

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PORTS AMERICA OUTER HARBOR, LLC,  
CURRENTLY KNOWN AS OUTER HARBOR  
TERMINALS, LLC

- and -

NLRB Case No.: 32-CA-110280

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

INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION

- and -

NLRB Case No.: 32-CB-118735

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

**RESPONDENT ILWU'S ANSWERING BRIEF IN OPPOSITION TO  
CHARGING PARTIES' CROSS-EXCEPTIONS**

## INTRODUCTION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Respondent International Longshore and Warehouse Union (“ILWU”) submits this Answering Brief in Opposition to Charging Parties International Association of Machinists & Aerospace Workers District Lodge No. 190’s and Lodge No. 1546’s (collectively “Charging Parties” or “IAM”) Cross-Exceptions to the Decision of Administrative Law Judge Mary Miller Cracraft (“ALJ”), which issued on December 1, 2016.

Respondent ILWU has filed numerous Exceptions to the ALJ’s Decision and a brief in support of those Exceptions.<sup>1</sup> ILWU continues to except to the ALJ Decision as set forth in its Exceptions and supporting brief and nothing in this Answering Brief waives or otherwise alters ILWU’s Exceptions or the arguments set forth in its brief in support of those Exceptions.

ILWU does not agree with and opposes IAM’s Cross-Exceptions to the ALJ’s Decision for all of the reasons set forth below.

## ARGUMENT

### **I. IAM Is Improperly Seeking Findings and Remedies that Far Exceed the Scope of this Case.**

#### **A. The ALJ Correctly Concluded that “Perfectly Clear” Successorship Is not at Issue in this Case.**

IAM excepts to the ALJ’s failure to make a finding that PAOH was a “perfectly clear” successor. (*See* Cross Exception No. 10). However, as the ALJ explained in her Decision: “the issue of ‘perfectly clear’ successor is not now nor has it ever been at issue in this proceeding.” (ALJD, 16:27-28). As testament of the accuracy of the ALJ’s conclusion, the Complaint is devoid of any mention of “perfectly clear” successorship as is the General Counsel’s post-

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<sup>1</sup> Respondent ILWU filed its Exceptions and Brief in support thereof on February 10, 2017. The General Counsel and the Charging Parties have indicated that they intend to file Answering Briefs to ILWU’s Exceptions, which are due to be filed by March 24, 2017.

hearing brief to the ALJ. (Second Amended Consolidated Complaint (hereafter “Complaint”), dated September 9, 2016; General Counsel’s Post Hearing Brief, dated November 4, 2016). Respondent ILWU shares in the ALJ’s view that “perfectly clear” successorship has never been at issue in this matter. For the ALJ to have made a finding related to “perfectly clear” successorship, where no allegations had been made, would have been improper and a clear violation of due process. *See Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 134-35 (2d Cir. 1990) (“In the context of the Act, due process is satisfied when a complaint gives a respondent fair notice of the acts alleged to constitute the ULP and when the conduct implicated in the alleged violation has been fully and fairly litigated.”); *King Manor Care Center*, 308 NLRB 884, 889 (1992) (elements required to satisfy procedural due process are “prior notice and an opportunity to be heard, timely recital of the matters of law and fact asserted, and a fair opportunity for a defense to be prepared and litigated”). There was no notice of a “perfectly clear” successor theory nor was it fully and fairly litigated precisely because it was never an issue in this matter.

**B. There Is No *Golden State* Successor Allegation in this Case.**

It is undisputed that IAM and PAOH settled the *Golden State* successor allegation against PAOH. (Final Settlement Agreement between IAM and PAOH, filed by IAM on August 17, 2016, 1-2; ALJD, 15:2-7). It is also undisputed that the operative complaint contains no *Golden State* allegation of any kind, as to any party. (Complaint, dated September 9, 2016; *see also* GC Post-Hearing Brief, 2 at fn. 1 (stating that the operative Complaint does not have *Golden State* successor allegations). Yet, IAM argues that ILWU is a *Golden State* successor and, therefore, should be liable for *all* remedies in the *PCMC* case, a completely separate case.<sup>2</sup> This is ridiculous –ILWU is not an employer and, in turn, cannot be a successor; and more obviously,

<sup>2</sup> The *PCMC* case is currently on appeal before the D.C. Circuit Court, and any liability on the part of ILWU will be appropriately determined in that case.

there is no *Golden State* successor allegation at issue in this case.<sup>3</sup>

**C. It Would Be Wholly Improper To Issue a Speculative Order Regarding Hypothetical Future Successors and Any Potential Liability.**

The Complainant in this matter alleges that PAOH was a *Burns* successor to PCMC and violated the Act by failing to recognize and bargain with IAM as the representative of mechanics working at Outer Harbor in July 2013. The Complainant makes no allegations regarding any other employers. (See Complaint, dated September 9, 2016). IAM, however, believes the ALJ erred by failing “to recognize that there may be a successor who is liable under *Golden State* or *Burns* and to issue an order reflecting that.” (Cross-Exception No. 5). Essentially, IAM wanted the ALJ to issue an order stating that any hypothetical future employer at Outer Harbor would be a successor with an obligation to recognize IAM. IAM also wanted an order that any hypothetical successor to PAOH is liable for the liability of both PAOH and PCMC that accrued from March 2005 to present under *Golden State*. To issue any such orders would have required the ALJ to rely on pure speculation as to what may or may not occur in the future. That clearly would be improper. If a new employer operates at Outer Harbor and at that time IAM believes that the employer has violated the Act, IAM can file ULP charges, which Region 32 can investigate. This case is not the proper forum for the Board to opine on the hypothetical future liability of non-parties.

**II. The ALJ Correctly Determined that Extraordinary Remedies Against ILWU Were Improper.**

The Board only entertains extraordinary remedies when a respondent’s unfair labor practices are “so numerous, pervasive, and outrageous” that such remedies are necessary “to

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<sup>3</sup> It should also be noted that IAM has settled with the employers in the *PCMC* case for the sizable sum of \$10.5 million. IAM’s settlement with PCMC resolved the remedies ordered against PCMC in that case, including a make whole remedy. In fact, the Board confirmed in writing that it considers IAM’s settlement with PCMC to satisfy PCMC’s make whole compliance obligation in the *PCMC* case.

dissipate fully the coercive effects of the unfair labor practices found” or when a respondent “is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights.” *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995); *In Re Federated Logistics & Operations*, 340 NLRB 255, 256-257 (2003); *Hickmott Foods*, 242 NLRB 1357 (1979). In considering such remedies, the Board must “examine[] in light of the appropriateness in the circumstances of [the] case.” *NLRB v. Mineworker District 50*, 355 U.S. 453, 458 (1958).

Here, ILWU’s actions meet neither standard. ILWU had been the collective bargaining representative of the mechanics working at Outer Harbor for many years before PAOH hired them. (*See* ILWU’s Exceptions Brief, Section IV.B.2.). In fact, many of the PAOH mechanics had been represented by ILWU even before the ULPs that are the subject of the *PCMC* litigation occurred. (*Id.*). The evidence also shows that PAOH made its own decision to join PMA and hire ILWU labor. (*See infra.*). For ILWU to continue to represent the PAOH mechanics was in no way outrageous.

The *PCMC* case does not support the IAM’s argument. First, the *PCMC* case does not show numerous ULPs or a proclivity to violate the act on ILWU’s part – the alleged ULPs in that case occurred more than eight years before the alleged ULPs at issue here. *Wolverine World wide, Inc.*, 243 NLRB 425 (1979) (misconduct committed 6 to 14 years earlier too remote to warrant broad order); *Daily Heating*, 280 NLRB 1260, 1280 (1986) (similar); *Hensel Phelps*, 284 NLRB 246 fn. 2 (1987); *Service Merchandise Co.*, 299 NLRB 1125 fn. 7 (1990) (similar); *Delcard Associates*, 328 NLRB 80 (1999) (similar); *Peckham Materials*, 307 NLRB 612 fn. 4 (1992) (similar).

Second, the *PCMC* case does not reveal the sort of conscious flouting of Board orders that warrants extraordinary remedies. The events that gave rise to the ULP charges at issue here

occurred in 2013, which was two years before the Board issued a constitutionally valid decision in 2015 finding merit to the General Counsel's theory in *PCMC*. Indeed, from 2009 until 2015, the only valid decision in the *PCMC* case was ALJ Anderson's decision rejecting the General Counsel's theory and finding that the mechanics had been accreted into the coastwise ILWU unit. And the *PCMC* litigation is not over and is currently before the D.C. Circuit Court. Therefore, the *PCMC* case does not make ILWU's representation of the PAOH mechanics starting in 2013 "so numerous, pervasive, and outrageous" to justify extraordinary remedies.

Likewise, ILWU's conduct in no way disregarded the PAOH mechanics' fundamental statutory rights. The PAOH mechanics had already been represented by ILWU for many years, and ILWU had no reason to believe that the mechanics no longer wanted to be represented by ILWU on July 1, 2013. In fact, because of their ILWU representation and rights under the PCL&CA, the PAOH mechanics have continued to have employment after PAOH's closure through the Dispatch Hall and steady jobs with other PMA member companies. (*See* ILWU's Offer of Proof, R-ILWU Exh. 228 #121, 122, 158, 187, 218, 219, 249, 250; R-ILWU Exh. 205 (report showing that former PAOH mechanics obtained either steady employment with other PMA-member companies or work out of the Dispatch Hall)). Based on the totality of the circumstances, there is no basis for any of the extraordinary remedies sought by IAM.

**A. The ALJ Correctly Concluded that a Broad Order Is Unwarranted.<sup>4</sup>**

IAM excepts to the ALJ's refusal to issue a broad order that ILWU cease acceptance of recognition as the collective bargaining representative of any new or accreted unit under the PCL&CA on a coast-wide (California, Oregon and Washington), multi-employer basis unless there is an NLRB-conducted election. As the ALJ explained, a broad order is unwarranted here because ILWU is not a repeat offender under Board law. (ALJD, 17:15-29). IAM has cited one

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<sup>4</sup> ILWU fully maintains its Exceptions to the ALJ Decision and Order, including its Exceptions to the order recommended by the ALJ.

case in support of its claim that ILWU is a repeat offender, the *PCMC* case.<sup>5</sup> Under the totality of the circumstances, the ALJ correctly determined that there is no clear pattern or practice of unlawful conduct and no showing of proclivity to violate the Act. (*Id.*). The facts and circumstances and the issues in the *PCMC* case and this case are complex, and ILWU's actions were not egregious or widespread. (*Id.*).

What is more, the General Counsel's Complaint sought as a remedy that ILWU abandon its recognition as the representative of mechanic employees employed by PAOH at Berths 20-26 and reimburse those employees for dues or fees paid to ILWU. (Complaint, dated September 9, 2016, 10). Nothing more. IAM's desired broad order goes far beyond the scope of the instant matter and serves to fundamentally undermine the purposes of the Act and potentially violate countless employees' Section 7 rights.

**B. The ALJ Properly Rejected IAM's Argument that ILWU Must Pay What IAM Believes It Failed To Get in Its Settlement with PAOH and MTC.**

In August 2016, IAM entered into a settlement in this matter with employers PAOH and MTC. IAM received \$3 million in return for the withdrawal of all charges against MTC and withdrawal of the *Golden State* successor allegation and all potential monetary liability against PAOH. Per the terms of the settlement, IAM pocketed all \$3 million, to do with whatever is pleased. (*See* Final Settlement, filed by IAM on August 17, 2016). That money settled all claims and all remedies sought "without limitation." (*Id.* at 1, 3, 5).

Now, IAM is getting greedy and wants ILWU to pay all the money it believes it did not get from PAOH and MTC in the \$3 million settlement – additional lost compensation, lost dues

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<sup>5</sup> IAM also cited *Retail Clerks Local 588*, 227 NLRB 670 (1976), *enforced*, 587 F.2d 984 (9th Cir. 1978), but for what proposition is unclear (IAM does not provide a pin cite). (IAM Cross-Exceptions Brief, 8). From the ALJ Decision, it appears the ALJ believed IAM was citing the case as an example of ILWU violating the Act, but this is incorrect. ILWU was not a party to that case, nor was ILWU involved in the facts of that case in any way. The union found to have violated the Act in that case was Local 588 of the Retail Clerks Association.

to IAM<sup>6</sup>, and trust fund contributions<sup>7</sup>. IAM attempts to justify this by arguing that ILWU forced PAOH to recognize ILWU and comply with the PCL&CA, the collective bargaining agreement to which ILWU and employer members of the Pacific Maritime Association are signatory. Nothing could be further from the truth. As the testimony at trial makes clear, PAOH decided in 2009, before it even commenced its operations, that it was going to join the PMA, comply with the PCL&CA, and hire ILWU labor. (Tr. 400:7-15, 1507:10-19, 1516:20-1517:2, 1519: 3-9, 1523:20-22; *see also* 1346:3-101522:9-11, 1522:22-24). PAOH then, its own accord, became a member of PMA in 2010. (GC Exhs. 94-96). Likewise, PAOH decided to hire ILWU mechanics in July 2013. (Tr. Tr. 673:7-9, 821:24-822:1, 883:23-884:6, 1549:11-12, 2007:16-22; GC Exh. 66). ILWU did not force PAOH to do anything.<sup>8</sup> In light of these accurate facts, there is no basis for ordering remedies against ILWU that would otherwise have been ordered against PAOH. The reason those remedies cannot be sought and obtained against PAOH is because IAM entered into a settlement with PAOH resolving all remedies “without limitation,” in return for \$3 million.

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<sup>6</sup> The ALJ correctly pointed out that IAM provided no authority for its argument that ILWU should pay IAM for lost dues. As the ALJ noted, such a remedy would be punitive. (ALJD, 16:19-22); *see H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (the Act authorizes only “make whole” and not punitive remedies).

<sup>7</sup> The ALJ correctly concluded that the cases cited by IAM in support of its argument that ILWU should pay IAM trust funds were distinguish and therefore unpersuasive. (ALJD, 16:4-17). IAM’s only response to the ALJ is that it does not matter because ILWU caused PAOH’s conduct. (IAM’s Cross-Exceptions Brief, 4). As discussed above, the evidence shows that PAOH made its own decisions and was not forced to do anything by ILWU.

<sup>8</sup> IAM’s brief in support of its Cross-Exceptions also argues that ILWU should be required to make PAOH whole for any expenditure PAOH made as a signatory to the PCL&CA, but IAM did not include this in any of its Cross-Exceptions. This may be because IAM’s brief in support of its Cross-Exceptions is almost identical to IAM’s post-hearing brief to the ALJ, and IAM may have forgotten to delete this argument that it is no longer pursuing. The Board’s Rules and Regulations are clear that a supporting brief may “contain only matter that is included within the scope of the exceptions.” 29 C.F.R. §102.46(a)(2). Regardless, this “extraordinary remedy” is wholly inappropriate and the ALJ correctly rejected it for all of the reasons set forth in this section – the evidence at trial shows that ILWU did not force PAOH to do anything. What is more, no claim for such a remedy has been made by either PAOH or the General Counsel at any time.

**C. The Changes to the Notice Remedies that IAM Seeks Are Improper.<sup>9</sup>**

IAM's desired changes to the text of the notices and its argument that the Decision should be mailed with the notices are unwarranted. The notices are standard notices used by the Board and comply with the ALJ's Decision. (*See* ALJD, 19, fn. 32). IAM's desire to editorialize and dictate the content of the communication to employees is improper.

In addition, there is no basis for IAM to demand that the cost of mailing PAOH's notice be funded by ILWU. IAM settled with PAOH for \$3 million, and the written settlement provides that the only remaining obligation PAOH had was to mail a notice to former employees if the ALJ found PAOH had violated the Act. (Final Settlement Agreement, filed by IAM on August 17, 2016, at 2). Seeing as IAM and PAOH explicitly contemplated the possibility of a notice mailing, they also should have considered that a notice mailing may cost money. IAM and PAOH entered into a settlement, to which ILWU was not a party, and should have planned for any costs that could foreseeably be associated with the terms of the settlement.

Finally, IAM's arguments that in addition to posting a notice, ILWU should mail the notice and Decision, be required to "utilize any social media it uses" to communicate the notice and Decision to employees, and read the notice at all ILWU membership meeting coast-wide are wholly unsupported. The ALJ ordered ILWU to post the notice for sixty (60) days, and that is all the Act requires. (ALJD, 19:37-20:8). The extraordinary remedies IAM seeks are overly broad and unwarranted for all of the reasons discussed above.

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<sup>9</sup> ILWU also disagrees with IAM's vague Cross-Exception regarding the "various other remedies" related to notice posting. (Cross-Exception No. 20). To the extent this Cross-Exception refers to any remedies other than those explicitly identified, the Cross-Exception fails to comply with Section 102.46 of the Board's Rules and Regulations and should, therefore, be disregarded. ILWU also objects to IAM's demands that the notice be published in a newspaper and that it to receive a list of all employees and contact information from ILWU as improper. These arguments appear only in IAM's brief and not in any of its Cross-Exceptions.

## CONCLUSION

For the foregoing reasons, the ALJ properly rejected the extraordinary remedies and findings outside the scope of this case sought by the Charging Parties in their Cross-Exceptions to the ALJ's Decision. So too should the Board reject Charging Parties' Cross-Exceptions in their entirety.

Respectfully submitted,

Dated: March 24, 2017

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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. I hereby certify that on **March 24, 2017**, I caused the foregoing **RESPONDENT ILWU'S ANSWERING BRIEF IN OPPOSITION TO CHARGING PARTIES' CROSS-EXCEPTIONS** to be filed electronically with the National Labor Relations Board and a true and correct copy of the same was served on all interested parties in this action as follows:

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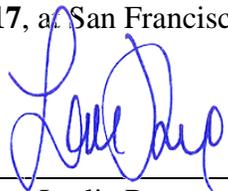
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- BY E-MAIL:** I caused the documents to be sent to the person at the electronic notification address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission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

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **March 24, 2017**, at San Francisco, California.

  
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Leslie Rose