

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: February 8, 2018

TO: Ronald K. Hooks, Regional Director  
Region 19

FROM: Jayme L. Sophir, Associate General Counsel  
Division of Advice

SUBJECT: APM Terminal and/or APM Terminals Tacoma, 524-0183-3333  
Pacific Maritime Association, 524-3350-6000  
International Longshore and Warehouse Union, 524-5067-0100  
International Longshore and Warehouse Union, 530-4825-6700  
Local 23 548-4080  
Cases 19-CA-197070, 19-CA-197114,  
19-CB-197129, and 19-CB-197218

These cases were submitted for advice as to whether a union, an employer association, and/or an alleged successor employer violated the Act by engaging in an unlawful scheme to ensure that the 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 a rival union. We conclude that no violation of the Act has been shown, as the Union as well as the predecessor employer and its bargaining representative (the employer association) had a legitimate non-discriminatory justification 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.

### FACTS

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 Pacific Maritime Association ("PMA"), of which each is a member.<sup>1</sup>

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<sup>1</sup> PMA is a multiemployer association that negotiates collective-bargaining agreements with the International Longshore and Warehouse Union on behalf of approximately 70 companies at various ports on the West Coast.

The instant cases arose in the aftermath of the Board's decision in *PCMC/Pacific Crane Maintenance Co.*,<sup>2</sup> which involved PCMC's operations at the APM Terminal. In that case, the Board held that PCMC had unlawfully withdrawn recognition from local unions affiliated with the International Association of Machinists and Aerospace Workers ("IAM") and unlawfully recognized the International Longshore and Warehouse Union, and its local unions ("ILWU"). The Board ordered PCMC to withdraw its unlawful recognition of ILWU, and to recognize and bargain with IAM. It also ordered ILWU to, among other things, cease and desist from accepting recognition on behalf of or applying the PMA-ILWU collective-bargaining agreement to PCMC's maintenance and repair mechanics at the APM Terminal. PCMC and ILWU sought review of the Board's decision and order in the D.C. Circuit.

Even after the Board's decision, 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."

In late 2016, PCMC and IAM agreed to a settlement, 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 October 4, 2016,<sup>3</sup> 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.

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<sup>2</sup> 362 NLRB No. 120 (2015), incorporating by reference the vacated two-Member Board decision reported at 359 NLRB 1206 (2013).

<sup>3</sup> All dates hereinafter are in 2016, unless otherwise noted.

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.<sup>4</sup> 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.

PCMC, PMA, and ILWU continued to discuss the layoffs over the next few days. On October 22, they executed an agreement that resolved the dispute, without any of the parties waiving their respective positions as to the contractual requirements and past practice.<sup>5</sup> They agreed that, "in accordance with [the parties' collective-bargaining agreement]," 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

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<sup>4</sup> PCMC's employees at the Evergreen Terminal are lawfully represented by ILWU.

<sup>5</sup> The Region's investigation has revealed that PCMC, PMA, and ILWU reached a final agreement after substantial negotiation over the specific language to be used. In particular, PCMC initially proposed language stating that PMA had directed it to lay off employees from both terminals based on port-wide seniority but, after immediate and heated objections from the other parties disputing the accuracy of that statement, the parties agreed to drop it. We note that, in private communications during the negotiations for the October 22 agreement, PCMC did not dispute that it had itself agreed to the terms of the layoff, but PCMC stated that it was reluctant to include language that indicated that it had agreed to the terms of the layoff because PCMC was concerned about how IAM would perceive its role in the agreement. Given all of the evidence regarding the negotiation of the October 22 agreement, we find this exchange yields no probative evidence as to the parties' motivation.

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 nine 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 April 17, 2017 (and as amended on May 31, 2017), IAM 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.

On October 2, 2017, APM prematurely terminated its lease before the December 31, 2017 expiration date. The terminal is now being leased to another company, Matson. Matson's terminal operations at its other West Coast locations are performed by SSA Marine, whose maintenance and repair mechanics are generally represented by IAM, except insofar as Matson is a successor employer to a bargaining unit represented by ILWU.

The Region's 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 Region 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).

The Region's investigation also revealed that, while PCMC and PMA initially asserted in October 2016 that the generally-applicable past practice was that the existing complement of maintenance and repair mechanics simply transfer to the new provider of those services in the event of a change of employers, none of the arbitration awards they 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. Indeed, Charging Party-IAM's main witness has expressed his belief that the issue of company versus terminal seniority has never arisen before, as no other employer has ever done work covered by the Tacoma Mechanic Port Supplement at more than one terminal at any given time.

### ACTION

We conclude that no violation of the Act has been shown, as: (1) ILWU has asserted legitimate non-discriminatory justifications for its demand for a port-wide, seniority-based layoff under the express terms of the Tacoma Mechanic Port Supplement, and PCMC and PMA have asserted legitimate non-discriminatory justifications for their agreement to a layoff consistent with those terms; (2) the history of ILWU's aspirations and misconduct is insufficient, absent some concrete evidence of an improper motive specific to its demand for a port-wide seniority-based layoff, to establish unlawful motivation; and (3) there is no evidence that APM had any involvement in the layoff.<sup>6</sup>

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<sup>6</sup> We note that these cases present a variety of other novel and difficult issues, including issues of: (1) agency liability, as PMA, and not PCMC, is a Charged Party, and as the Region's investigation has adduced no evidence 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, as it is for all its other member employers); (2) contractual waiver, as IAM's settlement with PCMC equally waived IAM's right to proceed against PCMC's agents and successor employers (other than *Burns* or *Golden State* successors), to the extent that any waiver applied to PCMC itself; (3) successorship, as the allegedly unlawful layoffs were undertaken by PCMC as a

Initially, we 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 Charged Parties' 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.

We further conclude that the evidence in the instant cases 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.<sup>7</sup> We recognize that there are reasons to be skeptical of the

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predecessor employer, apparently without any involvement of APM, and all APM has been shown to have done was merely to offer employment to PCMC's existing workforce after the layoffs and fill the additional vacancies pursuant to its otherwise-lawful collective-bargaining agreement with ILWU; and (4) Section 10(b) of the Act, as the charges in the instant cases allege that the Charged Employers (APM and PMA) discriminatorily failed and refused to *hire* IAM-represented mechanics, without addressing the layoffs by PCMC that Charging Party-IAM claims to be the central element of the unlawful conduct. We need not address any of these issues, however, given our conclusions that all of the allegations in these cases depend on the asserted unlawfulness of the layoffs and that the layoffs themselves cannot be shown to be unlawful.

<sup>7</sup> We recognize that ILWU's conduct in acting as the representative of the employees at this terminal was itself unlawful, as the Board found in *PCMC/Pacific Crane Maintenance Co.*, 362 NLRB No. 120, slip op. at 1. The allegations at issue in the instant cases, however, concern not the lawfulness of ILWU's mere representation (which has already been found unlawful by the Board), but the lawfulness of ILWU's conduct of that representation. Thus, while ILWU clearly acted unlawfully by accepting representative status for the entire time PCMC was the employer of the

Charged Parties' conduct (as well as that of predecessor employer, PCMC), given the history of unlawful conduct intended to further ILWU's representational interests in the PMA West Coast-wide bargaining unit, to the detriment of IAM's interests, including the prior unlawful conduct of PCMC and ILWU regarding the very terminal at issue here.<sup>8</sup> Other than these general concerns, however, there is no basis for issuing complaint. In this regard, we 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 they 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.<sup>9</sup> Indeed, Charging Party-IAM's main witness has expressed his belief that the issue of company versus terminal seniority has never arisen before, as no other employer has ever done work covered by the Tacoma Mechanic Port Supplement at more than one terminal at any given time. The Region's investigation adduced no evidence that would demonstrate that ILWU was not sincerely motivated by its reasonable contract interpretation 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 Region 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).

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maintenance and repair mechanics at APM Terminal, we conclude that ILWU did not *further* violate the Act in the course of its representation by demanding a port-wide, seniority-based layoff under the "lowest company seniority" requirement of the Tacoma Mechanic Port Supplement.

<sup>8</sup> *Id.* (incorporating by reference 359 NLRB at 1207-08, 1227).

<sup>9</sup> All of the instances cited by PCMC and PMA in their meetings with the ILWU in October 2016 involved: (1) different contractual language; (2) transfers rather than layoffs; (3) situations in which ILWU voluntarily agreed to depart from the contractual requirement; and/or (4) circumstances in which there was no foreseeable risk to future job security.

Significantly, 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. Thus, when APM itself took over the maintenance and repair work in November, it hired fewer unit employees than had been working for PCMC. Moreover, APM’s terminal lease was set to expire the following year,<sup>10</sup> and there was a legitimate basis for concern about what would happen to the existing employees at that time, particularly as the expected subsequent lease-holder (which did in fact obtain the lease) generally uses a terminal operator (SSA Marine) whose maintenance and repair employees have long been represented by IAM. In the absence of contrary evidence that would belie or overcome the ILWU’s reasonably-based assertion that the “lowest company seniority” requirement of the Tacoma Mechanic Port Supplement required layoffs on a port-wide basis, or its facially legitimate concerns for unit employees’ future job security, we conclude that no violation of the Act has been shown.

Accordingly, the Region should dismiss the charges in the instant cases, absent withdrawal.

/s/  
J.L.S.

ADV.19-CA-197070.Response.APM (b) (6), (b) (7)

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<sup>10</sup> In fact, APM’s operation of the terminal lasted less than a year, as APM terminated its lease on October 2, 2017.