

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH

MATSON TERMINALS, INC.

and

Case 20–CA–178312

HAWAII TEAMSTERS & ALLIED WORKERS
UNION, LOCAL 996

Scott E. Hovey, Jr., Esq., for the General Counsel.

Barry W. Marr, Esq.,
Christopher S. Yeh, Esq.
for Respondent.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This controversy concerns whether Matson Terminals, Inc. (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) when it transferred work which was performed by employees represented by the Hawaii Teamsters & Allied Workers Union, Local 996 (Charging Party or Union) to employees represented by another labor organization without providing the Union prior notice and an opportunity to bargain. Respondent defends its action by alleging that Respondent was contractually obligated to have the work at issue performed by these other employees. As discussed below, I find that Respondent violated the Act as alleged.

In detail, the General Counsel alleges, in the June 30, 2017 complaint, based on a charge and amended charge filed by the Charging Party on June 14, 2016, and June 23, 2017, that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with notice and an opportunity to bargain over its decision to transfer barge menu work performed by Union represented employees to nonunion represented employees. Respondent filed a timely answer and amended answer.

The parties filed a joint motion, joint exhibits, issues presented, and stipulation of facts on August 24, 2017 (Stipulation), pursuant to Section 102.35(a)(9) of the National Labor

Relations Board’s (the Board) Rules and Regulations, and the Stipulation was granted. Thereafter, the parties filed briefs on October 2, 2017.

On the entire record, including the stipulated facts and exhibits,¹ and after considering the briefs filed by the General Counsel and Respondent,² I make the following

STIPULATED FACTS AND ANALYSIS

I. JURISDICTION

Respondent, a State of Hawai`i corporation with offices and a facility located in Hilo, Hawai`i (Hilo facility), is engaged in providing stevedoring and terminal operations, where it annually purchases and received goods and supplies in excess of \$5,000 directly from points outside the State of Hawai`i and purchased and received at its Hilo facility goods valued in excess of \$50,000 directly from points outside of the State of Hawai`i. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Also, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the above, I find that these allegations affect commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. BACKGROUND: THE UNION AND RELEVANT LITIGATION HISTORY

On May 27, 2016, the Board certified the Union as the exclusive collective-bargaining representative of the following employees (the Unit) as a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time supervisors and senior supervisors employed by Matson Terminals, Inc. on the island of Hawaii, excluding all other employees, managers, guards and supervisors as defined by the Act.

Thereafter, on June 10, 2016, Respondent filed a request for review of the Region 20 Regional Director’s decision and direction of election in case 20–RC–173297. Respondent disagreed with the Regional Director’s decision, dated May 9, 2016, which determined that these full-time and regular part-time supervisors and senior supervisors are not managers and/or statutory supervisors under the Act. On October 7, 2016, the Board denied Respondent’s request for review.

On November 9, 2016, the Union filed charge 20–CA–187970 alleging that Respondent refused to recognize and bargain with the Union as the collective-bargaining representative of the Unit. On April 7, 2017, the Board issued a decision and order in case 20–CA–187970

¹ Other abbreviations used in this decision are as follows: “Exh.” for the parties’ exhibits attached to the original and revised stipulations; “GC Br.” for the General Counsel’s brief; and “R. Br.” for the Respondent’s brief.

² The Charging Party did not file a separate post-hearing brief.

finding that Respondent violated Section 8(a)(5) and (1) of the Act by Respondent’s failure and refusal to recognize and bargain with the Union. *Matson Terminals, Inc.*, 356 NLRB No. 56 (2017). On April 28, 2017, Respondent filed a petition for review with the District of Columbia Court of Appeals of the Board’s Decision and Order in case 20–CA–187970. On June 6, 2017, the Board filed with the District of Columbia Court of Appeals a cross-application for enforcement of the Board’s order in case 20–CA–187970. Respondent’s petition for review and the Board’s Cross-Application for Enforcement are currently pending before the District of Columbia Court of Appeals.³

III. RESPONDENT’S OPERATIONS

Respondent provides its customers with stevedoring and marine terminal services, including the shipping and receipt of cargo. Respondent conducts such operations at its facilities on the island of Hawai`i (the Big Island) where it has two ports—Hilo and Kawaihae, as well as the islands of Kauai, Maui, and Oahu. Respondent conducts a “hub-and-spoke” operation which means that cargo from the West Coast is delivered to the Honolulu, Oahu port which is the hub and, if cargo is needed to go to any of the neighboring islands which are the spokes, the cargo is then transported to that neighboring island on a barge.⁴

At each of Respondent’s facilities, including on the Big Island, the stevedoring operations include, without limitation, loading cargo onto and unloading cargo from barges. Respondent’s barge fleet includes barges with cranes to move cargo containers, as well as one barge, named the Waialeale, which is a roll-on/roll-off operation where cargo is driven onto and off the barge rather than the use of a crane to move the cargo. Respondent’s barge menu work performed on barges with cranes consists of communicating to crane operators over two-way radios as to which containers to load or off-load on the barge and communicating to the rig drivers over two-way radios which chassis are to be brought to the barge to load or off-load containers on the barge.

IV. THE ALLEGED UNILATERAL CHANGE

The parties stipulated as follows: For at least 10 years prior to June 3, 2016, barge menu work at Respondent’s Hawaii island operations performed on barges with cranes had exclusively been performed by supervisors and senior supervisors. On or about May 27, 2016, the same day the Board certified the Union as the exclusive representative of unit employees, Vice-president and Director of Stevedoring Laurence “Rusty” Leonard (Leonard) notified Respondent’s Big Island Terminal Manager Michael Leite (Leite) that Respondent would be using nonunit employees to perform the barge menu work.⁵ About June 3, 2016, Respondent transferred barge menu work performed on barges with cranes, previously performed by the Unit employees, to employees outside the Unit who are represented by the International Longshore and Warehouse Union Local 142 (ILWU).

³ The parties stipulated that nothing in this proceeding for case 20–CA–178312, including but not limited to the Stipulation, constitutes a waiver or limitation of any arguments being presented by Respondent in its petition for review of the Board’s decision and order in case 20–CA–187970.

⁴ The barge is an unmanned vessel which has no engine and is usually towed by a tugboat.

⁵ The parties stipulated that Leonard and Leite are agents of Respondent within the meaning of Section 2(13) of the Act.

Contentions of the Parties

5 The General Counsel’s position is that Respondent admittedly transferred work from Unit employees to nonunit employees thereby violating Section 8(a)(5) and (1) of the Act. The General Counsel argues that Respondent’s defense that it was obligated to transfer the work to nonunit employees is unavailing for several reasons including the obligation for Respondent to negotiate with the Union.

10 Respondent contends that its witnesses would testify that ILWU had a contractual right to perform the barge menu work pursuant to the wharf clerk collective-bargaining agreement between Respondent and ILWU. Furthermore, Respondent contends that for at least the past 30 years, ILWU represented wharf clerks exclusively performed the barge menu work for Respondent’s West Coast operations. In 2001, Respondent in Hawaii converted from a straddle carrier operation, where straddle carriers picked up and put down cargo containers on the ground, to a wheeled operation, where cargo containers were landed on trucks or trailers and taken to the container yard and parked in parking spaces. During this 2001 time period, Respondent had ongoing discussions and an understanding with ILWU that wharf clerks were continuing to control the flow of cargo to and from the crane, using new technology including mobile data terminals,⁶ and they would be assigned to and physically situated near Respondent’s cranes. Moreover, Respondent contends that its witnesses would testify that for at least the past 30 years at Respondent’s Kauai operations, ILWU represented wharf clerks have performed the barge menu work for all of Respondent’s barges. In addition, since at least 2012 on Oahu and Big Island, ILWU represented wharf clerks have performed barge menu-like work on the roll-on/roll-off Waialeale barge by directing longshoremen drivers as to the sequence of moving wheeled cargo onto and off of that barge. And since at least summer 2016 and due to Respondent’s and ILWU’s discussions about wharf clerk duties pursuant to the collective bargaining agreement including Exhibit B, Section IV, ILWU represented wharf clerks have performed the barge menu work on all the barges at Respondent’s Oahu, Maui and Big Island operations. Finally, in the assumption of barge menu work by the wharf clerks, there has been no loss of productivity, in other words, no loss of crane speed and efficiency.

35 Respondent and ILWU’s wharf clerk collective bargaining agreement (June 1, 2014 to June 30, 2019) Section 2.01, contains a provision which states that wharf clerk duties include “all checking of cargo on vessels and on docks when such work is performed by employees.” In addition, a letter of understanding between the parties, originally dated September 15, 2008, and updated and revised on June 1, 2015, stated, “the following work and functions shall be assigned to wharf clerks at all facilities covered by the wharf clerk agreement: 1) New Operations. All new duties that are traditionally wharf clerk functions generally identified as directing and executing the flow of cargo, [Respondent] shall first discuss the work jurisdictional issues in a meeting” with ILWU. Other provisions of the ILWU collective-bargaining agreement permit the expansion of wharf clerk duties.

⁶ For example, the wharf clerks handle the receipt of containers at the terminal, confirming that a particular discharged container was landed on a specific chassis.

V. ANALYSIS OF UNFAIR LABOR PRACTICE

5 Under Section 8(d) of the Act, mandatory subjects of bargaining include wages, hours, and other terms and conditions of employment. It is well established that an employer violates Sections 8(a)(5) and (1) of the Act when it makes substantial and material unilateral changes during the course of a collective bargaining relationship absent impasse on matters that are mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). Generally, an employer should give notice of a change in working conditions to the union, provide an opportunity to the union to bargain before implementing the change in working conditions, bargain in good faith if bargaining is requested by the union, and bargain to reach agreement or impasse concerning mandatory subjects of bargaining. A decision to subcontract or transfer unit work alters the terms and conditions of employment and is therefore a mandatory subject of bargaining.⁷ See *Fibreboard Corp.*, 379 U.S. 203, 210 (1964); see also *Regal Cinemas, Inc.*, 334 NLRB 304, 312–313 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003) (transfer of bargaining unit projectionist work to non-bargaining unit managers and assistant managers); *Cincinnati Enquirer, Inc.*, 279 NLRB 1023 (1986) (assigning bargaining unit fourth assistant editor work to deputy features editor supervisor). Moreover, it is well established that “once a specific job has been included within the scope of a bargaining unit by either Board action or consent of the parties, the employer cannot unilaterally remove or modify that position without first securing the consent of the union or the Board.” *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992); accord: *United Technologies Corp.*, 292 NLRB 248 (1989), enfd. 884 F.2d 1569 (2d Cir. 1989); *Bay Shipbuilding Corp.*, 263 NLRB 1133 (1982), enfd. 721 F.2d 187 (7th Cir. 1983).

25 Here, it is undisputed that Respondent failed to provide the Union with notice and an opportunity to bargain over the decision to transfer barge menu work performed by the Unit employees for at least the prior 10 years to employees represented by ILWU. Respondent’s transfer of Unit employees’ barge menu work, date June 3, 2016, is a mandatory subject of bargaining. Respondent’s bargaining obligation attached once the Union won the election and was certified by the Board on May 27, 2016, and Respondent acted at its own peril by not providing notice and an opportunity to bargain to the Union.⁸ See *Thesis Painting, Inc.*, 365 NLRB No. 142, slip op. at 4 (2017) (citing *Clement Wire*, 257 NLRB 1058 (1981)). Thus, I find that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally transferred bargaining unit barge menu work performed by Unit employees, to nonunit bargaining unit employees.

40 Respondent alleges that its action to transfer the Unit employees’ work to the ILWU represented employees was lawfully permitted because it was obligated to transfer the barge menu work, and therefore did not have a bargaining obligation with the Union. Respondent cites to section 2.01 of the ILWU collective bargaining agreement which states that wharf clerk duties

⁷ Respondent claims that the Unit employees have not suffered from loss of compensation due to the transfer of barge menu work (R. Br. at 10). Respondent makes this claim without any evidence, and fails to present any evidence as to how this transfer of work is immaterial, unsubstantial and insignificant. See *Weather Tec Corp.*, 238 NLRB 1535, 1536 (1978).

⁸ Respondent challenged the Union’s certification by filing a request for review of the Regional Director’s decision on June 10, 2016.

include “all checking of cargo on vessels” as well as to the letter of understanding which states that wharf clerks direct and execute the flow of cargo.

Respondent’s argument is not persuasive. Despite Respondent’s agreement with ILWU, Respondent stipulated that for at least the past 10 years the Unit employees performed barge menu work on the Big Island. Suddenly, in June 2016, with the decision being made the same day the Union was certified by the Board as the exclusive representative of Unit employees, Respondent decided that the barge menu work should be transferred to ILWU represented employees. Rather than provide notice and an opportunity to bargain to the Union, Respondent justifies its unlawful actions by claiming that its collective bargaining agreement and letter of understanding with ILWU required the barge menu work to be performed by ILWU represented employees. Respondent further supports its argument by adding that wharf clerks have been performing barge menu work on the West Coast and on Kauai for the past 30 years. It is irrelevant as to what work the ILWU represented employees performed on the West Coast and on Kauai. Furthermore, Respondent, citing *Murphy Oil USA, Inc.*, 268 NLRB 1039, 1046 (1987), and *Exxon Shipping Company*, 312 NLRB 566, 569 (1993), claims that Federal law requires it to transfer the work to ILWU without bargaining with the Union. However, both cases cited refer to the requirements of the Occupational Health and Safety Act (OSHA), 29 CFR § 1910.1200, and Federal maritime law, 46 U.S.C. § 10502(c), respectively. Respondent cites to no law which requires the barge menu work to be performed by ILWU represented employees.

Moreover, the matter at issue in this proceeding is whether Respondent failed to provide notice and an opportunity to bargain with the Union when it transferred work from the Unit. I decline to interpret the ILWU collective bargaining agreement and letter of understanding as to whether the barge menu work should be performed by the ILWU represented employees. Instead, Respondent failed to provide notice and an opportunity to bargain to the Union when it transferred barge menu work performed by unit employees, thereby, violating Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act representing:

All full-time and regular part-time supervisors and senior supervisors employed by Matson Terminals, Inc. on the island of Hawaii, excluding all other employees, managers, guards and supervisors as defined by the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by, on or about June 3, 2016, transferring barge menu work without providing the Union with notice and the opportunity to bargain.

4. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent Matson Terminals, Inc., has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having unlawfully changed the terms and condition of employment, shall rescind the transfer of barge menu work from the employees represented by the Union that was unilaterally implemented on or about June 3, 2016.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 3, 2016. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 20 of the Board what action it will take with respect to this decision. The General Counsel requests that the notice to employees be read to all employees including employees at Respondent's Hawai'i island operations represented by ILWU during work time by Respondent's management representative. I decline to recommend such a remedy as I do not find that the conduct of Respondent in this particular case is sufficiently egregious to warrant the granting of this "extraordinary" remedy. See *Dynawash*, 362 NLRB No. 53, slip op. at 8 (2015).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

Respondent, Matson Terminals, Inc., island of Hawai'i, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- a. Changing the terms and conditions of employment of its Unit employees without first notifying the Union and giving it an opportunity to bargain over the decision to transfer barge menu work.

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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- a. Rescind the change in the terms and conditions of employment for its Unit employees that was unilaterally implemented on or about June 3, 2016.

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- b. Within 14 days after service by the Region, post at its facilities on the island of Hawaii, copies of the attached notice marked “Appendix.”¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent’s authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since June 3, 2016.

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- c. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

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Dated, Washington, D.C. February 20, 2018

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Amita Baman Tracy
Administrative Law Judge

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¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment without first notifying your exclusive bargaining representative, Hawaii Teamster & Allied Workers Union, Local 996, and giving it an opportunity to bargain. The bargaining unit (Unit) affected are all full-time and regular part-time supervisors and senior supervisors employed by Matson Terminals, Inc. on the island of Hawaii, excluding all other employees, managers, guards and supervisors as defined by the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the change (transfer of barge menu work) in the terms and conditions of employment for our Unit employees that were unilaterally implemented on or about June 3, 2016.

MATSON TERMINALS, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

901 Market Street, Suite 400
San Francisco, California 94103-1735
Hours: 8:30 a.m. to 5 p.m.
415-356-5130.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/20-CA-178312 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE
DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY
ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR
COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE
REGIONAL OFFICE'S COMPLIANCE OFFICER, (628) 221-8875.