

DAVID A. ROSENFELD, Bar No. 058163  
WEINBERG, ROGER & ROSENFELD  
A Professional Corporation  
1001 Marina Village Parkway, Suite 200  
Alameda, California 94501  
Telephone (510) 337-1001  
Fax (510) 337-1023  
E-Mail: drosenfeld@unioncounsel.net

Attorneys for Charging Party INTERNATIONAL ASSOCIATION  
OF MACHINISTS & AEROSPACE WORKERS DISTRICT  
LODGE 190, EAST BAY AUTOMOTIVE MACHINISTS  
LODGE NO. 1546, INTERNATIONAL ASSOCIATION OF  
MACHINISTS & AEROSPACE WORKERS, AFL-CIO/CLC

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 32

PORTS AMERICA OUTER HARBOR, LLC,

and

INTERNATIONAL ASSOCIATION OF  
MACHINISTS & AEROSPACE WORKERS  
DISTRICT LODGE 190, EAST BAY  
AUTOMOTIVE MACHINISTS LODGE NO.  
1546, INTERNATIONAL ASSOCIATION OF  
MACHINISTS & AEROSPACE WORKERS,  
AFL-CIO/CLC,

Case No. 32-CA-110280

**CHARGING PARTY'S ANSWERING  
BRIEF TO ILWU'S EXCEPTIONS TO  
THE ADMINISTRATIVE LAW  
JUDGE'S DECISION**

INTERNATIONAL LONGSHOREMEN'S  
AND WAREHOUSEMEN'S UNION,

and

INTERNATIONAL ASSOCIATION OF  
MACHINISTS & AEROSPACE WORKERS  
DISTRICT LODGE 190, EAST BAY  
AUTOMOTIVE MACHINISTS LODGE NO.  
1546, INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS, AFL-CIO/CLC.

Case No. 32-CB-118735

**I. THE ADMINISTRATIVE LAW JUDGE PROPERLY APPROVED THE PARTIAL SETTLEMENT WITH PORTS AMERICA OUTER HARBOR**

The ILWU challenges the approval of the settlement between the Charging Party and Ports America Outer Harbor and MTC. That settlement was approved by the Administrative Law Judge and after the Board granted permission for a special appeal, the Board denied the ILWU's appeal on the merits challenging that settlement.

The ILWU concedes that the Charging Party detailed specifically how the settlement funds would be distributed. It offered no evidence that the Machinists would not follow through as represented. Most of the settlement funds went to pay for pension benefits for the employees. The ILWU does not seem to challenge that distribution. Indeed, most of the settlement relates to the *Golden Gate* successor claim against POAH and MTC for the period 2005 through 2013. Much of that pension payment will pay for benefits for that period as well as for the subsequent 2013 through 2016 period, before the facility was closed. As a result, employees will receive substantially better pensions.

It is true that the settlement distribution focuses on the employees who worked during the 2005 through 2013 period and then continued to work for Ports America Outer Harbor until it closed. This group of employees, both before 2013 and through 2016, lost the benefit of their IAM representation, including pension benefits, as well as wages and other benefits of working under the IAM agreement.

The ILWU challenges the fact that some recipients of the settlement money never worked for Ports America Outer Harbor. There were employees who were laid off or terminated in 2005 when PCMC committed its unfair labor practices. Some employees later went to work for other employers. Nonetheless, those employees who are receiving some portion of the settlement money were equally disadvantaged because of their loss of jobs in 2005. Because MTC and POAH were allegedly a *Golden State* successor, the settlement funds were used, in part, to remedy those unfair labor practices.

Furthermore the settlement was agreed to in light of the bankruptcy of PAOH had no settlement been achieved there would have been no recovery against PAOH.

In any case, this challenge is now moot. The settlement funds have been paid and have now been completely distributed. There is nothing left. Any review of the approval of the settlement agreement as to this point is totally moot.

**II. THE BARGAINING ORDER ISSUED BY THE ADMINISTRATIVE LAW JUDGE IS APPROPRIATE**

The ILWU challenges the alleged “hypothetical” bargaining order. See p. 46 of its Brief. That bargaining order is necessary in case the facility is reopened and there is a successor. That may not happen, but nonetheless, the bargaining order is appropriate to be consistent with similar cases where a bargaining order is issued. If no bargaining order is issued, employees or unions will assert that no bargaining order need be issued in similar cases.

**III. THE ILWU WAS PROPERLY ORDERED TO REIMBURSE DUES WHICH IT UNLAWFULLY EXACTED FROM EMPLOYEES WORKING AT THE OUTER HARBOR TERMINAL**

The ILWU complains because it is required to reimburse dues which were unlawfully exacted from employees who worked at the facility during the period 2005 through the closure in 2016. See Brief, p. 46-49. Although the ILWU may have “in good faith” represented those employees, meaning it didn’t breach its duty of fair representation towards any individual employee, nonetheless it violated the law. It unlawfully accepted and demanded recognition in 2005. In 2013, it again demanded that Ports America Outer Harbor continue to recognize it, even though there was pending litigation before the Board in the PCMC case. When the Board decided the PCMC case in 2015, again after deciding it once before, still the ILWU continued to assert that it was the representative of the employees.

Dues reimbursement is wholly appropriate in situations where a union unlawfully accepts recognition. Indeed, that is the standard remedy. The ILWU offers no reason why that standard remedy should be rejected in this case.

The ILWU does note, however, that employees who were members of the ILWU before 2005 should not be included in the dues reimbursement remedy. The Charging Party disputes

that. The only remaining members of the ILWU after 2005 or after Ports America Outer Harbor took over in 2013 were members because they were required to do so by the terms of the union security clause. Their choice to participate or not to participate as provided for in Section 7 was violated. The ILWU should be required to reimburse all dues that were exacted unlawfully from all employees in the bargaining unit. This dues reimbursement remedy should extend to employees who came into the unit after 2013, even though they may have been members of the ILWU at that time. They were forced to retain their membership in the ILWU and thus their dues should be reimbursed.

**IV. THE ILWU, THROUGHOUT ITS EXCEPTIONS, MAKES A POINT OF THE EXCLUSION OF THE CRANE MECHANICS**

The General Counsel properly excluded crane mechanics since they were never part of the original unit. The ILWU's failure to seek clarification on this point is not a basis to set aside the ALJ's Decision.

**V. THE ILWU OBJECTS TO THE FACT THAT THE ADMINISTRATIVE LAW JUDGE PREVENTED THE ILWU FROM PUTTING ON A CASE WHICH WOULD HAVE EFFECTIVELY REPUDIATED THE BOARD'S DECISION IN PCMC. 362 NLRB NO. 120**

It is undisputed that by the time the trial began in this case, the PCMC Decision was final. Although Petitions for Review were pending, subsequently the Petition for Review filed by PCMC was withdrawn, since PCMC settled with the Charging Party with the approval of the Board. Only the Petition for Review filed by the ILWU is still pending in the D.C. Circuit.

Nonetheless, the Board's Decision is final. 29 U.S.C. § 160(e). Because it is final, the ILWU is seeking to relitigate a final decision adverse to it.

The Administrative Law Judge properly recognized that that Decision held that the PCMC unit at the Outer Harbor was appropriately represented by the IAM, and not the ILWU. That unfair labor practice had not been remedied at the time that POAH took over in 2013. POAH took over as a *Burns* and *Golden State* successor. Because the unfair labor practice committed by PCMC and the ILWU had not been remedied, the ILWU cannot assert an accretion defense or otherwise assert a defense which would undermine its obligation to remedy the violations found.

**VI. THE CHARGING PARTY JOINS IN THE ANSWER BRIEF OF THE GENERAL COUNSEL**

Charging Party otherwise joins in the Answer Brief of the General Counsel.

**VII. CONCLUSION**

The Exceptions filed by the ILWU should be rejected.

Dated: March 24, 2017

WEINBERG, ROGER & ROSENFELD  
A Professional Corporation

By: /s/ David A. Rosenfeld  
DAVID A. ROSENFELD

Attorneys for Charging Party INTERNATIONAL  
ASSOCIATION OF MACHINISTS &  
AEROSPACE WORKERS DISTRICT LODGE  
190, EAST BAY AUTOMOTIVE MACHINISTS  
LODGE NO. 1546, INTERNATIONAL  
ASSOCIATION OF MACHINISTS &  
AEROSPACE WORKERS, AFL-CIO/CLC

134817\906121

## CERTIFICATE OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On March 24, 2017, I electronically filed the following document with the National Labor Relations Board, by using the Board's E-Filing system and served it in the manner described below:

### CHARGING PARTY'S ANSWER BRIEF TO ILWU'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

- (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from [kkempler@unioncounsel.net](mailto:kkempler@unioncounsel.net) to the email addresses set forth below.

on the following part(ies) in this action:

Mary Miller Cracraft  
Associate Chief Administrative Law Judge  
National Labor Relations Board, Region 20  
Division of Judges  
901 Market Street, Suite 300  
San Francisco, CA 94103-1738

Mark Theodore, Esq.  
Proskauer Rose LLP  
2049 Century Park East, Suite 3200  
Los Angeles, CA 90067-3206  
[mtheodore@proskauer.com](mailto:mtheodore@proskauer.com)

*Via E-Filing*

David S. Durham, Esq.  
Christopher M. Foster, Esq.  
DLA Piper LLP  
555 Mission Street, Suite 2400  
San Francisco, CA 94105-2933  
[david.durham@dlapiper.com](mailto:david.durham@dlapiper.com)  
[christopher.foster@dlapiper.com](mailto:christopher.foster@dlapiper.com)

Amy Berbower, Esq.  
David B. Willhoite, Esq.  
National Labor Relations Board, Region 32  
1301 Clay Street, Room 300N  
Oakland, CA 94612-5211  
[amy.berbower@nlrb.gov](mailto:amy.berbower@nlrb.gov)  
[david.willhoite@nlrb.gov](mailto:david.willhoite@nlrb.gov)

Robert Remar, Esq.  
Lindsay Nicholas, Esq.  
Eleanor Morton, Esq.  
Leonard Carder, LLP  
1188 Franklin Street, Suite 201  
San Francisco, CA 94109-6839  
[remar@leonardcarder.com](mailto:remar@leonardcarder.com)  
[lnicholas@leonardcarder.com](mailto:lnicholas@leonardcarder.com)  
[emorton@leonardcarder.com](mailto:emorton@leonardcarder.com)

Todd C. Toral, Esq.  
DLA Piper, LLP  
2000 Suite 400 North Tower  
Los Angeles, CA 90067  
[todd.toral@dlapiper.com](mailto:todd.toral@dlapiper.com)

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on March 24, 2017.

*/s/ Karen Kempler*  
\_\_\_\_\_  
Karen Kempler