UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

PACIFIC MARITIME ASSOCIATION

and

LONG BEACH CONTAINER TERMINAL LLC **Cases 21-CA-197882**
21-CA-198530

and

ILWU, WAREHOUSE, PROCESSING AND DISTRIBUTION WORKERS' UNION, LOCAL 26

GENERAL COUNSEL'S ANSWERING BRIEF TO THE AMICUS BRIEF OF THE INTERNATIONAL UNION

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I. INTRODUCTION

General Counsel files this answering brief to the amicus brief of the International Longshore and Warehouse Union (International Union) pursuant to the Board's Rules and Regulations, §102.46(i)(4). The International Union challenges the well-reasoned decision of Administrative Law Judge Andrew S. Gollin, wherein the ALJ found that Respondents violated Section 8(a)(5) and (1) by unlawfully modifying the terms of the Watchmen's Agreement without the consent of Charging Party ILWU, Local 26 (Local 26), and contrary to Section 8(d) of the Act; and, alternatively by unilaterally changing the watchmen's terms and conditions of employment without bargaining with their Section 9(a) representative.

The International Union's amicus brief accepts the ALJD's factual recitation and does not reject its legal analysis directly. Interestingly, the amicus brief does not support any of the exceptions of Pacific Maritime Association (PMA) and Long Beach Container Terminal (LBCT)

(collectively Respondents). Instead, in yet another attempt to distract the Board from the actual issues and unfair labor practices presented by these cases, the International Union's amicus brief propounds its own arguments, which the General Counsel urges the Board to reject. Each of its arguments is flawed and untenable.[1]

II. ISSUE PRESENTED

The legal issue presented here is whether Respondents violated Section 8(a)(5) when they disciplined a Local 26 watchman pursuant to a grievance-arbitration procedure contained in a different union's collective-bargaining agreement. (ALJD 1:2-5).

III. SUMMARY OF FACTS

Respondents are signatory to two coast-wide labor agreements with the International Union, collectively known as the Pacific Coast Longshore and Clerks Agreement (PCL&CA). Respondents and Local 26 have a stand-alone collective-bargaining agreement (Watchmen's Agreement) that is negotiated separately from the PCL&CA. (ALJD 1; Tr. 120-121; Jt. Exh. 1, 2).[2]

In 2001, the parties to the PCL&CA agreed to include in their agreement Section 13.2, a special grievance procedure for employees' discrimination complaints designed to limit the institutional parties' liability exposure. (ALJD 5:35-44; Tr. 234-235, 311-314; Jt. Exh. 5(a) at 77; Jt. Exh. 5(b) at 53; Jt. Exh. 6(a) at 77; Jt. Exh. 6(b) at 54).). A very unusual feature of Section 13.2 is that employees covered by the PCL&CA can file discrimination complaints

[1] In its amicus brief to the ALJ, the International Union propounded the very same arguments. The ALJ was not swayed by them, and he expressed disapproval of the way in which the International Union had manipulated its role in the Board's process. See, Administrative Law Judge Decision (ALJD), n. 3.

[2] References pages of the official transcript will be preceded by "Tr.," and where specific lines are referenced, they will be separated from the page number by a colon. References to party-exhibits will be preceded by the party's abbreviation. Joint exhibits are identified as Jt. Exh.

against other employees.[3] (Jt. Exh. 8 at 2). Such complaints are adjudicated by a designated Section 13.2 arbitrator, whose decision is final and binding, unless a party appeals it to the specially-designated Coast Appeals Officer. With respect to the PCL&CA, Respondents are required to implement the remedies provided in the final decision of the Section 13.2 arbitrator or, if applicable, the Coast Appeals Officer. According to the unambiguous terms of Section 13.2, this is a final decision. Indeed, no other appeals or proceedings are allowed. (ALJD 5-7 Jt. Exh. 8). Saliently, in 2014, the parties to the PCL&CA negotiated a letter of understanding permitting Section 13.2 complaints to be brought against "ILWU-represented guards," but Local 26 watchmen are **NOT** permitted to lodge Section 13.2 complaints against bargaining-unit employees covered by the PCL&CA. (Tr. 264-265; Jt. Exh. 9).

Local 26 had no involvement in the negotiation of the PCL&CA or the letters of understanding between the International Union and Respondents, relating to Section 13.2, and did not agree to or sign the letter of understanding. (ALJD 7:39-40). Moreover, when PMA proposed adding language from Section 13.2 to the Watchmen's Agreement during the last two contract negotiations, Local 26 successfully rejected those proposals. (ALJD 10:19-20).

Indeed, Local 26 is the **ONLY** waterfront union on the west coast that has never agreed to some form of the Section 13.2 procedure. (ALJD 10, n. 17). Instead, Local 26 has a separate provision in its agreement: Article 16 of the Watchmen's Agreement prohibits workplace discrimination and harassment. (ALJD 10: 9-14; Jt. Exh. 1 at 32). Respondents agreed to that stand-alone provision. And, Article 18 of the Watchmen's Agreement provides a separate mechanism for addressing allegations of discrimination and harassment, up to "final and binding" arbitration. (ALJD 8-10; Tr. 132, 348:1-16; Jt. Exh. 1:29-30; 35).

[3] Respondents refer to this as "worker-on-worker" complaints and maintain that the institutional parties have little to do with such complaints.

The underlying events giving rise to this dispute relate to allegations of discriminatory misconduct raised by marine clerk-Belnap, who is covered by the PCL&CA, against watchman-Pleas, a member of Local 26. Upon learning of Belnap's allegations, Respondents could have disciplined the watchman under the negotiated process contained in the Watchmen's Agreement; however, Respondents failed to follow the process they negotiated in the Watchmen's Agreement, and permitted the Section 13.2 complaint to go forward under the process rejected by Local 26 and contained in the PCL&CA. Thereafter, Respondents implemented the final decision of the Coast Appeals Officer over the objections of Local 26. Respondents' decision to participate in and enforce the procedures of Section 13.2 of the PCL&CA against a watchman covered by another agreement, and represented by Local 26 is unlawful, and calls for a Board remedial order.

IV. ARGUMENT

The essence of the International Union's argument is: (1) Respondents cannot disregard a bargaining unit member's "rights" under the PCL&CA, Section 13.2; (2) once a marine clerk files a Section 13.2 complaint, Respondents have no choice but to proceed with that complaint no matter what—even if the object of such complaint has no reciprocal rights, is represented by a different labor organization, and Respondents have agreed in a separate agreement to enforce a separate disciplinary process against the bargaining-unit members represented by a separate union; (3) thereafter, Respondents "adopt" as their own the disciplinary measures of the Section 13.2 area arbitrator's final decision; (4) if that decision results in adverse action against a Local 26-watchman, Local 26 can file a separate grievance against Respondents under the Watchmen's Agreement challenging the final and binding decision of the Section 13.2 arbitrator; and, (5) the second arbitrator is free to reach a distinct result, including rejecting the discipline imposed by

the Section 13.2 decision. According to the International Union, this nonsensical process would protect the bargaining rights of all parties. The International Union's argument that imposition of Section 13.2 of the PCL&CA on watchmen represented by Local 26 does not undermine the statutory rights of Local 26 and the bargaining-unit that it represents lacks merit.

Among the many problems with the International Union's argument—besides being flawed and disingenuous—is that it conflates the duties and obligations of signatories to collective bargaining agreements with the benefits employees may be entitled to receive under such agreements. Related problems with the International Union's argument are that they create a free-for-all, do not allow Local 26 employees access to the same process, and deprive Local 26 bargaining unit members of the benefit of their Local's collective-bargaining agreement with Respondents.

A. The International Union's Proposed Solution Violates the Terms of the Very Agreement It Seeks to Enforce

A primary problem with the International Union's argument is that it is illogical and violates the very provisions of the agreement it seeks to enforce, which provides for "[n]o other appeals or proceedings" reviewed by another arbitrator. In this regard, the terms of Section 13.2 are extremely clear, and state that "no other appeals or proceedings . . . shall be allowed in cases involving Section 13.2 claims in order to ensure their final resolution with all due speed. (Jt. Exh. 8 at 18) (emphasis added). Arbitration under the Watchmen's Agreement challenging a Section 13.2 award would obviously contradict this clear language and be susceptible to collateral estoppel or attack. So, too, the awards from different arbitrators would likely be

inconsistent as Section 13.2 discipline is broader than the disciplinary measures under the Watchmen's Agreement.[4]

B. The International Union Ignores the Fact that Local 26 Explicitly Rejected the Section 13.2 Process, and Respondents Agreed to a Different Process

The International Union argues that Respondents participation in, and enforcement of, the Section 13.2 proceedings against a watchman does not actually change anything or interfere with the statutory rights of Local 26's bargaining unit, ignoring the fact that Local 26 explicitly rejected the Section 13.2 process during its contract negotiations, and instituted a separate process to which Respondents agreed. The International Union disingenuously asserts that the provisions of Section 13.2 act as a substitute for Respondents' internal procedures for investigating claims of discrimination against a watchman, and that Section 13.2 requires Respondents to adopt the Section 13.2 arbitration decision as their own discipline. The International Union maintains that this holds true for all, including for the purposes of initiating and implementing discipline against Local 26 watchmen.

Thus, according to the International Union's revisionism, a Section 13.2 complaint that is heard and decided by a Section 13.2 area arbitrator, simply takes the place of Respondents' traditional investigation and disciplinary decision from which Local 26 can file a grievance under the Watchmen's Agreement. The effect of the International Union's argument would be to extend the reach of Section 13.2, and negate entirely the investigatory, disciplinary and grievance procedures to which Local 26 and Respondents agreed and are memorialized in the Watchmen's Agreement.

[4] Under the PCL&CA, Section 13.2 penalties are mandatory and more punitive, e.g. instead of being barred from working for LBCT only, watchman-Pleas was barred from working for all PMA employer-members for 28 days.

C. The International Union Ignores the Fact that Local 26 Has Its Own Process for Enforcing Discrimination Claims

The Watchmen's Agreement has an anti-discrimination provision under Article 16 and disciplinary and grievance procedures under Article 18. Under the Watchmen's Agreement, a signatory employer-member can file a complaint with the Labor Relations Committee, which may issue discipline that Local 26 can grieve. (Jt. Exh. 1 at pp. 33-36) Under the disciplinary and grievance provisions that Local 26 negotiated with PMA, a signatory employer-member can file a complaint against a watchman and have him removed from its terminal alone. Id. at p. 35. Absent additional infractions and progressive discipline, an employer-member cannot deregister or suspend a watchman from working at all terminals. By changing the disciplinary protocol and grievance procedures, and specifically by suspending watchman-Pleas from working at all terminals, the Section 13.2 process and the arbitrator's decision unilaterally changed the terms and conditions of the Local 26 bargaining unit, and unlawfully modified the Watchmen's Agreement in direct contravention of Section 8(d) of the Act, and the specific language of Article 21 of the Watchmen's Agreement, which states that "No provision or term of this Agreement may be amended, modified, changed, altered or waived, except by a written document executed by the parties hereto." Id. at p. 45. Thus, the unilateral implementation of Section 13.2 violates the terms of the Watchmen's Agreement and the statutory rights of Local 26 and the bargaining unit it represents.[5]

[5] Cited by the International Union, *Total Security Management*, 364 NLRB No. 106 (2016), and *Alan Ritchey*, 359 NLRB 396 (2012) are easily distinguishable from the instant case. Neither case allows an employer to impose the terms and conditions from contracts it has bargained with one union on another union and bargaining unit, and repudiate the collective-bargaining agreement it negotiated with the latter union, which is what happened here.

D. The International Union's Proposed Solution Makes No Sense

The International Union's assertion that Local 26 arbitrate the award of the Section 13.2 arbitrator adds another arbitration decision to the mix and will not resolve the issue here. Rather, it will create confusion and compound industrial strife. Indeed, if the International Union's scenario were played-out, it is possible that there would be multiple conflicting decisions by the different arbitrators. For example, if the Section 13.2 arbitrator decided against the Local 26 employee, and in favor of the employee represented by the International Union, but the second arbitrator decided against the Respondents and in favor of Local 26, there would be two different awards under two different agreements. If that were to occur, it is not clear, even under the International Union's tortured analysis which award should Respondents follow. This absence of certainty runs contrary to the goal of labor peace and the purpose of the NLRA, but is wholly predictable if employers are allowed to disregard the collective-bargaining agreement they sign with a union. Moreover, such instability would erode respect for collective-bargaining relationships.

E. A Party Cannot Be Forced to Arbitrate Against Its Wishes

Another important point against the International Union's argument for deferral to multiple arbitrations is that it is well established that requiring a party to submit a dispute to arbitration that it hasn't agreed to arbitrate violates that party's rights. The existence of an agreement to arbitrate is a condition precedent to arbitration. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); see also *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879-880 (1998) (parties cannot be forced to arbitration if they never agreed to arbitrate the dispute in question). Local 26 is not a

party to the PCL&CA or Section 13.2, and never agreed to arbitrate any disputes under the PCL&CA. As such, subjecting Local 26 to the PCL&CA, or any outgrowth of these agreements, violates the rights of Local 26 as a matter of law.

V. CONCLUSION

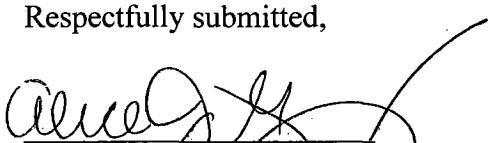
In short, the Board should affirm the ALJ, who concluded that deferral to arbitration was inappropriate and stated:

> I do not find the dispute is eminently well suited for resolution by arbitration because, as stated, I find the contractual language to be clear and unambiguous regarding the appropriate procedure and penalties to be applied in this case. Therefore, the special expertise of an arbitrator is unnecessary to interpret the contract. See *Doctors' Hospital of Michigan*, 362 NLRB No. 149, slip op. at 1 (2015) (deferral to arbitration was inappropriate because the relevant provision of the collective-bargaining agreement was unambiguous) (cases cited therein); See also *New Mexico Symphony Orchestra*, 335 NLRB 896, 897 (2001). (ALJD 24:36-44).

Based on the foregoing and the entire record, General Counsel requests that the Board adopt the Administrative Law Judge's findings of fact and conclusions of law. The arguments presented by Respondents and the International Union do not warrant reversal of the ALJ's decision.

Dated: November 19, 2018

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the General Counsel's Answering Brief to the Amicus Brief of the International Union in Cases 21-CA-197882 and 21-CA-198530 was submitted by E-filing to the NLRB's Executive Secretary's Office in Washington, D.C. on November 19, 2018. The following parties were served a copy of the same document by electronic mail:

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