

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

- and -

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 -

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

NLRB Case No.: 32-CA-110280

NLRB Case No.: 32-CB-118735

**RESPONDENT ILWU'S REPLY IN SUPPORT OF EXCEPTIONS TO THE
RULINGS AND DECISION OF THE ADMINISTRATIVE LAW JUDGE**

The General Counsel's ("GC") and Charging Party IAM's ("IAM") briefs in opposition to Respondent International Longshore and Warehouse Union's ("ILWU") Exceptions fail to provide adequate legal or factual support for the Administrative Law Judge's ("ALJ") Decision and her rulings, findings, and conclusions. For the reasons set forth below and in ILWU's Exceptions Brief, the ALJ erred and certain of her rulings and the Decision should be reversed. Alternatively, the Board should hold that the ALJ's refusal to allow ILWU to put on its case was a fundamental violation of ILWU's procedural due process rights and require that this case be reopened and remanded so ILWU may defend itself and present its case against the allegations made so they may be fully and fairly litigated.

I. The Denial of ILWU's Due Process Rights in this Case Is not Justified by the Board's Decision in the PCMC Case.

In arguing that the ALJ did not violate ILWU's due process rights, the GC and IAM rely solely on the *PCMC* decision¹, arguing that it is binding and therefore precludes Respondents from putting on their defenses in the instant case. This is an erroneous legal interpretation of the Act and wholly ignores that the *PCMC* case involved a different employer and different facts and circumstances that occurred in 2005, more than eight years before the alleged ULPs at issue in this case.

The ALJ, GC, and IAM incorrectly rely on cases that held that a Respondent employer cannot rely on its own unlawful unilateral changes in arguing that a bargaining unit is no longer appropriate. (*See* GC Answering Brief, 32). There is no dispute that PAOH is an entirely separate company from PCMC and that PCMC's alleged unlawful failure to recognize and bargain with the IAM occurred in 2005, before PAOH even existed. (Tr. 333:18-21). Here, the 2005 ULPs were PCMC's, *not* PAOH's; and, therefore, the cases relied upon by the GC and

¹ 362 NLRB No. 120 (June 17, 2015).

IAM provide no support for the argument that one employer's violations of the law deprive a different employer from the right to defend itself. Although ILWU was a party to both cases, whether ILWU lawfully accepted recognition from PAOH depends on whether PAOH was obligated to recognize IAM. Thus, even if ILWU unlawfully accepted recognition from PCMC in 2005,² this would not on its own prohibit the Board from considering ILWU's actions vis-à-vis independent company PAOH in 2013.

The *PCMC* ULP trial was held between September 2007 and June 2008; and the ALJ issued his decision on February 12, 2009. According to the GC and IAM, ILWU and PAOH were properly denied the right to put on their cases in the instant matter because everything had already been litigated in the *PCMC* case. But what about everything that occurred after the *PCMC* 2005 ULPs? What about everything that happened after the close of the *PCMC* trial? What about the fact that the *PCMC* trial had nothing to do with what happened in July 2013 as it related to PAOH? Much of the evidence ILWU attempted to present at trial, which the ALJ rejected, was evidence about what occurred during these latter time periods, which were not the subject of the *PCMC* case.

As ILWU's Exceptions Brief explains, procedural due process requires that respondents be afforded the opportunity to put on their cases to ensure that the issues are fully and fairly litigated. *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 134-35 (2d Cir. 1990); *King Manor Care Center*, 308 NLRB 884, 889 (1992). Here, ILWU was denied those procedural due process rights because the ALJ improperly precluded Respondents from putting on any case at all and, in turn, the issues in this matter have not been fully and fairly litigated.

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² The *PCMC* decision is currently on appeal before the D.C. Circuit Court of Appeals.

II. Regardless of the GC’s Intended Scope of the Unit, the GC Failed To Provide Proper Notice as Shown by the ALJ’s Contradictory Findings.

The GC argues that ILWU’s Exceptions regarding the GC’s change to the scope of the alleged unit is improper and a “sham,” but the truth of the matter is that the GC failed to provide proper notice of her allegations. First, ILWU’s Exceptions regarding this are proper – they are based on the GC’s deficient notice, which is evidenced by the ALJ’s own confusion and the contradictory findings in the ALJ’s Decision. As ILWU’s Exceptions Brief explains, the ALJ’s Decision includes findings that indicate that mechanics performing crane M&R are included in the alleged unit. (*See* ILWU’s Exceptions Brief, Section IV.A.2.b.; ALJD, 2:31, 3:1-2, 10:22-24) (“[t]he work of the unit employees involves maintenance and repair of *cranes*, generators, chassis, pickups and loading and unloading equipment”). The ALJ’s Decision generically refers to “M&R employees” and “M&R work,” never indicating that crane M&R employees and crane M&R work are omitted from those terms. The ALJ’s confusion, as well as ILWU’s, was due to the GC’s failure to provide notice throughout the course of the trial that the alleged unit did not include crane M&R mechanics. It is the GC’s responsibility to litigate her case so that Respondents *and the ALJ* actually know what her case is. The GC failed to do that here; and, as a result, Respondents and the ALJ did not receive fair and accurate notice of the allegations being made. Thus, Respondents must be afforded the opportunity to put on their cases as they relate to the scope of the unit now that the GC has changed the unit scope.

III. The Record Does not Support the ALJ’s Conclusion that There Was a Substantial Continuity of Business Operations.

Specifically with regard to the ALJ’s incorrect finding that there was substantial continuity of business operations between PCMC and PAOH, the GC completely ignores the arguments made by ILWU. As set forth in Section IV.E.1. of ILWU Exceptions Brief, the ALJ erred in finding that the businesses of PCMC and PAOH “were essentially the same.” In

response, the GC makes sweeping and unsupported statements and argues that the acquisition of assets is not determinative of whether there is substantial business continuity. ILWU agrees that the fact that PAOH did not purchase PCMC's assets is not determinative; but that fact along with all of the other evidence ILWU cites in its Exceptions Brief (*see* Section IV.E.) shows that there was no continuity of business operations between PCMC and PAOH. The GC also ignores ILWU's arguments that the ALJ erred in finding that the PAOH mechanics were doing the same jobs in the same working conditions under the same supervisors. The fact remains that the ALJ made multiple findings that are disproved by the undisputed record evidence (*see* Section IV.E); and the ALJ relied on those incorrect findings to conclude that there was substantial continuity of business operations. Thus, the ALJ erred in concluding there was substantial continuity of business operations and, therefore, her conclusion that PAOH was a *Burns* successor must be reversed.

IV. Contrary to the GC's and IAM's Argument, the PCMC Decision Alone Does not Prove Burns Successorship and Respondents' Liability.

The GC and IAM rely solely on the *PCMC* decision as support for the ALJ's findings and conclusions related to *Burns* successorship. As discussed above, such a position is premised on an incorrect legal interpretation of the Act and wholly ignores what occurred over the years following the *PCMC* ULPs and trial.

A. The Mechanics Were Accreted to the Coastwise ILWU Bargaining Unit.

The unit alleged by the GC did not exist as of July 2013 because it was accreted to the historic coastwise ILWU bargaining unit to which PAOH's workforce had always belonged. Over the intervening eight years after PCMC's alleged ULPs and before PAOH hired mechanics, it is undisputed that significant changes occurred to the bargaining unit that existed prior to March 31, 2005. The evidence ILWU attempted to present at trial shows that the unit alleged by

the GC did not exist in July 2013 because it was accreted to the historic coastwise ILWU bargaining unit. (*See* ILWU’s Offer of Proof, R-ILWU Exh. 228; R-ILWU Exhs. 1-227).

The *PCMC* decision does not overcome ILWU’s evidence showing accretion. As mentioned above, the *PCMC* case dealt with events that occurred in mid-2005 and the *PCMC* trial concluded in June 2008, so at a minimum, evidence of what occurred following those dates through July 2013, was not considered or accounted for in the *PCMC* case. ILWU sought to present that evidence, as well as additional evidence, showing accretion and should have been permitted to put on this evidence.³

B. An IAM Historical Bargaining Unit No Longer Existed in July 2013.

The GC and IAM argue that the *PCMC* decision held that IAM was the representative of a historical unit of M&R mechanics at Berths 20-24 in the Port of Oakland in 2005 and that continued to apply to the M&R mechanics hired by PAOH in July 2013. Again, sole reliance on the *PCMC* decision is deficient. As discussed at Section IV.D.2. of ILWU’s Exceptions Brief, when a bargaining unit no longer conforms “reasonably well” to the “standards of appropriateness,” a successor is not obliged to bargain with it. *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 119 (D.C. Cir. 1996), quoting *Crown Zellerbach Corp.*, 246 NLRB 202, 203 (1979); *see also Burns*, 406 U.S. at 281. In this case, it is undisputed that prior to working for PAOH, the PAOH mechanics had been part of the ILWU coastwise bargaining unit for at least eight years, and for many, much longer than that. It is also undisputed that they shared the same

³ The GC’s arguments against ILWU’s description of PAOH’s mechanic workforce as a workforce that was “fluid” where mechanics “came and went” provide yet another example of why ILWU should have been able to put on its case and present its evidence. The GC relies on general statements made by one individual. ILWU’s proffered evidence shows that the PAOH mechanic workforce was fluid and that steady mechanics indeed did come and go; but this evidence has gone unconsidered because ILWU was prevented from putting on any case. (*See* R-ILWU Exh. 228, Offer of Proof at pg. 1, R-ILWU Exh. 148; #117-118, R-ILWU Exhs. 201-202).

terms and conditions of employment under the PCL&CA as all other longshoremen up and down the West Coast for those eight years. When PAOH hired mechanics on July 1, 2013, PAOH continued to recognize those mechanics as ILWU and continued to abide by the PCL&CA for all of its longshore, including mechanic, and clerk workforce. *Dattco Inc.*, 338 NLRB 49, 50 (2002) (no longer an appropriate unit when “it has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity”); *see also P.S. Elliott Servs.*, 300 NLRB 1161 (1990) (no longer an appropriate unit because it did not have a “community of interest sufficiently distinct and separate” from the other employees); *Indianapolis Mack Sales & Serv., Inc.*, 288 NLRB 1123, 1127 (1988) (where “in reality, and for all practical purposes,” employees of two historically separate units have been treated “as one unit for many years,” there was a de facto merger of the units and the successor did not have to recognize separate units). The *PCMC* decision does not and cannot erase the evidence ILWU attempted to present at trial – evidence showing that even if there was an IAM historical unit in 2005, it no longer existed by July 2013.

C. The GC Has Ignored the Fact that She Failed to Meet Her Burden To Show that ILWU Did not Have Uncoerced Majority Support Among the PAOH Mechanics.

In the GC’s Answering Brief, she does not address the fact that she did not meet her burden to demonstrate that in July 2013, ILWU did not have majority support among the PAOH mechanics. *See, e.g., Dairyland USA Corp.*, 347 NLRB 310, 320 (2006) (General Counsel bears burden of proving that the union accorded recognition was not the majority representative); *Rainey Sec. Agency*, 274 NLRB 269 (1985) (same); *Regency Gardens Co.*, 263 NLRB at 1269 (1985) (“As has been pointed out in a similar case, inference is no substitute for actual proof, which is the burden of the General Counsel, that the Union did not in fact represent a majority of the Regency garden employees on the date of recognition.”). She neither challenges that this is her burden nor explains

how she believes she met that burden. This is because she did not meet her burden. Once again, her reliance on the *PCMC* decision is unpersuasive because the *PCMC* case dealt with ULPs that occurred in 2005, and the Board's decision in that case made absolutely no factual findings as to the mechanics PAOH hired in July 2013. In contrast, ILWU's proffered, but improperly rejected, evidence shows that ILWU had uncoerced majority support among the mechanics PAOH hired in July 2013. Not only had ILWU already represented those mechanics for many years, but a majority of those mechanics clearly chose to be represented by the ILWU, as demonstrated by the chart on page 26 of ILWU's Exceptions Brief and the underlying data (R-ILWU Exh. 228, Offer of Proof at pg. 1, R-ILWU Exh. 150). It is beyond dispute that a majority of the mechanic workforce PAOH hired chose to be represented by ILWU, either because they were represented by the ILWU before March 2005 or because they willingly chose to take an ILWU mechanic position.

V. The ALJ Erred in Issuing a Hypothetical Bargaining Order and Ordering that ILWU Reimburse Dues.

The GC and IAM both argue that the ALJ's bargaining order was proper under Board law and standard remedies; but this does not change the fact that a bargaining order was not sought by the GC in the operative complaint and that the bargaining order is hypothetical. PAOH closed its doors in March of 2016, and the mechanics formerly employed by PAOH have left and found other jobs with other employers. (Tr. 2353-2354). PAOH has filed bankruptcy, and all parties stipulated on the record that PAOH will cease to exist imminently. (*Id.*). Thus, there is no entity to which a bargaining order can be directed. Any bargaining order would be purely hypothetical.

The ALJ also erred by ordering that ILWU reimburse dues to mechanics who have been members of and represented by ILWU for over 10 years. Those mechanics continue to be

represented by ILWU today at their new jobs with different employers. ILWU maintains, and incorporates herein, all of the arguments set out in its Exceptions Brief against the back dues remedy. (See ILWU's Exceptions Brief, Section G.2.). Even if the Board ultimately determines that dues reimbursement is appropriate, the remedy must be modified to exclude both crane mechanics and any unit employees who were represented by ILWU prior to March 31, 2005, which at least would bring the remedy in line with the remedy in the *PCMC* decision. See, e.g., *Human Dev. Ass's*, 293 NLRB 1228, 1229 (1989); *Control Servs. Inc.*, 319 NLRB 1195, 1196 (1995). **Notably**, the GC agrees that ILWU should be obligated to reimburse dues to only "unit employees of PAOH who joined [ILWU] on or since March 31, 2005." (See GC Answering Brief, 41). Thus, if the Board decides reimbursement of back dues is warranted here, it should at least be limited to PAOH mechanics who were former unit members and who joined ILWU on or after March 31, 2005.

VI. The ALJ Erred by Approving the IAM-PAOH-MTC Settlement.

As addressed in Section IV.F. of ILWU's Exceptions Brief as well as in ILWU's briefs to the ALJ and the Board regarding the Settlement⁴, the ALJ erred by approving the Settlement between IAM, PAOH, and MTC. IAM's response to ILWU's Exceptions exposes the \$3 million game IAM is playing. IAM claims that its settlement distribution scheme "focuses on employees who worked during 2005 through 2013 and then continued to work for [PAOH] until it closed," but IAM then admits that the settlement money was actually given to many employees who never worked for PAOH. (IAM's Answering Brief, 1). The additional fact IAM fails to admit is that its distribution completely excludes a substantial number of mechanics who worked for PCMC and/or PAOH between 2005 and PAOH's closure in 2016. Ironically, IAM argues that

⁴ ILWU's arguments regarding the settlement are fully set forth in its submissions to the ALJ (ILWU Briefs to ALJ, dated August 17, 2016, and August 31, 2016) and its Motion to Appeal Approval of the Settlement to the Board, dated September 9, 2016.

ILWU must pay back dues to these individuals, but somehow these individuals are not entitled to any portion of the settlement money.

VII. Conclusion.

For all of the foregoing reasons and all of the reasons set forth in ILWU's Exceptions Brief, ILWU's Exceptions to the ALJ's rulings and the ALJ Decision and Order should be sustained by the Board and the Decision and Order reversed or, alternatively, reopened and remanded so ILWU can put on its case to ensure a full and fair hearing as required under the law.

Respectfully submitted,

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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 **April 7, 2017**, I caused the foregoing **RESPONDENT ILWU'S REPLY IN SUPPORT OF EXCEPTIONS TO THE RULINGS AND DECISION OF THE ADMINISTRATIVE LAW JUDGE** 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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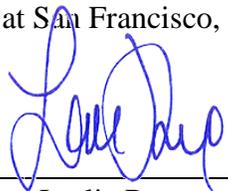
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- BY E-MAIL:** I caused the documents to be sent to the person at the electronic notification address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission 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 **April 7, 2017**, at San Francisco, California.



Leslie Rose