

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**PORTS AMERICA OUTER HARBOR, LLC, CURRENTLY
KNOWN AS OUTER HARBOR TERMINAL, LLC**

and

Case 32-CA-110280

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

**INTERNATIONAL LONGSHORE
AND WAREHOUSE UNION**

and

Case 32-CB-118735

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

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT
ILWU'S EXCEPTIONS TO THE RULINGS AND DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

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I. PRELIMINARY STATEMENT

On December 1, 2016, Administrative Law Judge Mary Miller Cracraft, hereinafter the Judge, issued her decision in the above-captioned cases. In her decision, the Judge correctly concluded that Ports America Outer Harbor, LLC, currently known as Outer Harbor Terminal, LLC (PAOH) is a *Burns* Successor to a bargaining unit historically represented by the Charging Party International Association of Machinists and Aerospace Workers, District Lodge 190, East Bay Automotive Machinists Lodge No. 1546, International Association of Machinists and Aerospace Workers, AFL-CIO/CLC (IAM) and violated Sections 8(a)(1), (2) and (5) of the Act by recognizing Respondent International Longshore and Warehouse Union (ILWU) as the representative of the historical bargaining unit and refusing to recognize and bargain with the Charging Party; correspondingly, the Judge found that Respondent ILWU violated Section 8(b)(1)(A) and (2) by unlawfully accepting recognition from Respondent PAOH.

On February 10, 2017, Respondent ILWU filed its “Exceptions to the Rulings and Decision of the Administrative Law Judge” and brief in support thereof. Pursuant to the Board’s Rules and Regulations, Series 8, as amended, Section 102.46(d)(1), Counsel for the General Counsel hereby files the following Brief in Answer to Respondent ILWU’s Exceptions and urges herein that the Board affirm the Judge’s decision in its entirety.¹

¹ Respondent PAOH did not file any exceptions to the Judge’s decision. On February 24, 2017, the Charging Party filed cross-exceptions to Judge’s decision and a brief in support thereof. The General Counsel is not filing a response to the Charging Party’s Cross-Exceptions.

II. THE JUDGE MADE APPROPRIATE RULINGS²

A. The Judge Correctly Rejected Respondents' Attempts to Relitigate Prior Board Findings Regarding the Unit at Issue in This Case

As correctly found by the Judge, Respondent PAOH's obligation to recognize and bargain with the IAM as the representative of the historical bargaining unit of marine terminal maintenance and repair employees at Berths 20-24 (M&R Unit) follows directly from the bargaining obligations of the predecessor employer of the bargaining unit, Pacific Crane Maintenance Co. (PCMC). PCMC's bargaining obligation is the subject of the Board's decision in *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*, 359 NLRB 1206 (2013)(*PCMC I*), as affirmed and incorporated by reference the Board in 362 NLRB No. 120 (2015) (*PCMC II*) (herein referred to jointly as *PCMC/PMMC*).³ The Board's *PCMC/PMMC* decision establishes that the IAM-represented the employees working in the M&R Unit when PAOH took over the work in July 2013. The decision also establishes that Respondent ILWU violated Sections 8(b)(1)(A) and (2) when it unlawfully accepted recognition of the M&R Unit from the predecessor employer PCMC and continued to unlawfully represent employees working in the unit through July 1, 2013 when PCMC ceased operating the historical unit.

It is well established that an administrative law judge is bound to apply established Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding

² References to the Judge's Decision and the Hearing Transcript are cited herein as (ALJD) and (Tr.), respectively, followed by the page and line number. References to the trial exhibits are as follows: General Counsel (GC), Respondent PAOH (PAOH), Respondent ILWU (ILWU), Charging Party IAM (IAM) and Administrative Law Judge (ALJ) followed by the exhibit number.

³ As a result of *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Board set aside its decision in *PCMC I*, 359 NLRB 1206 (2013) on procedural grounds. Upon reconsideration by a newly-composed Board, the *PCMC I* decision was affirmed and incorporated by reference in *PCMC II*, 362 NLRB No. 120 (2015).

contrary decisions by courts of appeals. See, e.g., *Pathmark Stores, Inc.*, 342 NLRB 378, n. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749, n. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962, n. 4 (1979), *enfd.* 640 F.2d 1017 (9th Cir. 1981); and *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), *enfd.* in part 331 F.2d 176 (8th Cir. 1964). Since the *PCMC/PMMC* decision has not been reversed by the Board or the Supreme Court, the Judge correctly found that decision to be binding in this case and she properly rejected the Respondents' numerous attempts to relitigate matters and overturn precedent set by the Board in that decision. (ALJD 4:fn 4)⁴ Respondent ILWU's exception Nos. 1 through 7 relate to the Judge's rulings prohibiting the relitigation of matters already determined by the Board, including: Respondent ILWU's attempts to attack the unit found appropriate by the Board in *PCMC/PMMC*, its renewal of its accretion argument already rejected by the Board in *PCMC/PMMC*, and its request to admit the entire transcript and exhibits from the *PCMC/PMMC* trial in furtherance of its efforts to relitigate matters already ruled upon by the Board.

Respondent ILWU's claims that the Judge's rulings with respect to the binding nature of the prior *PCMC/PMMC* decision resulted in a denial of due process are wholly without merit. As noted above, the *PCMC/PMMC* decision constituted binding precedent in this case and was properly relied upon by the Judge. Moreover, Respondent ILWU was a respondent in the *PCMC/PMMC* litigation and had the opportunity to put on evidence and argue these matters in that case, which it did before both ALJ Clifford Anderson and the Board. It would be wholly improper to permit Respondent ILWU a second opportunity to litigate and argue those same matters in this proceeding, particularly where the Judge was bound by the Board's prior rulings. Under such circumstances, the Judge's rulings adhering to the prior Board finding did not result

⁴ On May 2, 2016, the Judge properly rejected former Respondent MTC/MTCH's motion seeking to relitigate the *PCMC/PMMC* single employer stipulation entered in the prior litigation in light of the binding precedent of the *PCMC/PMMC* decision. (GC 1(mmmm)). Respondent PAOH did not file exceptions to this ruling.

in a denial of due process as to Respondent ILWU and its exceptions to the contrary should be denied.

Respondent ILWU's claim that it was denied due process because it did not receive notice of the scope of the alleged unit is wholly without merit and a complete ruse. In Exception No. 8, Respondent ILWU attempts to take exception to the "General Counsel changing the scope of the alleged unit in her post-hearing brief." The scope of the unit, and the issue of whether it includes crane mechanics, was established by the Board in the *PCMC/PMMC* decision, which found that the crane mechanics were not included. At no point did Counsel for the General Counsel ever claim that crane mechanics were included in the bargaining unit and Respondent ILWU admits this in its brief in support of exceptions at page 20. The fact that certain Transbay documents entered into evidence contained information about all Transbay M&R mechanics, including crane mechanics, is irrelevant. The scope of the historical bargaining unit is set forth in *PCMC/PMMC* decision and does not include crane mechanics and both Respondent ILWU and the General Counsel agree that crane mechanics are not properly included in the unit. Moreover, the complaints issued in this case, and the unit alleged and litigated in this case, has always been described as the unit set forth in the *PCMC/PMMC* decision, which excludes crane mechanics. While the General Counsel alleged that the unit was expanded geographically when Respondent PAOH took over Berths 25 & 26 and employees from those locations were hired into the historical unit, at no time has the General Counsel ever claimed or contended that the unit was expanded to include new positions previously excluded from the unit. Finally, not only is this Exception substantively flawed, it is also procedurally improper since it does not relate to a ruling or finding by the Judge, but rather a "statement" in the Counsel for the General Counsel's brief, which

Respondent ILWU nevertheless admits is correct; this sham exception should be rejected in its entirety.

B. The Judge Correctly Approved the Partial Non-Board Settlement and her Order Approving the Settlement Has Already Been Upheld by the Board

Prior complaints, including amendments thereto, issued in this matter included allegations that Respondent PAOH, and/or Respondent PAOH and MTC Holdings, Inc. (MTCH) and Marine Terminals Corporation (MTC) as single employers, violated Sections 8(a)(1), (2) and (5) of the Act, as well as allegations that Respondent PAOH and Respondent PAOH and MTCH and MTC, as a single-employer, were also *Golden State* successors liable to remedy certain unfair labor practices engaged in by 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.

On August 29, 2016, after briefing from the parties, the Judge issued an order approving a partial non-Board settlement agreement reached by Respondents PAOH, MTCH and MTC and the Charging Party IAM, which settled the single-employer and *Golden State* successor allegations.⁵ On August 31, 2016, the Judge approved the General Counsel's motion to withdraw those portions of the Amended Consolidated Complaint, which resulted in the removal of Respondents MTCH and MTC from the case entirely and left only the *Burns* successor allegations as to Respondent PAOH; the allegations against Respondent ILWU were unaffected by the settlement. On September 9, 2016, following the withdrawal of the settled allegations, the General Counsel issued the Second Amended Consolidated Complaint, which set forth the outstanding issues in this case and which were ruled upon by the Judge in her December 1, 2016 decision.

⁵ The Judge's August 29, 2016 Order was slightly modified by an erratum issued by the Judge on September 29, 2016.

On September 9, 2016, Respondent ILWU filed with the Board a Motion to Appeal the Judge's approval of the partial settlement. Thereafter, Respondents PAOH, MTCH, MTC, Charging Party IAM, and the General Counsel filed oppositions to Respondent ILWU's motion on both procedural and substantive grounds.

On November 18, 2016, notwithstanding procedural questions about Respondent ILWU's standing to appeal a partial settlement by separate respondents, the Board granted Respondent ILWU's motion for permission to appeal the Judge's August 29, 2016 Order approving the non-Board settlement agreement and denied the appeal on its merits, finding that Respondent failed to establish that the Judge abused her discretion in approving the settlement. As such, Respondent's objections to the Judge's approval of the settlement, as set forth in Exception Nos. 9, 44 and 46, have already been reviewed and dismissed by the Board. Respondent ILWU's Exceptions to the Judge's approval of the settlement raise no issues or arguments not previously considered by the Board and should be rejected.⁶

III. THE JUDGE MADE APPROPRIATE FINDINGS

A. The Judge Made Appropriate Findings of Fact

In support of her correct conclusion that Respondents PAOH and ILWU violated the Act, the Judge made appropriate factual findings, as detailed herein. As noted above, the foundational facts underlying the representational status of the M&R Unit at issue in this case are set forth in the *PCMC/PMMC* decision. On October 19, 2015, the Judge granted the General Counsel's motion to take administrative notice of the decision in this matter and she properly relied upon facts and findings set forth in the previous case. (Tr. 30:11-31:19) In

⁶Nevertheless, to the extent that the Board may wish to revisit the issue of the Judge's approval of the partial settlement in this case, the General Counsel's position on this matter is set forth in the General Counsel's Opposition to Respondent ILWU's Motion for Permission to Appeal Approval of Partial Settlement, which was filed with Board on September 23, 2016.

Exception Nos. 1-7, 11, 12, 15, 38 and 52, Respondent ILWU takes exception to the Judge's reliance on the *PCMC/PMMC* decision for foundational facts and findings. As discussed above, the Board's findings are binding on this matter and the Judge appropriately relied on those factual findings and adhered to the Board's legal findings in this case. (ALJD 4:fn 4)

1. Historical IAM Bargaining Unit

In the 1960s, the IAM began representing the employees performing marine terminal maintenance and repair (M&R) work at Berths 20-24 at the Port of Oakland, California. Until 1999, an entity known as Sea-Land operated the shipping terminal where Berths 20-24 are located, and it directly employed the M&R employees working there. Sea-Land's IAM-represented mechanics performed "shop work," i.e., the maintenance and repair of containers and stevedoring equipment, such as refrigeration equipment, chassis, generation sets, and power equipment.⁷ The IAM bargaining unit mechanics did not perform "crane work," i.e., the maintenance and repair of the 30-40 foot tall stationary cranes located on the waterfronts. Rather, mechanics historically represented by the ILWU performed the crane work at Sea-Land's terminal. *PCMC I*, 359 NLRB at 1207, 1227. (ALJD 2:Tr. 34:7-35:14, 145:8-146:11, 155:8-28; GC 2)

In 1999, Maersk bought out Sea-Land and entered into a lease with the Port of Oakland to operate the shipping terminal at Berths 20-24. Maersk put the M&R work up for bid and informed potential bidders that they would have to adopt the extant IAM/Sea-Land collective-bargaining agreement, which was not due to expire until 2002. *PCMC* wanted the work but could not bid on it because, as a member of the Pacific Maritime Association ("PMA"), it

⁷ Sea-Land also had employees performing container M&R work at shipping terminals in Tacoma, Washington and Long Beach, California. See *PCMC I*, 359 NLRB at 1207.

would have had to assign the work to its ILWU-represented employees.⁸ Thus, PCMC and Marine Terminals Corp. (“MTC”), a separate M&R contractor on the West Coast that had an existing collective-bargaining relationship with the IAM, formed a new company called Pacific Marine Maintenance Co. (“PMMC”) in order to obtain the Maersk contract at the terminal. Maersk awarded the contract to PMMC, who retained Sea-Land’s IAM-represented mechanics, recognized the IAM, and adopted Sea-Land’s collective-bargaining agreement with the IAM. When PMMC took over, the unit employees continued to perform the same work at Berths 20-24 in the Port of Oakland as it had previously performed for Sea-Land. *PCMC I*, 359 NLRB at 1207; (ALJD 2:23-3:10; Tr. 35:16-39:10)

In 2002, the IAM and PMMC entered into a successor collective-bargaining agreement that was to be effective until March 31, 2005. (GC 4) The successor agreement stated that the type of work it covered included the maintenance and repair of containers and all other work the IAM mechanics historically had performed under the contract. The agreement stated that it applied to all facilities and operations where PMMC did business and had commercial control, covered the mechanics and other employees presently and thereafter represented by the IAM, and applied to any and all accretions to the bargaining unit including, but not limited to, new contract work, newly established or acquired shops, and the consolidation of shops in the geographical area covered by the agreement. That same year Maersk and PMMC also renewed their service agreement, but Maersk demanded that it be on a month-to-month basis. *Id.* at 1207. (ALJD 3:11-15)

In 2004, Maersk asked PMMC to submit a new bid in order to keep the M&R work after concluding that labor costs under the IAM contract were too high. *Id.* PMMC responded

⁸ PMA is a multiemployer association that negotiates collective-bargaining agreements with the ILWU on behalf of approximately 70 companies at various ports on the West Coast. See *PCMC I*, 359 NLRB at 1207.

that it could not do the work for less than the current rate and that any labor cost increases under a new IAM contract would be passed on to Maersk per industry practice. *Id.* Maersk then approached PCMC about doing the work at a lower rate, noting that the PMMC-IAM contract was set to expire in 2005 and that labor costs under that agreement were expected to increase by 12 percent. *Id.* PCMC indicated that it could perform the work for less because its M&R employees would be working under the PMA-ILWU Agreement that would not expire until 2008. *Id.*

On January 6, 2005, Maersk, PMMC, and PCMC met and discussed how Maersk could transition from a PMMC/IAM to a PCMC/ILWU workforce for the M&R work, and worked out the details of a new contract between Maersk and PCMC. *Id.* On January 25, Maersk cancelled its maintenance contract with PMMC and awarded the work to PCMC, effective March 31, 2005. On January 26, PMMC informed the IAM that it had lost the work and that it expected to lay off the unit employees on April 1. *Id.* (Tr. 45:1-16, GC 3)

In February 2005, the IAM requested that PMMC bargain over both the decision to cease performing the M&R work and the effects of that decision on the unit employees. PMMC agreed to bargain over the effects of the layoff, but asserted that it was Maersk that had decided to use another contractor to perform the work. *Id.* at 1208.

On March 1, 2005, PCMC sent employment offers to 75-80 of the 100 former PMMC employees working at the Ports of Oakland and Tacoma.⁹ *Id.* The letters specified that the work belonged to PCMC's ILWU-represented bargaining unit and would be covered by the PMA-ILWU contract. *Id.* On March 10, the IAM sent a letter to PCMC demanding

⁹ By late 2002, the large portion of the M&R Unit that had been operating in Long Beach, California was accreted into a new terminal operation at the Port of Los Angeles under the ILWU. (Tr. 40:20-41:12). The loss of the Long Beach component of the historical bargaining unit was found by the Board not to affect the appropriateness of the bargaining unit in the *PCMC/PMMC* decision. *PCMC II*, 362 NLRB at 1211 fn. 19.

recognition as the bargaining representative of the former PPMC employees. On March 25, PCMC rejected IAM's demand and stated that its employees were covered by the PMA-ILWU contract. On March 30, 2005, PPMC permanently laid-off the IAM-represented unit employees. *Id.*

On March 31, 2005, 76 of the former PPMC mechanics began work for PCMC as ILWU-represented employees covered by the PMA-ILWU contract, and PCMC hired six more former PPMC mechanics shortly thereafter. *Id.* The mechanics continued to perform the same work at the same locations, with the same tools and equipment, and for the same supervisors. *Id.* at 1208, 1210, 1211. (ALJD 3:17-22; Tr. 842:4-25, 844:6-24) While the employees had historically been represented by the IAM, PCMC treated these employees as an accretion to ILWU's coast-wide bargaining unit and ILWU began actively representing them. *Id.*

Beginning on April 1, 2005, PCMC began to temporarily assign unit employees to perform non-unit work at non-unit locations and to assign non-unit employees to perform unit work. This included unilaterally transferring former PPMC unit employees at the Port of Oakland into the crane shop at Berths 20-24, where they had never worked, and unilaterally assigning its ILWU-represented employees from the crane shop to perform container M&R work, which they had never performed. *Id.* (Tr. 145:8-146:11, 155:8-18)

2. PCMC/PPMC Litigation

The IAM filed charges against PCMC and PPMC with the Board alleging that those entities constituted a single employer that had violated Section 8(a)(1) and (5) by unlawfully withdrawing recognition from the IAM, and had violated Section 8(a)(2) by recognizing the ILWU and applying the PMA-ILWU contract to the unit employees. The IAM also filed a Section 8(b)(1)(A) and (2) charge alleging that the ILWU had acted unlawfully by accepting

recognition and agreeing to apply its contract to the unit employees. These charges resulted in the Board decision in *PCMC/PMMC*.

On February 12, 2009, ALJ Clifford Anderson issued his decision in the *PCMC/PMMC* case. He determined, among other things, that unit employees lawfully had been accreted into the coast-wide ILWU bargaining unit and, accordingly, that PCMC neither violated Section 8(a)(1) or (5) by unlawfully withdrawing recognition from the IAM nor violated Section 8(a)(2) by recognizing the ILWU and applying the PMA-ILWU contract to the unit employees. The ALJ also concluded that ILWU had not violated Section 8(b)(1)(A) or (2) by accepting recognition from PCMC and applying its contract to the unit employees. See *PCMC I*, 359 NLRB at 1220-1256. Following the ALJ's decision, the then-Acting General Counsel and the IAM filed exceptions and supporting briefs with the Board, and PCMC/PMMC and the ILWU filed answering briefs. (ALJD 3:20-23)

3. PAOH Becomes Terminal Operator of Berths 20-24, but PCMC Continues to Employ M&R Unit

In 2009, Maersk cancelled its lease with the Port of Oakland to operate Berths 20-24. Around this same time, Ports America Outer Harbor was formed as a joint venture between HHH Oakland, Inc., a Ports America-related holding company, and Terminal Investments, Ltd.¹⁰ (Tr. 297:3-299:17; GC 31-32) In March 2009, shortly after its formation, PAOH won a 50-year concession with the Port of Oakland to operate the marine terminal at Berths 20-24 and it began operating the terminal on January 1, 2010. (ALJD 3:24; Tr. 52:2-12, 305:12-314:8, 376:2-8; GC 29-30)

¹⁰ In July 2007, an investment company called AIG Highstar, through a capital fund, purchased MTC, which had partnered with PCMC to form PMMC, and combined it with another East Coast based company to form a group of companies operating under the brand name Ports America, which includes Ports America Outer Harbor. (Tr. 296:15-298; 473:6-475:13)

PAOH did not take over the M&R work at Berths 20-24 when it began operating the terminal. Instead, PAOH entered into an agreement with PCMC to have it continue performing the container M&R work at those berths. (ALJD 3:24-25; Tr. 384:24-388-9; GC 36) PAOH also hired Gil Currier, the M&R Director who oversaw PCMC's M&R work for the prior terminal operator, and Currier continued to oversee PCMC's performance of M&R work on behalf of PAOH as the new terminal operator. (Tr. 433:8-435:14, 848:9-21)¹¹ Thus, when PAOH took over the terminal operations in January 2010, the M&R Unit continued to be employed by PCMC, under the PMA-ILWU collective-bargaining agreement, and their work was unaffected by the change in terminal operator. (Tr. 145:7:-152:13, 848:13-849:16, 2017:3-6).

4. Extension of PAOH Terminal Operations to Include Berth 25 & 26 and PCMC Hires Transbay M&R Employees Into the historical M&R Unit

In 2010, Transbay Container Terminal, which operated the terminal at Berths 25-26 immediately adjacent to PAOH at Berths 20-24, closed as part of a deal negotiated between PAOH and International Terminal Services (ITS), Transbay's parent company, under which PAOH took over the lease and terminal operations at Berths 25-26 and combined it into a single terminal operation including Berths 20 through 26. (ALJD 2:26-27, 4:26-28; Tr. 557:17-562:25, 582:20-25; GC 51, 53)

¹¹ Gil Currier has overseen the M&R Unit work since June 1979 when he started working for Sea-Land. He went to work for Maersk when it took over operation of Berths 20-24 in 2005. Within a year or two, Currier transferred to APM Terminals, the stevedoring operation of Maersk that operated Berths 20-24 just prior to PAOH. Under APM Terminals, Currier oversaw the work of PCMC at Berths 20-24 and he continued to oversee PCMC's M&R work when he was hired by PAOH in January 1, 2010 when it took over the terminal operation of APM. Under PAOH, Currier continued to oversee and direct PCMC's M&R work until July 1, 2013, when PAOH directly took over the M&R work and he became its M&R director and continued overseeing and began directly supervising the M&R work. (Tr. 836:22-845:8)

PAOH facilitated the hire of Transbay's IAM-represented mechanics by PCMC to perform M&R work for the combined terminal operation at Berths 20-26. In this regard, several months in advance of its takeover of Berths 25-26, PAOH's President Jay Bowden met twice with PMA managers to discuss the implications of taking over the work at Transbay and converting its IAM-represented mechanics to ILWU representation. (Tr. 577:20-578:23; GC 53) PAOH also proposed the particular takeover structure of Transbay to minimize risks of ILWU causing a major disruption of a jurisdictional dispute related to the conversion of Transbay's mechanics from IAM to ILWU. (Tr. 585:6-19)

Shortly before taking over operation of the Transbay terminal, PAOH renegotiated its contract with PCMC to extend the M&R work provided by PCMC to cover M&R work done at the expanded operation from Berths 20-26. (Tr. 587:1-8; GC 56) PCMC agreed to expand its workforce to cover the expanded unit from Berths 20-26 in exchange for PAOH's agreement to indemnify PCMC for any reasonable legal defense fees or costs of an NLRB proceeding, court proceeding or arbitration if an action were brought over the initial staffing of the new terminal at Berths 20-26. (Tr. 587:1-589:11; GC 56 at p. 4)

On October 1, 2010, PAOH assumed Transbay's lease with the Port of Oakland to operate the terminal and continue Transbay's M&R operations at Berths 25-26. (ALJD 4:26-28, 8:1-2; Tr. 564:12-15) PAOH purchased virtually all of Transbay's equipment and entered into agreements to continue servicing Transbay's customers. (ALJD 5:2-3, 8:2-3; Tr. 582:20-25, 602:4-15; GC 57-58) The fence that had separated Berths 24 and 25 was dismantled, effectively providing barrier-free movement throughout Berths 20 to 26. (ALJD 4:39-5:1, 8:4-6; Tr. 164:25-166:14, 592:9-594:12) At the time of its closure, Transbay employed approximately 20 IAM-represented M&R employees who worked out of an M&R shop located

at Berth 25. (Tr. 54:22-57:14, 591:17-23) When Transbay closed on October 1, 2010, PCMC hired all of Transbay's M&R employees to perform M&R work for PAOH at Berths 20 through 26, which now included work for customers previously served by Transbay.¹² (ALJD 5:1-2, 8:-13; Tr. 72:16-23, 582:20-25, 591:17-594:12; GC 6)

The former IAM-represented M&R mechanics of Transbay hired by PCMC became represented by the ILWU and were merged into the larger historical bargaining unit that was the subject of the *PCMC/PMMC* litigation. (ALJD 5:3-5; 8:15-16) The IAM did not file a new unfair labor practice charge alleging either that PCMC had failed to recognize it as the representative of the former Transbay employees or that the Transbay employees working at Berths 25-26 had been accreted into the historical bargaining unit because the complaint in *PCMC/PMMC* alleged that IAM represented the PCMC workforce into which the Transbay M&R employees merged and the IAM concluded that it did not need to file a new charge.¹³ (Tr. 250:9-255:12)

The approximately 20 former Transbay M&R employees were merged and wholly incorporated into the much larger historical bargaining unit. The former Transbay M&R mechanics were assigned the same type of work, used the same tools, reported to the same lead persons, supervisors and worked under the same managers as the other mechanics in the historical bargaining unit. Indeed, they worked alongside employees in the same job

¹² When Transbay closed, 4 M&R employees retired, leaving approximately 20 M&R employees who were all hired by PCMC. (Tr. 72:16-74:21, 80:10-14; GC 6)

¹³ Respondent ILWU asserts in its brief in support of exceptions at page 9 that the IAM never made a claim for the Transbay M&R work at Berths 25 and 26; this is patently false. As noted correctly by the Judge, the IAM did file a grievance over the matter based upon its contract with the related Ports America company, MTC. However, the grievance was rejected and never resolved due to MTC's and PAOH's claims to be unrelated to each other. Since the Transbay employees were hired into the historical bargaining unit, the IAM reasoned that their representation would be determined by the pending *PCMC/PMMC* litigation and it did not file an unfair labor practice charge over the change in representation of former Transbay employees. (ALJD 38-40; Tr. 82:1-102:22, 244:8-255:12, 619:8-20; GC 8-21)

classifications doing the same work that had been in the historical bargaining unit since the 1960s. (ALJD 5: 26-34, 8:16-24; Tr. 54:23-57:24, 164:25-168:11, 860:7-861:17, 2019:19-2020:2) In addition, Transbay M&R employees who had been working at a shop on Berth 25 were moved to the M&R shops at Berths 20- 24 and worked alongside the employees in the historical bargaining unit. (Tr. 164:25-168:11, 591:17-594:12)

Because PCMC continued its refusal to recognize the IAM as the historical bargaining representative, the former Transbay employees received the same ILWU representation as the other unit employees, and they lost their representation by the IAM. (ALJD 5:28-29, 8:23-24; Tr. 864:14-24) There were no additional requisites or hurdles placed on them as far as their absorption into the operations at Berths 20-24, and their inclusion did not result in displacement of any unit employees.

5. PAOH Requests Proposals from M&R Service Providers and Evaluates Performing the M&R Work and Hiring the Bargaining Unit Directly

In March 2013, PAOH provided notice to PCMC that it would be reopening its contract to perform the M&R services at Berths 20-26, which was set to expire on June 30, 2013. (Tr. 623:24-625:9; GC 56, 60) PAOH then solicited bids from numerous M&R service providers, including PCMC, to take over the M&R services being provided by PCMC at Berths 20-26.¹⁴ (Tr. 1361:20-24, 2006:10-13; GC 61). In the months that followed, POAH received at least 3 bids to continue the work and ultimately decided to do the work itself and directly hire the M&R Unit employees to perform the work. (Tr. 626:10-649-16, 663:1-665:7, 883:1-884:6,

¹⁴ The request for proposals at GC 61 refers to Berths 20-25, rather than Berths 20-26. PAOH President Bowden explained that the request for proposals sought proposals for M&R work at the entire PAOH terminal, which was Berths 20-26. He explained the lack of Berth 26 was either a typo or caused by the fact that Berths 25 and 26 operate as one berth and are sometimes referred to jointly as Berth 25. (Tr. 630:8-631:1)

1360:1-1361:24; GC 62, 64, 65) On June 11, 2013, PAOH notified PCMC that its bid to continue performing the work had not been accepted. (Tr. 1363:4-16; GC 88)

6. PCMC/PMMC Board Decision Issues

On June 24, 2013, the Board issued its decision in *PCMC/PMMC*, 395 NLRB 1206, reversing ALJ Anderson and finding that IAM is, and at all times material was, the exclusive bargaining representative of the historical bargaining unit. The Board specifically rejected PCMC/PMMC's and Respondent ILWU's arguments that the unit employees had been accreted into the ILWU coast-wide bargaining unit. The Board concluded that, notwithstanding evidence that the ILWU had begun transferring M&R employees to perform some crane work and granted them the same benefits as other ILWU employees, the historical bargaining unit had retained its distinct community of interest apart from the ILWU-represented employees who historically had performed non-unit, crane repair work and other traditional longshore work. Thus, the Board held that PCMC/PMMC had violated Section 8(a)(5) by withdrawing recognition from the IAM as the unit employees' bargaining representative, unilaterally laying off the unit employees from PMMC and informing them they could perform unit work only if rehired by PCMC as ILWU-represented employees, unilaterally changing terms and conditions of employment by applying the PMA-ILWU contract to the unit employees, and unilaterally assigning unit employees to non-unit positions and non-unit employees to unit positions. It also held that PCMC/PMMC had violated Section 8(a)(2) by recognizing ILWU, a minority-supported union, as the unit employees' bargaining representative, and that the ILWU had violated Section 8(b)(1)(A) and (2) by accepting recognition and applying the contract to the unit employees. The Board ordered PCMC/PMMC to, among other things, withdraw recognition from the ILWU, affirmatively recognize and bargain with the IAM, rescind the unilateral changes, make whole the IAM benefit funds, and

disgorge the dues paid to the ILWU. The Board also ordered the ILWU to cease accepting recognition of the unit until it had been certified by the Board as their collective-bargaining representative and to cease and desist applying the PMA-ILWU agreement to the unit employees. See *PCMC/PMMC*, 395 NLRB at 1212-1215.

PAOH became aware of the *PCMC/PMMC* decision shortly after it issued and before it hired the historical M&R bargaining unit, which had by then been geographically extended to include Berths 25 and 26. In fact, PAOH's M&R Director, Gil Carrier, and its M&R Manager, Michael Loftesnes, admitted that they had been aware of the pending litigation and kept abreast of developments in the case. (Tr. 844:1-848:25, 2066:8-2068:6) By letter dated June 28, 2013, the IAM sent PAOH a copy of the Board's decision in *PCMC/PMMC* and advised PAOH that it was a successor to the *PCMC/PMMC* bargaining unit that PAOH was obligated to recognize and bargain with the IAM over wages, hours, and working conditions for the unit of employees that it had taken over from *PCMC/PMMC*.¹⁵ (ALJD 3:30-4:2; Tr. 755:7-756:13, GC 21)

Respondent ILWU falsely claims in its brief at page 11, that receipt of the June 28, 2013 letter was "the first time PAOH management became aware of IAM was making any claim to the mechanic work at Outer Harbor." As noted above, both Carrier and Loftesnes had been aware of the ongoing litigation. Moreover, during the hearing, the General Counsel put on significant evidence of Respondent PAOH managers' and labor relations personnel's knowledge of the pending litigation related to *Golden State* successor allegations then pending in this case. Since those allegations were settled prior to issuance of the Judge's decision, she did not need to address that evidence or make findings related to Respondent PAOH's

¹⁵ The IAM also asserted that PAOH was a *Golden State* successor obligated to remedy *PCMC/PMMC*'s unfair labor practices. *Golden State Bottling Co., Inc. v. N.L.R.B.*, 414 U.S. 168 (1973).

knowledge of the pending litigation. Moreover, prior knowledge of a predecessor's unfair labor practices is not needed to establish a *Burns* successor, which was the only remaining allegation left as to Respondent PAOH following the non-Board settlement reached regarding the *Golden State* successor and single-employer allegations. See *NLRB v. Burns Int'l Security Services*, 406 U.S. 272 (1972)

7. PAOH Hires Bargaining Unit Directly and Succeeds PCMC's Bargaining Obligation

On July 1, 2013, PAOH hired 64 employees to perform the M&R work previously done by PCMC. (ALJD 4:4-5, 9:4-5; Tr. 684:11-695:20; GC 66-67) Prior to this date, PAOH did not employ any employees performing M&R work. (ALJD 4:5; Tr. 1366:9-14, 2013:21-2014:10) Every mechanic hired by PAOH came directly from PCMC and those employees continued to perform the same historical unit work at Berths 20-26 in the same manner and at the same location. (ALJD 4:5-6, 9:5-7, 10:28-11:7, 12:11-12; Tr. 162:6-164:24, 210:6-211:12, 221:8-225:12, 849:10-20; GC 66, 67)¹⁶ They also continued to work under the direction and oversight of the same managers and lead persons.¹⁷ (ALJD 9:6-8; Tr. 700:7-702:12, 848:22-849:9, 1997:2-1999:3, 2014:11-2016:1) The only change that resulted from PAOH's takeover

¹⁶ Due to a staggered shutdown of PCMC at the Port of Oakland, some PCMC employees began working for PAOH in early July while others didn't start work at PAOH until July 13, 2013. However, because PAOH's plan to hire PCMC's employees was developed as one package, all 67 mechanics that PAOH hired from PCMC were given the same seniority date of July 1, 2013. PAOH's records show that only 2 other employees were hired into the unit and they came from APM (another terminal operator) on November 11, 2013. (Tr. 684:11-695:29; GC 67)

¹⁷ In Exception No. 34, Respondent ILWU correctly points out that the Judge mistakenly found that PAOH hired supervisors Robert Walker and Brad Stolison from PCMC (they were instead hired from TTI, which also used PCMC as a M&R subcontractor). (Tr. 2015:5-2016:8, 1556:5-15) However, this error does not undermine the Judge's conclusion that there was a continuity of management and supervision to support a *Burns* finding. As the Judge noted, PAOH's M&R Director, Gil Currier, and its M&R Manager, Michael Loftesnes, continued to oversee and direct the work of the M&R department when it was operated by PCMC and after PAOH took the work in-house. (Tr. 700:7-702:12, 848:22-849:9, 1997:2-1999:3, 2014:11-2016:1) Indeed, PAOH carried over managers at the highest level with the most authority to direct the work and responsibility for the performance of the M&R work. Indeed, PAOH managers consulted with Currier regarding the hire of PCMC as a subcontractor in 2009 (even before Currier was hired by PAOH) and Currier's experience overseeing the M&R work at Berths 20-24 extended back to when the work was done by Sea-Land, PMMC, PCMC, and then ultimately continued through PAOH's operation. (Tr. 861:18-864:2, 873:15-875:2, GC 76).

was the name of the employees' employer changed, several supervisors were replaced, and the color of their coveralls changed from white to orange. (ALJD 9:7-8; Tr. 148:11-13) Because PCMC removed most of its tools and vehicles at the end of its contract, PAOH purchased newer versions of the same tools and vehicles used by the historical bargaining unit employees prior to the takeover. (ALJD 12:10-11; Tr. 162:6-17, 849:10-20, 869:7-870:5) However, unit employees continued to use their same personal tools on the job with both PCMC and PAOH. (Tr. 162:14-17) There was no reduction in force or hiatus in M&R operations at the terminal when PAOH took over. (ALJD 12:12-15; Tr. 148:17-18) Shortly after PAOH took over, the container/chassis repair operations from the mechanic shop at Berths 22-23 were moved to the mechanic shop at Berth 25, which had previously been used by Transbay M&R mechanics; however, the chassis mechanics retained their lockers in the old shop and continued to report to work there each day. (ALJD 11:16-18; Tr. 702:13-703:21)

By letter dated July 12, 2013, the IAM demanded, among other things, that PAOH recognize and bargain with it. The IAM stated that it had previously advised PAOH of its successorship obligation and that this was a further demand for recognition and bargaining. (GC 22) At all times during its operation of the M&R unit, PAOH refused to recognize or bargain with the IAM regarding the unit employees.

The ILWU has unlawfully accepted recognition in the historical bargaining unit since it accepted recognition from PCMC on March 31, 2005 through the closure of PAOH and layoff of bargaining unit employees in the Spring of 2016. (Tr. 2353:5-2354:6) Notwithstanding the Board's finding that it is an unlawful 8(b)(2) union, the ILWU admits that it continued to accept recognition and represent M&R employees in the historical bargaining unit when PAOH

took over operations from PCMC on July 1, 2013 and continued to do so throughout POAH's operation of the terminal. (GC 1(ppp))

B. The Judge Correctly Concluded That the Respondents Violated the Act

1. The Judge Correctly Found That Respondent PAOH is a *Burns* successor to PCMC's M&R Unit at the Port of Oakland

The Judge properly concluded that Respondent PAOH was a *Burns* successor and, notably, Respondent PAOH has not taken exception to her finding. As detailed herein, Respondent ILWU's exceptions to the Judge's determination that Respondent PAOH is a *Burns* successor are wholly without merit and should be rejected.

An employer succeeds to its predecessor's collective-bargaining obligations as a *Burns* successor if a majority of its employees, consisting of a substantial and representative complement in an appropriate bargaining unit, are former employees of the predecessor and if there is substantial continuity between the two enterprises. See *NLRB v. Burns Int'l Security Services*, 406 U.S. 272, 280-81 (1972); *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41-43 (1987). This is true even if only a portion of the historical bargaining unit, in this case the Port of Oakland portion of the unit, was taken over and operated by PAOH so long as the unit remains appropriate. See *Bronx Health Plan*, 326 NLRB 810, 811 (1998).

Contrary to Respondent ILWU's Exception Nos. 1-7, 13-26, 28-43, 45, and 48-52, the Judge correctly determined that PAOH became a *Burns* successor to PCMC when it took over the container M&R work at Berths 20-26 in the Port of Oakland in July 2013 because PCMC employees working in the historical bargaining unit constituted a majority of PAOH's M&R workforce and PAOH continued to perform the M&R work in the same manner as PCMC in an appropriate unit. The Judge correctly determined that, as a *Burns* successor, PAOH was

obligated to recognize and bargain with the IAM as the representative of its M&R Unit employees. (ALJD 12:13-14)

a. IAM is the established representative of the historical bargaining unit

As discussed above, it is well established that a judge is bound to apply established Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals. The Board's *PCMC/PMMC* decision clearly and unequivocally determined that the IAM represented the M&R employees working for PCMC in July 2013 when PAOH took over PCMC's operation. Since that decision has not been reversed, the Judge correctly concluded that the decision is binding in this case. (ALJD 4: fn 4)

Contrary to Respondent ILWU's Exception Nos. 8, 10, 12, 27, 31 and 53, the General Counsel did not change the scope of the alleged unit alleged after trial, nor did the Judge fail to identify the proper scope of the unit in her decision. As discussed earlier, these exceptions are a subterfuge. At all times, the General Counsel has defined the scope of the bargaining unit by referring to the unit forth in the *PCMC/PMMC* decision, and the Judge correctly did the same in her decision. The *PCMC/PMMC* decision clearly defines the scope of the unit as M&R mechanics as including container, chassis and power mechanics and excluding crane mechanics. *PCMC I*, 359 NLRB at 1207, 1227. At no time did counsel for the General Counsel ever state, argue or allege that the unit now includes crane mechanics, and Respondent ILWU concedes that the crane mechanics are not properly included in the unit. Contrary to the false and misleading statements in Respondent ILWU's brief, the General Counsel solicited evidence to establish that PAOH's M&R employees did not perform crane mechanic work, that such work was not included in the historical bargaining unit, and the M&R unit positions

weren't interchanged with crane mechanics.¹⁸ All of this contradicts Respondent ILWU's insinuations that the General Counsel at some point, without ever saying it on the record or alleging it in a complaint, took the position that crane mechanics were now included in the unit. Indeed, PAOH hired a lot of employees that were not included in the M&R unit at issue in this case, such as lashers, crane operators and container and material handlers, and it would be absurd to require the General Counsel to state affirmatively on the record whether each position that worked for PAOH was or was not included in the M&R unit, particularly when the unit at issue is clearly described in the complaint.

b. There is a substantial continuity of the workforce and employing enterprise between PAOH and PCMC

It is undisputed that all of the permanent employees that PAOH hired for its Port of Oakland M&R operation were former PCMC employees. As such, the Judge correctly concluded that there is continuity of workforce between PAOH and its predecessor PCMC. (ALJD 10:4-9) In an effort to defeat the *Burns* successor finding, Respondent ILWU falsely claims at pages 12 and 13 of its brief that PAOH's mechanic workforce was "fluid" and that its steady mechanics "came and went." These statements are directly contradicted by PAOH's M&R Supervisor, Michael Loftesnes, who testified that there was "virtually zero" turnover among PAOH's M&R mechanics and that he could not recall anyone being terminated and was confident that no one left the unit during his tenure as supervisor, which lasted from July 1, 2013 through his departure in January 2015. (Tr. 2034:25-2035:15; 2085:23-2086:257)

¹⁸ Employee John Costa testified, under questioning by the General Counsel, that he worked 2 to 3 years in the crane department under PCMC (as an ILWU-represented employee), but he would not have been able to work in that department under PMMC (as an IAM-represented employee); and that he only performed refer and power mechanic work for PAOH, not crane work. (Tr. 145:8-146:11, 155:8-28) Costa also testified that crane work was not part of the PMMC unit and that crane work had been done by the ILWU for decades (Tr. 176:8-177:9). PAOH Managers also testified, under questioning by the General Counsel, that the mechanic departments were fixed, that the crane, power, chassis and refer mechanics were not interchanged or transferred with one another, and that crane mechanics worked in a completely separate location on the PAOH terminal. (Tr. 867:3-868:15, 2016:6-2017:2; GC 77)

Respondent ILWU also urges that PAOH's occasional short-term use of non-steady mechanics from the ILWU dispatch hall undermines the Judge's finding that PAOH was a *Burns* successor employer. However, as noted by the Judge, there was no showing that dispatched employees were part of PAOH's workforce at the time PAOH hired its permanent representative complement of employees on July 1, 2013 (ALJD 10: fn14). To the contrary, it is clear from Loftesnes' testimony that such employees were not considered part of PAOH's permanent complement of employees since he testified that there was no turnover among PAOH's permanent M&R Unit employees and that, per the ILWU contract, non-steady dispatch employees could only be used for periods lasting from one day up to one week. (Tr. 2084:25-2086:7) Moreover, it cannot be overlooked that the use of the ILWU's hiring hall to dispatch temporary employees to work in the unit is an unlawful unilateral change that occurred only as a result of PCMC's unlawful recognition of ILWU and the unlawful application of the ILWU-PMA contract to the historical IAM bargaining unit.¹⁹

The Judge also correctly found that there was a substantial continuity of employing enterprise between PAOH and PCMC with respect to the M&R work. The factors relevant to determining whether there is a substantial continuity of the employing enterprise are:

- [1] whether the business of both employers is essentially the same;
- [2] whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and
- [3] whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

Fall River Dyeing Corp., 482 U.S. at 43; See also *Bronx Health Plan*, 326 NLRB at 811. As noted by the Judge, these factors are to be assessed primarily from the

¹⁹ Indeed, the ILWU's evidence regarding the use of short-term dispatch, or Hall mechanics, to supplement the historical bargaining unit was put into evidence in the *PCMC/PMMC* litigation, but ultimately rejected by the Board when it deemed the historical bargaining unit remained an appropriate unit. *PCMC I*, 359 NLRB 1206, 1212.

perspective of the employees involved, that is, whether the “employees who have been retained will understandably view their job situation as essentially unaltered.” *Fall River Dyeing Corp.*, 482 U.S. at 43. Therefore, when examining the continuity of the employing enterprise, the Board will look at the objective factors, and how those influence the subjective attitude of the employees. *Straight Creek Mining, Inc.*, 323 NLRB 759, 763 (1997), *enforced*, 164 F.3d 292 (6th Cir. 1998).

Contrary to Respondent ILWU’s Exception Nos. 10, 20-21 and 25-33, the Judge correctly found that PAOH’s container M&R operation at the Port of Oakland was the same as PCMC’s predecessor operation. When the M&R mechanics reported to work on July 1, 2013, after PAOH had replaced PCMC, they performed the same maintenance and repair work on the same shipping containers that they always had performed. In other words, they performed the same jobs under the same working conditions and the same direction at the same location. From the employees’ perspective, their work and working conditions remained unchanged. Therefore, it is clear, and the Judge correctly found, that there was substantial continuity between PAOH’s and PCMC’s container M&R operation.

The Judge’s continuity findings in this regard are wholly supported and indeed required in light of the testimony of long-time M&R Director Currier and M&R Supervisor Loftesnes, both of whom oversaw the M&R work while it was subcontracted to PCMC and took over direct supervision of the M&R Unit when PAOH took over the work. Both witnesses testified convincingly that virtually nothing about the actual day-to-day work performed by the M&R Unit employees changed when the PAOH takeover occurred. (Tr. 849:10-20; 2-17:19-23) The Judge correctly noted that the fact that PAOH did not purchase PCMC’s assets would not defeat a finding of substantial continuity of the employing enterprise since neither ownership

nor acquisition of the predecessor's assets is crucial for finding an employer to be a *Burns* successor. See, e.g., *Harter Tomato Products Co.*, 321 NLRB 901, 902 (1996), *enforced*, 133 F.3d 934 (D.C. Cir. 1998). Similarly, the fact PAOH purchased new tools for the employees after taking over operations did not defeat a finding that it was a *Burns* successor since PAOH purchased replacement versions of the same tools to be used in the same way as those previously provided by PCMC. Employees testified that they provided certain of their own tools and continued to use those same tools under both PCMC and PAOH. Also, Currier testified that PAOH merely provided newer versions of the same tools and that nothing about the work or the manner in which it was performed changed by the transfer of work from PCMC to PAOH. (Tr. 162:6-17, 849:10-20, 869:7-870:5) Finally, as noted by the Judge, the purchase of equipment is just one factor to be considered and such purchases are not enough to overcome a successorship finding, especially when, as here, the equipment purchased is used in the same manner as the old equipment. See, e.g., *Amscot Coal*, 281 NLRB 170, 182 (1986).

The Judge properly rejected Respondent ILWU's claims that PAOH could not be a *Burns* successor because it was a terminal operator and PCMC was a maintenance and repair subcontractor, or because it maintained and repaired containers from different shipping companies than those once serviced by PCMC. The trial witnesses, including PAOH's own managers, testified that the M&R work performed by PAOH and PCMC was exactly the same. The mere fact that PAOH was also engaged in other terminal operation work that PCMC did not do, does not mean that the M&R work done by PCMC, which was continued by PAOH, was significantly different or changed in any way, which all of the witnesses clearly testified it was not. Respondent ILWU also wrongly claims that PAOH and PCMC served different customers. This is wholly incorrect and disproved by the fact that PAOH's General Manager,

Norman Kaiser, testified that when PAOH made the decision to take over PCMC's M&R work, PAOH immediately solicited and attempted to secure contracts with PCMC's customers. (Tr.1363:1-1364:19; GC 88) Finally, even if some of the customers changed between PAOH and PCMC, which is not established by the record evidence, the witnesses clearly and unequivocally testified that the work of container repair did not change depending on who it was being done for; to the contrary, even if the customer changed, the unit work did not. (ALJD 12:7-14; Tr. 162:19-164:25, 224:3-225:13) Thus, regardless of which shipping company may own the containers, the unit employees perform the same work that they always have. See, e.g., *Mondovi Foods Corp.*, 235 NLRB 1080, 1081, 1082 (1978) (finding successor bargaining obligation where employees performed same work even though successor did not service any former customers of predecessor).

c. The M&R mechanics at Berths 20-26 at the Port of Oakland constitute an appropriate bargaining unit

As stated above, the Board will find successorship only if the bargaining unit in which the predecessor employees constitute a majority continues to be appropriate. See, e.g., *Burns*, 406 U.S. at 280. Here, contrary to Respondent ILWU's Exception Nos. 13, 17-19, 23-24, 36, 37, 49 and 53, the Judge correctly determined that PAOH's M&R Unit at the Port of Oakland from Berths 20 to 26 is an appropriate unit.

1. An Oakland only unit is appropriate

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." *Naperville Jeep/Dodge*, 357 NLRB 2252, 2253 (2012) (quoting *ADT*

Security Services, 355 NLRB 1388, 1388 (2010), and *Radio Station KOMO-AM*, 324 NLRB 256 (1997)). Since the IAM had represented the historical bargaining unit for nearly 40 years prior to PCMC's unlawful refusal to recognize the IAM, the burden is on Respondents PAOH and/or ILWU to demonstrate compelling circumstances sufficient to overcome this significant of this bargaining history, which neither Respondent was able to do.

Following PAOH's takeover of the M&R Unit, the work and composition of the unit in Oakland remained exactly the same. The only change to the composition of the unit was that PAOH did not operate in Tacoma, Washington and thus the unit no longer included any employees who remained working for PCMC in Tacoma. However, PAOH's 64-employee M&R Unit at the Port of Oakland remains an appropriate unit even though PAOH did not take over PCMC's operation in Tacoma, Washington, which historically had approximately 48 to 50 employees working separately in the Tacoma component of the bargaining unit.²⁰ (Tr. 46:7-19). As the Board held in *Bronx Health Plan*, "the bargaining obligations attendant to a finding of successorship are not defeated by the mere fact that only a portion of a former union-represented operation is subject to a sale or transfer to a new owner so long as the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation." *Bronx Health Plan*, 326 NLRB at 812.

It is well settled that the Act does not require that the unit be the *most* appropriate unit, but that it is *an* appropriate one. *Overnite Transportation*, 322 NLRB 723, 724 (1996); *Canal Carting*, 339 NLRB 969 (2003); see also, *Vincent M. Ippolito, Inc.*, 313 NLRB 715, 717

²⁰ Historically, the bargaining unit included employees performing M&R work in Oakland and Long Beach, California and Tacoma, Washington. In *PCMC/PMMC*, the Board overruled ALJ Anderson's finding 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. Instead, the Board found that notwithstanding the reduction in scope with the loss of the Long Beach work, the historical bargaining unit remained intact when PCMC hired the approximately 100 unit employees who remained at the Oakland and Tacoma locations. *PCMC II*, 362 NLRB at 1211 fn. 19.

(1994), *Morand Bros. Beverage Co.*, 91 NLRB 409, 417-18 (1950). This remains true even where the successor takes over only a small part of the predecessor's operations or maintains other operations that are not staffed with the predecessor's employees. See *Pathology Institute*, 320 NLRB 1050, 1051 (1996) (multi-location bargaining unit retained its separate identity even when it was reduced in scope and composition.) For example, in *Mondovi Foods Corp.*, 235 NLRB at 1082, the Board held that "in cases involving the successorship issue, the Board's key consideration is 'whether it may reasonably be assumed that, as a result of transitional changes, the employees' desires concerning unionization have likely changed,' " and noted that "a change in scale of operation must be extreme before it will alter a finding of successorship." Thus, mere diminution in the size of a successor's unit, as is the case here, is "insufficient to meaningfully affect the way the employees perceive their jobs or significantly affect employee attitudes concerning union representation." *Bronx Health Plan*, 326 NLRB at 813 (Board found successor's bargaining obligation where the employer took over a 16-employee clerical operation that had been part of a diverse unit of 3,500 employees in hundreds of job classifications.)²¹ In reaching its conclusion that employees' desires regarding union representation would not have been altered notwithstanding that the successor took over only a portion of a previous operation and bargaining unit, the Board in *Bronx Health Plan* noted that the clerical employees in that case had performed a distinct function from that traditionally performed by employees in the larger unit under the predecessor, that they had been physically

²¹ See also *Tree-Free Fiber Co.*, 328 NLRB 389, 390 (1999) (successor bargaining relationship found where successor employed only 50 employees and predecessor employed 500).

separated from the larger unit, and that they had not been subject to interchange with the larger unit. *Id.* at 812.²² Such factors are present in this case.

Here, the Judge correctly found that PAOH's container M&R mechanics at the Port of Oakland constitute a separate appropriate bargaining unit. The Judge specifically noted that the fact that PAOH took over only PCMC's Oakland operation, and not its operation in Tacoma, did not defeat a finding that an Oakland only M&R Unit is appropriate. PAOH hired 64 former PCMC unit employees at the Port of Oakland to do the historical bargaining unit work. Indeed, all of the employees PAOH hired came directly from PCMC's Oakland location and out of the historical unit. These employees continued to perform the same work at the same location in the same manner. The Oakland worked as a separate and distinct group under Sea-Land, PMMC, and PCMC, and the evidence shows that the Oakland mechanics remained a separate and distinct group under PAOH's operation. They continued to perform only container repair work and were not interchanged with mechanics, historically represented by the ILWU, who performed crane repair work.²³ (Tr. 34:7-35:14, 145:8-146:11, 155:8-28, 2012:21-2015:3, 2016:6-2017:2) Under these circumstances, it is clear, and the Judge correctly found, that the M&R mechanics at the Port of Oakland remained a separate appropriate unit when PAOH took over operations of only the Oakland portion of the historical bargaining unit in July 1, 2013.

²² See also *M.S. Management Associates*, 325 NLRB 1154, 1154-56 (1998) (finding new employer was *Burns* successor despite taking over only the four-employee HVAC portion of the predecessor's 40-employee housekeeping and maintenance unit), *enforced*, 241 F.3d 207 (2d Cir. 2001); *Lincoln Park Zoological Society*, 322 NLRB 263, 264-65 (1996) (successor unit included 70 employees as compared to predecessor's 2,500-person unit), *enforced*, 116 F.3d 216 (7th Cir. 1997). Similarly, in *Fabsteel Co. of Louisiana*, the Board found a valid successorship where the employer took over only one of the predecessor's seven plants. It relied on the ALJ's finding that the "facts reveal[ed] a sufficient identity of the [relevant plant's] employees as a separate group to warrant a separate employee complement from a structure viewpoint." *Fabsteel Co. of Louisiana*, 231 NLRB 372, 375-77 (1977), *enforced*, 587 F.2d 689, 695 (5th Cir.), *cert. denied*, 442 U.S. 943 (1979).

²³ As noted above, at no time did the General Counsel, or any party for that matter, claim that crane mechanics were part of the unit at issue in this case. The complaints issued in this matter always defined the unit as that set forth in the PMMC/PCMC unit, which does not include crane mechanics, and the General Counsel solicited evidence to demonstrate that the crane mechanics worked separately from M&R unit employees at issue here.

2. The bargaining unit was not accreted to the ILWU's coast-wide unit

Contrary to Exceptions No. 38 and 49, the Judge correctly rejected PAOH's and ILWU's claim that the historical bargaining unit is no longer appropriate because it was accreted to the ILWU's coast-wide unit. This argument is wholly without merit, has already been denied by the Board, and the Judge properly denied Respondent' ILUW's offer of proof on this matter. (ALJD 12:16-13:3; Tr. 2291:22-2298:6, 2339:13-20)

As an initial matter, the ILWU's accretion theory was already litigated and rejected by the Board in the *PCMC/PMMC* decision. There, the Board held that there "were no significant changes to the former PMMC unit employees' terms and conditions of employment that might warrant a finding of 'compelling circumstances' warranting a finding that the historical bargaining unit had been merged into the ILWU coast-wide unit. *PCMC I*, 359 NLRB at 1211. Indeed, the Board noted that "the only significant changes in the unit employees' terms and conditions resulted from PCMC's application of the PMA-ILWU Agreement to the unit employees and its assignment of unit employees to perform non-unit work at non-unit locations and of non-unit employees to perform unit work." *Id.* Ultimately, the Board did not consider these changes in determining whether the former PMMC unit lost its separate identity because the changes themselves were unfair labor practices that could not be relied upon to support an accretion. *Naperville Jeep/Dodge*, 357 NLRB 2252, 2253 (2012). Moreover, as noted by the Judge, the Board recently revisited and rejected the accretion argument again when it considered PCMC/PMMC's motion to reopen the record and for reconsideration of the *PCMC/PMMC* decision, which the Board rejected in an unpublished decision on March 1, 2016. (ALJD 12:28-13:3)

The Board's finding with respect to accretion is binding precedent on this case and it would be wholly improper to allow the ILWU to relitigate the Board's finding based on facts already considered and rejected in the prior litigation. It is notable that the ILWU is not seeking to present an accretion defense based on new evidence or changed circumstances. To the contrary, the ILWU's defense is based on evidence of interchange and integration that stems from unlawful application of the PMA-ILWU contract to the historical bargaining unit. (Tr. 2337:18-2338:15; ILWU Ex. 228) Moreover, the case for accretion is even less compelling under PAOH because, unlike PCMC, PAOH did not have any operations in the Port of Oakland other than those at Berths 20-26 and therefore there was no transfer or assignment of bargaining unit positions to non-unit positions or non-unit locations at PAOH like those considered by the Board in *PCMC/PMMC*. (Tr. 145:5-11, 210:7-10, 2016:6-2017:6) In addition, unlike the circumstances considered and found to be unpersuasive by the Board in the *PCMC/PMMC* case, Costa and Loftesnes testified that PAOH did not transfer M&R mechanics with non-unit crane mechanics, as PCMC had. (Tr. 145:8-146:11, 155:8-28, 2016:6-2017:2) ILWU's reliance on evidence previously considered and rejected by the Board is most evident from the fact that the ILWU made a motion to the Judge to take administrative notice of the entire *PCMC/PMMC* record into this case, which the Judge correctly rejected. (Tr. 2255:11-2257:4, 2341:10-2342:1) The ILWU also sought to import such evidence into the trial record of this case through its offer of proof, which is replete with citations to evidence that was considered and rejected by the Board in the prior litigation. (ILWU Ex. 228) Such efforts to relitigate the accretion issue decided by the Board are wholly improper and were correctly rejected by the Judge at trial.

Finally, even if it were proper to accept the ILWU's offer of proof and such evidence was sufficient to establish accretion in this case, the Judge correctly determined that it would be impermissible to rely on such evidence because it is based on changes to the historical bargaining unit that are themselves unfair labor practices. As the Board noted in *PCMC/PMMC*, a Respondent cannot rely upon evidence of its own unlawful integration and interchange to establish accretion. See *Naperville Jeep/Dodge*, 357 NLRB at 2253 ("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 273, 277-278 (1993). To permit the ILWU to rely on evidence of the application of the PMA-ILWU contract to the historical bargaining unit to support an accretion theory from the IAM to the ILWU under PAOH would be manifestly unjust and would essentially sanction the very unfair labor practices found unlawful in the *PCMC/PMMC* litigation and such attempts were properly rejected by the Judge.

3: The former Transbay M&R employees are part of the M&R Unit

Contrary to Respondent ILWU's Exceptions Nos. 13, 17, 18 and 19, the Judge correctly found that the former IAM-represented M&R mechanics of Transbay became part of the bargaining unit covered by the Board order in *PCMC/PMMC* when they were hired by PCMC and merged into the unit in 2010 and that the historical bargaining unit was geographically expanded from Berths 20-24 to include Berths 25-26 when the PAOH operation was expanded. (ALJD 4:34-7:9)

Where, as here, a collective-bargaining agreement defines the bargaining unit in terms of the type of work performed, new or transferred employees who perform that work are *ipso facto* included in the bargaining unit. See *Tarmac America, Inc.*, 342 NLRB 1049, 1050 & n.5 (2004) (employee was properly included in the bargaining unit where unit description included “yard persons,” the parties used the terms “fork-lift operator” and “yard person” interchangeably, the employee was a fork-lift operator, and the union’s geographical jurisdiction included the employee’s facility).²⁴ Once a determination is made that new or transferred employees already perform unit work and, thus, properly belong to the bargaining unit, an accretion analysis does not apply. See *Tarmac America, Inc.*, 342 NLRB at 1050, n.5; *Developmental Disabilities Institute, Inc.*, 334 NLRB 1166, 1168 (2001), citing *Premcor, Inc.*, 333 NLRB 1365, 1366 (2001) (once it is established that a new classification is performing the same basic functions as a unit classification historically had performed, the new classification is properly viewed as belonging in the unit rather than being added to the unit by accretion).

The record evidence clearly demonstrates that the former Transbay M&R mechanics were hired into bargaining unit positions in October 2010 and immediately began performing historical bargaining unit work in PAOH’s expanded operation at Berths 20-26. As such, the former Transbay M&R employees became part of the historical IAM-represented bargaining unit upon their hire by PCMC. The work jurisdiction clause in the 2002-2005 collective-bargaining agreement between PMMC and the IAM covered the container M&R work that the

²⁴ See also *Gourmet Award Foods*, 336 NLRB 872, 873 (2001) (“It is axiomatic that when an established bargaining unit expressly encompasses employees in a specific classification, new employees hired into that classification are included in the unit. This inclusion is mandated by the Board’s certification of the unit or by the parties’ agreement regarding the unit’s composition.”), *criticized on other grounds in Oakwood Care Center*, 343 NLRB 659, 661 (2004); *The Sun*, 329 NLRB 854, 859 (1999) (stating in unit clarification case that “[i]f the new employees perform job functions similar to those performed by unit employees, as defined in the unit description, we will presume that the new employees should be added to the unit, unless the unit functions they perform are merely incidental to their primary work functions or are otherwise an insignificant part of their work”).

former Transbay M&R employees were hired to perform for PAOH.²⁵ PCMC integrated the former Transbay M&R employees into its own operation and began applying the PMA-ILWU contract to those employees.²⁶ In *PCMC/PMMC*, however, the Board held that the historical IAM-represented unit had remained a separate appropriate bargaining unit that had not been merged into the coast-wide, ILWU-represented unit and that PCMC was obligated to bargain with the IAM as the representative of the container M&R employees in that unit and to restore the terms and conditions of employment under the 2002-2005 IAM contract. See *PCMC I*, 359 NLRB at 2012, 2014-6. Thus, when PAOH took over PCMC's operation on July 1, the former Transbay M&R employees were part of the same IAM-represented bargaining unit that the Board held in *PCMC/PMMC* had retained its separate identity. *Id.* at 2012.²⁷

Under these circumstances, it is clear that the former Transbay M&R mechanics are part of the historical IAM bargaining unit, and that PAOH violated Section 8(a)(5) by refusing to recognize and bargain with the IAM, which had submitted a request for recognition and bargaining on June 28, 2013, as their bargaining representative and by refusing to apply the terms of the 2002-05 IAM contract to them. See, e.g., *Tarmac America, Inc.*, 342 NLRB at 1050; *General Equipment Co.*, 297 NLRB 430, 433 n.3 (1989).

²⁵ Because the 2002-2005 IAM agreement was never construed to cover crane M&R mechanics, any former Transbay employees who perform crane work are not included in the unit. As of July 1, 2013 when PAOH took over the M&R Unit, there were 11 employees assigned to the crane department, which was run separately from the historic M&R Unit chassis, refer and power departments (Tr. 704: 2-708:2, 2014:21-2017:2; GC 67)

²⁶ While the container M&R work that the former Transbay M&R employees performed for PAOH may also fall within the work jurisdiction clause of the PMA-ILWU contract, the ILWU had never lawfully represented the employees who historically had performed the container M&R work at Berths 20-24. Thus, the work in question was never historically a part of the coast-wide PMA-ILWU bargaining unit.

²⁷ Although the bargaining unit found appropriate in *PCMC/PMMC* included container M&R mechanics in both the Ports of Oakland and Tacoma, as discussed above, a bargaining unit limited to the Port of Oakland remains a separate appropriate unit here.

As stated above and found by the Judge, an accretion analysis does not apply once a determination is made that transferred employees were hired or transferred into the unit to perform unit work. Nevertheless, even if the Transbay M&R employees weren't found to have been merged into the historical unit, the Judge correctly found that they would have been accreted into the bargaining unit covered by the Board order. (ALJD 7:11-31) When a newly created or acquired group of employees shares an overwhelming community of interest with employees in a preexisting unit and the new group cannot, by itself, constitute a separate appropriate unit, the new group will be accreted into the established bargaining unit without a showing of the union's majority support in the new group. *Gitano Distribution Center*, 308 NLRB 1172, 1174 (1992). The Board applies a "restrictive policy" regarding accretions in order to safeguard employee freedom of choice. *Super Valu Stores*, 283 NLRB 134, 136 (1987). Determining whether accretion is appropriate involves a fact-intensive balancing of multiple factors, including: bargaining history; functional integration of operations; types of work, skills, and education of employees; common control of labor relations; interchange between the two groups of employees; common day-to-day supervision; and physical or geographic proximity. *Ryder Integrated Logistics*, 329 NLRB 1493, 1499 (1999); *Gould, Inc.*, 263 NLRB 442, 445 (1982).

Initially, there is a shared bargaining history here between the two groups of employees. The IAM represented the container M&R mechanics at Berths 20-24 from the 1960s until 2005, when PCMC took over the work and unlawfully refused to recognize the IAM as the mechanics' bargaining representative. Similarly, the IAM historically represented the Transbay M&R mechanics working at Berths 25-26 until October 2010, when PCMC refused to recognize the IAM. (Tr. 54:22-57:11) The M&R mechanics represented by the IAM at

Transbay did the same work with the same tools as the M&R Unit represented by the IAM prior to PCMC's unlawful refusal to recognize the IAM. (Tr. 56:4-57:11)

Moreover, in October 2010, the former Transbay M&R mechanics at Berths 25-26 were functionally integrated into the historical bargaining unit at Berths 20-24. All physical barriers between Berths 20-24 and 25-26 were removed and the Transbay M&R mechanics were merged into the same departments in which they had worked for Transbay, but as part of PCMC's operations. In addition, because PCMC did not hire any of Transbay's managers, the former Transbay M&R mechanics were also supervised by PCMC supervisors.

The remaining factors for finding an accretion are also present here. Once the merger occurred, the former Transbay M&R mechanics worked side-by-side with the PCMC mechanics, received the same assignments, attended the same meetings, and used the same tools. They also shared the same work, job skills, education, and tools. PCMC also applied the terms of the PMA-ILWU agreement to the former Transbay M&R mechanics, as it previously had done to the employees at Berths 20-24. Additionally, labor relations were commonly controlled for all mechanics employed at Berths 20-26 through PCMC managers in conjunction with the PMA.

In sum, the critical factors of bargaining history, functional integration of operations, interchange between groups of employees, common supervision, physical proximity, common work, skills, and education, and common control of labor relations all support the a conclusion that the former Transbay M&R mechanics were accreted into the IAM-represented bargaining unit at Berths 20-24. Therefore, the Judge correctly concluded that, even under an accretion analysis, PAOH unlawfully refused to recognize and bargain with the IAM as the exclusive

bargaining representative of the former Transbay employees along with the other bargaining unit members.

2. The Judge Correctly Found that PAOH is Obligated to Recognize and Bargain with the IAM, not the ILWU

Contrary to Exception Nos. 37, 38, 40, 43, 50 and 51, the Judge properly rejected claims by PAOH and the ILWU that, even if PAOH were found to be a *Burns* successor, it was obligated to recognize and bargain with the ILWU, not the IAM, because that is the labor organization that predecessor PCMC recognized or because it had a good-faith doubt as to IAM's majority status. (ALJD 13:5-20).

As an initial matter, nothing in the Supreme Court's *Burns* decision gives carte blanche to a successor employer to recognize a minority union merely because its predecessor did so. *Burns*, 406 U.S. at 287 ("The source of [the successor's] duty to bargain with the union is not the collective-bargaining contract but the fact that it voluntarily took over a bargaining unit that was largely intact. "). Rather, a successor employer inherits the collective-bargaining "obligation" of its predecessor. See, e.g., *Specialty Hospital of Washington-Hadley, LLC*, 357 NLRB 180, 182 (2011); *Van Lear Equipment*, 336 NLRB 1059, 1063 (2001), citing *Fall River Dyeing Corp.*, 482 U.S. at 41-43.

Here, the M&R mechanics at the Port of Oakland continued to be the same employees who were represented by the IAM when they worked for Sea-Land. They have been denied the representation of their chosen bargaining representative since PCMC took over operations in late March 2005, when it unlawfully withdrew recognition from the IAM and extended recognition to a minority union, i.e., the ILWU. See *PCMC I*, 359 NLRB at 1210-1212. In *PCMC/PMMC*, the Board held that PCMC could not rely on its unlawful conduct to establish that the historical IAM-represented unit performing container work had been accreted into the

ILWU-represented unit performing crane work. Thus, the Board ordered PCMC to, among other things, withdraw recognition from the ILWU, cease applying the PMA-ILWU contract to the unit employees, and affirmatively recognize and bargain with the IAM. *Id.* at 1213.

On July 1, 2013, when PAOH hired the predecessor employees and began performing the container M&R work, PCMC's unfair labor practices had not been remedied. Because predecessor PCMC was obligated to recognize and bargain with the IAM, PAOH incurred that same bargaining obligation. PAOH cannot take over PCMC's operation and employees and assert that, by virtue of that successorship, that it is subject to a bargaining relationship that the Board has found unlawful. To allow this result would completely undermine the Board's authority and would result in remedial failure. Moreover, even assuming that PAOH held a good-faith belief that the ILWU was the legitimate collective-bargaining representative of the historical bargaining unit employees, an employer's recognition of a minority union "cannot be excused by a showing of good faith." See *ILGWU v. NLRB (Bernhard-Altmann Texas Corp.)*, 366 U.S. 731, 739 (1961).

Moreover, the Judge properly rejected arguments by PAOH and the ILWU that PAOH was not required to recognize the IAM because that labor organization lost the support of the majority of the bargaining unit employees. See *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 717, 725 (2001). The legal principle set forth in *Levitz* does not apply in a situation where both the predecessor and successor employers unlawfully refused to recognize and bargain with the incumbent union, as is the case here. See *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 178 (1996) (which held that where an employer has unlawfully refused to recognize and bargain with an incumbent union, a union's majority status cannot be challenged until bargaining has occurred for a reasonable period of time). Moreover, it cannot be

overlooked that the ILWU has been a minority union at all times since it unlawfully accepted recognition from PCMC in this unit. As such, the Judge properly concluded that neither Respondent could rely on any claimed evidence of loss of support since such evidence was inextricably tainted by the unlawful grant of recognition by PCMC and unlawful acceptance of recognition by the ILWU which was initiated in 2005, which continued unabated when PAOH took over the operation of the unit in July 2013, and which remains unremedied to date. (ALJD 12:19-26,13:8-12) Indeed, the Judge properly rejected the ILWU's attempt to put in evidence of loss of support for this very reason. (Tr. 2291:22-2298:6, 2339:13-20)

Finally, the fact that the Board's June 2013 *PCMC/PMMC* decision was set aside on procedural grounds in 2014 for reconsideration in light of *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), does not obviate PAOH's obligation to recognize and bargain with the IAM on July 1, 2013. That decision was binding as of June 24, 2013 and remained so on July 1, 2013 when PAOH committed the unfair labor practices alleged in the Amended Consolidated Complaint. The facts clearly demonstrate that the *PCMC/PMMC* litigation had been pending since the 2007-2008 trial, which PAOH managers and directors were aware of. Also, PAOH was informed of and served with the Board's June 12, 2013 decision before it took over operations on July 1, 2013, a time when the decision had not yet been impacted by the *Noel Canning* decision, and a time when PAOH made the decision not to recognize the IAM and to recognize the ILWU notwithstanding the bargaining unit's historical IAM representation and the Board's order.

3. The Judge correctly found that PAOH violated Section 8(a) (2) by recognizing the ILWU instead of the IAM

Since PAOH was obligated to recognize the IAM as a *Burns* successor, the Judge correctly determined that PAOH 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. (ALJD 14:30-35)

4. The Judge Correctly Found that the ILWU Violated Section 8(b)(1)(A) and 8(b)(2) by Accepting Recognition from PAOH

Finally, there can be no question that the ILWU violated Section 8(b)(1)(A) and (2) by accepting recognition from PAOH on July 1, 2013 and by 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. Indeed, the Board had already deemed ILWU a minority union in violation of Section 8(b)(1)(A) and (2) for accepting recognition from PCMC in the *PCMC/PMMC* decision that issued on June 24, 2013 and that unfair labor practice remained unremedied when ILWU accepted recognition from PAOH on July 1, 2013 in the same unit. As such, Respondent ILWU's exceptions should be denied and the Judge's findings in this regard should be upheld. (ALJD 14:37-41).

IV. THE JUDGE'S REMEDY IS APPROPRIATE

Contrary to Exceptions No.44, 45 and 47, the Judge's remedies, recommended order and proposed notice are appropriate to remedy the violations found and to make employees whole for the losses suffered as a result of Respondent's unlawful actions. (ALJD 14:45-20:15 and Appendix).

In light of PAOH's closure and its settlement of all financial liability with the Charging Party, the Judge properly ordered PAOH to mail the Board's standard notice to all former unit employees employed by PAOH in bargaining unit positions at any time during PAOH's operation relating to its failure to recognize and bargain with the IAM. Contrary to the

ILWU's claims, the fact that PAOH is closed does not obviate the need for a traditional bargaining order, since this order is necessary in case PAOH, or a potential successor to PAOH, resumes operations of the historical M&R unit.

The Judge properly ordered the ILWU to reimburse all present and former unit employees of PAOH 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 during their employment with PAOH, together with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). This remedy comports with and continues the remedy ordered previously by the Board in the *PCMC/PMMC* decision.

The Judge also properly ordered the ILWU to post the Board's standard notice to members and mail a signed copy of the notice to all former unit employees employed by PAOH in bargaining unit positions at any time during PAOH's operation. In light of the close factual connection between the unfair labor practices committed by PAOH and the ILWU, the Judge also ordered the ILWU to post and mail a signed copy of PAOH's notice, which will be provided by the Region, in the same places and under the same conditions as each posts and mails its own notice. The dual posting requirement comports with the Board's order in the *PCMC/PMMC* decision, wherein Respondent ILWU was similarly ordered to post the employer's notice as well as its own. *PCMC II*, 362 NLRB slip op. at page 2.

Under the circumstances of this case, including the settlement between the IAM and PAOH, the remedies, recommended order and proposed notice issued by the Judge are wholly

appropriate to the violations found, consistent with Board precedent, and should be adopted in their entirety.

V. CONCLUSION

It is respectfully submitted that the Judge's findings of fact and conclusions of law are fully supported by the record evidence and legal authority. Respondent ILWU's exceptions to the Judge's findings of fact and conclusions of law and its arguments in support of those exceptions are completely without merit. Accordingly, Respondent ILWU's exceptions should be rejected and the Judge's Decision and Recommended Order should be adopted by the Board.

Dated: March 24, 2017



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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

**PORTS AMERICA OUTER HARBOR, LLC, CURRENTLY
KNOWN AS OUTER HARBOR TERMINAL, LLC**

and

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

**INTERNATIONAL LONGSHOREMEN'S
AND WAREHOUSEMEN'S UNION**

and

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

Case 32-CA-110280

Case 32-CB-118735

Date: March 24, 2017

**AFFIDAVIT OF SERVICE OF THE GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT ILWU'S EXCEPTIONS TO THE RULINGS AND DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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