



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 19
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February 26, 2018

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DANIEL R. MORGAN, DIRECTING BUSINESS REPRESENTATIVE
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS AFL-CIO, DISTRICT LODGE 160
2121 70TH AVE W, STE A
UNIVERSITY, WA 98466

RE:

APM Terminal and/or APM Terminals
Tacoma
Case 19-CA-197070

Pacific Maritime Association
Case 19-CA-197114

International Longshore and Warehouse Union
(APM Terminals/APM Terminals Tacoma and
or Pacific Maritime Association)
Case 19-CB-197129

International Longshore and Warehouse
Union, Local 23
(APM Terminals/APM Terminals Tacoma and
or Pacific Maritime Association)
Case 19-CB-197218

Dear Sirs:

We have carefully investigated and considered your charges that APM Terminals Tacoma LLC, PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHORE & WAREHOUSE UNION and International Longshore and Warehouse Union, Local 23 have violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have decided to dismiss your charge for the reasons discussed below.

Your charges allege the International Longshore and Warehouse Union, International Longshore and Warehouse Union Local 23 (collectively "ILWU"), the Pacific Maritime Association ("PMA"), and APM Terminal and/or APM Terminals Tacoma ("APM") violated the

Act by engaging in an unlawful scheme to ensure that APM, as a successor employer, did not hire a majority of its workforce from the predecessor employer's workforce, in order to avoid incurring a successorship bargaining obligation with you.

More specifically, you allege that, prior to late 2016, Pacific Crane Maintenance Corporation ("PCMC") was a maintenance and repair subcontractor performing work at two shipping terminals at the Port of Tacoma, Washington. One terminal was operated by APM; the other by Evergreen. PCMC and APM are each represented in collective bargaining by PMA, of which each is a member.

Following the Board's decision in *PCMC/Pacific Crane Maintenance Co.*, 362 NLRB No. 120 (2015), incorporating by reference the vacated two-Member Board decision reported at 359 NLRB 1206 (2013), PCMC continued to recognize ILWU as the exclusive representative of its employees at both Tacoma terminals, and PCMC continued to operate under the terms of PMA's collective-bargaining agreements with ILWU, including the master Pacific Coast Longshore Contract Document and the Tacoma Mechanic Port Supplement. Significantly, the Tacoma Mechanic Port Supplement contains language which requires that, if layoffs are necessary, "the individual with the lowest company seniority shall be the first laid off."

██████████, you agreed to a settlement with PCMC, under which PCMC would: (1) terminate its subcontract and cease working at the APM Terminal within 45 days; (2) pay a large monetary settlement to IAM and its related benefit funds; and (3) withdraw its D.C. Circuit appeal of the Board's decision in *PCMC/Pacific Crane Maintenance Co.* The PCMC/IAM settlement also contained numerous releases of liability as to PCMC and related entities, including agents and certain successors, as well as a non-admissions clause for PCMC. The settlement did not have any effect on the Board's findings and order against ILWU; the D.C. Circuit litigation over ILWU's unfair labor practices is still ongoing.

On ██████████ after the PCMC/IAM settlement was finalized, PCMC notified APM that it would be terminating its subcontract on or before November 7. It soon became clear that APM would itself take over the maintenance and repair work at its terminal for the remaining term of its lease, without using a subcontractor. That lease was scheduled to expire on December 31, 2017. In light of PCMC's subcontract-termination announcement, a dispute arose between ILWU and PCMC regarding the future employment of the 31 steady mechanics employed by PCMC at the APM Terminal.

ILWU, PCMC, and PMA met on October 17 in an attempt to resolve the dispute. At the meeting, PCMC and PMA said that PCMC intended to transfer its existing workforce to the new maintenance and repair employer with seniority unchanged, consistent with what they asserted was past practice, or, alternatively, to lay off the 31 mechanics prior to the termination of its

subcontract. ILWU asserted that the “lowest company seniority” language in the Tacoma Mechanic Port Supplement required that PCMC instead lay off its 31 least senior employees of the 97 PCMC employees employed at the Port of Tacoma, including both the APM and Evergreen Terminals. ILWU also expressed concern that the upcoming expiration of APM’s terminal lease presented uncertain job security for employees working at that terminal. ILWU also noted that it was unclear whether even the new employer in November 2016 (i.e., APM) would hire the same number of maintenance and repair employees, and that this “pose[d] an immediate risk that some laid off mechanics will not get steady work any time soon.” PCMC, PMA, and ILWU failed to reach agreement regarding the layoffs at the October 17 meeting. At the end of the meeting, ILWU stated its intention to proceed to expedited arbitration over the issue, and that PCMC should not act unilaterally.

The parties eventually agreed PCMC would lay-off the 20 least-senior employees at both the APM and Evergreen terminals, with the exception of five named crane mechanics at the APM Terminal who would not be laid off, and that more senior employees could transfer into any of the positions vacated by the layoffs (i.e., senior employees at the APM Terminal could move to vacated positions at the Evergreen Terminal for job security purposes). As a result of this agreement, and the subsequent layoffs and transfers pursuant to it, 11 unit employees remained employed at the APM Terminal at the time PCMC ended its subcontract.

On November 5, when APM itself took over the maintenance and repair work at its terminal, it hired a total of 27 unit employees -- seven who were employed by PCMC when APM took over (APM offered employment to all of the PCMC unit employees who had not transferred to the Evergreen Terminal, but four of the PCMC employees at the APM Terminal left to work elsewhere) and 20 others dispatched by the ILWU hiring hall pursuant to APM’s preexisting collective-bargaining agreement with ILWU (two of these employees had previously been employed by PCMC at the APM Terminal). Thus, only 9 of the 27 employees hired by APM had ever worked for PCMC at the APM Terminal. APM recognized ILWU as the employees’ collective-bargaining representative, and applied the PMA-ILWU collective-bargaining agreements, including union-security provisions.

On [REDACTED] (and as amended on [REDACTED]), you filed the charges in the instant cases, alleging that APM and PMA had violated Section 8(a)(2), 8(a)(3), 8(a)(4), and 8(a)(5) of the Act by: (1) granting assistance to ILWU and recognizing it as the collective-bargaining representative of the maintenance and repair mechanics at APM Terminal, (2) refusing to hire the full complement of employees previously employed by the predecessor employer, PCMC, and (3) refusing to recognize and bargain with IAM; and alleging that ILWU violated Section 8(b)(1)(A) and 8(b)(2) of the Act by accepting recognition from APM and PMA and agreeing to

the application of the PMA-ILWU collective-bargaining agreements, including union-security provisions.

The investigation adduced no evidence that would demonstrate that ILWU was not sincerely motivated by its reasonable interpretation of the Tacoma Mechanic Port Supplement and/or its legitimate job security concerns in demanding the port-wide, seniority-based layoff, or that PMA and PCMC were not motivated by a desire to resolve an ongoing contractual labor dispute in agreeing to it. Nor has the investigation adduced any other evidence of anti-IAM motive in the layoff or hiring at issue here, other than the long history of these parties seeking to further ILWU's desire to represent all terminal employees on the West Coast in a PMA bargaining unit. The investigation also adduced no evidence that would demonstrate that APM had any involvement in the determination of the October 2016 layoffs, or that PMA was acting specifically as an agent of APM in the resolution of that dispute (although PMA is the bargaining representative of APM generally, as it is for all its other member employers).

As an initial matter I conclude that all of the allegations at issue in the instant cases depend on finding that ILWU's demand for a port-wide, seniority-based layoff under the "lowest company seniority" requirement of the Tacoma Mechanic Port Supplement, and PCMC's and PMA's agreement to a layoff along those lines, were discriminatorily motivated by the desire to not have IAM restored as the employees' bargaining representative when APM succeeded PCMC. Absent that threshold finding, APM could not have unlawfully refused to hire employees once represented by IAM because, as a successor employer, it merely offered employment to PCMC's existing workforce after the layoffs and filled all additional vacancies pursuant to its otherwise-lawful collective-bargaining agreement with ILWU. Therefore, if the evidence in these cases is not sufficient to overcome the assertions that ILWU had a legitimate, non-discriminatory basis for seeking to base the October 2016 layoff on port-wide seniority under the "lowest company seniority" requirement of the Tacoma Mechanic Port Supplement (particularly, in light of its expressed concerns about future job security), and that PCMC and PMA had a legitimate, non-discriminatory basis for agreeing to a compromise settlement with ILWU along those lines, then there is no basis for issuing complaint here.

I further conclude that the evidence is not sufficient to establish the threshold finding. Rather, the evidence demonstrates that the Charged Parties were motivated by legitimate, non-discriminatory concerns in structuring the October 2016 layoff. I recognize the history of unlawful conduct intended to further ILWU's representational interests in the PMA West Coast-wide bargaining unit, to the detriment of your interests, including the prior unlawful conduct of PCMC and ILWU regarding the very terminal at issue here. Other than these general concerns, however, there is no basis for issuing complaint.

In this regard, I note that, while PCMC and PMA initially stated in their October 2016 meetings with the ILWU that the generally-applicable past practice was that terminal mechanics retain their employment in the event of a change of maintenance and repair providers, none of the arbitration awards cited arose in comparable layoff situations under the applicable language of the Tacoma Mechanic Port Supplement or involved an employer that operated at more than one terminal at the same port. Further, the concerns ILWU emphasized in demanding compliance with its asserted view that the “lowest company seniority” requirement of the Tacoma Mechanic Port Supplement required layoffs on port-wide basis -- that the upcoming expiration of APM’s terminal lease presented uncertain job security -- appear to be reasonable and legitimately based.

In light of the above I conclude that no violation of the Act has been shown, as a legitimate non-discriminatory justification existed for the structure of the predecessor’s layoff, i.e., that it was based on a contractual requirement to layoff by company seniority, which arguably protected more senior employees’ job security, and there is no evidence the successor employer had any involvement in the layoff.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. To file electronically using the Agency’s e-filing system, go to our website at www.nlr.gov and:

- 1) Click on E-File Documents;
- 2) Enter the NLRB Case Number; and,
- 3) Follow the detailed instructions.

Electronic filing is preferred, but you also may use the enclosed Appeal Form, which is also available at www.nlr.gov. You are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect. To file an appeal by mail or delivery service, address the appeal to the **General Counsel** at the **National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

The appeal MAY NOT be filed by fax or email. The Office of Appeals will not process faxed or emailed appeals.

Appeal Due Date: The appeal is due on **March 12, 2018**. If the appeal is filed electronically, the transmission of the entire document through the Agency’s website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than March 11, 2018. **If an appeal is postmarked or given to a**

delivery service on the due date, it will be rejected as untimely. If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before March 12, 2018.** The request may be filed electronically through the *E-File Documents* link on our website www.nlr.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after March 12, 2018, **even if it is postmarked or given to the delivery service before the due date.** Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

/s/ *Ronald K. Hooks*

RONALD K. HOOKS
Regional Director

Enclosure

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

APM Terminal; Pacific Maritime Association; International Longshore and Warehouse Union (APM Terminals/APM Terminals Tacoma and or Pacific Maritime Association); International Longshore and Warehouse Union, Local 23 (APM Terminals/APM Terminals Tacoma and or Pacific Maritime Association)

Case Name(s).

19-CA-197070, 19-CA-197114, 19-CB-197129, 19-CB-197218

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

(Signature)