

Nos. 15-1336 & 16-1123

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO; DISTRICT LODGE 190;
LOCAL LODGE 1546; DISTRICT LODGE 160**

Intervenors for Respondent

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

USHA DHEENAN
Supervisory Attorney

AMY H. GINN
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2948
(202) 273-2942

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

(A) Parties and Amici: The International Longshore and Warehouse Union (“the Longshore Union”), petitioner/cross-respondent herein, was a respondent in the case before the Board. The Board is the respondent/cross-petitioner herein, and the Board’s General Counsel was a party in the case before the Board. The International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 190, Local Lodge 1546, and District Lodge 160 (“the Machinists”), intervenor herein, was the charging party before the Board.

(B) Ruling Under Review: This case involves a petition for review and a cross-application for enforcement of a Board Decision and Order issued on June 17, 2015, and reported at 362 NLRB No. 120. The Board seeks enforcement of that order against the Longshore Union.

(C) Related Cases: This case was previously before the Ninth Circuit on a prior Board Decision and Order issued on June 24, 2013, and reported at 359 NLRB 1206. The Board set aside that decision and the Ninth Circuit dismissed the case for lack of jurisdiction. (9th Cir. Case Nos. 13-72297 et al.)

Board counsel are unaware of any related cases currently pending before, or about to be presented before, this Court or any other court.

s/Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC
this 31st day of October, 2017

TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	1
Statement of the issues presented	3
Relevant statutory provisions.....	4
Statement of the case.....	4
I. Procedural history	4
II. The Board’s findings of fact	6
A. The Company’s bargaining relationship with the Longshore Union	6
B. The Company forms a new entity, PPMC, and establishes a bargaining relationship with the Machinists.....	7
C. The Company Discusses Terms with Maersk under which it could retain Maersk’s repair work in Oakland and Tacoma; the Company retains the work through PCMC instead of PPMC	9
D. The Company announces layoffs of the Machinists-unit employees from PPMC; the Company refuses to bargain with the Machinists	10
E. The Company offers employment to the PPMC unit employees in the Longshore Union-represented unit at PCMC; the Company refuses the Machinists’ demand for recognition.....	11
F. The Company lays off the unit employees from PPMC and rehires some of them the next day at PCMC; the employees perform the same work at the same locations; the Company begins temporary work assignments across unit lines	12
III. The Board’s Decision and Order	12
Summary of argument.....	14
Standard of review	17

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
Argument.....	18
I. Substantial evidence supports the Board’s finding that the Longshore Union violated Section 8(b)(1)(a) and (2) of the Act by accepting assistance and recognition from the Company and applying the terms of an existing collective-bargaining agreement when it did not represent an uncoerced majority of the unit employees	18
A. A union cannot lawfully accept recognition and assistance from an employer or apply a union-security provision in a contract when it does not represent a majority of unit employees	18
B. Substantial evidence supports the Board’s finding that the Longshore Union unlawfully accepted recognition as the unit employees’ representative and applied its existing collective-bargaining agreement, including the union-security provisions, to the unit employees.....	20
C. The Longshore Union’s defenses to the Company’s actions fail, and therefore its acceptance of the Company’s assistance was unlawful.....	24
1. The layoff of PPMC employees was not outside the Company’s control.....	24
2. The transfer of work was not a core entrepreneurial decision as it did not change the nature of the Company’s business and it turned on labor costs which were amenable to bargaining	27
3. The Board properly rejected the Longshore Union’s argument that the employees’ historical bargaining unit did not survive the transfer of work because it was merged into the Longshore Union-represented unit	34
II. The Court lacks jurisdiction to consider the Longshore Union’s challenge to the Board’s remedy; that remedy was within the Board’s broad remedial discretion.....	43
Conclusion	48

TABLE OF AUTHORITIES

Cases	Page(s)
<i>AG Commc'n Sys. Corp.</i> , 350 NLRB 168 (2007), <i>affirmed sub. nom.</i> , <i>Int'l Bhd. of Elec. Workers, Local 21 v. NLRB</i> , 563 F.3d 418 (9th Cir. 2009)	30, 31, 40, 41
<i>Armco, Inc. v. NLRB</i> , 832 F.2d 357 (6th Cir. 1988)	38
<i>Bally's Park Place, Inc. v. NLRB</i> , 646 F.3d 929 (D.C. Cir. 2011).....	17
<i>Blumenfeld Theatres Circuit</i> , 240 NLRB 206 (1979)	23
<i>Boilermakers Local 374 v. NLRB</i> , 852 F.2d 1353 (D.C. Cir. 1988).....	20
<i>Chevron Mining, Inc. v. NLRB</i> , 684 F.3d 1318 (D.C. Cir. 2012).....	47
* <i>Comar, Inc.</i> , 339 NLRB 903 (2003), <i>enforced</i> , 111 F. App'x 1 (D.C. Cir. 2004)	38, 41
<i>Dean Transp., Inc. v. NLRB</i> , 551 F.3d 1055 (D.C. Cir. 2009).....	35, 37
* <i>Dodge of Naperville, Inc. v. NLRB</i> , 796 F.3d 31 (D.C. Cir. 2015).....	36, 38
* <i>Dodge of Naperville, Inc.</i> , 357 NLRB 2252 (2012), <i>enforced</i> , 796 F.3d 31 (D.C. Cir. 2015).....	23, 36, 38, 39

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Duane Reade, Inc.</i> , 338 NLRB 943 (2003), <i>enforced</i> , 99 F. App'x 240 (D.C. Cir. 2004)	45
<i>Federated Logistics & Ops. v. NLRB</i> , 400 F.3d 920 (D.C. Cir. 2005).....	44
<i>Fibreboard Paper Prods. Corp. v. NLRB</i> , 379 U.S. 203 (1964).....	44
<i>First National Maintenance Corporation v. NLRB</i> , 452 U.S. 666 (1981).....	27, 28, 31
<i>Ford Motor Co. v. NLRB</i> , 441 U.S. 488 (1979).....	18
<i>Furniture Renters of America, Inc. v. NLRB</i> , 36 F.3d 1240 (3d Cir. 1994)	33
<i>Geiger Ready-Mix Co. of Kansas City, Inc. v. NLRB</i> , 87 F.3d 1363 (D.C. Cir. 1996).....	33
<i>Hahn Motors, Inc.</i> , 283 NLRB 901 (1987)	22
<i>Holly Farms Corp.</i> , 311 NLRB 273 (1993), <i>enforced</i> , 48 F.3d 1360 (4th Cir. 1995), <i>affirmed</i> , 517 U.S. 392 (1996).....	24
<i>Inova Health Sys. v. NLRB</i> , 795 F.3d 68 (D.C. Cir. 2015).....	17

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Int'l Ass'n of Machinists, Lodge 35 v. NLRB</i> , 311 U.S. 72 (1940).....	19
* <i>Int'l Ladies Garment Workers' Union v. NLRB</i> , 366 U.S. 731 (1961).....	19
<i>Int'l Transp. Servs. v. NLRB</i> , 449 F.3d 160 (D.C. Cir. 2006)	18
<i>Local 1814, Int'l Longshoremen's Ass'n v. NLRB</i> , 735 F.2d 1384 (D.C. Cir. 1984).....	45
<i>Local 702, Int'l Bhd. of Elec. Workers v. NLRB</i> , 215 F.3d 11 (D.C. Cir. 2000).....	17
<i>Machinists Local Lodge No. 1424 v. NLRB</i> , 362 U.S. 411 (1960).....	20
<i>Nat'l Maritime Union of Am. v. NLRB</i> , 683 F.2d 305 (9th Cir. 1982)	46
<i>NLRB v. Emsing's Supermarket, Inc.</i> , 872 F.2d 1279 (7th Cir. 1989)	21
<i>NLRB v. Noel Canning</i> , 134 S. Ct. 2550 (2014).....	5
<i>NLRB v. Thompson Transport Company</i> , 406 F.2d 698 (10th Cir. 1969)	32
<i>Northland Hub, Inc.</i> , 304 NLRB 665 (1991), <i>enforced</i> , 29 F.3d 633 (9th Cir. 1994)	42, 43

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Nova Southeastern Univ. v. NLRB</i> , 807 F.3d 308 (D.C. Cir. 2015).....	44
* <i>Pathology Institute, Inc.</i> , 320 NLRB 1050 (1996), <i>enforced</i> , 116 F.3d 482 (9th Cir. 1997).....	21, 22
<i>Penn. State Educ. Assn. v. NLRB</i> , 79 F.3d 139 (D.C. Cir. 1996).....	20
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941).....	44
<i>Radio Officers' Union v. NLRB</i> , 347 U.S. 17 (1954).....	20
* <i>Regal Cinemas, Inc. v. NLRB</i> , 317 F.3d 300 (D.C. Cir. 2003).....	26, 28, 30
<i>Road Sprinkler Fitters Local Union No. 669 v. NLRB</i> , 676 F.2d 826 (D.C. Cir. 1982).....	32
<i>Road Sprinkler Fitters Local Union No. 669 v. NLRB</i> , 789 F.2d 9 (D.C. Cir. 1986).....	32
<i>Rock-Tenn Co. v. NLRB</i> , 101 F.3d 1441 (D.C. Cir. 1996).....	30
<i>Safeway Stores</i> , 256 NLRB 918 (1981).....	35

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Serramonte Oldsmobile</i> , 318 NLRB 80 (1995), <i>enforced</i> , 86 F.3d 227 (D.C. Cir. 1996)	39
<i>Serramonte Oldsmobile, Inc. v. NLRB</i> , 86 F.3d 227 (D.C. Cir. 1996).....	35
<i>South Prairie Construction Co. v. Operating Engineers Local 627</i> , 425 U.S. 800 (1976).....	21
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984).....	18, 47
* <i>Trident Seafoods, Inc. v. NLRB</i> , 101 F.3d 111 (D.C. Cir. 1996).....	36
<i>United Food & Commercial Workers Union v. NLRB</i> , 447 F.3d 821 (D.C. Cir. 2006).....	44
<i>United Food & Commercial Workers v. NLRB</i> , 519 F.3d 490 (D.C. Cir. 2008).....	35
<i>United Parcel Serv.</i> , 303 NLRB 326 (1991), <i>enforced sub nom.</i> , <i>Teamsters Nat'l United Parcel Serv. Negotiating Comm. v. NLRB</i> , 17 F.3d 1518 (D.C. Cir. 1994).....	20
<i>United Technologies Corp.</i> , 296 NLRB 571 (1989).....	40
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	17

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Vance v. NLRB</i> , 71 F.3d 486 (4th Cir. 1995)	21
<i>Virginia Elec. & Power Co. v. NLRB</i> , 319 U.S. 533 (1943).....	44, 45
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982).....	45
Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	13, 18, 19
Section 8(a)(2) (29 U.S.C. § 158(a)(2)).....	23
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	21, 23
Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A))	3, 4, 5, 12, 19, 23
Section 8(b)(2) (29 U.S.C. § 158(b)(2))	3, 4, 5, 12, 19, 20, 23
Section 9(a) (29 U.S.C. § 159(a))	18, 19
Section 9(b) (29 U.S.C. § 159(b)).....	35
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(c) (29 U.S.C. § 160(c))	43, 44, 46
Section 10(e) (29 U.S.C. § 160(e))	2, 17, 44
Section 10(f) (29 U.S.C. § 160(f)).....	2

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

Act	The National Labor Relations Act (29 U.S.C §§ 151 <i>et seq.</i>)
Board	The National Labor Relations Board
Br.	The opening brief of ILWU to this Court
Company	Pacific Crane Maintenance Company, L.P. and Pacific Marine Maintenance Company, LLC together as a single employer
JA	Joint Appendix
Longshore Union	International Longshore and Warehouse Union
Machinists	International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 190, Local Lodge 1546, and District Lodge 160
PCMC	Pacific Crane Maintenance Company, Inc.
PMMC	Pacific Marine Maintenance Company, LLC

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 15-1336 & 16-1123

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO; DISTRICT LODGE 190;
LOCAL LODGE 1546; DISTRICT LODGE 160**

Intervenors for Respondent

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of the International Longshore and Warehouse Union (“the Longshore Union”) to review, and on the cross-

application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Longshore Union on June 17, 2015, and reported at 362 NLRB No. 120 (JA 1334-42), incorporating by reference a prior Board order issued on June 24, 2013, and reported at 359 NLRB 1206 (JA 1275-1326).¹ The International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 190, Local Lodge 1546, and District Lodge 160 (“the Machinists”), which were the charging parties before the Board, have intervened on behalf of the Board.

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) (29 U.S.C. § 160(e)), which allows the Board, in those circumstances, to cross-apply for enforcement. The Longshore Union filed its petition for review on September 22, 2015. The Board filed its cross-

¹ Citations are to joint appendix filed on October 20, 2017. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

application for enforcement on April 25, 2016. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.²

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Longshore Union violated Section 8(b)(1)(A) and (2) of the Act by accepting assistance and recognition from the Company and applying the terms of an existing collective-bargaining agreement when it did not represent an uncoerced majority of the unit employees.

2. Whether the Court lacks jurisdiction to consider the Longshore Union's remedial challenge and whether, in any event, the Board acted within its broad remedial discretion in fashioning the remedy for the Longshore Union's unfair labor practices.

² The Board further found that Pacific Crane Maintenance Company, L.P. and Pacific Marine Maintenance Company, LLC (together "the Company") committed several unfair labor practices and the Company filed a petition for review of the Board's Order with this Court. Following a settlement between the Company and the Machinists, the Court dismissed the Company's petition for review (Case No. 16-1077) and the Board's cross-application for enforcement (Case No. 16-1124) against the Company.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case arose as a result of a transfer of work and the unit employees who performed that work between two entities of a single employer. After the transfers, the Company withdrew recognition from the Machinists, who had represented the employees for over 40 years, and recognized the Longshore Union as the transferred employees' representative. Acting on unfair labor practice charges filed by the Machinists, the Board's General Counsel issued a complaint alleging, in relevant part, that the Longshore Union violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. § 158(b)(1)(A) and (2)) by accepting recognition from the Company as the representative of the employees and applying the terms of its pre-existing collective-bargaining agreement, including a union-security clause, to them at a time when the Longshore Union did not represent an uncoerced majority of employees and did not properly represent the employees.³ (JA 1291.)

³ There were no additional complaint allegations against the Longshore Union. The complaint contained additional allegations against the Company, all of which were resolved through the settlement between the Company and the Machinists.

Following a 41-day hearing before an administrative law judge, the judge issued a decision dismissing those complaint allegations. (JA 1325.)

The General Counsel and Machinists filed exceptions and supporting briefs. The Longshore Union and the Company filed answering briefs. Following consideration of all of the exceptions and briefs before it, the Board issued a Decision and Order reversing the judge and finding in relevant part that the Longshore Union violated Section 8(b)(1)(A) and (2) of the Act by accepting recognition as the unit employees' representative and agreeing to apply the terms of its existing collective-bargaining agreement with the Company, including union-security provisions, to the unit employees. (JA 1276.)

The Company, the Longshore Union, and the Machinists all filed petitions for review of the Board's Order and the Board filed cross-applications for enforcement, which were ultimately consolidated in the Ninth Circuit. (9th Cir. Case Nos. 13-72297 et al.) On June 26, 2014, while the consolidated cases were pending, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held three recess appointments to the Board in January 2012 invalid, including the appointment of Members Griffin and Block who participated in the 2013 Decision and Order. On June 27, the Board issued an Order setting aside the 2013 Decision and Order. On December 1, the Ninth

Circuit granted the Board's motion to dismiss the consolidated cases before it for lack of jurisdiction.

On June 17, 2015, a properly constituted Board panel (then-Chairman Pearce and Members Hirozawa and McFerran), upon *de novo* consideration of the judge's decision and the record in light of the exceptions and briefs, found that the Longshore Union violated the Act as alleged and incorporated by reference the 2013 decision. (JA 1334.)

The facts relevant to the Board's findings are detailed below, followed by a summary of the Board's Decision and Order.

II. THE BOARD'S FINDINGS OF FACT

A. The Company's Bargaining Relationship with the Longshore Union

Pacific Crane Maintenance Company ("PCMC") was incorporated in 1990 to perform marine terminal maintenance and repair work at shipping terminals on the West Coast. PCMC recognized the Longshore Union as the representative of its employees in a multi-employer, coastwide bargaining unit under a contract with the Pacific Maritime Association.⁴ (JA 1277; 46, 408-09.) As part of this agreement, PCMC utilized a "lean staffing model" to maintain steady employee complements at each of its terminals that were just large enough to perform the

⁴ Pacific Maritime Association is a multiemployer association that negotiates collective-bargaining agreements with the Longshore Union on behalf of approximately 70 companies at various ports on the West Coast. (JA 1276, 1292; 479-82, 493-96, 610.)

maintenance and repair work at the terminal during slack periods. When it needed to temporarily expand its work force during busier times, PCMC transferred mechanics from other terminals using the Longshore Union hiring hall. (JA 1277, 1297-98, 1315; 410-13, 415, 421, 1123.) By 2000, PCMC was performing maintenance and repair work for various companies at terminals in ports up and down the West Coast, including a significant portion of its work for shipping company Maersk. (JA 1276, 1299; 48, 62, 428, 527-30, 558.)

B. The Company Forms a New Entity, PMMC, and Establishes a Bargaining Relationship with the Machinists

In 1999, Maersk acquired the assets and operations of another shipping company, Sealand, at terminals in Long Beach and Oakland, California, and Tacoma, Washington. (JA 1276, 1298; 23, 47-48.) Sealand had employed mechanics performing marine terminal maintenance and repair work on containers and stevedoring equipment at those terminals. The Machinists had represented those mechanics since the 1960s. (JA 1276, 1298; 49, 187-88, 222-24, 331-33.)

To acquire the work at those ports, Maersk agreed to continue using Sealand's mechanics but it did not want to employ them directly. Maersk put the maintenance and repair work out for bid and informed potential bidders that they would have to adopt the extant Machinists/Sealand collective-bargaining agreement, which was not due to expire until 2002. (JA 1276, 1299; 27, 48-51, 54-55.) PCMC wanted the work but could not bid on it because, as a member of the

Pacific Maritime Association, it would have had to assign the work to its Longshore Union-represented employees. (JA 1276, 1299; 49-50.)

In order to obtain the Maersk contract at the terminal, PCMC and Marine Terminals Corporation, a separate maintenance and repair contractor that had an existing collective-bargaining relationship with the Machinists, formed a new company called Pacific Marine Maintenance Company (“PMMC”). (JA 1276, 1299; 23, 50-52, 426.) The parties stipulated at the hearing that PCMC and PMMC constitute a single employer. (JA 1275, 1292; 19, 608.) Maersk awarded the contract to PMMC, who retained Sealand’s Machinists-represented mechanics, recognized the Machinists, and adopted Sealand’s collective-bargaining agreement with the Machinists. (JA 1276, 1299; 24-28, 53-55, 146-47, 189, 225-26.) When PMMC took over, the unit employees continued to perform the same work as they had for Sealand. (JA 1276, 1299; 28, 226.)

In 2002, the Machinists and PMMC entered into a successor collective-bargaining agreement effective until March 31, 2005. (JA 1276, 1299; 24, 188-89, 862.) The successor agreement covered the maintenance and repair of containers and all other work the Machinists mechanics historically performed under the contract. The agreement stated that it applied to all facilities where PMMC did business and covered the mechanics and other employees presently and thereafter represented by the Machinists. Also in 2002, Maersk and PMMC renewed their

service agreement, but Maersk demanded that it be on a month-to-month basis.⁵

(JA 1299; 190, 200-01, 429.)

C. The Company Discusses Terms with Maersk Under Which It Could Retain Maersk's Repair Work in Oakland and Tacoma; the Company Retains the Work Through PCMC Instead of PPMC

In late 2004, after concluding that labor costs under the Machinists' contract were too high, Maersk asked PPMC if they could lower costs in order to keep the maintenance and repair work. (JA 1276, 1300; 89, 91.) PPMC responded that it could not do the work for less than the current rate and that any labor cost increases under a new Machinists contract would be passed on to Maersk per industry practice. (JA 1276, 1300; 112-14.) Maersk approached PCMC about doing the work at a lower rate, noting that the PPMC-Machinists contract was set to expire in 2005 and that labor costs under that agreement were expected to increase by 12 percent. (JA 1276, 1300; 64-66, 90-91, 162-63.) PCMC indicated that it could perform the work for less because its maintenance and repair employees would be working under the Longshore Union agreement and that contract would not expire until 2008. (JA 1276; 65-66, 91, 162, 167.)

⁵ By late 2002, PPMC was no longer performing the former Sealand maintenance and repair work in Long Beach. PCMC was performing that work at a new terminal in Los Angeles with employees represented by the Longshore Union. (JA 1277 n.7, 1299; 63, 430-32).

After gathering information from PMMC and PCMC, Maersk chose the lower labor rate and awarded the former Sealand repair work in Oakland and Tacoma to PCMC. (JA 1292-93, 1300; 157, 159, 161, 178.) On January 6, 2005, Maersk, PMMC, and PCMC representatives met to discuss how Maersk could transition the workforce to the Longshore Union contract, and worked out the details of a new contract between Maersk and PCMC. (JA 1276, 1300; 158, 445.) The Company agreed to select the new workforce in Oakland and Tacoma from current PMMC employees. (JA 1301; 73, 105, 437-38.)

D. The Company Announces Layoffs of the Machinists-Unit Employees from PMMC; the Company Refuses to Bargain with the Machinists

On January 25, Maersk terminated its maintenance contract with PMMC and awarded the work to PCMC, effective March 31, 2005. (JA 1276; 72, 95-97, 902.) On January 26, PMMC sent a letter to the Machinists announcing that it had lost the Maersk work and estimating that it would lay off the unit employees around April 1. PMMC also enclosed a memo from PCMC explaining how the unit mechanics could apply for employment with PCMC to continue working at the same terminals. (JA 1276-77, 1301; 96-97, 287-88, 323-24, 326-29, 334, 897-901.)

In early February, the Machinists requested that PMMC bargain over both the decision to cease work at Oakland and Tacoma, and the effects of that decision on the unit employees. The Machinists also requested information about the

relationship between PMMC and PCMC. PMMC agreed to bargain over the effects of the layoffs, but asserted that it was Maersk's decision to use another contractor to perform the work. PMMC denied that it was a single employer with PCMC and refused to provide the requested information. (JA 1277, 1301; 76, 181-85, 916-22.)

E. The Company Offers Employment to the PMMC Unit Employees in the Longshore Union-Represented Unit at PCMC; the Company Refuses the Machinists' Demand for Recognition

On March 1, PCMC sent employment offers to 75-80 of the approximately 100 Machinists-unit employees working at Oakland and Tacoma. The letters specified that the work belonged to PCMC's Longshore Union-represented bargaining unit and would be covered by that contract. (JA 1277, 1301; 106, 109, 438, 442-43, 908-09.) On March 10, the Machinists sent a letter to PCMC demanding recognition as the bargaining representative of the unit employees. PCMC refused to recognize the Machinists, explaining that its "new employees" were covered by the Longshore Union contract. (JA 1277, 1301; 76-78, 194-95, 204, 289, 903-07.)

F. The Company Lays Off the Unit Employees from PPMC and Rehires Some of Them the Next Day at PCMC; the Employees Perform the Same Work at the Same Locations; the Company Begins Temporary Work Assignments Across Unit Lines

On March 30, PPMC permanently laid off the Machinists-represented mechanics. On March 31, PCMC hired 76 of the unit mechanics to begin work as Longshore Union-represented employees, on the condition that they would be represented by the Longshore Union in the coastwide bargaining unit. PCMC hired six more former PPMC mechanics shortly thereafter. (JA 1277, 1303, 1313; 74, 109, 442.) The mechanics continued to perform essentially the same work at the same locations, with the same tools and equipment, in the same organizational units and for the same supervisors. (JA 1277, 1279, 1280, 1313, 1320; 82-86, 117, 131, 136, 138-39, 149, 261, 344, 462.) Beginning on March 31, PCMC began to temporarily assign nonunit work at nonunit locations to unit employees and to assign unit work to nonunit employees in accordance with its “lean staffing model.” (JA 1277, 1316; 124-26, 256, 335.)

III. THE BOARD’S DECISION AND ORDER

The Board (then-Chairman Pearce and Members Hirozawa and McFerran) found that the Longshore Union violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. §158(b)(1)(A) and (2)) by accepting assistance and recognition from the Company as the exclusive collective-bargaining representative of the unit employees at a time when the Longshore Union did not represent an uncoerced

majority of the employees in the unit, and maintaining and enforcing the Longshore Union's collective-bargaining agreement, including its union-security provisions, so as to cover the unit employees. (JA 1339.)

The Board's Order requires the Longshore Union to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act (29 U.S.C. §157). (JA 1339.) Affirmatively, the Order requires the Longshore Union to decline recognition as the exclusive collective-bargaining representative of the unit employees, unless and until it is certified by the Board as their representative. The Board further ordered the Longshore Union to jointly and severally with the Company reimburse all present and former unit employees for all initiation fees, dues, and other monies paid by them or withheld from their wages pursuant to the Longshore Union's agreement, with interest. (JA 1339.) The Longshore Union must also post copies of two remedial notices (one for the Longshore Union and one for the Company) at its headquarters and any offices and meeting halls in Oakland and Tacoma and distribute them electronically.⁶ (JA 1339.)

⁶ The Board ordered the Company to, among other things, withdraw recognition from the Longshore Union, affirmatively recognize and bargain with the Machinists, rescind the unilateral changes, and disgorge the dues paid to the Longshore Union. (JA 1334-35.)

SUMMARY OF ARGUMENT

The Longshore Union unlawfully accepted recognition and assistance from the Company at a time when it did not represent an uncoerced majority of a historical bargaining unit of maintenance and repair mechanics. The Company only offered the Longshore Union recognition after it unlawfully withdrew recognition from the Machinists, who had represented the unit employees for over 40 years. As a single employer, the Company had an obligation to bargain with the Machinists when one part of its operation, namely PCMC, took over contract work from Maersk that had been performed by another part of its enterprise, namely PMMC. The Company was obligated to bargain with the Machinists over the layoff of the unit employees from PMMC and the terms and conditions of employment they would be offered as future employees of PCMC. The Board found that there were multiple issues amenable to the bargaining process including concessions that may have alleviated the need to transfer the unit employees away from PMMC.

The Board found that not only did the basic nature of the Company's operation remain unchanged when Maersk contracted with PCMC for the maintenance and repair work but that the work, facilities, and locations were in fact identical. As such, the Board rejected the assertion that the Company was relieved of its duty to bargain because the transfer of work decision was a core

entrepreneurial decision akin to whether to be in business, which is not amenable to collective bargaining. In contrast, the Company's decision to satisfy its customer Maersk was particularly amenable to collective bargaining because Maersk's concern was cutting labor costs. As the Board found, the Company could have sought such cost-savings from the Machinists in bargaining rather than attempting to retain the work with the same workforce forced into a different bargaining relationship.

The Board specifically rejected the Longshore Union's arguments that the unit employees were merged into the Longshore Union coastwide bargaining unit and thus the Longshore Union acted lawfully when it accepted recognition from the Company for the merged unit. The Board concluded that the historical bargaining unit retained its distinct community of interest apart from the Longshore Union-represented employees. The Board found that the Company failed to meet its burden of demonstrating compelling circumstances to overcome the weight of bargaining history where there were no significant changes to the unit employees' terms and conditions of employment as of the transfer to PCMC. The Board declined to consider evidence of changes after March 31, the date on which the Company unlawfully extended recognition to the Longshore Union, because those changes to the employees' terms and conditions were made unilaterally in derogation of the Company's obligation to bargain with the

Machinists. Furthermore, the Board found the record evidence failed to establish that the Company had a well-defined plan for functional integration of the two bargaining units at the time it withdrew recognition from the Machinists. Thus, it was inappropriate to consider the interchange of unit and nonunit employees after March 31 to determine whether the Machinists-represented unit had been merged into the Longshore Union's coastwide unit. Because the Machinists-represented unit survived the transfer of work to PCMC, the Longshore Union could not lawfully accept recognition and assistance from the Company as to those unit employees.

Finally, the Court lacks jurisdiction to consider the Longshore Union's argument that the Board's remedy, requiring that the Longshore Union reimburse the unit employees for dues and fees it has collected from them, is punitive or should otherwise be vacated. The Longshore Union failed to preserve this argument for review because it never presented it to the Board, including in a motion for reconsideration after the remedy was ordered. In any event, the Board ordered its standard remedy when a union unlawfully accepts recognition of a bargaining unit. To the extent that the Longshore Union speculates about whether the employees have already been made whole, that is a matter for compliance and the Longshore Union will have the opportunity to present evidence that particular remedial provisions should be modified as they are no longer appropriate.

STANDARD OF REVIEW

This Court will uphold a decision of the Board “unless it relied upon findings that are not supported by substantial evidence, failed to apply the proper legal standard, or departed from its precedent without providing a reasoned justification for doing so.” *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015) (citation omitted). The Board’s findings of fact are “conclusive” when supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court may not displace the Board’s choice between two fairly conflicting views of the facts, even if the court “would justifiably have made a different choice had the matter been before it *de novo*.” *Id.* at 488; *accord Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (“the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary”). Finally, where the Board disagrees with the judge, the “standard of review with respect to the substantiality of the evidence does not change.” *Bally’s Park Place*, 646 F.3d at 935 n.4 (quoting *Local 702, Int’l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000)).

The Board’s legal determinations under the Act are entitled to deference, and this Court will uphold them so long as they are neither arbitrary nor contrary to

law. *Int'l Transp. Servs. v. NLRB*, 449 F.3d 160, 163 (D.C. Cir. 2006). The Board's interpretation of the Act must be upheld if reasonably defensible. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). As the Supreme Court has observed, "Congress made a conscious decision" to delegate to the Board "the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE LONGSHORE UNION VIOLATED SECTION 8(b)(1)(A) AND (2) OF THE ACT BY ACCEPTING ASSISTANCE AND RECOGNITION FROM THE COMPANY AND APPLYING THE TERMS OF AN EXISTING COLLECTIVE-BARGAINING AGREEMENT WHEN IT DID NOT REPRESENT AN UNCOERCED MAJORITY OF THE UNIT EMPLOYEES

A. A Union Cannot Lawfully Accept Recognition and Assistance from an Employer or Apply a Union-Security Provision in a Contract When It Does Not Represent a Majority of Unit Employees

Section 7 of the Act (29 U.S.C. § 157) guarantees employees, among other protected activities, the right to self-organization, to form, join or assist labor organizations, or to refrain from such activities. Under Section 9(a) of the Act, a union may attain the status of exclusive collective-bargaining representative when it is "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." 29 U.S.C. §

159(a). Together, Section 7 and Section 9(a) of the Act guarantee employees freedom of choice and majority rule in their selection of a bargaining unit representative. *Int'l Ladies Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961). Accordingly, the collective-bargaining process must be “free...from all taint of an employer’s compulsion, domination or influence.” *Int'l Ass'n of Machinists, Lodge 35 v. NLRB*, 311 U.S. 72, 80 (1940). Likewise, it is an unfair labor practice under the Act for an employer to withdraw recognition from a majority union, or to recognize a minority union, even when the collective-bargaining agreement has expired. *See Garment Workers*, 366 U.S. at 737-38.

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization to “restrain or coerce employees” in the exercise of their rights guaranteed by Section 7 of the Act, including the right to engage in and refrain from union activity. 29 U.S.C. § 158(b)(1)(A). A labor union violates Section 8(b)(1)(A) if it accepts exclusive recognition from an employer when it does not have support from a majority of unit employees. *Garment Workers*, 366 U.S. at 733, 738.

Section 8(b)(2) of the Act makes it an unfair labor practice for a labor organization to “cause or attempt to cause an employer to discriminate against an employee....” 29 U.S.C. § 158(b)(2). When an employer and a union that does not represent a majority of the unit employees include a union security clause in

their contract, requiring employees to become or remain union members, the union violates Section 8(b)(2) of the Act. *Machinists Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 412-14 (1960). *Accord Penn. State Educ. Assn. v. NLRB*, 79 F.3d 139, 154 (D.C. Cir. 1996); *United Parcel Serv.*, 303 NLRB 326 (1991), *enforced sub nom. Teamsters Nat'l United Parcel Serv. Negotiating Comm. v. NLRB*, 17 F.3d 1518, 1520, 1524 (D.C. Cir. 1994). The policy behind these provisions is to ensure that employees' jobs are insulated from their organizational rights. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954). *Accord Boilermakers Local 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988).

B. Substantial Evidence Supports the Board's Finding that the Longshore Union Unlawfully Accepted Recognition as the Unit Employees' Representative and Applied Its Existing Collective-Bargaining Agreement, Including the Union-Security Provisions, to the Unit Employees

The Board found that the Longshore Union violated Section 8(b)(1)(A) and (2) of the Act by accepting recognition from the Company and applying its collective-bargaining agreement with the Company, including the union-security provisions, to the unit employees at a time when it had not demonstrated that it had exclusive majority representative status. (JA 1281.) There is no dispute that the Longshore Union accepted recognition from the Company, or that it applied the extant collective-bargaining agreement to the unit employees. (JA 1304.) The Longshore Union's violations, however, flow from the Company's unlawful

withdrawal of recognition from the Machinists as the exclusive collective-bargaining representative of the unit employees when the Company laid off those employees and then rehired them into the Longshore Union bargaining unit. As shown below, the Board's unfair labor practice findings with respect to the Company are supported by substantial evidence and applicable precedent and, therefore, the Longshore Union also violated the Act.

The Board found that the Company, a stipulated single employer that included both PCMC and PMMC, was not free to withdraw recognition from the Machinists when PCMC took over the work of PMMC.⁷ Rather, the Company was “obligated to bargain with the Machinists over the layoff of the unit employees from PMMC and the terms and conditions under which they would be offered continued employment with PCMC.” (JA 1275.) In other words, the Company was “responsible to bargain with the Machinists regardless of which of its corporate manifestations nominally employed the bargaining unit employees.” (JA 1279.) *See Pathology Institute, Inc.*, 320 NLRB 1050, 1050 (1996) (bargaining

⁷ An employer is responsible for the Section 8(a)(5) (29 U.S.C. § 158(a)(5)) collective-bargaining obligations of a nominally distinct employer where the two of them constitute a single employer. *See, e.g., Vance v. NLRB*, 71 F.3d 486, 488, 489, 494-95 (4th Cir. 1995) (all entities involved in single employer relationship are jointly and severally liable for unfair labor practices committed by any one of the constituent entities); *NLRB v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1283 (7th Cir. 1989) (same). Moreover, one entity of a single employer can be bound by a collective-bargaining agreement entered into by another entity of that single employer. *See, e.g., South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800, 803-04 (1976).

obligation continues uninterrupted when one entity comprising a single employer takes over operations from another entity within that same single employer), *enforced*, 116 F.3d 482 (9th Cir. 1997).

Pathology Institute is illustrative. There, a single employer closed one of three entities that employed a unit of represented lab technologists. It then hired the technologists to perform the same work at two of its acute care hospitals and refused to apply their collective-bargaining agreement. *Id.* The Board found that the employer's transfer of represented employees from one to another of its entities constituting a single employer did not, of itself, obliterate the historic unit and its attendant bargaining obligations, even though the unit was diminished in scope by the transfers. *Id.* at 1051.

The same rationale applies here. The Company stopped doing work at the ports through one of its entities, PMMC, and then hired its mechanics to perform the same work through PCMC and refused to apply the Machinists' collective-bargaining agreement. The Board properly found that the Company could not "escape its bargaining obligation by the simple device of laying off the Machinists-represented employees from PMMC on March 30 and rehiring them as 'new' employees of PCMC on March 31, given that PMMC and PCMC were, for labor law purposes, the same entity." (JA 1279.) *See, e.g., Hahn Motors, Inc.*, 283 NLRB 901, 901-02 (1987) (finding unlawful failure to recognize union after

transfer of some unit employees to different facility of single employer);

Blumenfeld Theatres Circuit, 240 NLRB 206, 217-18 (1979) (finding unlawful refusal to bargain after theatre closed and then reopened under different entity of single employer).

As the Board explained (JA 1279), when it sought the Maersk work, PCMC already was the employer of the PMMC employees. Accordingly, as their employer, it was bound to bargain with the Machinists “about any changes in the unit employees’ terms and conditions of employment, including the layoff of the unit employees[] from PMMC, whether they would be reemployed by PCMC, and what their initial terms and conditions would be upon reemployment.” (JA 1279.) *See, e.g., Dodge of Naperville, Inc.*, 357 NLRB 2252, 2253-54 & n.7 (2012), *enforced*, 796 F.3d 31 (D.C. Cir. 2015). It failed to do that and therefore violated the Act.

The Board thus found that the Company violated Section 8(a)(5) and (2) of the Act (29 U.S.C. § 158(a)(5) and (2)) by withdrawing recognition from the Machinists and extending recognition to the Longshore Union. Therefore, the Board further found that the Longshore Union violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. § 158(b)(1)(A) and (2)) “by accepting recognition as the unit employees’ representative and agreeing to apply its collective-bargaining

agreement, including the union-security provisions, to the unit employees.” (JA 1276.)

C. The Longshore Union’s Defenses to the Company’s Actions Fail, and Therefore Its Acceptance of the Company’s Assistance was Unlawful

1. The layoff of PMMC employees was not outside the Company’s control

Before the Board, the Company argued that its actions were the direct result of Maersk’s decision to award the work to PCMC and, therefore it had no obligation to bargain with the Machinists. The Longshore Union repeats (Br. 24) that argument here. However, the “layoff, reemployment, and unilateral changes...were not an inevitable consequence of Maersk’s decision, but were only ‘one of a number of responses to changed circumstances.’” (JA 1279 & n.16 (quoting *Holly Farms Corp.*, 311 NLRB 273, 277-78 (1993), *enforced*, 48 F.3d 1360 (4th Cir. 1995), *affirmed*, 517 U.S. 392 (1996)). As the Board found, the Company “could have bargained with the Machinists over the transfer of the unit employees to PCMC without an intervening layoff and loss of seniority ...[a]lternatively, it could have maintained the unit employees’ terms and conditions while it negotiated with the Machinists over the cost saving concessions.” (JA 1279.)

The Company was not merely, as the Longshore Union implies (Br. 24), an unwitting participant in Maersk’s bidding process—it knew the price to which

Maersk had to go down and it chose to make that happen by sacrificing one side of its operations for the other. The Company had concerns about its ability to retain the Maersk work while using Machinists-represented employees but that did not justify converting those employees to Longshore Union representation. As a single employer, the Company retained its customer but did so by unlawfully imposing labor cost-cutting measures that it should have bargained about with the Machinists in the first instance. Because the Company never afforded the Machinists an opportunity to bargain about Maersk's requested concessions, it is unknown whether such negotiations would have been successful.

The Longshore Union's repeated assertion (Br. 11-13, 24, 27, 31) that the Board erred by failing to consider that Maersk wanted more than just "cheaper labor costs" but also "greater efficiencies" from the "dispatch system" ignores the Board's consideration of substantial evidence in the record demonstrating that "Maersk was focused on its costs." (JA 1279; 161.) The Board found "overwhelming record evidence" establishing that the "decisions at issue were motivated by a desire to reduce labor costs." (JA 1279.) As the Board stated, the Company's "focus was on the manner in which it would achieve the cost-savings that Maersk sought." (JA 1279.) To that end, the Board noted that it is "undisputed that the difference in the contract rates charged by PMMC and PCMC

was attributed by Maersk and the [Company] to the higher labor costs associated with operating under the Machinists' contract.⁸ (JA 1279.)

The Longshore Union asserts (Br. 32-34) that the Company had no obligation to bargain over the layoff of the unit employees because "Maersk's acceptance of PCMC's bid over that of PMMC . . . did not allow for the type of speculative bargaining" that the Board ordered. (Br. 34.) As discussed above, however, the Board correctly found that the Company was not set upon an "inevitable" path by Maersk's decision. (JA 1279.) Even after Maersk accepted one of two competing offers from the Company, the Company could have bargained with the Machinists over the transfer of unit employees "without an intervening layoff and loss of seniority" or, alternatively, it could have "maintained

⁸ The Longshore Union asserts (Br. 29) that the Company could not have bargained with the Machinists for an arrangement that allowed for additional employees to assist with increased work on an as needed basis and, thus, the Longshore Union's "lean staffing model" was of "incomparable value" to Maersk. The Board found that such a bargaining concession could have been sought, "perhaps including the temporary transfer of Machinist-represented mechanics from other terminals." (JA 1280.) The Longshore Union contends (Br. 29) the Board erred because it is undisputed that PMMC had no other operations and workers beyond those in Oakland and Tacoma. First, the record shows that transfers within the Maersk unit were common prior to March 31, 2005, and that the Machinists utilize a transfer system in Tacoma and Oakland under contracts with other employers. (JA 340-43, 383-85, 441.) Furthermore, the Act does not prohibit the transfer of work across units. Rather, it requires bargaining on the subject. *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 312 (D.C. Cir. 2003) (transfer of unit work is a mandatory subject of bargaining).

the unit employees' terms and conditions of employment while it negotiated...over cost saving concessions.”⁹ (JA 1279.)

2. The transfer of work was not a core entrepreneurial decision as it did not change the nature of the Company's business and it turned on labor costs which were amenable to bargaining

The Longshore Union incorrectly asserts (Br. 21-27) that the Company's decision to layoff the unit employees and subsequently rehire them with new terms and conditions of employment was a core entrepreneurial decision that the Company did not have to bargain over. It relies on *First National Maintenance Corporation v. NLRB*, 452 U.S. 666 (1981), in which the Supreme Court held that an employer was not obligated to bargain over its decision to close a part of its operation because the employer's change to the scope and direction of its business was a core entrepreneurial decision akin to the decision whether to be in business

⁹ The Longshore Union asserts (Br. 34-35) that because “effects bargaining” over the consequences of PMMC losing the Maersk contract occurred, the Company met its bargaining obligation. The Board did not find that the Company violated the Act simply by a failure to engage in effects bargaining but, rather, that the Company failed to give the Machinists “a meaningful opportunity to bargain” about “[a]ssigning unit employees to nonunit positions and locations, or assigning nonunit employees to perform unit work” as well as the “effects of such assignments.” (JA 1337.) The General Counsel took the position that the Company engaged in “effects bargaining regarding the termination of its Oakland and Tacoma Maersk operations.” (JA 1293 n.8.) The judge found (JA 1303) that the Company and the Machinists met for one bargaining session on March 15, 2005, to discuss the future of PMMC and the potential for additional laid-off PMMC employees to be hired by PCMC. Such effects bargaining regarding the termination of PMMC's Maersk operations fails to encompass the bargaining required by the Board's Order.

at all and thus not amenable to collective bargaining.¹⁰ *Id.* at 677. The Board, however, reasonably rejected the claim that the Company's actions were a core entrepreneurial decision.

Ample evidence supports the Board's finding that the "basic nature" of the Company's operation was unchanged. Indeed, the record shows that the unit employees performed the "identical work...at the same facility and locations within the facility using the same tools and equipment." (JA 1279.) *See First Nat'l Maint.*, 452 U.S. at 686 (illustrating limits of holding by noting that employer had no intention of replacing discharged employees and continuing work at current location or any location). More specifically, on March 31 when PCMC took over the work, the unit employees remained in Oakland and Tacoma, and performed the same work for Maersk that they had been performing for years.

The Board found, based on substantial evidence in the record, that the Company—as a single employer—was focused on how to “achieve the cost-savings that Maersk sought” with the understanding that the difference in contract

¹⁰ As this Court has noted, the Supreme Court in *First National Maintenance* identified three types of management decisions: “(1) those that have ‘only an indirect and attenuated impact on the employment relationship,’ such as decisions regarding advertising and financing; (2) those that ‘are almost exclusively an aspect of the relationship between employer and employee,’ such as decisions related to production quotas and work rules; and (3) those that have ‘a direct impact on employment...but [have] as [their] focus only the economic profitability of’ the business.” *Regal Cinemas*, 317 F.3d at 309 (quoting *First Nat'l Maint.*, 452 U.S. at 676-77).

rates for PCMC and PPMC was undisputedly attributed by both parties to higher labor costs under the Machinists' contract. (JA 1279.) The Board further determined based on "overwhelming record evidence" that the Company's decisions were thus "motivated by a desire to reduce labor costs." (JA 1279.) If, based on that motivation, the Company "desired to cooperate with Maersk in effecting the transfer of the unit work and the unit employees from PPMC to PCMC," the Company was "first obligated to bargain (to agreement or impasse) with the Machinists." (JA 1279.)

Indeed, the Company ultimately made changes to the terms and conditions of employment that affected labor costs and that were amenable to bargaining with the Machinists for "concessions on wages, hours, benefits, and staffing levels." (JA 1279.) For example, the Company and the Machinists could have bargained over adjusting labor rates, laying off employees to reduce costs, reducing benefits, making schedule changes, adjusting staffing levels, using Machinists-represented employees from other operations to augment staffing, and/or establishing a hiring hall or referral system. (JA 1279.)

The Longshore Union contends that the Company only had to bargain over its decision if the Machinists could have "meaningfully offer[ed] concessions and advice." (Br. 23.) In the first instance, whether or not the Machinists could have given "meaningful" concessions is unknown because the Company never disclosed

to the Machinists the necessity of concessions to retain the Maersk work.

Additionally, this Court has rejected the idea that an employer is excused from its bargaining obligation in a transfer of work situation because bargaining is allegedly futile, i.e., that a union could not have reduced costs enough to change the employer's decision. *See Regal Cinemas*, 317 F.3d at 312 (not considering futility where employer diverted unit work to non-bargaining unit supervisors to reduce labor costs); *Rock-Tenn Co. v. NLRB*, 101 F.3d 1441, 1446 (D.C. Cir. 1996) (“regardless of the alleged futility of bargaining” employer had obligation to do so when subcontracting “same work under similar conditions of employment” to reduce labor costs).

The Longshore Union's reliance (Br. 25-27) on *AG Communication Systems Corp.*, 350 NLRB 168 (2007), *affirmed sub. nom., Int'l Bhd. of Elec. Workers, Local 21 v. NLRB*, 563 F.3d 418 (9th Cir. 2009), is misplaced. There, the Board found that the employer did not violate the Act by integrating separate bargaining units without bargaining with the union that represented the smaller unit. Lucent Technologies, the larger of two related companies, merged with a smaller joint venture, AG Communication, and moved the smaller venture's employees into its existing bargaining unit. The Board found that the single employer did not have to bargain with the smaller unit's union representative over the decision to integrate employees into the Lucent unit because it was an entrepreneurial decision which

did not require bargaining under *First National Maintenance*. Lucent was seeking to increase profitability by streamlining operations and reducing redundancies with the added benefit of also pursuing a new product line. In those circumstances, the Board in *AG Communication* “emphasized that the employer’s integration decision was not animated by a desire to reduce labor costs.” (JA 1281 (citing 350 NLRB at 172).)¹¹ In contrast, here, the evidence fully supports the Board’s finding that the Company’s actions were motivated by its desire to reduce labor costs.

The Longshore Union additionally states that “PMMC and PCMC’s actions were not ‘animated by a desire to reduce labor costs’” because each entity put forward to Maersk their existing labor costs. (Br. 27.) Similarly, the Longshore Union states (Br. 29) that the Company did not decide to transfer the employees from PMMC to PCMC and, instead, Maersk was the driver of the change. While Maersk selected among options presented to it by the Company, it was the Company—not Maersk—that chose to accomplish the desired cost reductions by sacrificing PMMC’s business and laying off the entire bargaining unit. The Company then rehired fewer of them to do the same work under a different labor

¹¹ Unlike in *AG Communication*, there was no redundancy that was eliminated here. The Company performed the same work at the same locations for the same customer.

agreement in order to maintain its profitability. The Company made all of these decisions while refusing to bargain with the Machinists.¹² (JA 1279-80.)

The Longshore Union also relies on case law involving “double-breasted” operations to argue that the Company had no obligation to bargain with the Machinists over the initial terms and conditions of employment for the unit employees when they were hired by PCMC.¹³ (Br. 36-41.) Its position rests on an analogy to a customer’s decision to shift work from a single employer’s unionized operation to its “double-breasted” non-union operation. However, as this Court has held, in such situations, the allocation of work to a bargaining unit is a mandatory subject of bargaining and a single employer may not unilaterally shift work to its non-unionized workforce. *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982) (employer unlawfully diverted bargaining unit work when he began to place fewer and fewer bids for jobs through

¹² Because the Company is a single employer and acted as such in submitting its own competing proposals, the Longshore Union’s reliance (Br. 32) on *NLRB v. Thompson Transport Company*, 406 F.2d 698 (10th Cir. 1969), is misplaced. In that case, the Court found that an employer did not have an obligation to bargain over closing a terminal because “its change of operation could in no way be characterized as a ‘farming out’ or other procedure to continue its operation in a new or different manner.” *Id.* at 703. In contrast, here the Company acted to continue its operation with the same workforce in a different bargaining relationship.

¹³ A “double-breasted” employer is one with both union and nonunion operations performing similar work. *See Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 789 F.2d 9, 12 n.2 (D.C. Cir. 1986).

unionized operation as means of phasing-out that operation); *accord Geiger Ready-Mix Co. of Kansas City, Inc. v. NLRB*, 87 F.3d 1363, 1369 (D.C. Cir. 1996) (double-breasted employer unlawfully transferred work and closed unionized cement plant without bargaining).

The Longshore Union nevertheless argues (Br. 38) that under those cases, the Company acted lawfully because Maersk's "demand" for competing bids and its acceptance of PCMC's offer is the type of "external circumstances" that permits the Company to respond without bargaining. To the contrary, external circumstances are not the dispositive factor in whether an employer must bargain. Rather, the key is the employer's motivation and whether the decision is amenable to bargaining. As this Court held, "[i]f the employer's decision was prompted by factors that are within the union's control and therefore suitable for resolution within the collective bargaining framework, then bargaining is mandatory." *Geiger*, 87 F.3d at 1369 (quoting *Furniture Renters of America, Inc. v. NLRB*, 36 F.3d 1240, 1248 (3d Cir. 1994) (internal citation omitted)).

Significantly, the Court in *Geiger* specifically noted that a "change in the employer's *established* use of its union and nonunion sides in work assignments will almost always involve factors within the union's control" and will thus not be an "external circumstance." 87 F.3d at 1369 (emphasis in original). That is the situation here—the Company's established use of Machinists-represented

employees for the noncrane repair work involved factors amenable to bargaining. Customer demands do not serve to excuse the employer's obligation to bargain over *how* it meets those demands; here the customer, Maersk, wanted to lower costs. And, as explained, the Company could have explored, via bargaining, options other than transferring the unit employees to PCMC; it unlawfully failed to do so. By failing to bargain over changes to the unit employees' terms and conditions of employment, the Company violated Section 8(a)(5) and (1) of the Act. By accepting recognition and assistance from the Company in those circumstances, the Longshore Union violated Section 8(b)(1)(A) and (2) of the Act.

3. The Board properly rejected the Longshore Union's argument that the employees' historical bargaining unit did not survive the transfer of work because it was merged into the Longshore Union-represented unit

The Longshore Union further errs in arguing (Br. 42-58) that the historical Machinists' bargaining unit did not survive the transfer of unit work on March 31, 2005. Under its theory of the case, the Longshore Union lawfully recognized a bargaining unit that merged Machinists-represented mechanics and Longshore Union-represented mechanics into one unit. However, as the Board found (JA 1280), applying well-settled law to substantial evidence in the record, the historical Machinists-represented bargaining unit remained appropriate for bargaining after

the transfers and was not merged into the existing Longshore Union coastwide unit.

Section 9(b) of the Act “vests in the Board authority to determine ‘the unit appropriate for the purposes of collective bargaining.’” *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996) (citing 29 U.S.C. § 159(b)).

“Because the assessment requires a fact-intensive inquiry and a balancing of various factors, the Board has broad discretion in making the determination.”

United Food & Commercial Workers v. NLRB, 519 F.3d 490, 494 (D.C. Cir. 2008)

(quotation omitted). Accordingly, this Court has said that a bargaining-unit

determination by the Board “is entitled to wide deference.” *Id.* Additionally, the

Board ““need only select *an* appropriate unit, not *the most* appropriate unit.””

Dean Transp., Inc. v. NLRB, 551 F.3d 1055, 1063 (D.C. Cir. 2009) (quoting

Serramonte, 86 F.3d at 236) (emphasis in original)).

The Board generally considers the traditional community-of-interest factors to determine whether a unit remains appropriate for bargaining in light of changed circumstances but gives significant weight to the parties’ history of bargaining in separate units. (JA 1280.) *See, e.g., Safeway Stores*, 256 NLRB 918 (1981). As this Court has recognized, the Board “is reluctant to disturb units established by collective bargaining so long as those units are not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the

Act.” *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 114. (D.C. Cir. 1996).

Indeed, “‘compelling circumstances are required to overcome the significance of bargaining history.’” (JA 1280 (quoting *Dodge of Naperville, Inc.*, 357 NLRB 2252, 2253 (2012).) The Board places “a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate.” *Trident Seafoods*, 101 F.3d at 118. *Accord Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 38 (D.C. Cir. 2015) (burden of establishing merger on party asserting it).

Here, the Machinists represented the unit mechanics for nearly 40 years. The Board properly found that the Company, as the party asserting merger before the Board, failed to meet its burden of establishing any compelling circumstance to overcome the weight of that bargaining history and show the units were lawfully merged. (JA 1280 & n.18.) Rather, substantial evidence supports the Board’s finding that, as of March 31, there “were no significant changes to the former PMMC unit employees’ terms and conditions of employment that might warrant a finding of ‘compelling circumstances’” justifying a finding that the historical bargaining unit had been merged into the Longshore Union coastwide unit. (JA 1280.) On that date, the unit employees “generally continued to perform the same work at the same location, using the same tools and equipment as they had before the merger, working under separate immediate supervision from the [Longshore

Union]-represented employees.” (JA 1280; 82-86, 117, 131, 136, 138-39, 149, 261, 344, 462.)

It was only after the Company and the Longshore Union applied the terms of their labor contract to the unit employees, which included assigning them work at other locations, that significant changes in their terms and conditions of employment ensued. The Longshore Union argues (Br. 42-46) that the Board should have considered those additional changes made to the terms and conditions of employment for the unit employees. More specifically, the Longshore Union argues (Br. 42-58) that the Machinists-represented mechanics were “accreted” into the Longshore Union-represented bargaining unit. “Accretion is the addition of a group of employees to an existing union-represented bargaining unit without a Board election.” *Dean Transp.*, 551 F.3d at 1067. The Board’s established policy is to apply accretion doctrine restrictively to avoid stripping employees of their choice of representative. *Id.*; *accord Comar, Inc.*, 339 NLRB 903, 910 (2003) (noting that accretion is not required even if combined employees constitute an appropriate unit as long as the smaller unit itself is appropriate), *enforced*, 111 F. App’x 1 (D.C. Cir. 2004).

Moreover, in determining “whether an established bargaining unit retains its distinct identity,” the Board “does not consider the effects of [an employer]’s unlawful, unilateral changes to the existing unit employees’ terms and conditions

of employment.” *Dodge of Naperville*, 357 NLRB at 2253. “[G]iving weight to such changes would reward the employer for its unlawful conduct.” *Id.*

Accordingly, the Board has repeatedly disregarded as irrelevant to bargaining unit determinations any terms or conditions of employment wrongfully imposed upon employees, focusing instead upon the *status quo ante* in place prior to the employer’s unfair labor practices. *See, e.g., Comar*, 339 NLRB at 911 (where employer failed to fulfill duty to bargain “changes can be accorded little weight in determining whether the unit remained appropriate”); *Armco, Inc. v. NLRB*, 832 F.2d 357, 364 (6th Cir. 1988) (disregarding “the uniformity in wages, hours, and terms of employment” between two groups of employees because “it is the result of the disputed conduct”).

This Court recently upheld the Board’s finding that “it would be unfair to permit [the employer] to benefit from the uncertainty created by its unlawful refusal to bargain.” *Dodge of Naperville*, 796 F.3d at 40. In that case, the Court enforced a bargaining order against an employer who closed its unionized car dealership. The employer informed its six represented mechanics, all of whom were union members, that they were expected to continue working at its larger, non-unionized dealership for reduced wages and benefits. *Id.* at 34. The employer unilaterally withdrew recognition from the mechanics’ union contending that their bargaining unit had lost its distinct identity and merged with the group of

mechanics as the larger facility. *Id.* at 37. The Court agreed with the Board that the employer could not justify its unilateral withdrawal by asserting that the 20-year-old bargaining unit was rendered inappropriate by unilateral changes it made as a result of the transfers. *Id.* at 40.

This Court further agreed with the Board's approach in *Serramonte Oldsmobile*, where the employer relocated a bargaining unit and, in the process, wrongfully and unilaterally imposed upon the employees a new health insurance plan, retirement savings plan, and hourly wage compensation system. 318 NLRB 80, 104 (1995), *enforced*, 86 F.3d 227 (D.C. Cir. 1996). In finding that the bargaining unit remained appropriate, "rather than utilizing what was in effect under the legal fiction of [the employers'] unfair labor practices," the Board was "guided by what should have been in effect had no unfair labor practices been committed." *Id.* at 104 n.67.

Here, the Board noted that the "only significant changes in the unit employees' terms and conditions resulted from [PCMC]'s application of the [Longshore Union] 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."¹⁴ (JA 1280.) Given the well-settled principles

¹⁴ The Longshore Union incorrectly relies (Br. 51-52) on evidence of temporary transfers of unit employees to non-unit tasks and locations. As discussed, the Company had an obligation to bargain with the Machinists about any changes in

discussed above, the Board did not consider those changes in determining whether the former PPMC unit lost its separate identity.¹⁵ (JA 1280.)

The Longshore Union asserts (Br. 43-45) that *AG Communication*, discussed above at pp. 30-31, requires the Board to consider changes made to the unit employees' terms and conditions of employment pursuant to the Company's "well-defined plan" for implementing the "lean staffing model" in Oakland and Tacoma. (Br. 43.) *See AG Commc'n Sys. Corp.*, 350 NLRB 168, 172 n.8 (2007) (finding employer acted pursuant to a "well-defined plan or timetable for achieving full functional integration of operations at the time the withdrawal of recognition

employees' terms and conditions of employment including the temporary transfers. *See United Technologies Corp.*, 296 NLRB 571, 572 & n.3 (1989) (temporary transfer of unit employees between facilities was unlawful unilateral change in violation of Section 8(a)(5) of the Act). Similarly, that the unit employees availed themselves of certain Longshore Union contractual benefits, such as grievance processing, mandatory and voluntary training, and hiring halls, after being transferred to PPMC, are a result of the unlawful conduct of the Company unilaterally applying that collective-bargaining agreement to them. Thus, it cannot be used to establish that the Machinist-represented unit is no longer an appropriate unit for collective bargaining.

¹⁵ Moreover, the Board revisited and rejected the accretion argument again when it considered the Company's motion to reopen the record and for reconsideration of its 2015 Decision and Order. (JA 1371-76.) At that time, the Board rejected the Company's reliance on changes in working conditions as establishing an integration of operations because the changes "are a continuation of, or an effect of, its unlawful and unremedied unilateral changes in the unit employees' terms and conditions of employment." (JA 1375.) The Board went to state that, as explained in its underlying decision, the Board "will not consider the effects of unlawful, unilateral changes in determining whether an established bargaining unit retains its distinct identity; giving weight to such changes would reward the employer for its unlawful conduct." (JA 1375-76.)

occurred”) *affirmed sub. nom, Int’l Bhd. of Elec. Workers, Local 21 v. NLRB*, 563 F.3d 418 (9th Cir. 2009). However, as the Board found, when “PMMC effectively withdrew recognition from the Machinists, and PCMC refused to recognize it, on March 31,” the record evidence failed to establish that the Company had a “well-defined plan or timetable for achieving fuller integration.” (JA 1280 n.20.)

Rather, the Board found (JA 1281) that the Company moved employees from one unit into another in the absence of any large scale organizational restructuring, complete integration of PMMC and PCMC’s operations,¹⁶ or the shutdown of PMMC. Thus, the Board properly “consider[ed] whether changed circumstances existed as of March 31” and deemed the judge’s reliance on *AG Communication* to be misplaced as it was inappropriate to consider employee interchange after that date. (JA 1280 & n.20 (citing *Comar*, 339 NLRB at 910).)

Not only was there no well-defined plan executed on March 31, but “even 9 months after the consolidation, the bargaining units were not integrated to such a degree as to negate the separateness of the PMMC [Machinists-represented] unit.” (JA 1281.) The Board found that while some interchange of employees occurred during that time period, the “majority of the work performed by the unit employees continued to be unrelated to, and functionally distinct from, the work of PCMC’s

¹⁶ The Company’s witnesses testified that they never saw any written plan for integration and there is no evidence regarding such a plan for the transfer of employees or staffing changes. (JA 121-23, 128, 173, 266.)

preexisting complement of employees” historically represented by the Longshore Union. (JA 1281.) Given that outcome, the Board found that when the Company withdrew recognition from the Machinists, “it had no plans to fully integrate the former PPMC unit into its existing [PCMC] operations.” (JA 1281.)

The Longshore Union’s related reliance (Br. 44, 48) on *Northland Hub, Inc.*, 304 NLRB 665 (1991), *enforced*, 29 F.3d 633 (9th Cir. 1994), is also misplaced. In *Northland Hub*, the employer moved its three warehouse locations into one facility, withdrew recognition from the Teamsters (which had represented employees at one of the locations), and recognized the UFCW (which had represented other relocated employees) as bargaining representative of all of its employees at the consolidated location. The employer argued that the Teamsters unit was merged into the larger UFCW unit because operations were completely integrated after approximately six months. The Board rejected the employer’s argument, finding that in the absence of “objective factors to establish that (the employer) was following some well-defined plan and/or timetable for the full functional integration of its operations,” the unilateral changes in operations should be assessed as of the time the employer withdrew recognition from the Teamsters.¹⁷ *Id.* at 677. The Board’s statement may imply that had the employer

¹⁷ The Longshore Union incorrectly states that, in *Northland Hub*, the Board found a lawful accretion of bargaining units “where the employer followed ‘some well-defined plan and/or timetable for the full integration of operations.’” (Br. 44

been following a “well-defined plan” for operational integration, the survival of the separate Teamsters unit could have been assessed at some later date, perhaps when the full integration had been realized. However, unlike this case, there were no findings or assertions in *Northland Hub* that the actions taken by the employer to integrate its operations were themselves unlawful unilateral changes.

In sum, the Board properly found that the Company had a continuing obligation to bargain with and recognize the Machinists as the exclusive bargaining representative of the unit employees and that the Machinists unit remained an appropriate unit after the transfer of the maintenance and repair work to PCMC. Therefore, the Longshore Union violated the Act when it accepted recognition and assistance from the Company as the bargaining representative of the unit employees.

II. THE COURT LACKS JURISDICTION TO CONSIDER THE LONGSHORE UNION’S CHALLENGE TO THE BOARD’S REMEDY; THAT REMEDY WAS WITHIN THE BOARD’S BROAD REMEDIAL DISCRETION

Section 10(c) of the Act authorizes the Board, upon finding an unfair labor practice, to order the violator “to cease and desist from such unfair labor practice, and to take such affirmative action...as will effectuate the policies of [the Act].”

29 U.S.C. § 160(c). A reviewing court must enforce the Board’s choice of remedy

(quoting 304 NLRB at 677.) To the contrary, as stated above, the Board found no such plan and also found that there was an unlawful withdrawal of recognition from the Teamsters rather than a lawful accretion. *Id.* at 677-78.

unless a challenging party can show “that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.”

Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943); accord *United Food & Commercial Workers Union v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006).

The underlying policy of Section 10(c) is “a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

The Supreme Court has described the Board’s power to order make-whole relief, in particular, as a “broad, discretionary one, subject to limited judicial review.”

Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216 (1964). Accord *Federated Logistics & Ops. v. NLRB*, 400 F.3d 920, 934 (D.C. Cir. 2005).

To begin, Section 10(e) of the Act bars the Court from considering the Longshore Union’s argument (Br. 59) that the Board’s order, requiring it to reimburse employees for fees and dues, should be vacated. The Court cannot consider this argument because the Longshore Union never presented it to the Board. 29 U.S.C. §160(e) (“no objection that has not been urged before the Board...shall be considered by the Court” absent extraordinary circumstances). As the remedy was first ordered in the Board’s decision, the Longshore Union was obligated to file a motion for reconsideration with the Board to preserve the issue. *Nova Southeastern Univ. v. NLRB*, 807 F.3d 308, 316 (D.C. Cir. 2015). By failing

to raise the issue to the Board, the Longshore Union has deprived this Court of jurisdiction to consider its challenge to the Board's authority to grant the remedy. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (Section 10(e) of the Act precludes court of appeals from reviewing claim not raised to the Board).

In any event, the Board's order requiring reimbursement does not exceed its authority. The Board has "long ordered repayment of dues where employees, as a requirement of employment, were unlawfully required to support a union." *Local 1814, Int'l Longshoremen's Ass'n v. NLRB*, 735 F.2d 1384, 1404 (D.C. Cir. 1984) (citing *Virginia Elec. & Power*, 319 U.S. at 539-45). *Accord Duane Reade, Inc.*, 338 NLRB 943, 944-45 (2003) (ordering union and employer that unlawfully enforced union-security clause to "jointly and severally" reimburse employees for dues and other monies unlawfully collected pursuant to that clause), *enforced*, 99 F. App'x 240 (D.C. Cir. 2004).

Although as the Longshore Union states (Br. 59), the employees would have paid dues to the Machinists while working in the Machinists-represented bargaining unit, that is not a defense to the unlawful acceptance of recognition and collection of dues from employees who did not choose Longshore Union representation. As the courts have explained, "reimbursement...effectuate[s] the policy of the Act by returning to employees the money paid to support a union they

did not freely chose to join.” *Nat’l Maritime Union of Am. v. NLRB*, 683 F.2d 305, 308 (9th Cir. 1982).

The Longshore Union further claims (Br. 60-61) that it did not know the Company was a single employer and that it relied on the judge’s determination in 2009 that the complaint allegations against it should be dismissed. The Longshore Union, however, was aware as of October 29, 2007, that the Company was a single employer based on a stipulation at trial. (JA 19, 608.) Additionally, the Longshore Union was aware that the judge’s decision was not a final determination of the Board as the General Counsel and Machinists both filed timely exceptions to that decision with the Board.¹⁸ *See* 29 U.S.C. § 160(c) (“if no exceptions are filed within twenty days after service [of a judge’s decision] upon [the] parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective”).

The Longshore Union speculates (Br. 60) that the employees have already been made whole based on an unallocated lump-sum payment the Company made to the Machinists as part of a settlement agreement. Any assertion that the

¹⁸ In its exceptions to the judge’s decision, the General Counsel sought a remedy from the Board that included finding the Company and the Longshore Union “jointly and severally liable for all dues collected...under [their collective-bargaining agreement’s] union security provisions” and an order of disgorgement. (GC Exceptions Brief at 98 (Motion to Lodge with the Court the General Counsel’s Brief in Support of Exceptions filed on May 30, 2017).)

employees have already received the make-whole relief to which they are entitled is properly made and tested in compliance. Compliance proceedings are the “appropriate forum” for tailoring the remedy to suit the individual circumstances of each case. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984). *Accord Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1330 (D.C. Cir. 2012) (“compliance proceedings provide the appropriate forum to consider objections to the relief ordered”). In any event, the Board in this case specifically left open the possibility that changed circumstances could be presented in compliance. In its Order denying the Company’s motion to reopen the record and for reconsideration, the Board stated that the parties “may, in compliance proceedings, present evidence showing that particular remedial provisions are no longer appropriate, insofar as the issues they seek to raise have not already been addressed in this order.” (JA 1376 n.5.)

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Longshore Union's petition for review and enforcing the Board's Order in relevant part.

/s/Usha Dheenan

USHA DHEENAN

Supervisory Attorney

/s/Amy H. Ginn

AMY H. GINN

Attorney

National Labor Relations Board

1015 Half Street SE

Washington, DC 20570

(202) 273-2948

(202) 273-2942

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

October 2017

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

INTERNATIONAL LONGSHORE AND)	
WAREHOUSE UNION)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 15-1336 & 16-1123
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	32-CA-021925 et al.
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
INTERNATIONAL ASSOCIATION OF)	
MACHINISTS AND AEROSPACE WORKERS,)	
AFL-CIO; DISTRICT LODGE 190; LOCAL)	
LODGE 1546; DISTRICT LODGE 160)	
)	
Intervenors for Respondent)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 11,155 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 31st day of October, 2017

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, et seq.):

Section 7 (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a)(2) (29 U.S.C. § 158(a)(2)):

It shall be an unfair labor practice for an employer –
(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it

Section 8(a)(5) (29 U.S.C. § 158(a)(5)):

It shall be an unfair labor practice for an employer –
(5) to refuse to bargain collectively with the representatives of his employees

Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)):

It shall be an unfair labor practice for a labor organization or its agents –
(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7. . . .

Section 8(b)(2) (29 U.S.C. § 158(b)(2)):

It shall be an unfair labor practice for a labor organization or its agents –
(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership

Section 9(a) (29 U.S.C. § 159(a)):

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

Section 9(b) (29 U.S.C. § 159(b)):

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof

Section 10(a) (29 U.S.C. § 160(a)):

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce

Section 10(c) (29 U.S.C. § 160(c)):

. . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . .

Section 10(e) (29 U.S.C. § 160(e)):

The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice occurred or wherein such person resides or transacts business, for the enforcement of such order . . . No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

Section 10(f) (29 U.S.C. § 160(f)):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia. . . .

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

INTERNATIONAL LONGSHORE AND)	
WAREHOUSE UNION)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 15-1336 & 16-1123
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	32-CA-021925 et al.
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
INTERNATIONAL ASSOCIATION OF)	
MACHINISTS AND AEROSPACE WORKERS,)	
AFL-CIO; DISTRICT LODGE 190; LOCAL)	
LODGE 1546; DISTRICT LODGE 160)	
)	
Intervenors for Respondent)	

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not

by serving a true and correct copy at the addresses listed below:

Emily Maglio, Attorney
Robert Steven Remar, Attorney
Leonard Carder, LLP
1188 Franklin Street, Suite 201
San Francisco, CA 94109-6400

David A. Rosenfeld, Attorney
Weinberg Roger & Rosenfeld
1001 Marina Village Parkway
Alameda, CA 94501-6430

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 31st day of October, 2017