

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

MATSON TERMINALS, INC.

and

Case 20–CA–188087

**HAWAII TEAMSTERS & ALLIED WORKERS
UNION, LOCAL 996**

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

Barry W. Marr, Esq., and *Christopher S. Yeh, Esq.*,
of *Marr Jones & Wang, LLP*,
for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried on June 19, 2018, in Honolulu, Hawaii. Thereafter, the parties filed briefs on July 24, 2018.¹

This controversy concerns whether Matson Terminals, Inc. (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)² when it transferred paperwork

¹ The transcript in this case (Tr.) is mostly accurate, but at page 81, line 23: “times” should be “hours;” and page 202, line 5: “MDTs” should be “MIAs.” Also, on July 27, 2018, I issued an order granting the parties’ joint motion to correct the transcript at 35 additional instances. Other abbreviations used in this decision are as follows: “GC Exh.” for the General Counsel’s exhibits; “R Exh.” for the Respondent’s exhibits; “Jt. Exh.” for the joint exhibits; “GC Br.” for the General Counsel’s brief; and “R Br.” for the Respondent’s brief. Although I have included numerous citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based not solely on the evidence specifically cited, but rather on my review and consideration of the entire record.

² I take administrative notice that after consideration of a stipulated record in Case 20-CA-178312 between the same Respondent and Union in the instant action (but a different unit and port location), and the parties’ posthearing briefs, my colleague NLRB Administrative Law Judge Amita Baman Tracy issued a decision earlier this year on February 20, 2018 finding that the same Respondent here violated Section 8(a)(5) and (1) of the Act on or about June 3, 2016, by transferring barge menu work away from the Union at Respondent’s Hilo, Hawaii port without providing the Union with notice and the opportunity to bargain. *Matson Terminals, Inc.* (“Judge Tracy’s Findings”), JD(SF)-03-18 (February 20, 2018), with exceptions and cross-exceptions fully briefed and currently pending before the Board.

delivery 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 the transferred work was not material, substantial, or significant and 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 his March 23, 2018 complaint, based on a charge filed by the Charging Party on November 14, 2016³, 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 paperwork delivery duties historically and traditionally performed by union represented employees to different union represented employees. Respondent filed a timely answer on April 6, 2018 denying the material allegations in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent,⁴ I make the following

FINDINGS OF FACT

I. JURISDICTION

I find that at all material times, the Respondent, a Hawaii corporation with offices and a facility located in Honolulu, Hawaii (Honolulu facility), has been engaging in providing stevedoring and terminal operations. Respondent admits and I further find that during the 12-month period preceding issuance of the complaint, the Respondent, in conducting its Honolulu facility, purchased and received goods valued in excess of \$50,000 from points outside the State of Hawaii. Respondent also further admits and I further find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is 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

Following the representation election held by mail ballot, the Union was certified on June 11, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time Container Vessel Stevedoring (CVS) Superintendents, CVS Senior Superintendents, Container Yard (CY) Supervisors and Yard Controllers employed by Matson Terminals, Inc. in its Honolulu,

³ All dates are 2016, unless otherwise indicated.

⁴ The Charging Party did not file a separate posthearing brief.

Hawaii operation; excluding CVS Senior Superintendents who work at the Employer's Pier 2 operation, clerical employees, managerial employees, guards and supervisors as defined by the Act (the Unit). (Jt. Exh. 1.)

5 The Union continues to be the exclusive collective bargaining representative of the unit employees under Section 9(a) of the Act.

10 Thereafter, on July 3, 2014, the Union filed charge 20-CA-132200 alleging that Respondent refused to recognize and bargain with the Union as the collective-bargaining representative of the Unit and failed and refused to furnish the Union with requested information regarding the terms and conditions of employment of employees in the Unit ("test of certification"). (GC Exhs. 1(c) and 1(e).) On September 26, 2014, the Board issued a decision and order in case 20-CA-132200 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 and by failing and refusing to furnish the Union with requested information regarding the terms and conditions of employment of employees in the Unit, *Matson Terminals, Inc.*, 361 NLRB No. 50 (2014) (Not reported in Board volumes) (the 2014 Board decision). Thereafter, Respondent filed a petition for review of the 2014 Board decision and the Board filed a cross-application for enforcement of the 2014 Board decision with the District of Columbia Court of Appeals ("D.C. Circuit").

25 On February 26, 2016, the D.C. Circuit enforced the 2014 Board decision in the test of certification case. *Id.* On April 19, 2016, the D.C. Circuit issued its Mandate in the test of certification case. *Id.*

30 I take administrative notice that on May 17, 2016, the Union filed charge 20-CA-176385, alleging that Respondent violated Section 8(a)(5) of the Act by unilaterally transferring the menu and MIA work to employees not represented by the Union. (Jt. Exh. 2.) I take further administrative notice that the Union also filed charge 20-CA-179085, amended on August 12, 2016, alleging that Respondent violated Section 8(a)(5) of the Act by unilaterally reducing Union-represented employees hours and compensation without bargaining with the Union. (Jt. Exh. 3.) I also take administrative notice that on July 23, 2018, the Board filed a petition with the D.C. Circuit, seeking a finding of contempt of the Court's Order enforcing the Board's bargaining order against Respondent in the test of certification case No. 14-1189.

35 As discussed below, soon thereafter in the summer of 2016 from May through August 2016, Respondent failed to provide the Union with notice and an opportunity to bargain over its decision to transfer away from the Union menu work, missing in action container (MIA) work, and runner paperwork delivery work, which had historically and traditionally been performed by the Union.

III. RESPONDENT'S OPERATIONS

45 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 islands of Hawai'i (the Big Island), Kauai, Maui, and Oahu. Respondent conducts a "hub-

and-spoke” operation which means that cargo from the West Coast is delivered to the Honolulu facility, Oahu port, which is the main hub where its primary operations are conducted.

At each of Respondent’s facilities, including its main hub at the Honolulu facility, the stevedoring and terminal operations include, without limitation, loading cargo onto and unloading cargo from mostly vessels. Respondent’s Honolulu Sand Island facility contains three berths, numbered 51-53 with one ship crane and 6 gantry cranes so up to 7 CVS wharf or crane superintendents from the Union are assigned per shift. There are 2 shifts per day at Respondent – one day shift and one night shift and approximately 93 percent of the time, there is also a Union runner assigned to the shift who is a CVS superintendent.⁵ (Tr. 35-36; GC Exh. 2.) The cranes move cargo containers on and off vessels for unloading and transfer off the vessel and later loading and finish-up work to allow the departure of a fully loaded vessel.

IV. THE UNION’S PRESENCE AT RESPONDENT AND THE RUNNER’S TRADITIONAL DUTIES FOR MENU, MIA, AND PAPERWORK DELIVERY WORK BEFORE SUMMER 2016

There are a total of 49 Unit employees at Respondent’s Honolulu facility comprised of 31 CVS superintendents, 5 CVS senior superintendents, 8 container yard supervisors, and 5 yard controllers. (Tr. 11-12.) Union CVS superintendents rotate among 6 job assignments and although they can be assigned to any of the job assignments, the rotations among the assignments are inconsistent and not automatic but rather based on operational needs and employee experience and skills. Id.

Runners are one category of the 31 CVS superintendents and, as stated above, there is a runner performing its various duties at Respondent approximately 93 percent of the time (13/14) as approximately one shift out of fourteen shifts a week do not require a runner because only a barge operation is being performed. (Tr. 35-37.) Consequently, since at least June 2014, almost every shift has one Unit employee runner assigned to it on a rotating basis. (Tr. 37.)

Unit employees receive their weekly schedules every Thursday or Friday from Respondent’s General Superintendents that list what position they will work for each shift whether it be a full-time schedule of 4-5 days per week at ten-hour or eight-hour shifts, respectively or part-time work of up to 7 days per week. (Tr. 30-33.) A daily schedule is also handed out with more updated information as to the positions for a shift, the vessels to be worked on and the location of the work. (Tr. 32-33.)

The various rotating positions for Unit CVS superintendents are runner, water tower superintendent, wharf or crane superintendent, ship superintendent, roll on and roll off (RORO) operation for larger vehicles to and from a vessel and auto operator who watches the International Longshore Workers Union, Local 142 (“ILWU”) workers drive autos on and off the vessels. (Tr. 33-34.) ILWU wharf clerks work alongside Union wharf or crane superintendents under the cranes. (Tr. 48.)

⁵ The day shift is from 7 am to 6 pm and the night shift is from 6 pm to 5 am. Tr. 117-118.

Since 2014, a Union CVS superintendent's duties include transporting the manning or ILWU labor to and from cranes, vessels, and breakrooms at work. Other runner duties, explained further below, ensure the right equipment is coming under the crane, verify containers being loaded and unloaded off a vessel, perform menus which is giving directions to crane operators, checking everything off a schedule, wearing a radio for communications with crane operators and the water tower. (Tr. 39, 47-48.)

Prior to August 2016, Unit employee, CVS Superintendent, and experienced runner Tammy Escorzon ("Escorzon") opined that Union runners would average approximately 2 hours of downtime per shift as a result of sitting around and waiting for additional work on shifts that did not include the more manning intensive discharge or unloading shifts where a runner's manning work was quite busy. (Tr. 80-82.) During runner downtime, Escorzon explained that she normally sat by a crane and waited to see if equipment is changing so she can shift out the manning or she would sit in her van near the water tower waiting for some kind of direction. (Tr. 82.)

A. The Unit Employees' Menu and MIA Work

Prior to May 2016, the Union runners or the wharf superintendents exclusively performed the menu work at Respondent which is defined as the calling out of vessel plans to the various crane operators during all shifts or looking at the discharge plan or load-back plan and letting the crane operator know where and when to put or take each container. (Tr. 46.) From at least 2014 to May 2016, the ILWU wharf clerks⁶ did not call out the menus over the radio. (Tr. 48.)

Also prior to May 2016, Union CVS runner superintendents exclusively performed the missing containers search (MIA) work at Respondent which is defined as searching for missing containers that are not where they are supposed to be. (Tr. 58-64.)

In April 2016, Respondent and the ILWU met and agreed to create an ILWU-represented assist clerk position. (Tr. 122-123.)

On May 4, 2016, Respondent hired an assist clerk from the ILWU to train ILWU wharf clerks to perform menu work, perform their own menu work, MIA work, and eventually this ILWU assist clerk performed paperwork delivery work at Respondent in place of Unit employees who had traditionally performed this work. (Tr. 123, 183, 201-202, 208-209.)

Also in May 2016, Respondent instructed its general managers that ILWU wharf clerks in place of Unit CVS superintendents were going to be giving the menus to crane operators from that point in time forward and the Unit employees stopped doing menu work at that time. (Tr. 209.) Without any advance notice or opportunity to bargain, Respondent transferred the menu and MIA work away from the Union and specifically directed that this work be performed by the ILWU wharf clerks in place of Unit employees. (Tr. 49-50, 207-209.) ILWU wharf clerks had not traditionally performed menu work at the Honolulu facility prior to May 2016. (Tr. 49, 209.)

⁶ Respondent has a contract for outside labor with McCabe, Hamilton & Renny ("McCabe"), who supply Respondent with the ILWU wharf clerks and assist clerks under a labor agreement. Tr. 119.

B. The Unit Employee Runner's Manning and Paperwork Delivery Work

As specifically provided in Respondent's training manual to Unit employees, a Unit employee runner's job tasks include: (1) being responsible for the transportation of all labor to and from the vessel and crane ("manning"); (2) patrol the apron and yard and report any hazards or potential hazards; (3) monitor can or container drivers to ensure the proper parking of chassis and bombcarts in the yard and not on the apron; (4) work with high lift driver and wharf superintendent to ensure cone baskets are set up properly; (5) wake up any sleeping or cab drivers not paying attention to the line up; (6) ensure that cone poles, wires, shackles and other equipment is returned to the proper area in the gear container; (7) provide equipment for labor such as hammers, raincoats, ear plugs, water etc.; and, most critical to Respondent's operations⁷ - (8) *pick up and drop off stow plans to the [Union wharf] superintendents and [ILWU] wharf clerks ("the runner paperwork delivery work")*. (Tr. 72-74; GC Exh. 3 at 31.) (Emphasis added.)

Union Wharf Superintendent and seasoned runner Escorzon estimates that a runner's manning duties can vary from a total of 1 hour to 1.5 hours per shift to up to 2 hours per shift depending on whether it is a start-up shift versus a finish-up shift as more men are needed for transportation to a start-up shift vessel⁸ to unload it than for the finish-up work on a departing vessel which utilizes mostly crane operations placing containers back on a vessel before it departs the Honolulu facility. (Tr. 54-58.)

In contrast, a runner's paperwork delivery work usually is most heavy later in the load-back shift when the water tower generates new paperwork to document changes to the original flow or stow sheets. The runner usually retrieves the newly generated paperwork from the water tower from a hook on a string location under the water tower and delivers it to the crane as soon as possible so operations do not get delayed as the new paperwork contains significant or critical changes as to where containers need to be loaded on a vessel or unloaded from a vessel that have changed from the original flow or sequence sheets. (Tr. 64-65; GC Exhs. 4 and 5.) In addition, sometimes the flow sequencing gets doubled up or does not make sense so at that point the runner or wharf superintendent call the water tower and asks for the new paperwork and the water tower re-does or generates new corrected paperwork. (Tr. 65-66.)

Prior to late July/early August 2016, a Union runner superintendent traditionally and almost exclusively performed the paperwork delivery work at Respondent with either the runner performing this work or, if temporarily unavailable, a Unit crane or wharf superintendent would receive a call from the Water Tower superintendent to fill in to perform this work.⁹ (Tr. 71-74,

⁷ Unit CVS Superintendent employee Escorzon's uncontroverted testimony is that a crane cannot just stop operating for very long before someone screams about a stopped crane operation because you never want to stop operations on a vessel because of the high cost to Respondent for idle labor and delayed business but a crane operator cannot just load whatever container they want if there have been changes to the original loading or discharge plans. Tr. 72-74. This need to revise load-back plans most frequently occurs the last 4 hours of a load-back or finish-up plan. Tr. 69-71, 81-82, 206. Crane operators must stop and wait to receive the communicated new paperwork directions from Union runner superintendents or Union wharf or crane superintendents that contains the changed plans or changed sequence of loading or unloading containers to or from a vessel. Tr. 72-74.

⁸ Start-ups occur approximately 3 times per week. Tr. 57.

⁹ Like paperwork delivery work, other Unit wharf superintendents help or assist runners perform

211-212.) Only a few times over her more than six years did Escorzon actually see an ILWU wharf clerk voluntarily perform this work and the Unit employees never called or directed the ILWU wharf clerk to perform paperwork delivery work for them. (Tr. 77, 79-80, 211-212.)

5 Once again, Respondent's runner paperwork delivery work consists of ongoing changes to the original cargo flow discharge¹⁰ or load-back¹¹ sequence schedules that occur during the unloading and loading processes as viewed by superintendents in the water tower.¹² Prior to August 2016, when new paperwork was printed and ready for pick up, the Water Tower superintendent would step outside the Water Tower and attach the paperwork to a paperclip that was attached to a string. (Tr. 67.) The Water Tower superintendent would next lower the
10 paperwork down off the Water Tower balcony for the Unit employee runner to pick up. (Tr. 67; R. Exhs. 8 and 9.)

15 This paperwork delivery work is vital to Respondent's ongoing operations because without paperwork delivery to the cranes in a timely manner, operations must completely stop until the crane receives the revised stow plan information radioed to them from the paperwork delivery to the Unit employee wharf superintendent or runner. The delivery information contains the revised flow sequence for loading or unloading containers. (Tr. 64-65, 71-74.)

20 Respondent's General Superintendent Matthew Bright¹³ (Bright) admitted at hearing that new paperwork which must be delivered by the runner to the Union wharf superintendent and ILWU wharf clerk at a crane is generated 75 to 80 times a week. (Tr. 196-197.) Escorzon confidently opined that delivering paperwork can take anywhere from 1 to 7 minutes for each delivery. (Tr. 69.) As a result, I find that runner paperwork delivery work generally takes
25 between 1.25 hours (75 x 1 minute) to 9.33 hours (80 x 7 [560] minutes) per week to perform by CVS superintendents who rotate each shift to perform the runner's tasks on almost every shift. Taking into consideration that 13 of 14 shifts require a runner's paperwork delivery duties, I further find that a runner generally averages between 5.77 minutes per shift (75 minutes / 13 shifts per week) to 43.08 minutes per shift (560 minutes / 13 shifts) performing runner
30 paperwork delivery work. (Tr. 37.)

manning work. Tr. 58.

¹⁰ A discharge plan shows the sequence that containers must be taken off a vessel. See Tr. 43-44; GC Exh. 3 at 35. The runner's paperwork delivery task contains the most up-to-date and significant information that crane operators need from the water tower to receive changes to the original discharge plan to prevent a work stoppage.

¹¹ A load-back plan shows the sequence that containers must be loaded onto a vessel. See Tr. 43-45; GC Exh. 3 at 36. The runner's paperwork delivery task contains the most up-to-date and significant information that crane operators need from the water tower to receive changes to the original load-back plan to also prevent a work stoppage.

¹² The water tower is the same as a watch tower which is positioned directly between Berth 52 and Berth 53 and in its elevation provides a bird's eye view of all 3 berths and operations at Respondent. Tr. 54; GC Exh. 2.

¹³ From 2006-2016, General Superintendent Bright was also a CVS Superintendent and a Unit employee from June 11, 2014, until he was promoted in August 2016 to be one of Respondent's 3 general superintendents. Tr. 189.

Since runner paperwork delivery work is heaviest during a revised load-back or finish-up shift that occur 3-4 shifts per week, Escorzon's explanation that at these times the paperwork delivery work can last for 2 hours is most convincing. (Tr. 57, 64-67, 69-70, 72-74, 80-82.) Escorzon further opined that this 2 hours flurry of paperwork delivery work involves runners, or Union CVS crane superintendents in a runner's absence, constantly retrieving paperwork to deliver and they end up with a book of paper at the end of their shift and the saying goes: "we are killing trees today" from the large amount of paper generated from the water tower plan revisions. (Tr. 69-70, 74, 81-82, 206.)

V. THE ALLEGED UNILATERAL CHANGES

As witnessed by Escorzon and admitted at hearing by Respondent's General Superintendent Bright,¹⁴ in or about May 2016, Respondent transferred menu and MIA work traditionally performed by the Union to the ILWU nonunit workers and neither the Union wharf superintendents nor Unit employee runners call out the menus after May 2016 as they had exclusively done in the past. (Tr. 48-49, 207-212.) This transfer of the menu and MIA work from the Union wharf superintendents to the ILWU wharf clerks occurred soon after the April 2016 Mandate from the DC Circuit without advance notice or an opportunity to bargain. (Tr. 49-50, 207-212.)

I further find that from at least June 11, 2014, to on or about August 1, 2016, paperwork delivery work at Respondent's Honolulu facility was performed almost exclusively by Unit runner CVS superintendent employees or other CVS superintendent employees. As stated above, Respondent's own training manual for Unit employees specifically lists one of a runner's job duties to include this paperwork delivery task as the "pick up and drop off [of] stow plans to

¹⁴ A credibility determination may rely on a variety of factors, including the context of the witness' testimony; the witness' demeanor; and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, above at 622. I have also considered the longstanding principle that "the testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." *Flexsteel Industries*, 316 NLRB 745, 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996), citing *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978), enfd. denied for other reasons, 607 F.2d 1208 (7th Cir. 1979) and *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); see also *Federal Stainless Sink Division of Unarco*, 197 NLRB 489, 491 (1972). As a result, I credit the testimony of current Unit employee Escorzon over the testimony of General Manager Teegarden and General Superintendent Bright for this reason to the extent they contradict the testimony of Escorzon. Escorzon and Bright confidently agreed in their testimonies about the transfer of menu, MIA, and paperwork delivery work away from the Unit employees' exclusive hold to the ILWU wharf clerks by August 2016. Tr. 46-50, 58-84, 201-202, 207-209. Moreover, I reject the testimony of General Manager Teegarden as he unbelievably denies that an additional ILWU-represented assist clerk was hired in August 2016 to perform work previously performed by Unit employees. See Tr. 176-180, 201. I also reject as untrue General Manager Teegarden's attempt to change his December 8, 2016 affidavit because it is sooner in time than his change in memory which appeared contrived at hearing. Id.

the supts [Unit superintendents] and [wharf] clerks.” (GC Exh. 3 at 31.) The wharf clerks are members of the ILWU.

Beginning first in July 2016, the ILWU wharf or assist clerks began openly taking the paperwork delivery work from Unit employees and physically blocking them from picking up the paperwork as for the first time the Water Tower was simultaneously notifying the Unit employee runners and the ILWU-represented assistant clerks of the paperwork ready for pick up. (Tr. 74-76, 202, 209-210.) Later on or about August 1, 2016, one of Respondent’s manager’s, either a pre-shift manager or Manager Alan Tokayra, notified Unit employees at a pre-shift meeting that Respondent would be using only ILWU nonunit labor to perform the paperwork delivery work from that point in time forward. (Tr. 74-77, 100-108.) Also beginning in August 2016, all Unit employees stopped being called by the Water Tower to come pick up new paperwork for delivery to the cranes. (Tr. 76-77, 102-103, 108-113.) In fact, the Unit employee runners were specifically told by Respondent management not to pick up and deliver paperwork. (Tr. 77, 102-103, 108-113.) I further find that on or about August 1, 2016, Respondent unilaterally transferred paperwork delivery work, previously performed by Unit employee runners or other Unit employees, to workers outside the Unit who are represented by the ILWU without advance notice or an opportunity to bargain. (Tr. 77-80, 103.)

I also find that this loss of runner paperwork delivery work adds an additional 2 hours of downtime to a runner’s average daily downtime of 2 hours so that beginning in August 2016, a runner’s average daily downtime was doubled to approximately 4 hours per shift. (Tr. 80-84.) In place of Unit employees, the ILWU assist clerk hired in May 2016 performs the paperwork delivery work. (Tr. 212.) Escorzon, as a former bargaining unit representative for the Union, credibly opined that the Union has lost bargaining unit support since 2014 because of the lost menu, MIA, and paperwork delivery work Respondent to the ILWU clerks since 2016 and Escorzon further opined that the Union now enjoys less than 50 percent support from its bargaining unit as a result. (Tr. 82-84.)

ANALYSIS

I. Contentions of the Parties

The General Counsel’s position is that Respondent transferred work from Unit employees to nonunit clerks at the ILWU 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 clerks is unavailing for several reasons including the obligation for Respondent to negotiate with the Union and that Respondent had no collective bargaining agreement obligations to the ILWU who had contracted, instead, with McCabe, Hamilton & Renny Co., LTD. (“McCabe”) and not the Respondent. (See R Exh. 1.)

Respondent contends that the paperwork delivery work change was not unlawful because it was not material, substantial, or significant. Respondent also contends that it had no obligation to give the paperwork delivery work exclusively to the Unit employee runner. Finally, Respondent contends that the evidence shows that ILWU had a contractual right to perform the paperwork delivery work pursuant to the ILWU’s wharf clerk collective-bargaining agreement (July 1, 2014 to June 30, 2019) (“ILWU CBA”).

**II. MATSON VIOLATED SECTION 8(A)(5) OF THE ACT BY UNILATERALLY
TRANSFERRING, WITHOUT NOTICE TO THE UNION, THE VITAL RUNNER
PAPERWORK DELIVERY DUTIES HISTORICALLY AND TRADITIONALLY PERFORMED
BY UNIT EMPLOYEES**

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). An employer's duty to bargain only arises if the changes are material, substantial, and significant ones affecting terms and conditions of employment. *Millard Processing Services*, 310 NLRB 421, 425 (1993).

A decision to subcontract or transfer unit work alters the terms and conditions of employment and is therefore a mandatory subject of bargaining. See *Fibreboard Corp.*, 379 U.S. 203, 210 (1964); see also *Eugene Iovine, Inc.*, 328 NLRB 294 (1999) (Reducing the hours and days of work of employees are changes in terms and conditions of employment over which an employer must bargain); *Fry Foods*, 241 NLRB 76, 88 (1979), *enfd.* 609 F.2d 267 (6th Cir. 1979) ("It is to say that the reclassification of a position for the bargaining unit job to a nonunit job is a mandatory subject of collective bargaining if the reclassification has the impact on bargaining unit work."). If the Government demonstrates an employer made a unilateral change involving a mandatory subject of bargaining, the burden rests with the employer to demonstrate such a unilateral change was in some way privileged or the employer's change will violate the Act. *Pan American Grain*, 351 NLRB 1412, 1414, *fn.* 9 (2007). 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 (2^d Cir. 1989); *Bay Shipbuilding Corp.*, 263 NLRB 1133 (1982), *enfd.* 721 F.2d 187 (7th Cir. 1983).

Here, it is undisputed that Respondent failed to provide the Union with notice and an opportunity to bargain over the decision by August 1, 2016 to transfer paperwork delivery work performed almost exclusively by the Unit employees for at least the prior 2 years to nonunit clerks represented by the ILWU. I find that Respondent's transfer of Unit employees' paperwork delivery work by August 1, 2016, is a mandatory subject of bargaining as it involves a reduction of hours and has doubled from 2 hours to 4 hours a Unit employee runner's downtime with no specific duties. Respondent's bargaining obligation attached once the Union won the election and was certified by the Board on June 11, 2014 and the test of certification was affirmed in the 2014 Board decision and was upheld by the D.C. Circuit's February 26, 2016 ruling and its April 2016 Mandate. Respondent acted at its own peril by not providing notice and an opportunity to bargain to the Union for its transfer of paperwork delivery work to the ILWU workers from the Unit employee runners. See *Thesis Painting, Inc.*, 365 NLRB No. 142, slip op. at 4 (2017) (citing *Clement Wire*, 257 NLRB 1058 (1981)). Moreover, I further find that the Union's paperwork delivery work has been included within the scope of a bargaining unit by the consent of the parties as evidenced in Respondent's own training manual with Unit employees

which specifically references paperwork delivery work as a task for the Unit employee runner. Respondent cannot unilaterally remove or modify that paperwork delivery runner task without first securing the consent of the Union or the Board. (See GC Exh. 3 at 31.) Thus, I find that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally transferred bargaining unit paperwork delivery work performed by Unit employees to nonunit ILWU clerks.

Respondent claims that paperwork delivery work is insignificant because the Unit employees have not suffered from loss of compensation due to the transfer of paperwork delivery work. (R. Br. at 25-33). What Respondent misses, however, is that the paperwork delivery work is material and significant enough to get transferred to a new ILWU assist clerk worker who is compensated in addition to the Unit employee to perform this same work. This stripping of significant Unit employee duties from CVS superintendent runners and Wharf superintendents makes the lost paperwork delivery work a further substantial reduction in a Unit employee's work opportunities and especially when added to the recently lost menu and MIA work, doubles a Unit employee runner's downtime from 2 to 4 hours on some days - a material and substantial amount of downtime that required the hiring of the nonunit ILWU assist clerk. While this Unit employee runner position may, in fact, be a "loss leader" position which Respondent maintains at full compensation, it is just a matter of time when the increased downtime causes a Unit employee runner even more harm such as losing their runner position entirely or more work benefits to the ILWU assist clerk. It is difficult to imagine a more dramatic change for a Unit employee than having half a shift removed from them trying to appear busy other than perhaps being discharged which would be the logical next step here.

Moreover, the paperwork delivery work is likely the most substantial and vital work performed at Respondent, second only to the work of crane operators, as all of Respondent's entire operations grind to a halt while crane operators wait for the significant paperwork sequence changes from the Water Tower to be delivered to them through radio communications from the CVS superintendents and the wharf clerks next to them at the crane after the runner has delivered this critical paperwork to the cranes.

Also, the ILWU's wharf clerk collective-bargaining agreement (July 1, 2014 to June 30, 2019) ("ILWU CBA") is not a binding agreement with the Respondent but instead is an agreement between the ILWU and a different legal entity, Employer McCabe.¹⁵ (R Br. p. 8, fn. 11.) Also, Section 2.02 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 of the Employer [McCabe]." (R. Exh. 1 pp. 3, 23.) In addition, a letter of understanding also between the ILWU but not Respondent, dated September 15, 2008, and updated and revised on June 1, 2015, states, "the following work and functions shall be assigned to wharf clerks at all facilities covered by the [ILWU CBA]: 1) New Operations. All new duties that are traditionally wharf clerk functions generally identified as directing and executing the flow of cargo, [McCabe as employer] shall first discuss the work jurisdictional issues in a meeting" with ILWU. (R Exh. 1

¹⁵ As pointed out by the General Counsel, Respondent "borrows" stevedores and Wharf Clerks from McCabe. Tr. 119; GC Br. 19, fn. 29. Respondent did not sign the ILWU CBA and is not a party to it. General Manager Teegarden opined that Respondent "generally follows" the ILWU CBA with McCabe but Respondent has not presented any evidence that it is legally bound by the terms of the ILWU CBA. Id.

at 36.) As stated above, even if relevant, none of these obligations are Respondent's obligations since Respondent is not a party to the ILWU CBA.

Respondent also alleges that its action to transfer the Unit employees' work to the ILWU represented clerks was lawfully permitted because it was obligated to transfer the paperwork delivery work, and therefore did not have a bargaining obligation with the Union. Respondent cites to section 2.02 of the ILWU collective-bargaining agreement which states that wharf clerk duties 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 unpersuasive. I find that from at least June 2014 to August 1, 2016, the Unit employees performed paperwork delivery work at Respondent's Honolulu facility. Soon after the April 2016 D.C. Court mandate, beginning in July and extending to August 1, 2016, Respondent decides that the paperwork delivery work should be transferred to ILWU represented clerks. Rather than provide notice and an opportunity to bargain to the Union, Respondent justifies its unlawful actions by claiming that an ILWU CBA of which Respondent is not a party to, and a letter of understanding also not signed by Respondent, with the ILWU required the paperwork delivery work to be performed by ILWU clerks.¹⁶ Respondent further argues by adding that wharf clerks have been performing paperwork delivery work at its Honolulu facility for many years. Respondent, citing *Murphy Oil USA, Inc.*, 286 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 authorities which require the paperwork delivery work to be performed by ILWU represented clerks.

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

¹⁶ I further find that the ILWU CBA and 2008 Letter of Understanding are not lawful work-preservation agreements and even if they are, their terms do not apply to paperwork delivery work traditionally performed by CVS superintendents. First of all, the ILWU CBA makes no specific reference to the disputed paperwork delivery work. See *National Woodwork Mfrs. Assn. v NLRB*, 386 U.S. 612 (1967); *Teamsters (Active Transportation Co.)*, 335 NLRB 830, 832-833 (2001). In addition, paperwork delivery work is not "new duties" or work that is traditionally performed by ILWU-represented clerks at Respondent's Honolulu facility. Based on this record, I conclude that Respondent lacks a valid work preservation claim with respect to the paperwork delivery work because it has never been a function performed by the ILWU clerks at Respondent's Sand Island, Honolulu facility. *Sheet Metal Workers Local 27*, 321 NLRB 540 (1996).

CONCLUSIONS OF LAW

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

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

10 All full-time and regular part-time Container Vessel Stevedoring (CVS) Superintendents, CVS Senior Superintendents, Container Yard (CY) Supervisors and Yard Controllers employed by Matson Terminals, Inc. in its Honolulu, Hawaii operation; excluding CVS Senior Superintendents who work at the Employer's Pier 2 operation, clerical employees, managerial employees, guards and supervisors as defined by the Act (the Unit).

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

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

REMEDY

25 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.

30 Respondent, having unlawfully changed the terms and conditions of employment, shall rescind the transfer of paperwork delivery work from the employees represented by the Union that was unilaterally implemented on or about August 1, 2016.

35 Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Employer's Honolulu 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 August 1, 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.

45 The General Counsel requests that the notice to employees be read to all employees including employees at Respondent's Honolulu facility represented by ILWU during work time by Respondent's management representative. (See R Br. 34, fn. 28.) As indicated above in

footnote 2, the parties have filed exceptions to Judge Tracy’s decision, which remain pending, and thus her findings are not final. Nevertheless, it is appropriate to consider and rely on those findings in deciding the proper remedies in this case. The issues decided by Judge Tracy were fully litigated before her, and relitigating or revisiting those issues de novo in this related
 5 proceeding, while the matter is before the Board, would be antithetical to judicial efficiency and economy and potentially lead to inconsistent results and unnecessary delays. See *Wynn Las Vegas, LLC*, 358 NLRB No. 81 fn. 1, slip op. at 4–5 (2012) (Board affirmed judge’s ruling that the respondent company was precluded from relitigating lawfulness of suspension, an issue fully litigated and decided by another judge in a prior case, even though that decision was pending
 10 before the Board on exceptions); *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 394–395 (1998), enfd. mem. 215 F.3d 1327 (6th Cir. 2000) (judge relied on another judge’s findings in an earlier case as evidence of animus even though the case was pending before the Board on exceptions); and *Detroit Newspapers Agency*, 326 NLRB 782 fn. 3 (1998), enfd. denied on other grounds 216 F.3d 109 (D.C Cir. 2000) (judge relied on earlier decision of
 15 another judge to find that a strike was an unfair labor practice strike, even though the decision was pending before the Board on exceptions). As a result, I find that Respondent here is a recidivist employer who has engaged in a pattern of unlawful conduct by transferring away from the Union the barge menu work at Respondent’s Hilo facility, and transferring away from the Union the menu and MIA work and paperwork delivery work in this case to the benefit of the
 20 ILWU without notice and without the opportunity to bargain. I find that Respondent’s conduct is numerous, pervasive, and outrageous that an extraordinary remedy is necessary to dissipate fully the coercive effects of the unfair labor practices I find as Escorzon further believably opined that the loss of menu, MIA, and paperwork delivery work has caused the Union to lose bargaining unit support. For these reasons, I recommend the extraordinary remedy that the notice to
 25 employees be read to all employees including employees at Respondent’s Honolulu facility represented by ILWU during work time by Respondent’s management representative and I further find that the conduct of Respondent in this particular case when added to its conduct from Judge Tracy’s decision is sufficiently egregious to warrant the granting of this “extraordinary”
 30 remedy. See *Federated Logistics and Operations*, 340 NLRB 255, 256 (2003)(“The Board may order extraordinary remedies when the [r]espondent’s unfair labor practices are so ‘numerous, pervasive, and outrageous’ that such remedies are necessary ‘to dissipate fully the coercive effects of the unfair labor practices found.’ [citation omitted]”).

35 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

40 Respondent, Matson Terminals, Inc., Sand Island, Honolulu, island of Oahu, its officers, agents, successors, and assigns, shall

1. Cease and desist from

¹⁷ 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.

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 paperwork delivery work.

5

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.

10

a. Rescind the change in the terms and conditions of employment for its Unit employees that was unilaterally implemented on or about August 1, 2016.

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b. Within 14 days after service by the Region, post at its facilities in Honolulu, on the island of Oahu, copies of the attached notice marked "Appendix."¹⁸ The attached remedial notice shall be read aloud to the Respondent's employees including employees at Respondent's Honolulu facility represented by ILWU during work time by Respondent's management representative in the presence of a Board agent. 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 August 1, 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. October 16, 2018



Gerald Michael Etchingham
Administrative Law Judge

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¹⁸ 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 Container Vessel Stevedoring (CVS) Superintendents, CVS Senior Superintendents, Container Yard (CY) Supervisors and Yard Controllers employed by Matson Terminals, Inc. in its Honolulu, Hawaii operation; excluding CVS Senior Superintendents who work at the Employer’s Pier 2 operation, clerical employees, managerial employees, 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 paperwork delivery work) in the terms and conditions of employment for our Unit employees that were unilaterally implemented on or about August 1, 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.**