

Nos. 18-1124 & 18-1168

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

INTERNATIONAL LONGSHORE & WAREHOUSE UNION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**EAST BAY AUTOMOTIVE MACHINISTS LODGE NO. 1546;
INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE
WORKERS DISTRICT LODGE 190; INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO/CLC**

Intervenor for Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-
APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL LONGSHORE)	
& WAREHOUSE UNION,)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	Nos. 18-1124
Respondent/Cross-Petitioner)	18-1168
)	
-----)	Board Case No.
)	32-CB-118735
EAST BAY AUTOMOTIVE MACHINISTS)	
LODGE NO. 1546; INTERNATIONAL)	
ASSOCIATION OF MACHINISTS)	
& AEROSPACE WORKERS DISTRICT)	
LODGE 190; INTERNATIONAL)	
ASSOCIATION OF MACHINISTS AND)	
AEROSPACE WORKERS, AFL-CIO/CLC,)	
)	
Intervenors for Respondent/Cross-Petitioner)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

A. Parties and Amici

International Longshore and Warehouse Union (“ILWU”) is the Petitioner in case No. 18-1124, and the Cross-Respondent in case No. 18-1168. The Board is the Respondent in case No. 18-1124, the Cross-Petitioner in case No. 18-1168.

International Association of Machinists and Aerospace Workers, District Lodge 190, East Bay Automotive Machinists Lodge No. 1546, International Association of Machinists and Aerospace Workers, AFL-CIO/CLC (“IAM”) is the Intervenor for the Board in case Nos. 18-1124 and 18-1168, and was the charging party before the Board in unfair-labor practice case Nos. 32-CA-110280 and 32-CB-118735.

B. Ruling under Review

The case under review is a Decision and Order issued by the Board against ILWU in Board Case No. 32-CB-118735, entitled *Ports America Outer Harbor, LLC, currently known as Outer Harbor Terminal, LLC, et. al.*, and reported at 366 NLRB No. 76, 2018 WL 2086090 (May 2, 2018).

C. Related Cases

On September 19, 2018, the Board filed an application for this Court to enforce its Decision and Order against Ports America Outer Harbor (“PAOH”) in Board Case No. 32-CA-110280 (also entitled *Ports America Outer Harbor, LLC, currently known as Outer Harbor Terminal, LLC, et. al.*, and reported at 366 NLRB No. 76, 2018 WL 2086090 (May 2, 2018)), which the Court docketed as case No. 18-1215. On October 22, 2018, the Court granted the Board’s motion to withdraw that application for enforcement and dismissed the case.

Board counsel is not aware of any other related case currently pending or about to be presented in this or any other court.

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Dated at Washington, DC
this 30th day of November 2018

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GLOSSARY

The Act	National Labor Relations Act, 29 U.S.C. § 151 et seq.
The Board	National Labor Relations Board
Br.	Opening brief of International Longshore & Warehouse Union
Complaint	Second Amended Consolidated Complaint (Sept. 9, 2016)
Order	<i>Ports America Outer Harbor, LLC, currently known as Outer Harbor Terminal, LLC, et. al.</i> , No. 32-CB-118735, 366 NLRB No. 76 (May 2, 2018)
General Counsel	Counsel for the Board’s General Counsel
Historical unit	Collective-bargaining unit of M&R employees represented by IAM since the 1960s
IAM	International Association of Machinists & Aerospace Workers District Lodge 190, East Bay Automotive Machinists Lodge No. 1546, International Association of Machinists and Aerospace Workers, AFL/CIO-CLC
ILWU	International Longshore & Warehouse Union
JA	Joint Appendix
Longshore contract	Collective bargaining agreement between PMA and ILWU
Machinists contract	Collective bargaining agreement between PMMC and IAM
Maersk	A.P. Moller-Maersk, and A.P. Moller Terminals
Mechanics	M&R employees who are members of the historical unit represented by IAM

M&R	Maintenance and Repair
MTCH	MTC Holdings
PAOH	Ports America Outer Harbor, and Outer Harbor Terminal, LLC
PCMC	Pacific Crane Maintenance Company, Inc., and Pacific Crane Maintenance Company, LP
<i>PCMC I</i>	<i>PCMC/Pac. Crane Maint. Co.</i> , 359 NLRB 1206 (2013)
<i>PCMC II</i>	<i>PCMC/Pac. Crane Maint. Co.</i> , 362 NLRB No. 120 (2015)
<i>PCMC III</i>	<i>Int’l Longshore & Warehouse Union v. NLRB</i> , 890 F.3d 1100 (D.C. Cir. 2018)
PMMC	Pacific Marine Maintenance Company, LLC
Supp. JA	Supplemental Joint Appendix
The Port	Port of Oakland, California
Transbay	Transbay Container Terminal

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of International Longshore & Warehouse Union (“ILWU”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Board

Order against ILWU. International Association of Machinists & Aerospace Workers District Lodge 190, East Bay Automotive Machinists Lodge No. 1546, International Association of Machinists and Aerospace Workers, AFL/CIO-CLC (“IAM”) has intervened on behalf of the Board. The Board’s Decision and Order, reported at 366 NLRB No. 76 (May 2, 2018), is final. The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”), as amended, 29 U.S.C. § 151 et seq., § 160(a). All filings with the Court are timely. This Court has jurisdiction under Section 10(e) and (f) of the Act. *Id.* § 160(e), (f).

STATEMENT OF ISSUES

1. Whether substantial evidence supports the Board’s finding that ILWU violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. § 158(b)(1)(A) and (2), by accepting assistance and recognition as the representative of a unit of mechanics employed by Ports America Outer Harbor (“PAOH”) and maintaining and enforcing the relevant collective-bargaining agreement.
2. Whether the Board acted within its broad discretion in approving a private settlement among IAM, PAOH, and MTC Holdings.
3. Whether the Board acted within its broad discretion in remedying the unfair labor practices listed above.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

This case arises from a dispute between two unions vying to represent a unit of maintenance and repair (“M&R”) employees, also referred to as “mechanics,” in the Port of Oakland, California (“the Port”). The unit in question was historically represented by IAM. In 2005, however, the mechanics’ then-employer, Pacific Marine Maintenance Company, LLC (“PMMC”), ceased operations and was succeeded by a related entity, Pacific Crane Maintenance Company, Inc. (“PCMC”). PCMC offered to rehire the mechanics, but on condition that they be represented by ILWU instead of IAM. In the ensuing litigation, the Board found *inter alia* that PCMC violated the Act by recognizing ILWU by as the unit’s collective-bargaining representative, and that ILWU violated the Act by accepting PCMC’s recognition. *See PCMC/Pac. Crane Maint. Co. (PCMC I)*, 359 NLRB 1206, 1207 (2013), *set aside and incorporated by reference, PCMC/Pac. Crane Maint. Co. (PCMC II)*, 362 NLRB No. 120, 2015 WL 3791632 (2015). This Court recently enforced the Board’s order against the ILWU. *See Int’l Longshore & Warehouse Union v. NLRB (PCMC III)*, 890 F.3d 1100 (D.C. Cir. 2018).¹

¹ In *PCMC III*, PCMC settled all claims so it does not appear in the caption and only the ILWU-related portion of the case was decided by the Court.

This case picks up where the *PCMC* litigation left off. As detailed below, in 2013 PAOH ended PCMC's subcontract, took all M&R operations in-house, and hired most of PCMC's former employees. Thereafter, PAOH recognized ILWU as the unit's collective-bargaining representative, as PCMC had done before, and ILWU accepted that recognition. In the Decision and Order before the Court, the Board found *inter alia* that PAOH was a successor employer to PCMC and that PAOH and ILWU violated the Act by their actions. The Board seeks enforcement of its Order in full.

Although the history of this case is complex, and ILWU's arguments somewhat esoteric, the key issue before the Court is quite narrow. There is no dispute that PAOH recognized ILWU as the mechanics' collective-bargaining representative, or that ILWU accepted PAOH's recognition. Therefore, the main question for the Court is whether the Board reasonably found that PAOH was a successor employer to PCMC. If so, then established law dictates that PAOH was obligated—as PCMC was before it—to recognize and bargain with IAM, not ILWU. Accordingly, ILWU violated the Act by accepting PAOH's recognition as the exclusive representative of employees who, since 2005, have been denied representation by IAM, their prior longstanding union. In other words, if the Court agrees that PAOH was PCMC's successor, then it follows automatically that ILWU violated the Act by accepting recognition from PAOH. The remaining

issues—whether the Board abused its broad discretion in approving the settlement among IAM, PAOH, and MTCH, and in devising the remedy to this case—are ancillary to the successorship question.

I. STATEMENT OF RELEVANT FINDINGS OF FACT

A. Background

The Port leases shipping berths to marine-terminal operators. Beginning in the 1960s, the Port leased berths 20-24 to terminal operator SeaLand. Also starting in the 1960s, SeaLand recognized IAM as the exclusive collective-bargaining representative of a single unit comprised of mechanics employed at berths 20-24 in Oakland and at other SeaLand terminals in Long Beach, California, and Tacoma, Washington. *PCMC I*, 359 NLRB at 1207.

M&R work consists of maintaining and repairing intermodal containers used to transport goods on cargo ships, as well as the various types of equipment and vehicles—such as forklifts, bombcarts, and yard goats—used to move containers around the terminal.² The work is typically divided into departments based on the

² M&R work also includes maintaining and repairing the heavy cranes used to load and unload containers onto and from shipping vessels. That work is generally handled by mechanics in their own department, with separate onsite facilities, and who are often grouped in a separate bargaining unit. *See PCMC I*, 359 NLRB at 1227-28. It is undisputed that crane mechanics are not included in the contested bargaining unit. (JA 1738 n.1, 1740 n.8.) In this brief, therefore, the term “M&R work” refers only to *non*-crane work.

type of containers, equipment, and vehicles being serviced. (JA 1746, 1750 & n.16; JA 10-11, 20-21, 204, 205);³ *see generally* *PCMC I*, 359 NLRB at 1227-28.

While some terminal operators perform M&R work in-house, like SeaLand, others outsource the work to companies like PCMC. During its existence, PCMC was a member of a multiemployer trade organization, the Pacific Maritime Association, and a signatory to that association’s collective-bargaining agreement with ILWU (“the Longshore contract”). By 1999, PCMC performed M&R work at shipping terminals up and down the West Coast, including a significant portion for terminal operator A.P. Moller-Maersk (“Maersk”). *PCMC I*, 359 NLRB at 1207.

B. PCMC Litigation

In 1999, Maersk acquired SeaLand’s assets and operations in Long Beach, Oakland, and Tacoma.⁴ As part of the deal, Maersk agreed to retain IAM-represented employees to perform M&R work at those terminals. Maersk contracted the work to PCMC’s related entity, Pacific Marine Maintenance Company, LLC (“PMMC”), which hired SeaLand’s former employees and adopted

³ The record abbreviations in this brief are explained in the Glossary. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

⁴ Soon after acquiring SeaLand’s assets, Maersk spun off its stevedoring division (which handled loading and unloading cargo from ships) into a new entity named A.P. Moller Terminals. (JA 112.) For simplicity, this brief continues to refer to that entity as Maersk, but in the transcript, it is called Maersk, APM, or APMT.

its contract with IAM. In 2002, IAM and PPMC entered into a successor agreement (“the Machinists contract”) to last until March 31, 2005. (JA 1746; JA 1189-90); *see also PCMC I*, 359 NLRB at 1207.

Over time, Maersk became dissatisfied with PPMC, which it deemed too expensive owing to the labor costs of the Machinists contract. In January 2005, Maersk, PCMC, and PPMC hatched a plan to transfer Maersk’s M&R work from PPMC’s costlier, IAM-represented workforce to PCMC’s less expensive, ILWU-represented employees. *See PCMC I*, 359 NLRB at 1207.

On March 30, 2005, PPMC ceased all operations and permanently laid off its IAM-represented employees in Oakland and Tacoma (hereinafter referred to as “the historical unit”).⁵ The next day, March 31, PCMC took over PPMC’s operations in both locations and hired PPMC’s former mechanics. However, instead of recognizing IAM and applying the Machinists contract, PCMC recognized ILWU and applied the Longshore contract, which included a union-security clause requiring unit employees to join ILWU. (JA 1738, 1746); *see also PCMC I*, 359 NLRB at 1208.

⁵ By this time, PPMC had ceased performing M&R work in Long Beach. *PCMC I*, 359 NLRB at 1207 n.7, 1230.

IAM filed Board charges, which were litigated and resulted in the Board's *PCMC I* decision.⁶ (JA 1738, 1746-47.) As relevant here, the Board found that PMMC and PCMC, a stipulated single employer, violated Section 8(a)(5), (2) and (1) of the Act, 29 U.S.C. § 158(a)(5), (2) and (1), by withdrawing recognition from IAM, extending recognition to ILWU when it did not represent an uncoerced majority of unit employees, and applying the terms of the Longshore contract, including its union-security provisions, to the historical unit. *PCMC I*, 359 NLRB at 1212. The Board also found that ILWU violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. § 158(b)(1)(A) and (2), by accepting recognition as the historical unit's representative and agreeing to apply the Longshore contract and its union-security provisions to unit employees. *Id.*

PCMC, ILWU, and IAM petitioned the Ninth Circuit to review the Board's order in *PCMC I*, and the Board cross-applied for enforcement. *See Int'l Longshore & Warehouse Union v. NLRB*, Nos. 13-72297 et al. (9th Cir.). In the interim, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held that three recess appointments to the Board made in January 2012 were invalid—including two members who were on the panel that

⁶ In August 2007, Pacific Crane Maintenance Company, LP purchased the business and assets of Pacific Crane Maintenance Company, Inc., and continued to operate the business in essentially the same form. *PCMC I*, 359 NLRB at 1207 n.3. For simplicity, this brief refers to both entities as PCMC.

decided *PCMC I*. On June 17, 2015, after reviewing the record *de novo*, a properly constituted Board issued a new decision incorporating *PCMC I* by reference and finding that PCMC and ILWU violated the Act as found therein. *PCMC II*, 2015 WL 3791632, at *1. As relevant here, the Board ordered PCMC to withdraw and withhold all recognition from ILWU and recognize and bargain with IAM upon request. The Board also ordered ILWU to decline recognition as the historical unit's bargaining representative. Finally, the Board ordered PCMC and ILWU to jointly and severally reimburse unit employees for all fees, dues, and other monies they had paid pursuant to the Longshore contract. *Id.* at *6-9.

ILWU and PCMC petitioned this Court to review the Board's order in *PCMC II*, and the Board cross-applied for enforcement against both. During that proceeding, PCMC and IAM settled their dispute, whereupon the Court dismissed PCMC's petition for review and the Board's cross-application for enforcement against PCMC. On May 29, 2018, the Court enforced the Board's order against ILWU.⁷ *PCMC III*, 890 F.3d at 1100.

C. The Board's Findings of Fact in the Instant Case

As stated on p. 8, above, in 2005 PCMC replaced PMMC as Maersk's M&R contractor in Oakland and Tacoma. In the process, the mechanics who comprised

⁷ When referring to the *PCMC* case, this brief generally cites to *PCMC I* because it contains the most detailed facts and the Board's complete reasoning. It is understood, however, that *PCMC II* is the Board's final decision in that case.

the historical, IAM-represented unit were laid off by PPMC and immediately re-hired by PPMC, but under ILWU's representation and applying the Longshore contract. *PCMC I*, 359 NLRB at 1208.

Five years later, on January 1, 2010, PAOH replaced Maersk as the operator of berths 20-24. PAOH renewed PPMC's contract, and unit employees continued performing the same M&R work for PPMC with ILWU as their representative. (JA 1738-39, 1746; JA 12, 73, 1205, Supp. JA 1.)

In the summer of 2010, IAM became aware that PAOH would soon take over operation of berths 25 and 26, which are adjacent to berths 20-24. IAM represented the M&R workforce employed by the outgoing operator, Transbay Container Terminal ("Transbay"), at those two berths. IAM requested to bargain with PAOH over the historical unit and Transbay's employees, but PAOH declined. (JA 1749; JA 9-10, 16, 65-69, 1196-98, 1203.)

On October 1, 2010, PAOH took over operation of berths 25 and 26. (JA 1738, 1746, 1747, 1749; JA 86, 133-34, 1198.) PAOH purchased the vast majority of Transbay's equipment, tore down the fence between berths 24 and 25, and began to operate the expanded area as a fully integrated terminal. (JA 1747, 1749; JA 84-86, 1198.) Concurrently, PAOH renegotiated PPMC's contract to cover berths 20 to 26. (JA 1747, 1749; JA 82, 1209.) PPMC hired 20 former Transbay employees and integrated them into the historical bargaining unit, but

under the Longshore contract. (JA 1746, 1747, 1749; JA 15, 83, 123, 1194.)

Those employees were incorporated in their corresponding departments at PCMC, where they worked alongside with, and performed the same jobs as, other PCMC employees. (JA 1747, 1749; JA 37-38, 60-61, 207-08.) The nature of their work did not change from what they did at Transbay. (JA 1749; JA 122, 207-08.) IAM did not file a new unfair-labor-practice charge at that time. (JA 1746; JA 70.)

On June 24, 2013, the Board issued its decision in *PCMC I*.⁸ On June 28, IAM faxed PAOH a copy of that decision and advised PAOH that, as PCMC's successor, it was required to remedy the violations found therein. IAM also demanded that PAOH recognize and bargain with it as the exclusive collective-bargaining representative of any unit that PAOH had acquired as a successor for PCMC or PMMC. (JA 99, 1199-1200.) PAOH responded by letter, stating that it was not PCMC's successor. (JA 103-04.)

On July 1, 2013, PAOH terminated PCMC's contract and took over performance of all M&R work on berths 20-26, essentially insourcing the work.⁹ (JA 1739, 1747, 1749; JA 17-18, 1219, 1233.) Prior to that date, PAOH did not have any M&R staff. On July 1, PAOH hired 48-52 former PCMC mechanics who were already working on berths 20-26. (JA 1747, 1750 & n.17; JA 54-55, 145,

⁸ See *supra* p. 9.

⁹ PAOH did not take over PCMC's operations in Tacoma. (JA 1750.)

203-04, 1224-25.) On July 13, PAOH hired another 16 former PCMC mechanics who until then worked at another terminal run by a different company. (JA 1750 & n.18; JA 1219-1231.) Under PAOH, management and daily supervision of M&R operations remained largely unchanged. (JA 1739 n.5, 1751; JA 97, 115-16.) PAOH continued PCMC's recognition of ILWU as the mechanics' collective-bargaining representative. (JA 1739, 1747; JA 293 ¶ 9(c).) The shift from PCMC to PAOH did not occasion any reduction in force or interruption of employment for the former PCMC mechanics, and they did not have to submit job applications or interview to work for PAOH. (JA 1750; JA 28, 40, 53-55, 1221-25.) PAOH did not hire any more mechanics until November 2013. (JA 1750 & n.19; JA 96, 1229.)

After PAOH took over M&R operations, unit employees continued to perform the same work, in the same conditions and generally in the same locations as they had for PCMC and PPMC before that. (JA 1750-51; JA 22-25, 26-29, 34, 49-51, 56-58, 61-62, 64, 116, 206, 1203.) The change that the mechanics noticed most was that their coveralls changed from white to orange. (JA 1750; JA 28, 39, 63.) PAOH acquired a variety of tools and vehicles, including forklifts and yard goats, to replace similar equipment owned by PCMC; however, employees used those tools and performed M&R work on the new container-handling equipment in the same way they did for PCMC. (JA 1750-51; JA 33-34, 36, 42-44, 49, 57, 126-

27, 206.) The mechanics did not work on port-side cranes and did not interchange with PAOH's crane mechanics, who worked in separate locations and were also represented by ILWU. (JA 1740, 1750; JA 13-14, 30-32, 52, 124-25, 192-93, 1203, 1232.)

On July 12, 2013, IAM requested by letter that PAOH recognize and bargain with it as the exclusive collective-bargaining representative of the historical unit. (JA 1739; JA 198-99, 1201-02.) However, PAOH continued to recognize ILWU and to apply the Longshore contract to its M&R employees. (JA 1739, 1747.) In February 2016, PAOH ceased operations and petitioned for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101, et seq.¹⁰ (JA 1741 n.11, 1747; JA 246-47.)

II. PROCEDURAL HISTORY

On July 30, 2013, IAM filed a Board charge, subsequently amended, alleging in relevant part that PAOH unlawfully refused to recognize and bargain with IAM as the historical unit's exclusive collective-bargaining representative. On December 6, IAM filed a second charge alleging, in relevant part, that ILWU unlawfully accepted PAOH's recognition as the unit's exclusive collective-bargaining representative. Based on those charges, the Board's General Counsel

¹⁰ At the time of its bankruptcy, PAOH had been renamed Outer Harbor Terminal, LLC. (JA 1741 n.11.) For simplicity, this brief continues to refer to that entity as PAOH.

issued a complaint against PAOH and ILWU on December 31, 2014. (JA 1747 n.9; JA 248-263.)

On October 19, 2015, the parties began a hearing before Administrative Law Judge Mary Miller Cracraft. In the course of the hearing, the General Counsel obtained the judge's permission to issue an amended consolidated complaint (JA 267-89), which included an alternative theory of liability alleging that PAOH was a single employer with another terminal-management company, MTC Holdings ("MTCH"). In August 2016, during a break in the proceedings, PAOH, MTCH, and IAM signed a private settlement resolving the claims among them, which was approved by the judge.¹¹ (JA 1746 n.4; JA 381-99.) Thereafter, the General Counsel rested her case. (JA 217.)

On September 9, 2016, the General Counsel issued a Second Amended Consolidated Complaint ("the Complaint"), which is the operative document in this case. (JA 417-26.) The Complaint alleges that PAOH violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by failing and refusing to recognize and bargain with IAM, and also violated Section 8(a)(2) and (1) of the Act, *id.* § 158(a)(2) and (1), by rendering unlawful assistance and support to

¹¹ Additional facts specific to the settlement are set forth in the argument portion of this brief, under section II.

ILWU. The Complaint further alleged that ILWU violated Section 8(b)(1)(A) and (2) of the Act, *id.* § 158(b)(1)(A) and (2), by accepting PAOH's recognition.

After the hearing resumed, ILWU began its case-in-chief and sought to introduce evidence that the historical unit was no longer appropriate because it had been accreted over time into ILWU's coast-wide unit. (JA 223-25.) However, the judge found that any accretion that might have occurred was the result of the unfair labor practices in *PCMC I*, namely, PCMC's unlawful recognition of ILWU in 2005, and ILWU's unlawful acceptance of the same. The judge reasoned that ILWU could not rely on the effects of those prior, unremedied unfair labor practices to defend against the allegations in this case, and accordingly precluded ILWU from arguing or presenting evidence to support its accretion defense. (JA 1740 n.9, 1751; JA 227-30, 239-40.) For the same reason, the judge also precluded evidence or argument regarding whether ILWU had uncoerced majority support from unit employees, and whether PAOH had a good-faith doubt as to IAM's continuing majority status in the unit. (JA 1740 n.10, 1751; JA 231-36, 240.) ILWU submitted an offer of proof comprising additional exhibits in support of those defenses, which the judge rejected based on her earlier rulings. (JA 240-44.)

On December 1, 2016, the judge issued a decision finding that PAOH and ILWU violated the Act as alleged. (JA 1746-56.) First, the judge found that

PCMC continued to unlawfully recognize ILWU as the historical unit's collective-bargaining representative after the events of *PCMC I*. (JA 1747.) Second, the judge found that PCMC continued its unlawful conduct after October 1, 2010, when PAOH replaced Transbay as operator for berths 25 and 26. The judge found that Transbay's employees were integrated into the historical unit, that the unit remained appropriate for collective-bargaining purposes, and that PCMC continued to unlawfully recognize ILWU as its representative. (JA 1747-49.) Third, the judge found (JA 1749-51) that once PAOH took all of the M&R work in-house on July 1, 2013, it became a successor to PCMC and was therefore obligated to recognize and bargain with IAM. *See NLRB v. Burns Sec. Servs.*, 406 U.S. 272, 280-81 (1972) (successor employer inherits predecessor's duty to recognize and bargain with incumbent union). Fourth, the judge found that PAOH violated the Act by failing and refusing to recognize IAM as the historical unit's exclusive collective-bargaining representative, by recognizing ILWU as the unit's representative, and by applying the Longshore contract and its union-security provisions to unit employees. (JA 1752.) Finally, the judge found that ILWU violated the Act by accepting assistance and recognition from PAOH as the historical unit's exclusive collective-bargaining representative, and by applying the Longshore contract and its union-security provisions to unit employees. (JA 1752.) All parties but PAOH filed exceptions to the judge's decision.

III. THE BOARD'S CONCLUSIONS AND ORDER

On May 2, 2018, the Board (Members Pearce, Kaplan and Emanuel) issued a Decision and Order finding, in agreement with the judge, that PAOH violated the Act as alleged. (JA 1738-40.) The Board found that PAOH qualified as a successor employer under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), because it continued PCMC's business in substantially unchanged form, it began operations with an M&R workforce consisting entirely of former PCMC employees, and the unit remained appropriate for collective bargaining under PAOH's operations. (JA 1739-40.) As a remedy for its unlawful actions, the Board ordered PAOH, among other things, to mail copies of a signed remedial notice to current and former unit employees, and to provide copies of that notice to ILWU for posting at its facilities. In addition, and only in the event that PAOH were to resume operations, the Board ordered it to recognize and bargain with IAM as the unit's exclusive collective-bargaining representative. (JA 1743.)

Separately, the Board affirmed the judge's finding that ILWU violated Section 8(b)(1)(A) and (2) of the Act by accepting PAOH's assistance and recognition, and by applying the Longshore contract and its union-security provisions to unit employees. (JA 1740.) The Board also affirmed the judge's rulings precluding ILWU from arguing or presenting evidence that the historical unit had been accreted into ILWU's coast-wide unit, that ILWU had uncoerced

majority support from unit employees, or that PAOH had a good-faith doubt as to IAM's continuing majority status. (JA 1740 nn.9-10.)

The Board's Order requires ILWU to cease and desist from the unfair labor practices found and, 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, 29 U.S.C. § 157. (JA 1743.) The Order affirmatively requires ILWU to decline recognition as the unit's exclusive collective-bargaining representative and reimburse all present and former unit employees for all initiation fees, dues, and other monies paid or withheld pursuant to the Longshore contract, with interest. (JA 1743.) The Order further requires ILWU to post paper copies of a remedial notice, distribute that notice electronically to its members (if ILWU customarily communicates with them by such means), and to post the notices provided by PAOH. (JA 1743-44.)

SUMMARY OF ARGUMENT

This case is a continuation of the *PCMC* litigation, which culminated in this Court's *PCMC III* decision enforcing the Board's order against ILWU. The only significant development since the facts underlying that case has been PAOH's terminating PCMC's contract and taking all M&R operations in-house. Therefore, the main issue presented here is whether substantial evidence supports the Board's finding that PAOH was a successor employer to PCMC and was therefore

obligated (like PCMC had been) to recognize and bargain with IAM instead of ILWU. If the Court resolves that question in the Board's favor, then the Court must affirm the Board's finding that ILWU violated Section 8(b)(1)(A) and (2) of the Act by accepting PAOH's recognition as the historical unit's representative and by applying the Longshore contract to unit employees.

Under Board law, successorship exists if the new employer hires most of its workforce from its predecessor and continues business operations in substantially the same way, and if the bargaining unit remains appropriate despite the change. ILWU does not seriously challenge the Board's findings on the first two factors, but disputes the historical unit's continued appropriateness. However, the judge performed a detailed review of the historical unit's appropriateness over time, beginning right after the events of *PCMC I*, through the absorption of Transbay's employees, and up until PAOH took M&R operations in-house. That analysis, which is supported by substantial evidence, demonstrates that through it all, unit employees continued to perform the same M&R work, using the same tools, under the same working conditions and generally the same immediate supervisory structure, and did so without interchange with other ILWU-represented employees.

ILWU claims that, since the events of *PCMC I*, the historical unit has accreted, *i.e.* merged, into ILWU's coast-wide bargaining unit, such that it is no longer appropriate on its own and thereby negates PAOH's successor status and

bargaining obligation to IAM. If this accretion argument gives the Court a sense of déjà vu, that is because it rejected the very same claim in *PCMC III*. Indeed, ILWU seems bent on relitigating that case, to the point that it does not even mention *PCMC III* in its opening brief. Instead, ignoring the history of the case, ILWU claims that the Board abused its discretion by precluding its accretion argument and its claims that ILWU had uncoerced majority support from unit employees, and that PAOH had a good-faith doubt as to IAM's continuing majority status. However, the Board's decision is based on sound precedent, which dictates that employers (and unions) cannot benefit from prior, unremedied unfair labor practices when challenging the appropriateness of a bargaining unit, or the majority status of a union.

ILWU's remaining claims—regarding the settlement among IAM, PAOH, and MTCH, and the remedies to this case—are equally unmeritorious. There is no dispute that the Board followed the proper procedure in approving the private settlement, and ILWU has offered no evidence that the Board abused its broad discretion in so doing. ILWU also fails to show that the Board abused its broad discretion in fashioning the remedy to this case. By ordering ILWU to reimburse all fees and dues paid by unit employees, the Board corrected the injustice done to employees who were forced to support a union they did not freely choose to join. Moreover, the Board's compliance mechanism can ensure that ILWU does not

compensate employees who have already been made whole by the settlement. Finally, the Board applied this Court’s test in finding that PAOH should be required to bargain with IAM in case it resumes operations, and the fact that PAOH has filed for bankruptcy does not moot or otherwise render the Board’s Order unnecessary.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT ILWU VIOLATED THE ACT BY ACCEPTING PAOH’S RECOGNITION AND ASSISTANCE, AND BY APPLYING THE LONGSHORE CONTRACT, INCLUDING ITS UNION-SECURITY PROVISIONS, TO UNIT EMPLOYEES

A. Applicable Principles

1. Standard of Review

This Court’s “role in reviewing an NLRB decision is limited.” *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). The Court must treat the Board’s factual findings as conclusive if they are “supported by substantial evidence on the record considered as a whole.” *Id.* (quoting 29 U.S.C. § 160(e)). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). Under that standard, therefore, “the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary.” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011);

see also Universal Camera, 340 U.S. at 488 (reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it *de novo*”). Finally, the Court defers to the Board’s interpretation of the Act so long as it is reasonably defensible. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984); *accord Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002).

2. A union cannot lawfully accept recognition and assistance from an employer or apply a contractual union-security provision when it does not represent the majority of bargaining-unit employees

Section 7 of the Act guarantees employees “the right . . . to form, join or assist labor organizations [and] to bargain collectively through representatives of their own choosing” 29 U.S.C. § 157. Section 9(a) of the Act provides that a union “designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes” becomes that unit’s exclusive collective-bargaining representative. *Id.* § 159(a). Together, Sections 7 and 9(a) guarantee employees freedom of choice and majority rule in their selection of a bargaining-unit representative. *Int’l Ladies Garment Workers’ Union v. NLRB*, 366 U.S. 731, 737 (1961).

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization to “restrain or coerce employees” in the exercise of their rights guaranteed by Section 7 of the Act, including the right to engage in and refrain

from union activity. 29 U.S.C. § 158(b)(1)(A). Accordingly, a union violates Section 8(b)(1)(A) if it accepts exclusive recognition from an employer when it does not have support from a majority of unit employees. *Garment Workers*, 366 U.S. at 733, 738; *accord PCMC III*, 890 F.3d at 1108.

Section 8(b)(2) of the Act makes it an unfair labor practice for a labor organization to “cause or attempt to cause an employer to discriminate against an employee” 29 U.S.C. § 158(b)(2). When an employer and a non-majority union include in their collective-bargaining agreement a union-security clause requiring employees to become or remain union members, the union violates Section 8(b)(2). *Machinists Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 412-14 (1960); *accord PCMC III*, 890 F.3d at 1108.

3. A successor employer cannot lawfully refuse to recognize and bargain with a duly certified union and cannot recognize and bargain with a union that does not represent the majority of unit employees

As stated above, the Act guarantees employees the right to freely choose their bargaining representative. To preserve that right, the collective-bargaining process must remain “free . . . from all taint of an employer’s compulsion, domination or influence.” *Int’l Ass’n of Machinists, Lodge 35 v. NLRB*, 311 U.S. 72, 80 (1940). Accordingly, the Act makes it an unfair labor practice for an employer to refuse to recognize and bargain with the duly certified union of its employees. 29 U.S.C. § 158(a)(5). Likewise, it is unlawful for an employer to

support a union financially or otherwise, *id.* § 158(a)(2), including by recognizing a union that does not represent the majority of its employees, *Garment Workers*, 366 U.S. at 737-38.

Within certain limits, the duty to recognize and bargain also applies to a new employer taking over a unionized business. *Burns*, 406 U.S. at 278-79; *accord Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1082 (D.C. Cir. 2003). A successor employer will inherit its predecessor's obligation to recognize and bargain with an existing union if: (1) it hires the majority of its workforce from the predecessor's union-represented employees; (2) there is substantial continuity between its business and that of its predecessor; and (3) the bargaining unit remains appropriate under the new management. *Burns*, 406 U.S. at 280-81; *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41, 43-47 (1987); *accord Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1060 (D.C. Cir. 2009). However, the successor employer may still lawfully refuse to recognize and bargain if it shows, as an affirmative defense, that it harbors a good-faith doubt about the union's continuing majority support among employees. *Burns*, 406 U.S. at 278; *accord Cmty. Hosps.*, 335 F.3d at 1082. This Court will affirm the Board's successorship findings if they are supported by substantial evidence. *S. Power Co. v. NLRB*, 664 F.3d 946, 950 (D.C. Cir. 2012).

B. Substantial Evidence Supports the Board’s Finding that PAOH Was a Successor Employer that Inherited PCMC’s Obligation to Recognize and Bargain with IAM

1. PAOH hired the majority of its M&R workforce from PCMC

The Board found, and ILWU does not dispute, that PAOH did not employ any mechanic prior to July 1, 2013. (JA 1747, 1750.) Nor is there any dispute that, on that day when PAOH took over M&R operations, its entire M&R staff consisted of former PCMC mechanics. (JA 1739, 1747, 1750.) Accordingly, the first factor of the *Burns* analysis is satisfied.

2. PAOH substantially continued PCMC’s business

To determine whether substantial continuity exists between two businesses, the Board considers whether the new company has “acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor’s business operations.” *Dean Transp.*, 551 F.3d at 1060 (quoting *Fall River*, 482 U.S. at 43). More specifically, the Board examines:

[W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

Id. This inquiry is highly fact-specific, based on the totality of the circumstances, and no single factor is dispositive. *United Food & Commercial Workers v. NLRB*, 768 F.2d 1463, 1470 (D.C. Cir. 1985). Moreover, the Board conducts its review

“from the perspective of the employees involved.” *Cnty. Hosps.*, 335 F.3d at 1083 (citing *Fall River*, 482 U.S. at 43).

Substantial evidence supports the Board’s finding that there was substantial continuity between PAOH and PCMC. First, ILWU does not dispute that PAOH continued to perform the same M&R work previously done by PCMC. As far as unit employees were concerned, therefore, PAOH’s business was essentially identical to PCMC’s. (JA 1739, 1750.)

Second, ILWU does not contest that, from the mechanics’ point of view, their jobs were essentially unaltered after PAOH replaced PCMC. (JA 1739, 1750-51.) Mechanics John Luis Costa and Bobby Payne testified without contradiction that the only change after PAOH replaced PCMC was the color of their coveralls. (JA 1750; JA 28, 39, 63.) Otherwise, the mechanics continued to perform the same M&R work, on the same kind of equipment, using the same type of tools, in the same conditions, and with largely the same supervision as they did under PCMC. (JA 1739 n.5, 1750-51; JA 26-29, 34, 49-51, 56-58, 61-62, 64, 97, 115-16.) Costa’s and Payne’s testimony was corroborated by witnesses for PAOH. (JA 1751; JA 116, 206.)

Third, the evidence overwhelmingly supports the Board’s finding that PAOH’s business and production processes related to M&R work were almost identical to PCMC’s, and that unit employees would view their job situations as

“essentially unaltered.” (JA 1739, 1750 (citations omitted).) The record plainly shows that, between 2005 and 2013, the nature of M&R work remained the same, *i.e.*, servicing and repairing containers, refrigeration systems, and the equipment and vehicles used to move containers around the terminal. Contrary to ILWU’s claim (Br. 30), the fact that Maersk, who had been PCMC’s main client, accounted for only a fraction of PAOH’s business is irrelevant to the Board’s finding. Indeed, as noted by the Board (JA 1740), a mere change in customer identity does not preclude finding successorship when employees continue to perform the same work, in the same location, and with the same equipment. *See, e.g., Mondovi Foods Corp.*, 235 NLRB 1080, 1081-82 (1978) (finding *Burns* successorship where employer resumed predecessor’s business operation in same location and facility, employed majority of predecessor’s employees, and made same product using same equipment, even though successor had different customers and suppliers). Also contrary to ILWU’s assertions (Br. 30), there is no evidence that M&R work differs depending on the client or container type, except in minor ways. ILWU relies on Costa’s testimony (Br. 30), but he clearly stated that, while there might be “small differences” from one container type to another, “the basic device itself is the same.” (JA 35.)¹² And the management witness cited by ILWU, when asked for examples of how M&R work differs from one client to

¹² Costa’s testimony was corroborated by Payne. (JA 58-59.)

another, offered the case of a client who simply wanted a common maintenance check done more frequently than others. (JA 194-96.) Thus, even the testimony on which ILWU relies does not support its claim.

In sum, substantial evidence supports the Board's finding that PAOH was a *Burns* successor to PCMC, meaning that PAOH inherited PCMC's obligation to recognize and bargain with IAM. ILWU's rejoinder is that, even if PAOH was a *Burns* successor, the historical unit was no longer appropriate by the time PAOH ended PCMC's contract and took all M&R operations in-house. As shown in the next section, there is no merit to that argument.

3. The historical unit found appropriate in *PCMC I* remained appropriate even after PAOH's takeover of M&R operations

The Board found that the historical unit remained appropriate after PCMC expanded its M&R operations to berths 25-26, and after PAOH took over all M&R operations from PCMC. (JA 1740, 1747-50.) The Act vests in the Board the authority to determine "the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b); *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996). The Board "need only select *an* appropriate unit, not *the most* appropriate unit." *Dean Transp.*, 551 F.3d at 1063 (quotation marks and citation omitted). Given the fact-intensive nature of this inquiry, the Board has "broad discretion" in making bargaining-unit determinations and its findings are "entitled to wide deference." *United Food & Commercial Workers v. NLRB*, 519

F.3d 490, 494 (D.C. Cir. 2008). Accordingly, the party challenging a historical unit bears “a heavy evidentiary burden” to show that it is no longer appropriate. *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996). ILWU has not met that burden here.

Substantial evidence supports the Board’s first finding, *i.e.*, that the historical unit remained appropriate after October 1, 2010, when PCMC hired the 20 former Transbay mechanics working on berths 25-26. (JA 1747-49.) Those employees were part of the same job classification as their PCMC peers.¹³ As the Board explained, “[i]t is axiomatic that when an established bargaining unit expressly encompasses employees in a specific classification, new employees hired into that classification are included in the unit.” (JA 1748 (quoting *Gourmet Award Foods, N.E.*, 336 NLRB 872, 873-74 (2001)).) Alternately, the Board found, the same result obtains under an accretion analysis. (JA 1748-49.) Accretion involves “the addition of a group of employees to an existing union-represented bargaining unit without a Board election.” *Dean Transp.*, 551 F.3d at 1067; *NV Energy, Inc.*, 362 NLRB No. 5, 2015 WL 413894, at *4 (2015) (accretion occurs when employees added to a historical unit “have little or no separate group identity [and] share an overwhelming community of interest with

¹³ Compare JA 1190 (“Work Jurisdiction” section of Machinists contract), with JA 1192 (“Working Jurisdiction and Union Security” section of the contract between IAM and Transbay).

the preexisting unit” (quotation marks and citations omitted)). The Board found, and ILWU does not dispute, that the former Transbay mechanics and their PCMC colleagues worked side-by-side, with identical skills and functions, in integrated operations, using the same type of equipment, and under the same supervision and working conditions. (JA 1749.) Nor does ILWU dispute that management, labor relations, and administrative control were all centralized. (JA 1749.) Thus, the historical unit remained appropriate after it expanded to encompass berths 20-26.

Substantial evidence also supports the Board’s finding that the historical bargaining unit remained appropriate as of July 1, 2013, when PAOH took over M&R operations as it insourced that work from PCMC.¹⁴ (JA 1740, 1749-50.) It is uncontroverted that under PAOH, unit employees continued to perform the same M&R work, using the same type of tools, under the same working conditions, and with their own immediate supervisory structure, as they had under PCMC. (JA 1739, 1750-51.) Finally, ILWU does not dispute the Board’s finding (JA 1740) that, because unit employees continued to work in different locations than, and without interchange with, ILWU’s crane mechanics, they remained a

¹⁴ ILWU does not dispute the Board’s finding (JA 1750) that the unit was not rendered inappropriate by the fact that PAOH did not take over PCMC’s operations in Tacoma. *See Bronx Health Plan*, 326 NLRB 810, 812 (1998) (obligation to bargain remains if successor employer acquires only a small portion of a larger union-represented operation, so long as the new unit remains separate and appropriate within successor’s operations, and represented employees form a majority), *enforced*, 203 F.3d 51 (D.C. Cir. 1999).

separate and distinct group under PAOH's operations. *Cf. Bronx Health Plan*, 326 NLRB 810, 812 (1998) (unit found appropriate whose employees were physically separate from, could not interchange with, and performed different functions than employees in larger unit), *enforced*, 203 F.3d 51 (D.C. Cir. 1999).

ILWU does not challenge the Board's unit-appropriateness analysis except to the extent the Board rejected ILWU's defenses and excluded its supporting evidence. Underlying those defenses is ILWU's notion that the events of *PCMC I*—PCMC's unlawful recognition of ILWU as unit representative and ILWU's unlawful acceptance thereof—are irrelevant to determining whether the historical unit remained appropriate when PAOH took over in July 2013. That predicate collapses, however, because any operational change that could affect the unit's appropriateness as of 2013 was the direct result of those prior violations. Indeed, both the Board and this Court have held that changes resulting from unremedied unfair labor practices cannot serve to negate the continued appropriateness of a bargaining unit. Thus, as shown next, the Board properly rejected ILWU's arguments and precluded its supporting evidence.

4. The Board did not abuse its discretion by precluding ILWU from presenting evidence and making arguments based on the unremedied unfair labor practices of *PCMC I*

During the hearing, the judge ruled that ILWU could not argue or present evidence that the historical unit had accreted into ILWU's coast-wide unit, that

ILWU had uncoerced majority support from unit employees, or that PAOH had a good-faith doubt as to IAM's continuing majority status. The judge reasoned that ILWU could not rely on the effects of the prior, unremedied unfair labor practices of *PCMC I* to defend against the allegations of this case. (JA 227-36, 242.) On review, the Board affirmed the judge's rulings. (JA 1740 nn.9-10.) ILWU contends that those rulings violated its due-process rights and that its proffered evidence, if taken into account, would compel a different ruling in this case. (Br. 21-34.) This Court reviews the Board's evidentiary rulings for abuse of discretion. *Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1273 (D.C. Cir. 2012). As shown below, ILWU's evidence and arguments were irrelevant to the analysis as a matter of law where its claimed facts—accretion, ILWU's majority support, PAOH's good faith doubt about IAM's majority status—all were the direct result of unremedied unfair labor practices. Accordingly, it was not error for the Board to exclude them.

a. The Board properly excluded evidence and arguments related to ILWU's accretion defense

ILWU claims (Br. 26-30) that the judge improperly excluded evidence and arguments that would have shown that, when PAOH took over M&R operations, the historical bargaining unit was no longer appropriate because it had accreted into ILWU's coast-wide unit. (JA 1740 n.9; JA 227-28, 229, 242.) The Board and this Court already rejected ILWU's argument in the *PCMC* litigation because it is

entirely built on the unremedied unfair labor practices found there. *See PCMC I*, 359 NLRB at 1211-12; *PCMC III*, 890 F.3d at 1111-12. ILWU fares no better reprising it here.

As noted above, accretion will not be found unless “the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted.” *E.I. Du Pont De Nemours, Inc.*, 341 NLRB 607, 608 (2004); *accord Dean Transp.*, 551 F.3d at 1067. The Board applies the accretion doctrine restrictively, as it effectively strips employees of their right to decide whether to be represented by a union. *Dean Transp.*, 551 F.3d at 1067. For that reason, when considering whether a bargaining unit retains its distinct identity, the Board’s established practice—as approved by this Court—is to ignore the effects of any unlawful unilateral changes made by the employer to the unit’s terms and conditions of employment. *See Dodge of Naperville, Inc.*, 357 NLRB 2252, 2253 (2012), *enforced*, 796 F.3d 31, 39 (D.C. Cir. 2015). Indeed, “[t]o hold otherwise would allow [the employer] to benefit from its own unlawful conduct.” *PCMC III*, 890 F.3d at 1111 (second alteration in original) (quotation marks and citation omitted). Therefore, in verifying whether an established bargaining unit retains its distinct identity after being joined to another, the Board’s benchmark is the situation that existed before the unfair labor practices occurred. *See id.* at 1112.

In *PCMC I*, the Board found that after PCMC took over PMMC's operations in 2005, "unit employees generally continued to perform the same work at the same location, with the same tools and equipment as they had before the merger, working under separate immediate supervision from the ILWU-represented employees." 359 NLRB at 1211. Indeed, the Board found, "the only significant changes" to unit employees' terms and conditions of employment resulted from PCMC's unlawfully recognizing ILWU in lieu of IAM and applying the Longshore contract to the historical unit. *Id.* Accordingly, and with this Court's approval, the Board held that PCMC could not rely on those unlawful acts to show that the historical unit had lawfully accreted into ILWU's coast-wide unit. *Id.*; *PCMC III*, 890 F.3d at 1112.

This case is no different. There is no question that, after the Board decided *PCMC I*, PCMC and its successor PAOH continued to unlawfully recognize ILWU as the historical unit's representative, and that ILWU continued to unlawfully accept their recognition and assistance. Given those uncontroverted facts, ILWU is barred from relying on changes to the bargaining unit that resulted from those prior unlawful actions in order to challenge the unit's continued appropriateness. *See Comar, Inc.*, 339 NLRB 903, 911 (2003) (changes to bargaining unit "can be accorded little weight in determining whether the unit remained appropriate" where employer failed to bargain prior to their implementation); *accord PCMC III*,

890 F.3d at 1112 (refusing to consider, as evidence of accretion, events after unit employees were unlawfully laid off by PPMC and rehired by PCMC under Longshore contract). Simply put, ILWU’s arguments and supporting evidence would not warrant reversing the Board’s finding of appropriateness (JA 1740 n.9) even if admitted; therefore, the Board did not abuse its discretion by precluding them altogether.¹⁵

ILWU does not dispute the Board’s rationale that the effects of past unfair labor practices should not factor into the accretion analysis. Instead, it seemingly tries to relitigate *PCMC I*, citing to the judge’s accretion findings in that case—which run contrary to the Board’s and this Court’s—and arguing that the evidence on which the judge relied “only continued and further solidified [for] *another eight years.*” (Br. 27.) Thus, ILWU maintains that the historical unit has been merged into its coast-wide unit and has lost its separate identity (Br. 29-30) while completely ignoring this Court’s *PCMC III* decision. Instead, ILWU cites a series of inapposite cases (Br. 27-29), none of which involves unlawful conduct by a predecessor employer negating the continued appropriateness of a bargaining

¹⁵ Moreover, the Board noted that, despite excluding ILWU’s arguments and evidence, the judge considered them in post-hearing briefing but nevertheless rejected them. (JA 1740 n.9.) Indeed, ILWU does not dispute the Board’s findings that unit employees continued to perform the same M&R work under PAOH, using the same type of tools, under the same working conditions, or that they kept their own immediate supervisors and had no interchange with other employees. (JA 1740 & n.9, 1750-51.)

unit.¹⁶ In essence, ILWU asks the Court to pretend that the changes incurred by the unit from 2005 until 2013 were not entirely predicated on its unlawful recognition, first by PCMC and then by PAOH. (Br. 31-32.) Because ILWU could not rely on those changes for its accretion defense, the Board did not abuse its discretion in excluding ILWU's evidence and arguments.

b. The Board properly excluded evidence and arguments about ILWU's majority support within the unit and PAOH's good-faith doubt about IAM's continuing majority status

ILWU disputes the judge's decision to preclude evidence and argument regarding whether ILWU commanded majority support in the unit, and whether PAOH harbored a good-faith doubt about IAM's continuing majority status. (JA 1740 n.10, 1751; JA 231-36, 240.) The Board rejected those arguments on two grounds, neither of which constitutes an abuse of discretion.

First, the Board explained that ILWU acquired the status of bargaining-unit representative through the unremedied unfair labor practices in *PCMC I*, namely PCMC's unlawful recognition of ILWU, ILWU's unlawful acceptance of PCMC's recognition and assistance, and their joint application of the Longshore contract, including its union-security clause, to unit employees. (JA 1740 n.10, 1751.)

¹⁶ See *Deferiet Paper Co. v. NLRB*, 235 F.3d 581, 581-82 (D.C. Cir. 2000); *Trident Seafoods*, 101 F.3d at 112-13; *Dattco Inc.*, 338 NLRB 49, 49-51 (2002); *P.S. Elliott Servs.*, 300 NLRB 1161, 1161-62 (1990); *Indianapolis Mack Sales & Serv., Inc.*, 288 NLRB 1123, 1124 (1988).

ILWU further maintained that status when PAOH continued to unlawfully recognize ILWU instead of IAM. Because Board law bars employers (and unions) from reaping benefits from their own unremedied unfair labor practices, the Board did not abuse its discretion by rejecting evidence related to ILWU's alleged majority status (or IAM's alleged lack thereof). *Cf. Dodge of Naperville*, 357 NLRB at 2253; *PCMC III*, 890 F.3d at 1111.

Alternately, the Board reasonably found that neither claim could succeed on the merits. As pertains to its majority-support claim, the crux of ILWU's argument is that most of the mechanics who comprised the bargaining unit in July 2013 joined it as members of ILWU. (Br. 32-33.) Simply put, ILWU's numbers are irrelevant. As the Board explained, the determination of majority support turns on "whether a majority of unit employees wish to be represented by a particular union, not on whether a majority of them are members of that union." (JA 1740 n.10 (citing *Trans-Lux Midwest Corp.*, 335 NLRB 230, 232 (2001), *enforced*, 53 F. App'x 571 (D.C. Cir. 2002) (per curiam)).) Thus—and setting aside the fact that, since 2005, ILWU and PCMC had unlawfully combined to oust IAM and require that anyone seeking to join the historical unit be a member of ILWU—the mere fact that a majority of unit employees were ILWU members when PAOH came along is no reflection of employee *choice* between the two unions.

ILWU fares no better arguing that PAOH harbored a good-faith doubt about IAM's continuing majority status when it took over M&R operations. (Br. 34-35.) It is settled law that "[a]n employer cannot use the good-faith doubt defense to reap benefit from its own unfair labor practices, or from the unfair practices of its predecessor." *Proxy Commc'ns of Manhattan, Inc. v. NLRB*, 873 F.2d 552, 554 (2d Cir. 1989) (per curiam) (citations omitted), *enforcing* 290 NLRB 540 (1988). In *Proxy Communications*, the successor knew when it acquired the predecessor's business that the predecessor had committed unfair labor practices aimed at disaffecting employees from their union, and which remained unremedied. 290 NLRB at 540. The Board found, and the Second Circuit agreed, that in those circumstances the successor could not rely on the effects of its predecessor's unlawful conduct to question the union's majority status. *Id.* at 542.

In this case, it is uncontroverted that PAOH received notice of *PCMC I* before it took over M&R operations, and at the very latest on June 28, 2013, when IAM faxed a letter with a copy of the decision to PAOH's then-president, Jay Bowden.¹⁷ (JA 99, 104, 1199-1200.) There is no dispute either that PAOH persisted in refusing to recognize and bargain with IAM because PAOH believed

¹⁷ At least 2 management witnesses also testified that the *PCMC I* litigation was a frequent topic of discussion on the harbor. (JA 113-15, 127-28, 209-11.)

that it was not a successor to PCMC.¹⁸ *PCMC I* found, *inter alia*, that PCMC violated the Act by recognizing ILWU instead of IAM and applying the Longshore contract “to the unit employees at a time when the ILWU did not represent an unassisted and uncoerced majority of the employees in the unit.” 359 NLRB at 1212. Therefore, as a *Burns* successor, PAOH was barred from taking advantage of PCMC’s unremedied unfair labor practices to dispute IAM’s majority status, especially since PAOH knew of those unremedied violations from the Board’s adverse decision in *PCMC I. Proxy Commc’ns*, 290 NLRB at 542; *see also Mediterranean Diner, Inc.*, 279 NLRB 538, 538-39 (1986) (holding that any challenge by successor to union’s majority status would be “fatally tainted” until predecessor’s unfair labor practices are remedied); *Silver Spur Casino*, 270 NLRB 1067, 1074 (1984) (“An employer with knowledge of wrongdoing which stands as the principal reason for doubting majority can scarcely claim the doubt to have arisen in good faith.”).

ILWU also misses the mark in arguing that PAOH is being “held responsible” for PCMC’s unfair labor practices, or that the Board “attributed” PCMC’s unlawful conduct to PAOH. (Br. 36-37.) First, any liability that PCMC acquired from the *PCMC* litigation was resolved by its settlement with IAM.

¹⁸ Bowden testified that, after discussion with PAOH’s attorneys, he sent IAM a response to the effect that PAOH disagreed with the notion that it was a successor to PCMC. (JA 100-02.)

Second, the Board's only findings in the instant case were that PAOH was a *Burns* successor to PCMC, and that PAOH violated its successor duty to recognize and bargain with IAM. In other words, the Board did not hold PAOH responsible for remedying PCMC's unfair labor practices; the Board simply found that, as a *Burns* successor, PAOH could not defend its unlawful act of failing to recognize IAM by relying on the unresolved effects of its predecessor's unfair labor practices.¹⁹

Finally, ILWU overlooks important context in suggesting that it was impossible for PAOH to know IAM was the majority union in July 2013 because the Board's *PCMC II* decision issued only in June 2015. (Br. 25-26.) As noted above, PAOH received notice of *PCMC I* on June 28, 2013 at the latest, before it formally took over M&R operations. Moreover, ILWU's arguments cannot conceal the fact that, even if PAOH was comparatively new to the scene, ILWU itself had been involved since 2005, and was well aware of the litigation's progress. Notably, ILWU knew that, because IAM and the General Counsel had filed exceptions to the judge's decision in *PCMC I*, the Board could eventually overturn the judge's ruling, as happened in June 2013.

¹⁹ ILWU is correct in one regard (Br. 37), which is that this case is not akin to *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 176-80 (1973) (holding that Board may order bona fide purchaser, who acquires business with knowledge of unremedied unfair labor practices perpetrated by its predecessor, to remedy those unlawful acts even if it did not commit them). Here, PAOH is held liable for its own unlawful acts, not those of PCMC.

In these circumstances, PAOH and ILWU acted at their peril in proceeding with their relationship on the assumption that, in this complex litigation, the Board would ultimately find that PAOH was not a successor to PCMC. While PAOH may have faced a dilemma in choosing between the two unions, the dispositive issue from the start of this case has been the question of successorship, and that finding does not turn on whether either PAOH or ILWU had bad motive or intent. Here, the record and relevant law clearly establish that PAOH was a successor to PCMC; therefore, and on that basis alone, PAOH was required to recognize IAM, not ILWU.

II. THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN APPROVING THE SETTLEMENT AMONG IAM, PAOH, AND MTCH

Since its creation, the Board has maintained a policy of encouraging the peaceful, nonlitigious resolution of disputes. *See generally Wallace Corp. v. NLRB*, 323 U.S. 248, 253-54 & n.8 (1944); *see also NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 128 (1987) (“[S]ettlements constitute the ‘lifeblood’ of the administrative process, especially in labor relations.” (footnote omitted)). At the same time, it is self-evident that settlements are the product of compromise, in which parties voluntarily forgo certain remedies rather than face the risk of litigation. *Indep. Stave Co.*, 287 NLRB 740, 743 (1987). Accordingly, the Board will not require a settlement to

fully, or even substantially, remedy the unfair labor practices it purports to resolve. *Id.* at 742-43. Instead, the Board will approve a private settlement simply if doing so will “effectuate the purposes and policies of the Act.” *Id.* at 741.

In *Independent Stave*, the Board refined its settlement-approval test and explained that it would henceforth review “all the surrounding circumstances” of a given case, including, but not limited to:

(1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Id. at 743. The General Counsel’s opinion carries considerable weight in this analysis, but is not dispositive. *Compare Beverly Cal. Corp. v. NLRB*, 253 F.3d 291, 295 (7th Cir. 2001) (listing examples where Board cited General Counsel’s opposition in rejecting settlements), *with McKenzie-Willamette Reg’l Med. Ctr. Assocs.*, 361 NLRB 54, 55 (2014) (approving settlement over General Counsel’s objections).

A. Settlement Background

During the hearing, IAM, PAOH, and MTCH entered into a private settlement to resolve all claims among them.²⁰ The settlement provided for a \$3 million lump-sum payment to IAM, which would then distribute the funds as follows: almost a third would go IAM's health and pension funds, nearly two thirds would be distributed to 37 employees as compensation for their losses, and the remaining 5 percent would serve to reimburse IAM's legal fees and expenses. (JA 383-84, 396.)

Applying the *Independent Stave* analysis, the judge found that approving the settlement would effectuate the purposes and policies of the Act. (JA 381-87.) After the judge rejected its motion to reconsider, ILWU requested permission to appeal her decision to the Board. (JA 405-09, 414-16, 429-48.) The Board (then-Chairman Pearce, then-Member Miscimarra, and Member McFerran) granted ILWU's request and denied the appeal on the merits, finding that ILWU failed to show that the judge abused her discretion in approving the settlement. *Ports Am. Outer Harbor, LLC*, Nos. 32-CA-110280 & 32-CB-118735, 2016 WL 6833983 (NLRB Nov. 18, 2016).

²⁰ The settlement also involved an MTCH affiliate, Marine Terminals Corporation. For simplicity, both entities are referred to as MTCH.

B. The Board Did Not Abuse its Broad Discretion in Approving the Settlement

This Court has long recognized the Board’s “broad discretion” in the settlement of unfair-labor-practice cases.²¹ *Textile Workers Union of Am. v. NLRB*, 315 F.2d 41, 42 (D.C. Cir. 1963) (per curiam). ILWU’s challenges to the Board’s decision reflect a fundamental misconception of the Board’s role and responsibilities when parties elect to resolve their differences privately.

1. The settlement satisfies the Board’s *Independent Stave* test

The record demonstrates unambiguously that the judge—and the Board, which affirmed her decision—followed the *Independent Stave* analysis before approving the settlement. First, the judge found that IAM, PAOH, and MTCH all agreed to be bound by the settlement, and that the General Counsel agreed with nearly all its terms, with one minor exception regarding the allocation of funds towards IAM’s legal fees and expenses. (JA 386.) However, after ordering additional briefing on that issue (JA 369-71), the judge concluded that it was not a sufficient basis to reject the settlement *in toto*, especially given the lack of Board law explicitly precluding legal fees and expenses from settlements. (JA 386-87.)

²¹ ILWU’s claim that the same, substantial-evidence standard applies to settlement orders as to “any other Board decision” (Br. 39) is incorrect. In the case on which ILWU relies, not only had the Board issued an order, but that order had already been enforced in court, thus triggering a higher standard of review. *See Dupuy v. NLRB*, 806 F.3d 556, 562 (D.C. Cir. 2015). However, *Dupuy* recognized that the Board has “wide latitude” to settle cases during the prosecutorial stage. *Id.*

Second, the judge found the settlement reasonable given the violations alleged, the relatively early stage of the hearing, and the risks for IAM of pursuing litigation. Besides the risks inherent in PAOH's bankruptcy, the judge observed that procedural rulings favorable to IAM could be overturned on review, or that IAM could altogether lose its claims against PAOH and ILWU. (JA 386.) Third and fourth, the judge found no evidence of fraud, coercion or duress by any of the settling parties, or any history of prior settlements being breached. (JA 386.)

The judge's analysis, which the Board affirmed, shows that she thoroughly examined each *Independent Stave* factor before approving the settlement. Indeed, the judge ordered supplemental briefing twice, once regarding IAM's legal fees and expenses, and another when ILWU moved for reconsideration and challenged the allocation of funds to 15 specific employees. (JA 412-13.) Only after reviewing the parties' filings did the judge find that the sums reserved for those employees were neither arbitrary nor capricious, but rather a reasonable method of distribution given the overall circumstances of the case. (JA 416.)

Finally, and also as prescribed by *Independent Stave*, the judge took into account the context of the settlement, notably that PAOH had already filed for Chapter 11 bankruptcy and ceased doing business altogether when the parties reached their agreement, as well as the fact that *PCMC I* remained unresolved after over 10 years of litigation. (JA 382-83, 386 n.10.) Those circumstances, together

with the risks inherent in pursuing the litigation, inform the Board's decision to affirm the judge's ruling and approve the settlement rather than jeopardize any chance of recovery for unit employees. *See UPMC*, 365 NLRB No. 153, 2017 WL 6350171, at *1 (2017) (approving settlement where further delays could jeopardize chances of obtaining any relief from respondent).

2. ILWU has not carried its burden to show that the Board abused its discretion in approving the settlement

ILWU does not dispute the bulk of the Board's *Independent Stave* findings, but attacks the settlement's reasonableness on four separate grounds, none of which has merit.

ILWU contests that the settlement gives IAM discretion to distribute funds to employees. (Br. 40.) However, as ILWU itself admits, IAM provided a distribution proposal, which the Board reviewed before approving the settlement. (JA 383-84, 396.) ILWU points to no rule prohibiting this type of lump-sum payment, especially when the union submits a distribution plan for review, nor does it offer any evidence to impugn the Board's reliance on IAM to distribute the funds according to that plan. Accordingly, ILWU fails to show that the Board abused its broad discretion by not rejecting the settlement on this ground.

ILWU also argues (Br. 40-42) that IAM's distribution plan violates Section 8(b)(1)(A) of the Act because it only gives money to unit employees who were IAM members, even though the then-operative complaint requested that all

historical-unit employees be made whole (JA 287). As an initial matter, the Court is jurisdictionally barred from hearing that Section 8(b)(1)(A) argument because ILWU failed to raise it before the Board.²² *See* 29 U.S.C. § 160(e); *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir. 2015).

In any event, ILWU ignores that the complaint alleged that PAOH and ILWU violated the Act in different ways, causing different injuries to unit employees. Significantly, the complaint alleged that PAOH (and, alternately, PAOH as a single employer with MTCH) unlawfully employed unit mechanics under the Longshore contract, which had different terms and conditions of employment than the IAM contract. (JA 271, 273, 280-81, 282-83, 287.) There is no reason to assume that all employees would be entitled to a remedy on equal footing regardless of their union membership. For example, it stands to reason that longstanding IAM members would be most negatively affected by the switch from

²² ILWU raised several objections to the settlement before the judge, and in its motion for special permission to appeal the settlement to the Board. (*See* JA 301-17, 377-79, 405-08, 429-47.) In those objections, ILWU challenged the distribution plan as “arbitrary” (JA 304-05, 307-09, 435-40), and occasionally derided it as “subject to favoritism and abuse” or “plain cronyism” (JA 305, 406). ILWU also argued that giving IAM discretion to distribute a large sum would violate section 302(a) and (b) of the Labor Management Relations Act, 29 U.S.C. § 186(a) and (b). (JA 309-14, 440-45.) Significantly, however, not once did ILWU allege that IAM’s distribution proposal violated Section 8(b)(1)(A) of the Act. Thus, the Court lacks jurisdiction to consider that argument now.

the IAM contract to the Longshore contract.²³ By contrast, employees who had always been ILWU members may not have seen much change in benefits. Finally, apart from rank speculation, ILWU has not offered any reason or evidence to believe that the distribution plan was designed to disadvantage certain unit members based on their historical union membership, as opposed to simply trying to account for the relative harms suffered by each. Therefore, the Board acted within its broad discretion by deciding not to reject the settlement on this ground.

Nor is there any merit to ILWU's claim (Br. 43-46) that the proposed distribution plan was unsupported by the evidentiary record. The record includes a letter submitted in response to the General Counsel's inquiries, which explained IAM's rationale for allocating different sums to employees. (JA 397-99.) The General Counsel reviewed that letter before endorsing the settlement. (JA 385.) ILWU argues the General Counsel "could have" conducted a full backpay analysis (Br. 43), but omits that *Independent Stave* imposes no such requirement. And ILWU's analogy with *Dupuy v. NLRB*, 806 F.3d 556 (D.C. Cir. 2015), is similarly deficient because the settlement in that case occurred after court enforcement of a final Board order. Finally, none of the inconsistencies alleged by ILWU supports

²³ It bears reminding that this case originated with Maersk's frustration over the labor costs of the Machinists contract, which precipitated its 2005 decision to hire PCMC, whose ILWU-represented labor was less expensive. *See PCMC I*, 359 NLRB at 1207.

its claim that IAM intended to distribute settlement funds “for its own political or other undisclosed reasons.” (Br. 46.) In sum, ILWU offers no reason to find that the Board abused its broad discretion by not rejecting the settlement on this ground.

ILWU’s challenge (Br. 46-47) to the distribution of some settlement funds to IAM for legal fees and expenses (JA 396) is equally unfounded. In reviewing that complaint, the Board found no law precluding the allocation of settlement funds to cover such fees, and further that in “the give and take of negotiation” among the parties, the allowance of well-documented fees furthered the goal of encouraging settlement. (JA 386-87.) ILWU does not contest that fact, but argues only that such a provision does not effectuate the purposes and policies of the Act. (Br. 47.) The Board did not abuse its broad discretion in finding that, under the circumstances of this case, which include a protracted litigation history and PAOH’s bankruptcy, those purposes and policies were better served by approving the settlement than rejecting it altogether.

Finally, IAM asserts (Br. 47) that the Board erred in finding that the settlement “specifically excludes lost IAM dues” (JA 384) when the distribution letter states that “part of this money is to recompense” IAM for “lost dues” (JA 398). However, the letter’s next sentence “[makes] clear that th[e] settlement does not include those dues which were paid to the ILWU” by unit employees, and

adds that “those [dues] are subject to a separate claim against the ILWU.”

(JA 398.) Therefore, it appears the Board correctly noted that the settlement did not address the money still owed to unit employees (as opposed to IAM) for the dues they were unlawfully required to pay ILWU, and which are the subject of this proceeding.

In sum, and contrary to ILWU’s claims, the Board did not abuse its discretion in finding, after reviewing all the *Independent Stave* factors, that approving the settlement would effectuate the purposes and policies of the Act.

III. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN ISSUING ITS ORDER

ILWU contests the portion of the Board’s remedial Order requiring it to reimburse unit employees for all initiation fees, dues, and other monies paid or withheld pursuant to the Longshore contract. (JA 1743.) ILWU also challenges the portion of the Order requiring PAOH to bargain with IAM in case it resumes operations. (JA 1743.) ILWU’s challenges must fail, as the Order does not exceed the Board’s remedial authority.

In Section 10(c) of the Act, Congress conferred upon the Board the power to remedy unfair labor practices by ordering any entity found violating the Act to “take such affirmative action . . . as will effectuate the policies of [the Act].”

29 U.S.C. § 160(c). The Board’s remedial power under Section 10(c) is “a broad discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods.*

Corp. v. NLRB, 379 U.S. 203, 216 (1964) (citation omitted); *King Soopers, Inc. v. NLRB*, 859 F.3d 23, 37 (D.C. Cir. 2017). “In fashioning its remedies . . . , the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969); *see also Fibreboard Paper*, 379 U.S. at 216 (“the relation of remedy to policy is peculiarly a matter for administrative competence” (citation omitted)). Accordingly, the Supreme Court has held that courts must enforce the Board’s chosen remedies “unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Fibreboard Paper*, 379 U.S. at 216 (citation omitted); *King Soopers*, 859 F.3d at 37.

A. Dues and Fees Reimbursement

The Board acted well within its statutory authority in ordering ILWU to reimburse dues and fees paid by unit employees. “[T]he Board has long ordered repayment of dues where employees, as a requirement of employment, were unlawfully required to support a union.” *Local 1814, Int’l Longshoremen’s Ass’n v. NLRB*, 735 F.2d 1384, 1404 (D.C. Cir. 1984) (citing *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539-45 (1943)). The Board’s Order repeats the remedy in *PCMC I*, which required PCMC and ILWU to jointly and severally reimburse all fees, dues, and other monies paid by unit employees. *See PCMC I*, 359 NLRB

at 1217-18, *adopted as modified by PCMC II*, 2015 WL 3791632, at *7, 9; accord *Duane Reade, Inc.*, 338 NLRB 943, 944-45 (2003) (ordering union and employer that unlawfully enforced union-security clause to “jointly and severally” reimburse employees for dues and other monies unlawfully collected pursuant to that clause), *enforced*, 99 F. App’x 240 (D.C. Cir. 2004).

While ILWU is correct in saying that, had circumstances been different, unit employees would have paid dues to IAM (Br. 51), that is no defense to unlawfully collecting dues from employees who did not choose ILWU representation. As another court explained, “reimbursement . . . effectuate[s] the policy of the Act by returning to employees the money paid to support a union they did not freely chose to join.” *Nat’l Maritime Union of Am. v. NLRB*, 683 F.2d 305, 308 (9th Cir. 1982). That is why ILWU cannot claim either that it fulfilled its representational duties in good faith (Br. 51, 52-53) as an excuse to escape liability for violating unit employees’ Section 7 rights in the first place. Nor can ILWU invoke its purported reliance on the judge’s favorable decision in *PCMC I*. (Br. 53.) The Board overturned the judge’s decision in June 2013, and while the Board’s decision was later set aside due to the *Noel Canning* recess-appointment issue, ILWU was plainly aware of what it stood to lose if validly appointed Board members reviewed and adopted the *PCMC I* decision.

ILWU also claims that unit employees have already been made whole by the settlement among IAM, PAOH, and MTCH. (Br. 52.) It is well established that the compliance stage of Board proceedings is the “appropriate forum” for tailoring remedies to suit the circumstances of each case. *Sure-Tan*, 467 U.S. at 902; *accord Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1330 (D.C. Cir. 2012) (“compliance proceedings provide the appropriate forum to consider objections to the relief ordered”). Therefore, and notwithstanding the entirely speculative nature of ILWU’s claim, it is best asserted at compliance, where the Board can consider any modification of amounts owed based on the settlement. *See PCMC III*, 890 F.3d at 1113 (recognizing availability of compliance proceedings to consider whether particular remedial provisions are no longer appropriate). The same applies to ILWU’s claim that the remedy should be modified to exclude unit employees who joined ILWU prior to March 2005, and to limit reimbursement to the time that unit employees worked as steady mechanics for PAOH. (Br. 53.)

B. Affirmative Bargaining Order

The Board’s affirmative bargaining order, which requires PAOH to recognize and bargain with IAM only in the event that it resumes operations, was also well within the Board’s broad remedial authority. In finding that an affirmative bargaining order was warranted, the Board applied the balancing analysis prescribed by this Court in *Vincent Industrial Plastics, Inc. v. NLRB*, 209

F.3d 727, 738 (D.C. Cir. 2000). (JA 1741-42.) Specifically, the Board found that an affirmative bargaining order would vindicate the Section 7 rights of employees who were denied their choice of collective-bargaining representative due to PAOH's and ILWU's unlawful conduct. At the same time, the Board found that employees opposed to IAM would not be unduly prejudiced because the order would last no longer than reasonably necessary to remedy the effects of the violation. The Board also found that such an order would serve the purposes of the Act by removing PAOH's incentive to delay bargaining in the hope of discouraging support for IAM, while ensuring that IAM would not be pressured to achieve immediate results at the bargaining table in order to forestall a representation challenge by ILWU. Finally, the Board found that a simple cease-and-desist order would expose IAM to future challenges before the taint of PAOH's unlawful actions could dissipate. The Board noted that such a result would be particularly unjust in this case because PAOH's actions not only made clear its preference for ILWU, but also likely created a lasting negative impression of IAM among unit employees, and because ILWU was able to enjoy the fruits of its unlawful representation for many years. (JA 1742.) The Board's analysis is thorough, comprehensive, and amply supports its finding that an affirmative bargaining order is warranted here should PAOH resume operations.

ILWU's primary rejoinder is that no bargaining order is necessary because PAOH has filed for bankruptcy and does not intend to return to business. (Br. 48-51.) However, ILWU ignores the fact that the Board's bargaining order is conditioned on PAOH resuming operations. If that were to happen, bankruptcy proceedings would not preclude PAOH, or any successor employer, for that matter, from bargaining with IAM over unit employees' terms and conditions of employment. *See, e.g., NLRB v. Warehouse Supermks. of Ariz., Inc.*, 956 F.2d 1167, at *1 & n.1 (9th Cir. 1992) (unpublished table decision) (enforcing bargaining order despite employer's pending bankruptcy); *Ahrens Aircraft, Inc. v. NLRB*, 703 F.2d 23, 23 (1st Cir. 1983) (per curiam) (bankruptcy proceedings do not render Board cases moot).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying ILWU's petition for review and enforcing the Board's Order with respect to ILWU.

Respectfully submitted,

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November 2018

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL LONGSHORE)	
& WAREHOUSE UNION,)	
)	
Petitioner/Cross-Respondent)	
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v.)	
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)	Nos. 18-1124
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ASSOCIATION OF MACHINISTS AND)	
AEROSPACE WORKERS, AFL-CIO/CLC,)	
)	
Intervenors for Respondent/Cross-Petitioner)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) and 32(g)(1), the Board certifies that its final brief contains 12,813 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2016. The Board further certifies that the electronic version of the Board’s brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel, and that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington,
this 30th day of November 2018

STATUTORY ADDENDUM

STATUTORY ADDENDUM
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THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)

Section 8(b) of the Act (29 U.S.C. § 158(b)) provides in relevant part:

(b) It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [of subsection (a)(3) of this section] or to discriminate against an employee with respect to whom

membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 9 of the Act (29 U.S.C. § 159) provides in relevant part:

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time

showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may

modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

THE LABOR MANAGEMENT RELATIONS ACT

29 U.S.C. § 186. Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

* * *

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)		
Intervenors for Respondent/Cross-Petitioner)		
)		

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2018, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC
this 30th day of November 2018