150 mechanic to work on the machine, since Lehman had already successfully brought the machine into proper working order. (Tr. 34, 36) Ryberg specifically testified, "I had a body there, we moved it with no thought of assignment or no thought of whatever. We just moved the piece of equipment." (Tr. 46)

Jack Gray's assignment of Local 150 members to the machine in June, 2016, after the grievance was filed, after the threat to strike was made, and days before the hearing, should be viewed in the same light as the "new" contract. Again, Ryberg explicitly testified that Local 150's threat to strike impacted Jack Gray's "preference" for who performs the work. (Tr. 16, 23, 58) This assignment, like the contract, was a product of the very threats that generated the unfair labor practice charge, for the sole purpose of attempting to generate evidence supportive of its position in this case. Because Jack Gray's assignment of work to Local 150 operators was a result of its unlawful threat to strike, it must be ignored. *Brady-Hamilton Stevedore*, 223 NLRB at 1037.

Therefore, the above-factors support an award of the work to Local 1969 because Jack Gray stated a preference in December, 2015, and assigned the mechanical work to a worker represented by Local 1969. Jack Gray's stated preference only changed as a result of coercion through the unlawful threats that generated this unfair labor practice charge. Finally, Jack Gray's past practice dictates that Local 1969 members operate all machines *except for* Manitowoc cranes.

**III. An award of the operation of the Material Handler to operators represented by Local 1969 would be in line with the area and general industry practice of longshoremen operating machinery used in stevedore operations.**

The Board considers both industry and local area practices in its determinations of jurisdictional disputes. *J.A. Jones Contr. Co.*, 135 NLRB at 1411. In this case, the historic division of labor—Local 150 only operating Manitowocs and Local 1969 operating everything else—is the practice of *every employer* signatory to a CBA with Local 1969 at the Port of Indiana waterfront. Indeed, employees represented by Local 150 have only ever operated Manitowocs for two employers, Jack Gray and Federal Marine, and have never done so for the other three employers signatory to the CBA with Local 1969. (Tr. 158, 197) Employees represented by Local 1969 have for many decades operated *every other piece of machinery* involved in the loading and unloading of cargo from ships and barges at the Port of Indiana. (Tr. 158, 197, 214) Local 1969 is simply asking for the current and historical distinctions at the Port of Indiana to be maintained going forward.

Local 150 introduced many contracts with employers throughout Illinois and Indiana. These contracts fail, however, to establish the general industry practice with respect to loading and unloading cargo from maritime vessels on a waterfront. While Local 150 does operate material handlers on construction sites and even in the Port, it does not unload cargo from

vessels. Local 150's operation of material handlers in the Port is limited to scrap yard operations for NLMK. (Tr. 105-06) Moreover, Local 150 does that scrap yard work solely because there was a recent representation election and Local 150 prevailed over a different ILA local, and it has no bearing on area or industry practices with respect to unloading and loading maritime vessels. (Tr. 104-06)

- A. The industry practice is to use longshoremen to load or unload barges, ships, and other vessels, regardless of the equipment utilized.

International Vice President Ray Sierra testified about the practices at ports around the country, as well as in Canada and territories and countries in the Caribbean. Sierra has been a longshoreman since the very beginning of Local 1969 and the Port of Indiana, i.e. since 1972. (Tr. 207) He has held offices with Local 1969 for many decades, including business agent for 30-plus years and President for more than five. (Tr. 207) He has also been an ILA officer since the 1980s. (Tr. 208) As a result, he is quite familiar with practices at waterfront ports across North America. According to Sierra, there are very few exceptions to the rule that, when it comes to the unloading of ships and other vessels in commercial ports, longshoremen do the work and they do all of it (Tr. 219). Indeed, the operation of the Material Handler on and around the docks at Jack Gray is "traditional longshore work, involving the loading and unloading of ships." *Sea-Land Service*, 163 NLRB 85, 87 (1967).

This factor of area and industry practice supports an award of the Material Handler operation at Jack Gray's waterfront to longshoremen represented by Local 1969 because Local 1969 members typically operate every machine on the waterfronts of the Port of Indiana and across North America, including Canada and the Caribbean. The area and industry practice is to hire longshoremen to do longshoremen's work, therefore the Board should award this work to the longshoremen represented by Local 1969.

**IV. Local 1969 represents skilled operators who are qualified to operate the Material Handler and those operators are the most economic and efficient choice for Jack Gray.**

The Board will consider the relative skills of the workers involved, as well as the economy and efficiency of hiring one group of workers as opposed to another. *J.A. Jones Contr. Co.*, above at 1410-11. In this case, the Local 1969 members are more than qualified to operate the Material Handler, and do so in a more economic and efficient manner than Local 150 members.

A. Local 1969 represents longshoremen who are qualified to operate the Material Handler based on their decades of experience and hands-on training.

As Ryberg acknowledged, Local 1969 members are qualified to operate the Material Handler in light of the fact that they *already operate* the machinery in question at the Port of Indiana for a different employer - NLMK - and have done so exclusively for at least 20 years. (Tr. 165; ILA Ex. 8). Out of only 40-something active members, there are eight (8) who are currently qualified by the contractual method to operate a hydraulic material handler, and four (4) more are in training (Tr. 188). Despite the attempts of Local 150's business agent to portray on-the-job training as inadequate, the employer has explicitly agreed that the longshoremen represented by Local 1969 are qualified to operate hydraulic material handlers. (Tr. 55, 89, 188-89) The training they receive is from other members of Local 1969 who have extensive experience operating the machines at issue; operators are trained by longshoremen with *at least 20 years* of experience operating that specific machine. (Tr. 188, 202-03) This method of training is recognized by OSHA as being sufficient to "certify" an operator as qualified, since there is no particular program of certification required for the operation of the Material Handler. (Tr. 31, 198-99)

Local 1969's training protocol was agreed to by Jack Gray when it signed the CBA with Local 1969 and there is no evidence in the record that the employer has ever had cause for concern with regards to Local 1969 members' operation of bulldozers, ship's cranes, conveyors, forklifts, payloaders, or any of the other machines they operate. (E.g. ILA Ex. 6 at \*3, 16-17; Tr. 199-200, 204). The mechanic who performed the work on the material handler and then operated it during the inspection, Larry Lehman, explained that he had no trouble operating it for the inspector - "it's pretty easy." (Tr. 144). Local 1969's hands-on training provides in-the-seat experience operating a piece of machinery under the instruction of a highly experienced operator. Local 1969 members have trained in this way and have operated all kinds of machines at the Port of Indiana and have done so safely for decades. There is no evidence suggesting that the Material Handler would be an exception.

B. Local 1969 operators can be hired at a lower cost to Jack Gray, and can relieve each other to ensure efficiency of operations.

During the conversations which preceded the arrival of the material handler, Ryberg stated to Local 1969 officers that members of their local cost about *one-half* of what Local 150 members cost and require lower benefit contributions. (Tr. 160, 189) Additionally, Local 1969 members can better absorb the work, as they are more numerous at the worksite than Local 150 members who only work on one specific type of crane, the Manitowoc, and pursuant to its CBA Local 1969 utilizes a system where two operators work as relief for one another. (Tr. 156-58, 183, 197)

Based on the lower costs, both in terms of wages and benefit contributions, and based on the relief operators provided when Local 1969 is operating the material handler, the factors of economy and efficiency favor an award of the work to Local 1969. *Albin Stevedore Co.*, 182 NLRB at 637 (1970) (factor of skills, economy, and efficiency supported award of work to

longshoremen's union where both unions had trained operators but longshoremen were more numerous and operation by longshoremen would eliminate the need to hire a relief operator since two longshoremen would "switch[] off the job at regular intervals"); *NLRB v. Local 25, IBEW*, 396 F.2d 591, 594 (2d Cir. 1968) *enfg.* 162 NLRB 703 (1967) (affirming Board's award of work to telephone company employees based on economy and efficiency where the telephone company employees' top rate was \$3.66 per hour and electrical workers received \$5.20 per hour).

**V. The loss of the operation of the Material Handler on Jack Gray's waterfront would be a significant loss of employment for the longshoremen represented by Local 1969, in contrast to the minimal gain that Local 150 would achieve for its 23,500 members.**

The Board also considers relative sizes of the locals disputing the work and the industries in which they typically work in an attempt to determine who would gain or lose the most by an award. *E.g. Albin Stevedore*, above at 636; *Sea-Land Service*, 188 NLRB 241, 243 (1971). The operation of the Material Handler by Local 1969 will not displace any operating engineers represented by Local 150. (Tr. 20, 59) Ryberg was asked directly if Jack Gray proposed to stop using the Manitowocs altogether and replace them with the single Material Handler at issue here and he replied "No" (Tr. 20). Either way, the work done by the Manitowoc cranes historically operated by Local 150 is the same work that is also currently done by the other equipment already operated by Local 1969, namely the loading and unloading of ships and barges. (Tr. 18, 156-57) Moreover, unlike the Manitowoc cranes Local 150 historically operates, the Material Handler at issue can load/unload cargo *from barges only*, and not the larger ships that also come into the Port, which would prevent the machine from replacing the Manitowocs. (Tr. 19, 25) Though he mentioned the possibility of using the Material Handler as a backup when the Manitowocs break down, Ryberg also testified that when those cranes have broken down in the

past, *conveyors* had been used, and they were operated by Local 1969 in accordance with the historical division of labor at the Port of Indiana and the parties' respective contracts with Jack Gray. (Tr. 57) Ryberg explicitly stated that use of the Material Handler is "not eliminating a job on the 150 side. So it has nothing to do with somebody losing a job or losing a position." (Tr. 59)

Furthermore, the relative sizes of the locals militates in favor of awarding this work to Local 1969, since it would represent a far greater loss for the longshoremen than it would a gain for the operating engineers. Thus, this case is similar to *Albin Stevedore* and *Sea-land Service* (1971), in which the Board considered the relative sizes of the locals and the industries in which they typically work.

In *Albin Stevedore*, the Board noted that while longshoremen numbered fewer than 100, the operating engineers local had "several thousand" members. 182 NLRB at 637. The members of that larger local had the additional advantage of seeking work in the general building and construction industry, while the opportunities available to members of the far smaller longshoremen local were limited to the shipping industry. *Albin Stevedore*, above. The Board concluded that awarding the work to the engineers would bring about "a significant loss of employment opportunities for longshoremen as contrasted with a minimal gain for operating engineers." *Albin Stevedore*, above.

Similarly, in *Sea-Land Service*, the Board noted that membership in the Operating Engineers totaled more than 1,600 in the Kodiak area, in contrast to the 20 registered longshoremen. *Sea-Land Service*, 188 NLRB at 244. It also recognized that:

[t]he largest number of employment opportunities open to operating engineers in the Alaska area is in the building and construction industry. For longshoremen employment opportunities are limited to the shipping industry. Placed in this context, a loss of one job opportunity for longshoremen is a significant one. [An award of work to the operating engineers] would bring about a significant loss of

employment for longshoremen as contrasted with a minimal gain for operating engineers.

*Ibid.*

As in *Albin Stevedore and Sea-Land Service*, Local 150 is a populous local union, with 4,000 strong just in Merrillville, Indiana, and 23,500 members in total. (Tr. 106) The longshoremen, on the other hand, number fewer than 50 active members. (Tr. 229) Though the total seniority list has 144 names on it, most of those people are no longer actively engaged in longshoremen work. *Ibid.* Perhaps even more importantly, operating engineers are not solely dock workers; rather “[t]he largest number of employment opportunities open to operating engineers in the [ ] area is in the building and construction industry.” *Sea-Land Service*, above. According to Local 150’s business representative, Jeff Valles, the operating engineers’ work opportunities include jobs in “a slew of different industries” (Tr. 69). Local 150’s jurisdiction spans three (3) different states and extends from “steel mill services, building and construction,” including road, building, highway, bridge, and tunnel construction, to stevedoring, “the drilling and testing industry, the wind tower industry,” and others. (Tr. 106-07)

For the members of Local 1969, the employment opportunities are limited to the shipping industry and even more specifically, to the five signatory employers on the waterfront at the Port of Indiana, Burns Harbor - Jack Gray, Federal Marine, Tanco, Rogers Green, and NLMK. (Tr. 153-54, 166; ILA Ex. 5). The only exception to that limited jurisdiction is that Local 1969 members work “a couple of shifts [ ] in Chicago” each year, where they load and unload grain ships on the waterfront using both land and ship-based equipment. (Tr. 166)

Based on these facts, an award of the Material Handler work to Local 150 would represent a significant loss of work for the 40-plus longshoremen of Local 1969, who work solely for stevedore companies at the Port of Indiana, and an infinitesimally small gain for the

23,500-plus operating engineers in Local 150, who have myriad opportunities for work in a dozen industries throughout three different states. *Albin Stevedore*, above; *Sea-Land Service*, above.

### **CONCLUSION**

The manifest weight of all relevant factors favors an award of the operation of the Material Handler to the longshoremen represented by the International Longshoremen's Association, Local 1969. The longshoremen possess the requisite skills to operate the Material Handler and have done so for other employers at the Port of Indiana for twenty years, as their CBA covers the operation of Material Handlers. Longshoremen represent the economical and efficient choice, in terms of both wages and benefits and based on operational practices.

Longshoremen were the preferred workers and were in fact assigned the work by Jack Gray until Local 150 made an unlawful threat of a strike, which has since succeeded in coercing Jack Gray to broaden the scope of 150's work on its docks. The longshoremen have for decades respected the agreement between their union and Local 150, pursuant to which Local 150 would operate the Manitowocs only and no other machines. Finally, longshoremen work exclusively in the maritime shipping industry. They do not work in the construction, steel mill services, drilling, or wind tower industries; they work on the waterfront at the Port of Indiana for stevedore companies like Jack Gray. The loss of this work would be a substantial one to the fewer than 50 active longshoremen represented by Local 1969; the gain of this work would be a minimal one for the 23,500 operating engineers represented by Local 150. Therefore, Party-in-Interest Local 1969 respectfully requests that the Board make an affirmative award of the operation of the hydraulic material handler at Jack Gray to the longshoremen it represents.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Colin Burns, an attorney, certify that I caused a copy of the foregoing document to be served upon the following persons by email pursuant to the Board's Rules and Regulations on July 15, 2016:

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