

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**EVERPORT TERMINAL SERVICES, INC.**

**and**

**Case 32-CA-172286**

**INTERNATIONAL ASSOCIATION OF  
MACHINISTS & AEROSPACE WORKERS,  
DISTRICT LODGE 190, LOCAL LODGE 1546,  
AFL-CIO, AND INTERNATIONAL  
ASSOCIATION OF MACHINISTS AND  
AEROSPACE WORKERS, DISTRICT LODGE  
190, LOCAL LODGE 1414, AFL-CIO**

**INTERNATIONAL LONGSHORE  
AND WAREHOUSE UNION**

**and**

**Case 32-CB-172414**

**INTERNATIONAL ASSOCIATION OF  
MACHINISTS & AEROSPACE WORKERS,  
DISTRICT LODGE 190, LOCAL LODGE 1546,  
AFL-CIO, AND INTERNATIONAL  
ASSOCIATION OF MACHINISTS AND  
AEROSPACE WORKERS, DISTRICT LODGE  
190, LOCAL LODGE 1414, AFL-CIO**

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS'  
EXCEPTIONS TO THE RULINGS AND DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

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## I. PRELIMINARY STATEMENT

This case arises out of Respondent Everport’s premature recognition of Respondent International Longshore and Warehouse Union (ILWU) as the representative of its maintenance and repair (“M&R”) employees, also referred to as “mechanics,” in the Port of Oakland, California. The mechanics in question were historically represented by the Charging Party International Association of Machinists and Aerospace Workers District Lodge 190, Local Lodge 1546 and Local Lodge 1414 (IAM) in units employed by predecessor employers Marine Terminals Corporation (MTC) and Miles Motor Transport System (MMTS). On July 31, 2018, Administrative Law Judge Sharon Levinson Steckler (ALJ) issued her decision in these cases in which she found that Respondent Everport was a *Burns* successor to the IAM-represented MMTS and MTC bargaining units and that it violated Section 8(a)(1), 8(a)(2), 8(a)(3), and 8(a)(5) of the Act by conduct including unlawful threats to IAM applicants, premature recognition of the ILWU, a discriminatory hiring scheme, refusal to recognize and bargain with the IAM, and unilateral changes. Correspondingly, the ALJ found that ILWU violated Section 8(b)(1)(A) and 8(b)(2) of the Act by unlawfully accepting recognition from Everport. Pursuant to the Board’s Rules and Regulations, Series 8, as amended § 102.46(d)(1), Counsel for the General Counsel (CGC) hereby files the following Brief in Answer to Respondents Exceptions<sup>1</sup> and urges herein that the Board affirm the ALJ’s decision in its entirety subject only to minor modifications to correct certain inadvertent errors as discussed in CGC’s October 26, 2018 limited exceptions.<sup>2</sup>

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<sup>1</sup> On November 5, 2018, Respondent Everport filed its “Revised Exceptions to the Decision of the Administrative Law Judge by Everport Terminal Services, Inc.” and brief in support thereof. On November 20, 2018, Respondent ILWU filed its “Respondent ILWU’s Corrected Joinder in Respondent Everport Terminal Services, Inc.’s Exceptions and Brief in Support of Exceptions.”

<sup>2</sup> On November 26, 2018, IAM filed cross-exceptions to the ALJ’s decision and a brief in support thereof. The General Counsel is not filing a response to the IAM’s cross-exceptions.

## II. LEGAL ANALYSIS

A. **The ALJ Correctly Found that Everport Violated Section 8(a)(2) of the Act By Prematurely Recognizing ILWU as the Collective-Bargaining Representative of Everport's Maintenance & Repair Mechanics at the Nutter Terminal (Everport Exceptions 1, 2, 5, 7-8, 11, 38-41, 43, 45-46, 48, 66, 75, and 94; ILWU Exception 7)**<sup>3</sup>

On largely undisputed facts, the ALJ correctly found that Everport prematurely recognized ILWU under controlling precedent. ALJD 58-59.<sup>4</sup> First, Everport did not employ any employees when it joined the Pacific Maritime Association (PMA) on June 30, 2015. Nor was Everport engaged in normal business operations as of June 30, 2015, since it did not begin operating the Nutter Terminal (hereinafter NT) until December 5, 2015, and did not employ any mechanics there until December 14, 2015. Tr. 1488, 1490-1491. It is further undisputed that Everport believed it was obligated to use ILWU-registered employees from the PMA-ILWU joint dispatch hall by virtue of joining the PMA. Thus, when Everport joined the PMA it thereby prematurely recognized the ILWU as the bargaining representative of the mechanics at the NT before actually hiring any employees and beginning normal business operations at the NT in violation of the Act. *Elmhurst Care Center*, 345 NLRB 1176, 1176 (2005), enf'd, 303 Fed. Appx. 895 (D.C. Cir. 2008); *A.M.A. Leasing, Ltd.*, 283 NLRB 1017, 1023 (1987).

Independent of this unlawful premature recognition, Everport further granted unlawful recognition and assistance to the ILWU when it subsequently assumed operation of the NT and

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<sup>3</sup> Given that Respondents have excepted to virtually every legal conclusion found by the ALJ and the underlying critical facts supporting the ALJ's legal conclusions, CGC's answering brief does not independently address each separate exception but rather has sought where feasible to group related exceptions together by subject matter as logically dictated by the violations found by the ALJ derived from the controlling principles of *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972).

<sup>4</sup> References to the record are as follows: Tr. for transcript; GC Exh. for General Counsel exhibits; ETS Exh. for Everport exhibits, ILWU Exh. for ILWU exhibits, IAM exhibits for IAM exhibits, and ALJD for the Administrative Law Judge's Decision.

determined to utilize the ILWU-registered mechanics even though the ILWU did not represent an uncoerced majority. As made clear in *Comtel Systems Technology*, 305 NLRB 287, 289-90 (1991), as well as in *Mohawk Business Machines Corp.*, 116 NLRB 248, 249 (1956), an employer is not privileged to bind its employees to a collective-bargaining agreement without their consent merely by virtue of joining a multi-employer bargaining association. (ALJD 61) Everport's self-serving belief that it was obligated to recognize the ILWU entirely disregards the value that Board law places on historical separate units such as the MTC and MMTS units.

In their exceptions, Respondents argue that employers have rotated in and out of the PMA over the years and have consistently utilized the ILWU-registered coastwide unit in order to retain their initial complement of employees, and that no Board cases have found such an arrangement to constitute an unlawful prehire agreement. However, there is no evidence that an unfair labor practice charge was filed against any of the other employers who joined PMA and/or recognized ILWU before their normal operations had commenced or they employed any unit employees. Plainly, the Board lacks any power or jurisdiction to rule upon the lawfulness of the conduct of an employer or a union if no charge has been filed. As the ALJ correctly ruled at Tr. 3618 and 3622, the absence of prior unfair labor practice charges does not preclude the IAM from having filed its charge in the instant cases or the Region from issuing complaint.

Further, contrary to Respondents' claim that the ALJ ignored cases which Respondents cite for the proposition that joining PMA binds an employer to the Pacific Coast Longshore & Clerks' Agreement (PCL&CA),<sup>5</sup> the ALJ appropriately distinguished such cases as dealing with other inapplicable sections of the Act and non-successorship situations, and as not having arisen

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<sup>5</sup> The PCL&CA consists of the Pacific Coast Longshore Contract Document (PCLCD) which covers longshore work including some mechanic work, and the Pacific Coast Clerks Contract Document (PCCCD) which covers clerk work.

from a charge filed by a union that represented a historically separate non-ILWU represented unit, and relied instead on other applicable Board authorities such as *Comtel, Mohawk and Pepsi-Cola Bottling Co. of Kansas City*, 55 NLRB 1183 (1944). ALJD 61. Further, Respondents fail to offer any evidence of truly similar circumstances in the past in any event.<sup>6</sup>

Despite Respondents' efforts to analogize the maritime industry to the construction industry, the fact remains that Section 8(f) of the Act is limited to the construction industry. Section 8(f) essentially forbids prehire agreements in which an employer binds its employees to a particular union before hiring them, in any industry other than the building and construction industry which is the sole industry in which such arrangements are permissible. Here, Respondents cannot proffer any Board case which sanctions prehire agreements in the maritime industry. Instead, Respondents rely upon cases involving the coastwide unit of employees allegedly employed by PMA and represented by ILWU which raise issues under Sections 8(e) and 10(k) of the Act which are not present in the instant cases. Moreover, while such cases observe that membership in PMA lawfully triggered certain contractual responsibilities governing work jurisdictional disputes, these cases are inapposite inasmuch as they assume and presuppose that the employers joined—i.e., with their employees' consent—PMA in the first place.<sup>7</sup> Here there can be no such assumption. Accordingly, the ALJ correctly found that the

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<sup>6</sup> ILWU's chart of employers that have entered or exited PMA (ILWU Exh. 30) does not contain any indication that any of the employers took over terminals in which they displaced or discriminated against a long-established historic mechanic unit or units that were represented by a union other than ILWU. Along the same lines, the ALJ correctly rejected ILWU's attempt to introduce excerpts from the Federal Register with respect to exemptions of employers leaving PMA from pension withdrawal liability. ALJD 66 n. 60; Tr. 2029-2031; ILWU Exhs. 31-35. The ALJ's ruling was correct because Pension Benefit Guaranty Corporation documents regarding the movement of companies in and out of PMA and their exemption from the normal withdrawal liability associated with withdrawing from a multiemployer unit is irrelevant given that §8(f) of the Act has never been amended to include any industries other than the construction industry (such as the maritime industry).

<sup>7</sup> See *Teamsters Local 85 (Pacific Maritime Association)*, 191 NLRB 493 (1971) (interpreting employer's contractual relations with ILWU); *ILWU Local 10 (Matson Navigation Co.)*, 140 NLRB 449,

terms of the PCL&CA do not override the terms of the Act. The Act does not permit Everport to effectively enforce a prehire agreement where it binds its employees to the ILWU before it has hired any of them or has begun operating, thereby discriminating against the IAM-represented employees. Section 8(f) of the Act provides no special dispensation to the maritime industry, even if there are respects in which it resembles the construction industry.<sup>8</sup>

Respondents' reliance upon the Board's decision in *Pacific Maritime Association*, 256 NLRB 769, 769-770 (1981) is misplaced. In that case, the Board determined that certain portions of the PCL&CA did not violate §8(e) of the Act. The Board held, *inter alia*, that the contract clause that stated "[a]n employer in a port covered by this Contract Document who joins the Association subsequent to the execution hereof. . . becomes subject to this Contract Document," merely lawfully provided that employers who join the PMA after the collective-bargaining agreement was executed became subject to its terms and did not violate §8(e). Thus, the ALJ correctly distinguished *Pacific Maritime Association*. In any event, *Pacific Maritime Association* is also unavailing as it assumes that the contractual obligations of any employers who joined the PMA after the execution of the PCL&CA are lawfully premised on their employees' selection of the ILWU as their representative. Again, such an assumption cannot be indulged in the instant cases. *Comtel*, supra, 305 NLRB at 289-290; *Mohawk*, supra, 116 NLRB

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454 (1963) (interpreting employers' contractual obligations to both ILWU and Carpenters, noting that "[b]y virtue of their membership in PMA, both APL and Matson have been in contractual relations with the ILWU, covering longshoremen, for the past 25 years.")

<sup>8</sup> Nor can Respondents rely upon cases where a successor can communicate its clear intent to hire a predecessor's employees and trigger the obligation to bargain before the successor actually hires employees. See *Creative Vision Resources, LLC*, 364 NLRB No. 91, slip op. at 7 (2016); *Elf Atochem North America, Inc.*, 339 NLRB 796 (2003); *Helnick Corp.*, 301 NLRB 128 n. 1 (1991). These cases do not provide a safe harbor, as the perfectly clear successors in those cases acknowledged their bargaining obligation to the incumbent union. Here, Respondent Everport acted in derogation of its obligations as a *Burns* successor when it prematurely recognized Respondent ILWU.

at 249.<sup>9</sup> Though Respondents falsely assert that there are no victims of their unlawful conduct, Respondents have trampled the rights of the discriminatees in this case who plainly valued their decades-long representation by IAM, who never had an opportunity to vote to ratify the most recent version of the PCL&CA, and whose acceptance of positions with Everport was reluctant at best given the severe restrictions imposed by the Herman Flynn letters and the loss of the seniority and benefits accrued over years under the IAM collective-bargaining agreements.<sup>10</sup>

Starkly put, Everport picked its poison. Under substantial pressure from ILWU and aware of prior labor strife as between PMA and ILWU at Oakland and other ports, and knowing that ILWU represented far more total employees at the Port of Oakland than did the IAM, Everport consciously exalted the PCL&CA between PMA and ILWU and ignored its statutory obligation under NLRA as *Burns* successor to the MTC and MMTS units. Everport essentially chose to deal with the present unfair labor practice charge rather than deal with the grievance(s) and/or work stoppages that it believed would have ensued if it had recognized IAM or considered or hired IAM-represented mechanics before exhausting the joint dispatch hall of ILWU-registered mechanics. See ALJD 69.<sup>11</sup>

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<sup>9</sup> *International Association of Machinists and Aerospace Workers, District Lodge No. 94 v. ILWU Local 13 and Pacific Maritime Association*, 781 F.2d 685 (9<sup>th</sup> Cir. 1986), on which Everport repeatedly relies, is distinguishable, as properly found by the ALJ (ALJD 65). This is a case under the Labor Management Relations Act §301 which simply raised an issue of a conflict between the PCL&CA and a preexisting contrary agreement reached by an IAM local and a single ILWU local. It did not involve the issue of an employer's obligations as a potential *Burns* successor under the Act.

<sup>10</sup> Indeed the many aspects in which the terms of the PCL&CA are inferior to the terms established by the IAM collective-bargaining agreements with MTC and MMTS may be discerned from a comparison between the MTC and MMTS collective-bargaining agreements (GC Exhs. 50-59) and the PCL&CA (ILWU Exhs. 5, 6, 8) and are discussed in detail at ALJD 34-35. The ALJ also properly relied on the firsthand testimony of mechanic Preston Humphrey who has worked under both the IAM collective-bargaining agreements and the PCL&CA. See ALJD 34, 48, 62.

<sup>11</sup> Indeed, Everport (Brief pg. 20) feared not just grievances but strikes if it had hired IAM mechanics rather than ILWU-registered mechanics through the joint dispatch hall. See also GC Exh. 47 (text message from ILWU official Melvin Mackay to Choi in which Mackay states among other things “relay

Everport attempts to portray itself as an innocent victim powerless to challenge ILWU and/or PMA's interpretation of the PCL&CA and its red circle provisions.<sup>12</sup> This is not supported by the evidence, which suggests not so much that PMA conclusively informed Everport that Everport was bound by PMA's interpretation of the PCL&CA and its red circle language, as that Everport took PMA's word for it that Everport would be unlikely to prevail in arbitration if it took a position contrary to PMA and ILWU's interpretation. Nor, given the successful assertion of privilege with respect to various deliberations between PMA and Everport, is it clear that Everport consulted with PMA about the possibility that Everport's obligations as a *Burns* successor under the Act might be contrary to the PMA and ILWU interpretation of Everport's obligations under the PCL&CA. In any event, and as noted by the ALJ, the IAM is not and has never been a party to the PLC&CA, so this ostensibly binding interpretation of the PCL&CA entirely disregards the Section 7 rights of the predecessor mechanics in this case. ALJD 69.

The ALJ's decision does not represent a "drastic departure from 80 years of Board precedent." To the contrary, the Board has recently condemned the ILWU's attempts to take mechanic work from other unions whose represented employees have historically performed it. See *Ports America Outer Harbor*, 366 NLRB No. 76 (2018); *PCMC/PMMC*, 359 NLRB 1206

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this message to the powers that be it [is] not conducive to alienate the work force and expect full production"); GC Exh. 165.

<sup>12</sup> The General Counsel's theory of the violations in this case is premised upon statutory principles and not on any "red circle" language in the PCL&CA. ILWU Exh. 5, Sec. 1.81, ILWU Exh. 10. The ALJ acknowledged that the red circle argument was a "red herring." ALJD 69. CGC at all times sought to enforce Everport's legal obligations as a *Burns* successor under the Act, not any alleged contractual obligations under the PCL&CA such as red circle obligations. Tr. 973, 977. Here, the "red circle" concepts provide context regarding the longstanding presence over decades of historical non-ILWU-registered units performing work at the NT and other terminals. Further, the existence and quantity of red circle terminals in ILWU Exh. 10 at the Port of Oakland cuts against Respondents' attempt to establish that employers have no choice but to join PMA and employ ILWU-registered mechanics in order to operate a container handling terminal. See Tr. 2166-2167.

(2013), reaffirmed in *PCMC/PMMC, et al.*, 362 NLRB No. 120 (2015), enf'd, 890 F.3d 1100, 1111 (D.C. Cir. 2018). Plainly, the Board's consideration of non-successorship contexts involving the coastwide unit involving Sections 8(e) and 10(k) of the Act, does not demand, much less allow, that the Board ignore the presumptive appropriateness of historically separate units like the MTC and MMTS units in this case.<sup>13</sup>

**B. The ALJ Correctly Found that Everport Is a Burns Successor to Predecessors MTC and MMTS**

The ALJ's conclusion that Everport is a *Burns* successor to MTC and MMTS is amply supported by the record. ALJD 42-48. *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972) and *Fall River Dyeing & Finishing v. NLRB*, 482 U.S. 27, 43 (1987), require a fact based inquiry into whether there is a "substantial continuity" between the two enterprises, by examining whether 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 has the same body of customers. *Voith Industrial Services, Inc.*, 363 NLRB No. 116, slip op. at 31 (2016).<sup>14</sup> In particular, the focus is on whether operations, as they impinged upon bargaining unit members, remained essentially the same after the transfer of

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<sup>13</sup> Everport's "all or nothing" argument at pg. 21 of its Brief similarly fails. Instead of acceding to the PMA and ILWU's interpretation of the PCL&CA, Everport could have recognized the ILWU as the representative of all non-mechanics and IAM as representative of the mechanics. Its anticipation of ILWU's negative response to such an option does not justify its failure to honor its statutory obligations. Far from the Catch 22 posed by Everport, Everport could have simply bargained with ILWU through PMA as to non-mechanics and bargained with IAM directly as to the mechanics.

<sup>14</sup> Everport produced no evidence that it served different customers at the NT after December 5, 2015 than were served by Seaside Transportation Services (STS) and its subcontractors MTC and MMTS in the period before December 5, 2015. Even if there were different customers, such evidence would not detract from the ALJ's finding of successorship. See *Mondovi Foods Corp.*, 235 NLRB 1080, 1082 (1978) (bargaining obligation even though successor did not service any former customers of predecessor). ALJD 42.

ownership. *Children's Hospital of San Francisco*, 312 NLRB 920, 927 (1993), enf'd, 87 F.3d 304 (9<sup>th</sup> Cir. 1996). Critically missing from Respondents' arguments, but evident in the ALJ's findings and conclusions (ALJD 41), is the fundamental understanding that the substantial continuity analysis is to be taken primarily from the perspective of the employees, i.e., whether those employees who have been retained will understandably view their job situations as essentially unaltered. *Tree-Free Fiber Co.*, 328 NLRB 389 (1999). The ALJ properly found that all of these factors support a finding of *Burns* successorship in this case.

**1. There is Substantial Continuity Between the Predecessor and Successor Operations Under Everport at the Nutter Terminal (Everport Exceptions 2-3, 34, 49, 109 and 114)**

Respondents' exceptions address certain modest changes occurring in the NT after December 5, 2015, which they contend demonstrate a lack of substantial continuity. However, the ALJ correctly found that the employing enterprise was substantially unchanged after the December 5, 2015 takeover, and that any changes that did occur were so insubstantial as to not defeat a finding of substantial continuity. See *Ford Motor Company*, 367 NLRB No. 8, slip op. at 10 (2018) (disclaiming reliance on employer's overstating of modest or immaterial changes).

a. Similarity in Supervision

Many of the supervisors previously employed by MTC, STS or MTC d/b/a Ports America (Brandon Olivas, Weida Du, Tom Favila, Mike Andrews, and Mark Simpson) continued to serve as supervisors under Everport. Tr. 121-122, 164-167, 1421-1422. The fact that the Everport management team was not comprised entirely of former MTC and MMTS persons does not detract from the ALJ's finding of substantial continuity.<sup>15</sup> To the extent that Everport employs

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<sup>15</sup> See, e.g., *Pennsylvania Transformer Technology, Inc.*, 331 NLRB 1147 (2000), enf'd, 254 F.3d 217 (D.C. Cir. 2001) (finding successorship where some, but not all, successor supervisors were employed by predecessor company).

supervisors who were not employed by STS, MTC or MMTS, the ALJ correctly found that this too does not detract from the conclusion of substantial continuity. ALJD 43; *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1063-1064 (2001) (finding substantial continuity between predecessor and successor despite different supervisors, different pay rates and benefits and newer buses, since bus drivers were performing same work as they had for predecessor); *Simon DeBartelo Group a/w M.S. Management Associates, Inc.*, 325 NLRB 1154, 1155 (1998), enf'd, 241 F.3d 207 (2d Cir. 2001); *Publi-Inversiones de Puerto Rico, Inc.*, 365 NLRB No. 29, slip op. at 10 (2017), enf'd 886 F.3d 142 (D.C. Cir. 2018); *GFS Building Maintenance, Inc.*, 330 NLRB 747, 752 (2000). Nor did Respondents present any evidence that the supervision by Everport supervisors not hired from STS, MTC or MMTS resulted in any concrete changes in the working conditions of the supervised mechanics.

Further, the record contained evidence that many of the MTC, MMTS or STS (or possibly Evergreen) employees not in the IAM-represented units have continued to work for Everport in the same or similar roles as they previously held irrespective of whether they constitute §2(11) supervisors. See, e.g., Tr. 349-352 with respect to Robin Hsieh, Captain Huang, Brandon Olivas, David Choi, and Weida Du; Tr. 3637. Captain Huang works out of the same office in the same building with Everport presently that he worked out of when STS was operating the NT. Tr. 354. Robin Hsieh under STS frequently communicated with power shop foreman Preston Humphrey regarding parts issues, issues with respect to equipment specifications and how long certain equipment had been operating or was likely to be non-operational. The ALJ properly credited Humphrey's uncontradicted testimony that Hsieh (who was not called as a witness by Respondents) continued to contact Humphrey about the same types of issues by the same methods after Everport took over operation of the NT. Tr. 355-359;

GC Exh. 7.<sup>16</sup> Choi as of December 5, 2015, or January 4, 2016, was a superintendent for Everport, the same title he had held at the end of his employment with MTC. Tr. 473-474. Choi reports to Michael Andrews, who reports to Captain Huang, both of whom frequently worked at the NT during the MTC tenure. Tr. 474.<sup>17</sup> The ALJ accordingly was correct in her finding of substantial similarity in supervision.

b. Similarity in Nature of Work Performed

The ALJ properly found that Everport has been providing the same basic services to the same customers since the transition from MTC and MMTS to Everport. ALJD 42. Since assuming operations about December 5, 2015, Everport has used the same four transtainer cranes that were utilized by MTC/MMTS prior to December 5, 2015. Tr. 357, 392, 754-755, 1523, 1649. Because IAM mechanic Humphrey worked in the power shop under MTC and in the power shop under Everport after January 4, 2016, and because the power shop and crane shop have at all times been jointly responsible for the four transtainer cranes, Humphrey was uniquely qualified to testify about the similarities between the power shops under both MTC and Everport and the crane shops under both MTC and Everport, such that it was appropriate for the ALJ to

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<sup>16</sup> Indeed Humphrey testified that Hsieh continued to contact Humphrey to ask work-related questions after December 5, 2015, when Humphrey was at home without a job given the departure of STS and MTC/Ports America and before Everport informed Humphrey that he was being offered a position at the NT with Everport. Tr. 370. Hsieh also consulted with Humphrey during the MTC tenure with respect to which equipment Everport should or should not purchase from MTC/Ports America. Tr. 467-468.

<sup>17</sup> Both Crosatto and Jack Sutton Sr. (a friend of Captain Huang) testified that they understood Captain Huang to be a port captain for Evergreen (Tr. 1320, 1425-1426), with Sutton Sr. confirming that his understanding was based on statements that Huang made directly to him. To the extent that Everport sought to impeach IAM representative Don Crosatto based on an alleged lack of understanding of the duties of a port captain (Tr. 1321), such impeachment failed as Everport introduced no evidence thereafter with respect to the general duties of a port captain for Evergreen, Everport, or any other employer. The ALJ accordingly properly credited Crosatto. ALJD 39.

credit Humphrey's testimony. ALJD 39; Tr. 341-343, 412.<sup>18</sup> The power shop, chassis shop, crane shop and reefer shop are all in the same location under Everport as they were under MTC and MMTS. Tr. 335-337. Reefer mechanics under Everport service and maintain refrigerated containers and gensets (portable generators that mount to chassis or containers to supply electric power to keep container contents cold) just as they did under MTC. Tr. 342, 114, 258, 744-745, 748-749.<sup>19</sup> The process of loading and unloading ships has not changed, and the yard operation process is the same. Tr. 755-756. Other than certain roadability functions formerly performed next to the chassis shop under MTC being moved to the entrance/exit gate under Everport (Tr. 343, 752), there are no differences with respect to where work is performed as between MTC and Everport.<sup>20</sup> It is also evident that roadability occurred at the NT both during the MTC and Everport tenures notwithstanding any transition from voluntary to mandatory roadability. Tr. 1764, 1768.<sup>21</sup> With respect to tires, M&R mechanics repaired or changed the tires on

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<sup>18</sup> As established in the record, Humphrey testified at the hearing pursuant to a subpoena from the General Counsel. Tr. 332. In crediting Humphrey (ALJD 31), the ALJ correctly ruled that any issue with respect to the circumstances in which Humphrey provided a declaration in connection with parallel district court §10(j) proceedings was irrelevant to the instant case and that Everport's efforts to explore this area during cross-examination threatened to constitute a violation of §8(a)(4) of the Act. Tr. 403-409. Further, the mere fact that Humphrey did not see purchase agreements with respect to equipment sold by MTC/Ports America to Everport (Tr. 435) does not detract from Humphrey's ability to observe when similar or identical equipment was being used at the NT both before and after December 5, 2015.

<sup>19</sup> While the plugging and unplugging of reefers was done by ILWU Local 75-represented guards/watchmen under MTC whereas it has been performed by ILWU Local 10-represented mechanics since Everport began operating the NT, Lang conceded that there has not been any change in the fundamental nature of this work other than who is performing it. Tr. 3866. The ALJ properly found that the nature of reefer work was largely unchanged between the predecessor and the successor but for the use of computers instead of paper to monitor the reefers, with the same things (e.g., vent settings, temperatures) being monitored. ALJD 12, 42.

<sup>20</sup> The movement of the roadability work from next to the chassis shop to the entrance/exit gate (Tr. 1773) likely did not occur until after the January 4, 2016 date on which the ALJ found that a substantial and representative complement existed and normal operations had begun. Further, even if one views roadability as a distinct function, there is evidence that roadability was merely a chassis department function and was not a separate department under MTC in the past or under Everport now. Tr. 857; GC Exh. 37.

<sup>21</sup> PMA Coast Director of Contract Administration and Arbitration Richard Marzano was unable to provide any detailed testimony with respect to any alleged increase in roadability resulting from it going

transtainers, bombcarts and terminal vehicles under both MTC and Everport, with the only difference being that chassis tires were repaired by an outside vendor under MTC whereas the repairs were done in-house by Everport after the transition. Tr. 756-758, 1778, 3967-3968.<sup>22</sup>

Power shop mechanics attended daily morning meetings under MTC and continued to do so under Everport. Tr. 337-338, 344. The morning meetings in each of the shops under Everport are led by the leadmen in each shop, who are comparable to the MTC foremen who led the meetings under MTC. Tr. 338-339, 345. The same equipment corrals were utilized by MTC prior to December 5, 2015, and Everport after December 5, 2015, to store top picks (aka top handlers) and tractors. Tr. 346. Approximately three vessels per week arrived at the NT before December 5, 2015 (and before August 2015) and three vessels per week have continued to arrive at the NT after December 5, 2015. Tr. 387, 726-727, 1512, 3867, 3961.<sup>23</sup>

MTC employed approximately six guards prior to its departure from the NT and Everport employed six guards when it began operating the NT thereafter, including at least some of the same guards who had worked for MTC. Tr. 729-730, 733. Similarly, MTC employed 10-14

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from voluntary to mandatory even though he worked for PMA through September 2015. Tr. 2693-2694, 2697.

<sup>22</sup> The ALJ properly discredited Everport's contentions regarding roadability and Everport's ostensible plan to use roadability as a significant revenue stream (ALJD 13, 46) given the lack of documentary evidence by Everport of such a plan, the initial posting of positions only for chassis and not specifically for roadability, the lack of reference to roadability and tire employees in Leonard's December 7, 2015 letter to Lang (GC Exh. 86), and the evidence that mandatory roadability was established and dictated under the most recent 2014-2019 PCL&CA, whereas its mandatoriness had previously been disputed under prior versions of the PCL&CA. Tr. 754, 1537-1538, 1770; ILWU Exh. 5. See *Naperville Jeep/Dodge*, 357 NLRB 2252, 2253 (2012) (in determining whether an established unit retains its distinct identity, Board does not consider effects of employer's unlawful unilateral changes to the existing unit employees' terms and conditions of employment, as giving weight to such changes would reward the employer for its unlawful conduct). In short, even if the ALJ had credited Everport's roadability evidence, which the ALJ did not, it would not have been enough to show a lack of substantial continuity between the work performed before and after the date of the transition from MTC/MMTS to Everport.

<sup>23</sup> That any vessel may have "upsized" in order to carry more containers is of no import and does not in and of itself constitute a change in the fundamental nature of the work. Tr. 3999.

request clerks, the same number initially employed by Everport after it took over operations at the NT, at least some of whom were the same people. Tr. 733-735. It also appears that the same number of ILWU-registered equipment operators were in place at the time of MTC's departure and the initial operations of Everport in early 2016. Tr. 736-737. MTC used the same process in 2015 for citing workers for unsatisfactory work that Everport used in 2016 and thereafter. Tr. 738-739. Everport used the same forms and processes to seek the dispatch of ILWU-registered longshoremen in 2016 that MTC used for the same purpose in 2015. Tr. 741-742.

Thus, all of the above evidence readily supports the ALJ's conclusion of substantial similarity between the work performed by predecessors MTC and MMTS and that performed by successor Everport. ALJD 42.<sup>24</sup>

c. Similarity in Equipment

The ALJ properly found substantial similarity between the equipment and types of equipment used by MTC or MMTS and the equipment or types of equipment used by Everport. ALJD 43. Everport, at a cost of \$765,000, for its own convenience, purchased a substantial amount of equipment, tools and vehicles from MTC/Ports America that was formerly used by MTC and/or MMTS mechanics that continues to be used by Everport mechanics. Tr. 388-389, 1523, 3375-3376; GC Exhs. 68, 69. Similarly, as conceded by George Lang and ILWU official Ed Ferris, the additional types of equipment which Everport bought in order to operate the NT (e.g., top picks/top handlers, bomb carts, roll-off trailers, yard vehicles, heavy forklifts, small forklifts, fuel trucks, industrial sweeper, tractors/UTR's, shuttle buses) were all the same types of

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<sup>24</sup> See *Torch Operating Co.*, 322 NLRB 939 (1997) (substantial continuity found although successor took over only 10% of predecessor's operations, installed new more advanced equipment, and made substantial changes in unit employees' duties); *CitiSteel USA*, 312 NLRB 815 (1993).

equipment previously used by MTC and MMTS. Tr. 390-392, 1517-1520, 3159-3161.<sup>25</sup> Choi and Lang confirmed that Everport utilized the same types of equipment that MTC used (Tr. 532-533, 535-536, 1521), and that the same types of containers and chassis have been used both by MTC before 2016 and Everport during and after 2016 (Tr. 533, 1521).<sup>26</sup> While Lang espoused the benefits of two used “one-over-five” gantry cranes that he was still negotiating the future purchase of late in the hearing in mid-July 2017, Lang conceded that there are already one-over-five gantry cranes at the NT. Tr. 3811-3812. The quantity of equipment is also not fundamentally different. Lang testified that STS utilized 11 top handlers at the NT whereas Everport operated 13 top handlers as of January 2016. Tr. 3812-3813.<sup>27</sup>

Accordingly, despite Everport’s contentions to the contrary, the ALJ was constrained to conclude that Everport’s new equipment was similar in function and performance to the equipment upon which the predecessors’ mechanics had worked. ALJD 43. The ALJ also inferred in a common sense manner (ALJD 44) that the new warranted equipment obtained by Everport at various times would likely require less mechanic work rather than more. Everport did not produce any employee witnesses to testify to the contrary. That Everport may have spent more money on purchasing new equipment for the NT than it spent purchasing existing

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<sup>25</sup> ILWU official Ed Ferris explained that, in his mind, the biggest difference between MTC’s operation of the NT and Everport’s operation of the NT was not anything operational but instead his mere belief that the red circle applied at the NT under MTC but not under Everport. See Tr. 3157, 3159, 3161.

<sup>26</sup> Thus, even taking as true that Everport has made a capital investment of 18 million dollars in the NT (Tr. 3748), the money was spent to acquire the same types of equipment (top picks, UTR’s, transtainers, fuel trucks, forklifts, etc.) that had been present under MTC and MMTS for the purpose of operating the NT in the same basic manner as it had previously operated albeit on a potentially larger scale. However, any potential expansion was not undertaken when Everport commenced operations with a substantial and representative complement of employees on January 4, 2016.

<sup>27</sup> The alleged acquisition of two additional top handlers in December 2016 as testified to by Lang (Tr. 3813) does not detract from the established evidence of substantial continuity, particularly since such acquisition occurred well after the January 4, 2016, date on which the ALJ properly found that a substantial and representative complement was present and even several months after Everport posted additional steady mechanic positions from March-June 2016 (ETS Exhs. 9-13).

equipment from MTC falls short of disproving substantial continuity and successorship.<sup>28</sup> See *Pennsylvania Transformer Technology, Inc.*, 331 NLRB 1147 (2000) (successorship found where successor used only 45-50% of predecessor's former plant and equipment); *Amscot Coal*, 281 NLRB 170, 182 (1986), enf'd, 819 F.2d 1132 (3d. Cir. 1987) (finding purchase of new equipment not enough to overcome successorship where function of new equipment was same as old and would not have changed employees' desire for union representation).

d. Similarity in Customer Base and Services Performed

Evergreen (as parent of Everport. ALJD 5; Tr. 949-950; 1260-1261) has at all times been the primary customer at the NT. Tr. 528, 723, 1512, 1516, 3020, 3990; GC Exh. 8.<sup>29</sup> There is abundant evidence in the record of the desire and need of Everport as an entity and Everport's managers and supervisors as individuals to accommodate, please and satisfy Evergreen's

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<sup>28</sup> An example of the insignificance of the purported improvements on which Everport seeks to rely is the lack of material differences between Kalmar and NOW Solutions. While STS was operating the terminal, MTC utilized a container tracking system entailing cameras, a global positioning system (GPS), monitors, and local area network (LAN), which was known as NOW Solutions. Tr. 394-395. Humphrey testified in detail about the way in which the NOW Solutions system operated. Tr. 393-396. Humphrey also testified that the current Kalmar container tracking system used by Everport also utilizes cameras, GPS, LAN and monitors, and that the computer communicates with the employee in the same way under Kalmar as it did under NOW Solutions. Tr. 396-397. Everport's Lang also confirmed various similarities between Kalmar and NOW Solutions and how systems like these are used at every terminal. Tr. 4036-4037. In short, Kalmar performs the same functions as NOW Solutions and is not any kind of upgrade or improvement. Tr. 398. In fact, there is evidence in the record that Kalmar has been plagued by various problems and that the Kalmar problems have directly contributed to a need to have more clerks. Tr. 398-399. Thus, contrary to Respondents' exceptions, the evidence is hardly sufficient to demonstrate that the hiring of additional clerks by Everport stems from any alleged well-defined expansion plan at the NT. Notably, the key document describing the Kalmar system (ETS Exh. 20) only notes the additional work for clerks that will be created by the use of new technology and does not describe any additional work for mechanics to be created by the use of Kalmar. Tr. 3889, 4035-4036.

<sup>29</sup> While Everport excepts (114) to the ALJ's characterization of Evergreen as a terminal operator (ALJD 6), Evergreen undisputedly had the right to operate the NT from 2002 until July 1, 2012 when it assigned its interest to Everport. However, the larger point, as conceded by ILWU and Choi, is that Evergreen at all times was the primary customer at the NT just as other carriers were the primary customers at other terminals at the Port of Oakland. Tr. 528-531, 3597-3598. Choi testified that during the six months prior to MTC's departure from the NT in December 2015, only Evergreen vessels stopped at the NT, and that after the reopening of the NT in early 2016, only Evergreen vessels stopped at the NT.

demands. Tr. 481, 487, 493-494, 768, 3990; GC Exh. 9, 11, 47. In fact, Lang testified that Everport chairman Eric Wang worked for Evergreen for 30 years before assuming the top position at Everport. Tr. 4015-4016. Along the same lines, Evergreen as of November 11, 2015, less than a month before the date of the transition from MTC/MMTS to Everport, sought to assure its customers that Evergreen would be providing the same types of services both before and after the transition date and that the transition would be seamless. GC Exh. 70, Tr. 1532-1533. Everport's own witnesses referred to the Nutter Terminal as the "Evergreen Terminal" in various declarations and other pleadings in separate litigation. Tr. 1856-1858, 1860.<sup>30</sup> There is no probative evidence of other shipping lines using the NT at any point. Thus, the ALJ properly concluded that the presence of Evergreen as the key customer at all times demonstrated the substantial continuity between the customer base as between the predecessor and the successors.

In short, the ALJ correctly found that substantial continuity existed and that Respondent's alleged well-defined expansion plan did not provide a basis for concluding otherwise. Even giving weight to Everport's assertion that it is doing more business, volume or lifts now than it did in 2016 or when STS was operating the NT through MTC and MMTS in 2015, the ALJ cut through the distractions and concluded that all Everport is doing is more of the same. ALJD 42.<sup>31</sup> There has been no fundamental transformation in the nature of the work performed or the services rendered. The NT moved containerized cargo before December 5, 2015, and it continues to do so today. This is not a case where a cargo terminal operator altered its products

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Tr. 723. Lang himself admits that Evergreen has been the shipping line with the largest volume at the NT. Tr. 1512.

<sup>30</sup> Minor and insignificant changes, such as the alleged upgrading or cleaning of rest rooms at the NT do not detract from the otherwise overwhelming and dispositive evidence of substantial continuity. Tr. 3163.

<sup>31</sup> Lang also admits at Tr. 3963-3964 that the 140,000 lifts figure for 2015 is actually artificially low because Everport intentionally turned away certain vessels to ports other than the Port of Oakland during December 2015 that could normally have been received and handled, in order to install certain technological upgrades at the NT.

or services in such a way that the essence of successorship could be genuinely disputed. The modest incidental changes relied upon by Respondents with respect to roadability, tire repair, or replacing NOW Solutions with Kalmar do not alter that basic picture. ALJD 42-43.<sup>32</sup> Indeed, the Board cannot rely upon these minor changes in any event, since the Board's settled practice when considering whether a bargaining unit retains its distinct identity is to ignore the effects of unlawful unilateral changes made to the employees' working conditions since to do so would allow the employer to benefit from its own unlawful conduct. *Dodge of Naperville, Inc.*, 357 NLRB 2252, 2253 (2012), enf'd, 796 F.3d 31, 39 (D.C. Cir. 2015); *PCMC/PMMC*, 359 NLRB 1206 (2013), reaffirmed in *PCMC/PMMC, et al.*, 362 NLRB No. 120 (2015). In sum, the formerly IAM-represented mechanics at the NT after December 5, 2015 viewed their jobs as the same as they always had been, but for the application of the PCL&CA and its Herman Flynn terms to them.

2. **The ALJ Correctly Concluded that Everport Employed a Substantial and Representative Complement of Mechanics as of January 4, 2016, the Proper Date for Assessing Successorship Factors (Everport Exceptions 5, 31-33, 35-36, 52 and 109)**

Here, the ALJ correctly found that the appropriate date for evaluating continuity for purposes of successorship analysis in this case is the January 4, 2016 date on which the initial

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<sup>32</sup> See *Cincinnati Bronze, Inc.*, 286 NLRB 39, 41-42 (1987) (changes in the scope or focus of the new employer's business that do not affect the employment relationship or the working conditions of the employees will not preclude a finding of successorship); *Publi-Inversiones de Puerto Rico, Inc.*, 365 NLRB No. 29, slip op. at 10 (2017) (not fatal to successorship finding that successor had fewer departments than predecessor and that certain departments under predecessor became subdepartments under successor); *Pressroom Cleaners*, 361 NLRB 643, 672 (2014) (that successor had different business model from predecessor using part time rather than full time employees and more automated machinery than predecessor did not detract from substantial continuity between predecessor and successor); *Comar, Inc.*, 349 NLRB 342, 361 (2007) (incremental improvements to production techniques are commonplace in industry and do not justify withdrawal of recognition from a union that represents a longstanding established unit); *Massey Energy Co. d/b/a Mammoth Coal Co.*, 354 NLRB 687, 727 (2009) (two-person Board decision), subsequently adopted in 358 NLRB 1643 (2012) (successor's use of different trucks and equipment in extracting coal wholly inadequate to show a change in essential nature of business).

complement of both ILWU-registered and former IAM-represented mechanics had begun working at the NT. See *Eastern Essential Services, Inc.*, 363 NLRB No. 176, slip op. at 16 (2016); *MSK Corp.*, 341 NLRB 43, 44-45 (2004).

Lang testified that Everport intended to commence operations at the NT with 27 mechanics—the exact same number of mechanics employed by MTC and MMTS. Tr. 1493-1494. Since Everport did not yet have any employees as of the November 18, 2015 date of IAM’s request for recognition and bargaining (GC Exh. 63), the logical date for the assessment is the soonest date thereafter on which a substantial and representative complement of employees was present, which was the January 4, 2016 date on which the initial groups of ILWU-registered and former IAM-represented mechanics had begun working.<sup>33</sup> Because the IAM’s demand had ripened by the January 4, 2016 date on which the initial complement of both ILWU and IAM mechanics had begun working, the “continuing demand” rule applied and there was no need for IAM to make any renewed demand for bargaining as Everport suggests. Indeed, the ALJ correctly found that no demand was required at all because no bargaining demand is necessary when an employer’s unlawful refusal to hire predecessor employees renders any bargaining request futile. *Smith and Johnson Construction*, 324 NLRB 970 (1997); *Triple A Services*, 321 NLRB 873, 877 n. 7 (1996); *Precision Industries*, 320 NLRB 661, 711 (1996), enf’d 118 F.3d 585 (8<sup>th</sup> Cir. 1997). ALJD 60.

In its exception 31, Everport argues that the Board should assess the presence or absence of a substantial and representative complement as of June 8, 2016. Its rationale for selecting such a later date is obvious insofar as it facilitates Everport’s reliance on its alleged well-defined

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<sup>33</sup> See *Simon DeBartelo Group a/w M.S. Management Associates Inc.*, 325 NLRB 1154, 1156 (1998) (where union demands recognition from prospective successor employer before successor has hired substantial and representative complement, union’s demand is deemed to be continuing one and successor’s bargaining obligation matures once it hires substantial and representative complement).

plan of expansion and further increases the ratio of ILWU-registered mechanics to IAM-represented predecessor mechanics beyond that present on January 4, 2016.<sup>34</sup> However, the General Counsel notes that, in the circumstances of the instant case, the ability to assess the substantial and representative complement issue in isolation is significantly affected if not rendered impossible by Everport's discriminatory hiring plan as alleged by the General Counsel and found by the ALJ.<sup>35</sup> Nevertheless, consistent with the principles of *Love's Barbecue Restaurant No. 62*, 245 NLRB 78, 79 (1979), enf'd in part, 640 F.2d 1094 (9<sup>th</sup> Cir. 1981), where a successor in violation of §8(a)(3) of the Act discriminatorily refuses to hire enough of the predecessor's employees to constitute a majority, the Board presumes that it would have hired a majority absent discrimination and imposes an §8(a)(5) bargaining obligation. Pursuant to *Love's Barbecue* and its progeny such as *New Concept Solutions*, 349 NLRB 1136, 1157 n. 44 (2007), *Advanced Stretchforming International*, 323 NLRB 529 (1997), enf'd in part, 233 F.3d 1176 (9<sup>th</sup> Cir. 2000) and *Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1368 (4<sup>th</sup> Cir. 1995), aff'd, 517 U.S. 392 (1996), an employer that engages in a discriminatory hiring scheme forfeits and is deprived of the right to set initial terms and conditions of employment that a *Burns* successor would normally possess. With these authorities in mind, the ALJ properly concluded that Everport's discriminatory hiring precluded the hiring of a substantial and representative complement when Everport began its operations. ALJD 44.

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<sup>34</sup> CGC notes that the Board generally finds an existing complement to be substantial and representative when approximately 30 percent of the eventual employee complement is employed in 50 percent of the job classifications. *Ford Motor Company*, 367 NLRB No. 8, slip op. at 14 (2018); *Shares, Inc.*, 343 NLRB 455, 455 n. 2 (2004); *NLRB v. Asbury Graphite Mills, Inc.*, 832 F.2d 40, 43 (3d Cir. 1987). Therefore, given Everport's admission in its exceptions brief that at no time since June 8, 2016 has it employed more than "39 or 40" mechanics at the NT, it is evident that a substantial and representative complement was already present when the initial 27 mechanics were present on January 4, 2016 (27 out of 39 being 69% and 27 out of 40 being 67%, well over the 30% threshold).

Under *Fall River Dyeing*, there is a presumption of majority status of an incumbent union during a successorship situation. *Fall River Dyeing* cautioned against successor employers "exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence." 482 U.S. at 39-40. In arguing for a date of June 8, 2016, Everport utterly neglects "the significant interest of employees in being represented as soon as possible," and disregards the way in which delay "disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions." 482 U.S. at 49-50. In the cases in which employers have been permitted to postpone the date on which majority is to be assessed, there has generally been some hiatus between the end of the predecessor's operations and the start of the successor's operations,<sup>36</sup> and/or the business of the predecessor has essentially collapsed, such that the successor requires time to rebuild both production demand and the work force.<sup>37</sup> Here, there was only a brief hiatus and no real cessation of operations, particularly given the testimony from Everport witnesses about how hard they were working to effectuate the transition from STS to Everport at the time.<sup>38</sup> See *Publi-Inversiones de Puerto Rico, Inc.*, 365 NLRB No. 29, slip op. at 10-11 (2017) (finding one month hiatus to strongly militate in favor of successorship finding and discussing cases in which substantial continuity was established despite far longer hiatuses). The ALJ therefore correctly found that the one month hiatus in this

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<sup>35</sup> See *Galloway School Lines, Inc.*, 321 NLRB 1422, 1427 (1996) ("Burns principles cannot be neatly employed to an employer" whose only plan was to avoid recognizing and bargaining with the union "because we simply do not know what its hiring plan would have been if it had acted lawfully.")

<sup>36</sup> See, e.g., *Georgetown Stainless Mfg. Co.*, 198 NLRB 234 (1972). However, even a lengthy hiatus without more will not be defense to a finding of successorship. See *Straight Creek Mining*, 323 NLRB 759 (1997), enf'd 164 F.3d 292 (6<sup>th</sup> Cir. 1998). *Fall River Dyeing* itself involved a 7 month hiatus.

<sup>37</sup> See, e.g., *NLRB v. Pre-Engineered Building Products, Inc.*, 603 F.2d 134, 136 (10<sup>th</sup> Cir. 1979).

<sup>38</sup> See also *Sahara Las Vegas Corp.*, 284 NLRB 337, 343 (1987), enf'd, 886 F.2d 1320 (9<sup>th</sup> Cir. 1989) (unilaterally imposed probationary period has no legally cognizable significance on legal obligation of a successor employer to recognize and bargain with an exclusive employee representative). Thus, the probationary status of the Herman Flynn mechanics prior to later receiving their Class B longshore

case was not significant, did not detract from the substantial continuity between the predecessor and the successor, and did not support any postponement of the date on which to assess the substantial and representative complement.<sup>39</sup> ALJD 43.<sup>40</sup>

**3. The ALJ Properly Concluded that Respondents Did Not Demonstrate a Well-Defined Plan to Expand Everport's Operations at the Nutter Terminal (Everport Exceptions 19, 21, 29, 31-33, 35 and 109)**

The ALJ correctly rejected Everport's specious argument that it had a well-defined plan to expand its operations at the NT prior to its commencement of operations at the NT on December 5, 2015.<sup>41</sup> In reaching this conclusion, the ALJ was not persuaded by Everport's reliance on the increase in the amount of mechanics at the NT between January 4, 2016 and June 8, 2016 as evidence of an alleged expansion plan. Rather, the ALJ concluded that the hiring was simply a result of the need to respond to operational complications and ongoing dissatisfaction

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registration has no bearing on the assessment of the appropriate date in this case and does not support Everport's exception calling for the assessment date to be June 8, 2016 rather than January 4, 2016.

<sup>39</sup> See, e.g., *Pennsylvania Transformer Technology*, supra, 331 NLRB at 1147-1148 & fn. 6 (2000) (employer had hired a "substantial and representative complement" on the date that it employed 68 employees, even though it employed 100 at time of hearing, and 130 when case came before the Board 2 years later); *Hospital San Francisco, Inc.*, 293 NLRB 171, 172-173 (1989), enf'd, 930 F.2d 906 (1<sup>st</sup> Cir. 1991) (majority status to be measured as of date of union's recognition demand rather than 10 weeks later, despite probationary status of employees, new and different management team, and remodeling of hospital with new sophisticated equipment).

<sup>40</sup> Lang testified as to dramatic changes in the West Coast and worldwide shipping industry that caused some companies to have dramatic reductions or increases in volume. Tr. 3738. While Lang's avowed interest in efficiency of Everport operations is understandable and commendable (Tr. 3740), there is simply no support for Everport's implication that successorship and a substantial and representative complement should not be assessed until an employer concludes that it has finally reached the stage at which it is operating with maximum efficiency.

<sup>41</sup> Further, under Board law, a successor employer who engages in a discriminatory hiring scheme essentially forfeits the right to rely upon later hirings made pursuant to unilateral changes which the successor made without bargaining with the incumbent union that represented the unit employees of the predecessor. *Voith*, supra, 363 NLRB No. 116 (2016). Thus, once the ALJ concluded that a discriminatory hiring scheme had been established, the ALJ was not necessarily obligated to even consider Everport's evidence with respect to an allegedly preferable later date for determination of when a substantial and representative complement was present in accordance with a well-defined plan. Further, even if Everport had a well-defined plan to expand the NT beyond the initial 27 mechanics present as of January 4, 2016, Everport continued to discriminate in its hiring practices by continuing to go exclusively

by the key client and parent company Evergreen. The ALJ fully considered Everport's evidence with respect to its alleged well-defined plan (ALJD 34-35, 44-46) but correctly found that Respondents' evidence of such a plan was both too speculative and remote in time and in fact contradicted by Everport's own witnesses. Humphrey credibly testified that in the period after Everport took over operation of the NT in December 2015 and when he testified in March 2017, Everport did not expand the NT in any respect. Tr. 387. Further, neither Everport nor ILWU introduced any evidence that any mechanic applicant in any interview was ever informed about any alleged expansion plans. Tr. 369. It would stand to reason that if Everport truly had any such plan, it likely would have touted it to prospective employment candidates. Indeed Lang testified that Everport's initial plan was to hire 27 mechanics, the same amount it understood MTC and MMTS to have employed. While Lang sought to buy himself wiggle room to develop well-defined expansion plan arguments, using words like "preliminary step" and "baseline" (Tr. 1491, 1492), he was impeached by his affidavit testimony in which he unequivocally stated that 27 was the number of mechanics that Everport would need when it was fully operational. Tr. 1493-1494.<sup>42</sup> Consistent with the joint dispatch hall postings, Lang also confirmed that he instructed Leonard that 27 was the amount of mechanics to be hired. Tr. 1495. While Lang claimed that Everport had "plans" to hire more mechanics, he knew neither how many more mechanics Everport planned to hire or when. Tr. 1804.<sup>43</sup> Lang also represented in a declaration

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to the PMA-ILWU joint dispatch hall to get any additional mechanics and did not offer any jobs to any of the remaining MTC or MMTS mechanics after Nenad Milojkovic started work on January 26, 2016.

<sup>42</sup> See also Tr. 3705 where Lang testified that Everport's plan was to hire the complement "believed to be the same as the previous company in there," after which Everport counsel immediately sought to have Lang distance himself from such testimony by leading the next question with "I've confused you."

<sup>43</sup> While Everport contends that it planned to add a night shift in certain shops as part of its well-defined plan, this provides no justification for delaying the date of assessing successorship since the original postings for the initial 27 positions at the NT (GC Exh. 37) reflected the intent to have day shift and night shift positions from the outset. Everport also concedes that interviewees were asked their shift preference. ALJD 44; Tr. 779, 3392.

in related state court litigation that if Everport were ordered to hire more IAM-represented mechanics, it would be forced to lay off the same amount of ILWU-registered mechanics, again a far cry from hiring or retaining more mechanics in accordance with a well-defined expansion plan. Tr. 1805.<sup>44</sup> <sup>45</sup>

The ALJ also properly refused to give significance to events that had not yet happened as of the July 11 and 12, 2017 dates on which Lang was testifying (e.g., the unfinished completion of discussions to purchase additional rubber tire gantry cranes/transtainers and/or additional acreage at the Port of Oakland—Tr. 3736, 3751-3753, 3787, 3807) or to events that occurred well after the complaint issued and only a few months before Lang testified (e.g., the alleged repair of a formerly inoperable ship to shore crane—Tr. 3813-3814). To give weight to such remote events would utterly disregard and violate fundamental principles of successorship law that take account of the vulnerability felt by formerly represented employees deprived of their chosen union at a time of transition between employers. *Fall River Dyeing*, supra, 482 U.S. at 27, 39 (1987). Lang admitted that he did not know when his discussions with the Port of Oakland about obtaining additional acreage began (Tr. 3783-3784), and such discussions had not even led to a consummated transaction by July 2017 (a year and a half after Everport commenced operations at the NT in December 2015). Contrary to Lang’s repeated yet unsupported grandiose pronouncements about Everport’s major expansion plans at the NT, the ALJ correctly gave weight to the admission by Lang in an internal Everport document he

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<sup>44</sup> See also GC Exh. 114 (November 24, 2015 email exchange between ILWU officials John Castanho and Ed Ferris where Ferris responds to the question “and how many are they planning on hiring total?” with the answer “there are 27 jobs” without any mention of any plan on the part of Everport to expand in any respect).

<sup>45</sup> That Everport was considering an outside contractor for M&R work until the Joe Gregorio-owned subcontractor withdrew from consideration at the 11<sup>th</sup> hour again demonstrates the absence of a well-defined plan to dramatically expand its own M&R operations at the terminal, and is consistent with any such plan at best being developed “on the fly.” Tr. 3644, 3914, 3977, 4015.

prepared that Everport “has entered the market during the worst time in history for the shipping industry.” GC Exh. 91; ALJD 35, 54.

Further cutting against Respondents’ well-defined plan argument, there is significant record evidence demonstrating that any increase in the size of the mechanic complement after January 4, 2016, stemmed not from an expansion in volume of cargo but from (1) the lesser productivity and lesser skills of certain ILWU-registered mechanics, (2) other nagging problems at the NT such as numerous inoperable chassis needing repairs and problems implementing a new intellectual technology system, and (3) a rigid insistence by ILWU that certain tasks be performed in certain ways even where that was less efficient than how such tasks had previously been performed by IAM mechanics.<sup>46</sup> For example, GC Exh. 78 discusses numerous problems with roadability as of January 13, 2016, and Lang when confronted with this document conceded that Evergreen as Everport’s key customer was insisting that Everport had to devote more mechanics to roadability given the problems described therein (as opposed to any well-defined plan to expand roadability).<sup>47</sup> Tr. 1619-1620. Similarly, GC Exh. 79 demonstrates that roadability problems continued into December 2016, and, as argued at Tr. 1630-1633, it was appropriate for the ALJ to infer that any additional hiring of steady chassis mechanics into the Everport unit at the NT was not part of a well-defined plan but was instead a reaction to Evergreen and Everport’s dissatisfaction with the performance and skill levels of ILWU-registered mechanics, particularly non-steady mechanics dispatched from the joint dispatch hall

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<sup>46</sup> It is evident that even as late as September 28, 2016, Everport had not yet implemented any alleged well-defined plan with respect to chassis. See GC Exh. 9 (Sept. 28, 2016 email from Mike Andrews to Everport Chairman Eric Wang, George Lang and Randy Leonard stating “it remains my strong opinion that to successfully take on additional M&R work including repairing Flexi-Van and TRAC chassis and damaged containers, an M&R superintendent is also needed. . .”); GC Exh. 77; Tr. 1607-1608.

<sup>47</sup> And even then, there is evidence in the record that Everport addressed such roadability problems by having non-steady mechanics dispatched from the joint dispatch hall rather than hiring additional steady mechanics. Tr. 1787-1788.

on weekends. See GC Exhs. 78, 89, 90, 92.<sup>48</sup> GC Exh. 89 starkly describes how Everport had to hire “more gangs” and “extra labor” not due to a well-defined expansion plan but due to problems with the implementation and testing of a new intellectual technology system. Tr. 1664. Even as late as March 3, 2016 (two months after the date on which the initial 27 mechanics were working), Hsieh emailed various Evergreen and Everport officials to complain about the lack of manpower at Oakland and how crane and power shop mechanics had not had time to perform an IT installation because they were dealing with non-operational cranes and top picks, and to further express that Hsieh was hesitant to seek more mechanics from the joint dispatch hall due to its expense and being “not sure we can have qualified ones.” GC Exh. 90. Finally, GC Exh. 92, the minutes from an Everport managers meeting from April 14, 2016, reflects that Lang had serious concerns about the productivity of the Everport M&R department at the NT in comparison with the stellar IAM mechanic performance under MTC which he instructed Leonard to speak to ILWU official Melvin Mackay about. Tr. 3873.<sup>49</sup>

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<sup>48</sup> The record (Tr. 856, 3870; GC Exh. 79) strongly suggests that Choi was not impressed with the performance of the regular steady weekday chassis mechanics either, though he was plainly less impressed with the weekend hall chassis mechanics “who can’t repair a tire.” Choi did not consider roadability to be complex work. In contrast to these complaints, it should be noted that many of the MTC mechanics who Everport did not hire had chassis mechanic experience (e.g., Mike Meister, Matthew Tavares, Brandon Tavares, Patrick Fenisey, Jack Sutton Jr., Matthew Polcer). GC Exh. 65. While Everport sought to distance itself from GC Exh. 79, it shows on its face that it was prepared and reviewed by numerous Everport supervisors (Tr. 1640) and Lang admitted that he had no reason to believe that any of the information contained in it is inaccurate. Tr. 1638.

<sup>49</sup> Given the repeated complaints by Everport officials in their internal documents about the performance of ILWU mechanics in comparison with IAM mechanics, it should come as no surprise that the ALJ as part of her *Love’s Barbecue* analysis held it against Everport that it opted not to hire the readily qualified and available complement of IAM-represented mechanics in order to facilitate the hectic and stressful transition from the predecessor to the successor. See ALJD 47. See *Mammoth Coal Company*, supra, 358 NLRB 1643 (2012) (noting employer’s questionable rejection of qualified unionized predecessor candidates in favor of non-union inexperienced candidates and existing employees from other understaffed employer locations); *Pressroom Cleaners*, supra, 361 NLRB at 672 (employer’s decision to “ignore the obvious choice” of hiring an experienced and available workforce supports a reasonable inference that its decision was motivated by animus towards the union).

Thus, the ALJ rightfully concluded that Everport was not calmly implementing a well-defined plan but rather was putting out fires, such that any subsequent growth in the complement of steady mechanics flowed not from a well-defined expansion plan but from the fact that the existing work was not getting done in a timely manner and Everport did not trust non-steady hall mechanics to competently perform it.<sup>50</sup>

In any event, it is far from clear that any significant increase in manpower even occurred. Lang admitted in a declaration in related litigation that Everport employed 27 steady mechanics at the NT as of March 7, 2016, the same approximate amount employed by Everport as of the January 4, 2016 date on which the ALJ found a substantial and representative complement was present. Tr. 1784-1786.<sup>51</sup> It is thus evident that Everport's claim that June 8 rather than March 7 is the appropriate date is solely so that Everport can derive the benefit of the additional steady mechanics that were hired as of that June 8 date. Respondents also cannot legitimately rely upon evidence of changes taking place after January 4, 2016 in order to postpone the date on which the substantial and representative complement is assessed.<sup>52</sup> Therefore, changes occurring after January 4, 2016 have no bearing on substantial continuity. *A fortiori*, Everport's evidence of

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<sup>50</sup> See also GC Exh. 91 (October 5, 2016, email from Lang to various Evergreen executives admitting that the changeover from IAM to ILWU has been difficult and the cost difference significant).

<sup>51</sup> The difference between the initial 26 as of January 4, 2016 and 27 as of March 7, 2016 is likely explained by the starting of Mackay at the terminal on February 8, 2016, the starting of Steve Sanders at the terminal as of January 12, 2016, or the starting of Nenad "Nash" Milojkovic at the terminal on January 26, 2016. ILWU Exh. 1, Tab Sanders and Tab Milojkovic; GC Exh. 121; Tr. 2865-2866.

<sup>52</sup> See *Torch Operating Co.*, 322 NLRB 939 (1997) (duty to bargain to be assessed upon employer's acquisition of facility, before implementation of operational changes on which employer sought to rely in arguing lack of substantial continuity); *Pennsylvania Transformer Technology, Inc.*, supra, 331 NLRB at 1148 n.7 (refusing to reopen record to consider changes occurring after date on which Board found substantial and representative complement employed and successorship existed); *Banknote Corp. of America*, 315 NLRB 1041 (1994), enf'd, 84 F.3d 637 (2d Cir. 1996) (employer's right to set initial terms and conditions of employment does not extend to changes made after bargaining obligation attaches). See also *Mammoth Coal Co.*, 354 NLRB 687, 727 (2009) (relocation of equipment and staff and discontinuation of belt line system long after takeover by successor irrelevant as assessment of bargaining

changes which were merely being considered but had not been effectuated even at the time of trial (Tr. 2400-2402, 3793-3794, 3803) is totally irrelevant to the substantial continuity analysis. The fact-intensive successorship inquiry is difficult enough when properly confined to actual changes implemented. The ALJ appropriately refused to give significant weight to Everport's evidence that essentially constituted mere perceptions of need for given changes rather than actual changes timely implemented.

4. **The ALJ Correctly Concluded that the Everport M&R Mechanic Unit Remained Appropriate After the Transition and Was Not Accreted into the Coastwide Unit (Everport Exceptions 1-2, 8-9, 19-30, and 109; ILWU Exception 2)**

In the successorship context, "the party challenging a historical unit bears the burden of showing that the unit is no longer appropriate. The evidentiary burden is a heavy one." *Publi-Inversiones*, supra, 365 NLRB No. 29 at 10.<sup>53</sup> Any change in the scope of the bargaining unit does not detract from its historical nature or reduce Respondents' burden of demonstrating that the historic units are no longer appropriate. The bargaining obligation attendant to a finding of successorship is not defeated by the mere fact that only a portion of a former union-represented operation is subject to a sale or transfer to a new owner, so long as the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation. *Bronx Health Plan*, 326 NLRB 810, 812 (1998), enf'd, 203 F.3d 51 (D.C. Cir. 1999); *Hydrolines, Inc.*, 305 NLRB 416, 423 (1991). Board law requires a successor to

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obligation judged from time recognition was unlawfully withdrawn, not from later date on the basis of unilateral changes an employer has made without regard to its bargaining obligation).

<sup>53</sup> *Children's Hospital of San Francisco*, 312 NLRB 920, 928-929 (1993) (compelling circumstances are necessary to overcome the significance of bargaining history; history of meaningful bargaining alone suggests appropriateness of a separate bargaining unit); *P.J. Dick Contracting*, 290 NLRB 150, 151 (1988) (units with extensive bargaining history remain intact unless repugnant to Board policy); *Always East Transportation, Inc.*, 365 NLRB No. 71, slip op. at 4 n. 11 (2017) (we continue to adhere to our long held view that bargaining history is an important factor when determining whether a proposed unit is appropriate in successorship cases).

recognize an incumbent union even if it takes over only a small portion of the predecessor's unionized operations, and the same principle applies here as Everport began operations with 27 mechanics, the same number as existed in the MTC and MMTS units when combined.

Respondents cannot meet their heavy burden here. Both Everport and ILWU point to the 1938 certification of the coastwide bargaining unit in *Shipowners' Association of the Pacific Coast*, 7 NLRB 1002 (1938) to argue that its mechanics were accreted to the Board-certified coastwide unit. Respondents contend that when Respondent Everport joined the PMA, it thereby became an employer of the ILWU-PMA's preexisting registered coastwide longshore workforce and, since the unit employees at the NT constitute only a small fraction of that coastwide workforce, the ILWU had majority status in the coastwide unit.

There are at least two flaws to this argument. First, neither *Shipowners' Association of the Pacific Coast*, 7 NLRB 1002, 1025 (1938) nor any other case noting the 1938 certification of the ILWU have established any presumption in favor of the coastwide unit. The Board's certification of the coastwide multiemployer unit in *Shipowners' Association* calls for neither the creation of a presumption of appropriateness for such a unit nor an abandonment of traditional accretion principles in the West Coast longshore industry. Although the Board held that a coastwide unit was appropriate, it did not explicitly create a presumption in favor of that unit to the detriment of a single-facility unit. Moreover the mechanics employed by MTC and MMTS did not consent to representation by the ILWU in the multiemployer unit, and, despite the history of bargaining between the PMA and the ILWU, that factor should not be accorded more weight

than employee choice of representation. See *Mohawk Business Machines Corp.*, 116 NLRB 248, 249 (1956).<sup>54</sup>

Second, Respondents' argument ignores the Section 7 rights of the former MTC and MMTS mechanics who were hired by Everport. The purpose of the accretion doctrine is to "preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made." *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 473 (2d Cir. 1985); *Frontier Telephone of Rochester*, 344 NLRB 1270, 1271 (2005), enf'd, 181 Fed. Appx. 85 (2d Cir. 2006). However, because accreted employees are added to the existing unit without an election or other demonstration of majority support, the accretion doctrine's goal of promoting industrial stability is in tension with employees' §7 right to freely choose a bargaining representative. *NV Energy, Inc.*, 362 NLRB No. 5, slip op. at 5 (2015). The Board accordingly follows a restrictive policy in applying the accretion doctrine. See *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001)); *Super Valu Stores*, 283 NLRB 134, 136 (1987); *Towne Ford Sales*, 270 NLRB 311 (1984), enf'd, 759 F.2d 1477 (9<sup>th</sup> Cir. 1985); *E.I. Du Pont de Nemours, Inc.*, 341

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<sup>54</sup> Although not specifically addressed by the ALJD, another flaw in Respondents' accretion defense is that an accretion claim must be determined on the facts that existed on the date of the recognition of the union that represents the larger unit to which the employer seeks to accrete the employees, in this case the coastwide unit. See *Ford Motor Company*, 367 NLRB No. 8, slip op. at 12 n. 15 (2018); *American Medical Response, Inc.* 335 NLRB 1176, 1178 (2001); *Dedicated Services, Inc.*, 352 NLRB 753 n. 1, 762 (2008) (two person Board decision); *Brooklyn Hospital Center*, 309 NLRB 1163, 1182 (1992), enf'd 9 F.3d 218 (2d Cir. 1993). In the instant case, the effective date of recognition of ILWU was either the June 30, 2015 date on which Everport was accepted into membership in PMA or in any event no later than the November 19, 2015 date on which Everport counsel sent a letter to IAM counsel advising that Everport was declining to recognize IAM and not disputing the contention in IAM's November 18, 2015 letter (GC Exh. 63) that Everport had recognized the ILWU. GC Exh. 64. IAM representative Don Crosatto testified confidently that until receiving this November 19, 2015 letter, IAM did not know that Everport had joined PMA (with any corresponding obligation to recognize ILWU). Tr. 1336. Thus, regardless of whether the June 30 or November 19 date is used, as in *Dedicated Services*, supra, 352 NLRB at 762 Respondents' accretion argument immediately fails because on either date Everport was not yet engaged in normal business operations at the NT with no unit employees having performed any unit work for Everport by that time.

NLRB 607, 608 (2004); *Meijer's Thrifty Acres*, 222 NLRB 18, 24 (1976), enf'd, 564 F.2d 737 (6<sup>th</sup> Cir. 1977); *Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969) (although Board might find an overall unit appropriate in representation case where all included employees have equal voice in initial representation decision, it will not under guise of accretion compel a group of employees who may constitute a separate appropriate bargaining unit to be included in overall unit without allowing those employees opportunity to express their preference); *Always East Transportation, Inc.*, 365 NLRB No. 71, slip op. at 4 (2017) (determination of appropriateness of a unit is different in successorship context than in an initial representation case; single facility presumption is particularly strong where employees have historically been represented in a single-location unit). If the new group may constitute a separate appropriate unit, the Board will not find accretion. *Save Mart of Modesto*, 293 NLRB 1190, 1191 (1989), enf'd, 933 F.2d 1016 (9<sup>th</sup> Cir. 1991).

Importantly, where the two groups of employees share similar wages, benefits and terms and conditions of employment, the Board considers whether this resulted merely because of the employer's application of the existing collective-bargaining agreement to the new group of employees without their consent. *Party Cookies, Inc.*, 237 NLRB 612, 616 (1978), enf'd in part, 681 F.2d 820 (7<sup>th</sup> Cir. 1982). That is exactly the case herein. Thus, all of the factors ostensibly supporting accretion discussed at pgs. 30-32 of Everport's brief cannot and should not be considered in the instant case in which the ALJ properly found a discriminatory hiring plan. That the formerly IAM-represented mechanics hired by Everport now share certain working conditions with the long-time ILWU registered mechanics employed by Everport is solely because of the unlawful application of the PCL&CA to the IAM-represented mechanics without recognizing or bargaining with the IAM. See *Meijer's Thrifty Acres*, supra, 222 NLRB at 24.

Board law squarely places the burden on a party alleging accretion to show compelling circumstances. The key compelling circumstance evaluated by the Board is a fundamental change in the scope and direction of the employer's enterprise. *PCMC*, supra, 359 NLRB at 1211-1212. While the Board evaluates the traditional community-of-interest factors to determine whether a unit remains appropriate for bargaining in light of changed circumstances, the Board gives significant weight to the parties' history of bargaining in separate units, reasoning that "compelling circumstances are required to overcome the significance of bargaining history."<sup>55</sup>. Along these lines, the ALJ correctly found there to be abundant evidence of a substantial continuity between MTC's and MMTS' operations and Everport's operations at the NT rather than any concrete evidence of a fundamental change in the scope of the enterprise. The modest incidental changes relied upon by Respondents with respect to roadability, tire repair, or technological improvements did not alter the basic mission and function of the terminal. ALJD 12, 42-43. Thus, Respondents failed to establish the type of compelling circumstances necessary to establish an accretion in the face of a longstanding history of bargaining in separate units.

In addition to these legal deficiencies, Respondents' accretion argument is factually deficient. Accretion is inappropriate here because the IAM-represented MTC and MMTS units, historically excluded from the coastwide ILWU unit, coexisted side-by-side for decades and shared no community of interest with the ILWU unit at the NT. See *Kaiser Foundation Hospitals*, 343 NLRB 57 (2004). ILWU Exh. 10 reflects that the Port of Oakland had more red

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<sup>55</sup> See *Naperville Jeep/Dodge*, 357 NLRB 2252, 2253 (2012) (quoting *ADT Security Services*, 355 NLRB 1388, 1388 (2010), enf'd 689 F.3d 628 (6<sup>th</sup> Cir. 2012), and *Radio Station KOMO-AM*, 324 NLRB 256 (1997)); *Serramonte Oldsmobile*, 318 NLRB 80, 104 (1995), enf'd. in relevant part 86 F.3d 227 (D.C. Cir. 1996); *Children's Hospital of San Francisco*, 312 NLRB 920, 929 (1993) ("Both the Board and the courts have long recognized not only that the traditional factors, which tend to support the finding of a larger or single unit as being appropriate, are of lesser cogency where a history of meaningful bargaining has developed, but also that this fact alone suggests the appropriateness of a separate bargaining unit and

circled terminals than any other port mentioned therein, thus demonstrating the nature of that longstanding coexistence.

In determining whether the accretion standard has been met, the Board considers factors including integration of operations, centralization of management and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history, degree of separate daily supervision, and degree of employee interchange, including specifically temporary transfers. *Archer Daniels Midland*, supra at 675. However, the Board has held that the "two most important factors--indeed, the two factors that have been identified as critical to an accretion finding--are employee interchange and common day-to-day supervision," and therefore "the absence of these two factors will ordinarily defeat a claim of lawful accretion." *Frontier Telephone of Rochester*, supra at 1271 and fn. 7. In rejecting the accretion defense (ALJD 63-64), the ALJ correctly determined that the unit employees now at the NT do not share such an overwhelming community of interest with the employees in the ILWU coastwide unit that they cannot constitute a separate appropriate unit.

Initially, the evidence of interchange in this case is more theoretical than actual. The PMA payroll records reflect that of the Herman Flynn mechanics who had begun working as of the January 26, 2016 date on which the last Herman Flynn mechanic (Nenad Milojkovic) had started, only one of them (Tim Burns) has worked any hours for any other employer or in a classification other than mechanic at any time between January 26, 2016 and February 2017. ILWU Exh. 1, Tab Burns; Tr. 2366, 2391.<sup>56</sup> See *Towne Ford Sales*, 270 NLRB 311 (1984) (no

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that compelling circumstances are required to overcome the significance of bargaining history.") (internal quotation marks omitted), enf'd 87 F.3d 304 (9th Cir. 1996).

<sup>56</sup> No weight should be given to the fact that Herman Flynn mechanic Brent Zieska worked a mere one day in a non-mechanic classification for an employer other than Everport between January 26, 2016 and February 2017. ILWU Exh. 1, Tab Zieska. Zieska is an outlier. The more typical experience is that of Herman Flynn mechanic Preston Humphrey who testified that after starting work with Everport he needed

weight is assigned to the fact that interchange is feasible when in fact there has been no actual interchange of employees). Similarly, although it is irrelevant to the accretion analysis here, the evidence of interchange just involving the ILWU-registered mechanics is not significant.<sup>57</sup> There was no evidence of temporary or permanent employee interchange between the M&R mechanics employed by either MTC and MMTS or Everport at the Terminal and the ILWU-represented M&R mechanics employed by other employer-members of the PMA at any other facilities in Oakland or on the West Coast. Choi admitted that Everport has not since December 5, 2015, sent any of its mechanics from the NT to work at any other port or for any other employer. Tr. 500, 505-506.

Further, there is also no evidence of the existence of common day-to-day supervision over the longshore and M&R mechanic workforce. Supervisors or leadmen from Stevedoring Services of America (SSA) and Trapac do not supervise or give orders to Everport mechanics (Tr. 536), and there is correspondingly no evidence that Everport leadmen or supervisors ever supervise or give orders to SSA or Trapac mechanics. Tr. 537. Similarly, while ILWU-registered walking bosses may supervise other ILWU-registered classifications such as so-called 9.43 operators, there is no evidence in the record of walking bosses supervising mechanics working alongside persons in other job classifications. Tr. 2114-2115, 2121. For these reasons, Respondents' accretion defense lacks both legal and factual merit.

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to work more overtime in order to compensate for the fact that he was earning less money with Everport under the PCL&CA than he had been earning in his predecessor IAM-represented position, such that he had no time or energy to seek out other jobs at other terminals or ports. See ALJD 48; Tr. 470-471.

<sup>57</sup> The ILWU payroll record summaries (ILWU Exhs. 13-16) exaggerate the extent to which various ILWU-registered longshoremen have worked at various ports and/or for various employers by not noting the frequency of such occurrences. A review of these summaries and comparison with underlying PMA payroll records (GC Exhs. 116-160) indicates that many of the ILWU-registered longshoremen have worked fewer than five times for each named employer and/or fewer than five times at each named port, as reflected on an Appendix A that was submitted as an attachment to the General Counsel's post-hearing brief to the ALJ.

**C. The ALJ Correctly Rejected Respondents “Perfectly Clear” Claim (Everport Exceptions 2-3, 10, 14-17, and 109)**

As explained above, the ALJ correctly found substantial continuity between the predecessor and successor operations, that a substantial and representative complement of mechanics were working at the NT as of January 4, 2016, and that the historically IAM-represented units remained appropriate after Everport took the M&R work in-house at the NT. The ALJ accordingly found that all prerequisites to *Burns* successorship were satisfied. The General Counsel does not allege that Everport is a perfectly clear successor to the MTC and MMTS units, and the ALJ appropriately did not make any such finding.<sup>58</sup> Respondents, however, argue that it is “perfectly clear” that Everport was required to bargain with the ILWU by virtue of its joining the PMA. It is manifest that Respondents fundamentally misapprehend the “perfectly clear” doctrine as articulated by the Board and Supreme Court. Under this settled precedent, when it is perfectly clear that a successor employer will retain the predecessor’s employees under their prior working conditions, the successor must first consult with the employees’ bargaining representative before setting initial terms and conditions of employment. *Burns*, 406 U.S. at 294-295. Thus, a perfectly clear successor faces more stringent restrictions than a traditional *Burns* successor and is never privileged to withdraw recognition from the incumbent union.

Here, however, Respondent’s perversion of the perfectly clear doctrine wholly ignores the fact that the IAM historically represented the mechanics employed by predecessor MTC and

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<sup>58</sup> The facts further show that the elements of perfectly clear successorship are absent, as Everport never expressed any intent to retain all 27 of the IAM-represented mechanics working for MTC and MMTS at the NT. Everport did not inform them that their working conditions would be the same under Everport as they had been under MTC or MMTS. Rather, it asked each IAM-represented interviewee if they were amenable to working pursuant to the restrictive and very different working conditions set forth in the Herman Flynn letters. See *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enf’d, 529 F.2d 526 (4<sup>th</sup> Cir.

MMTS. Respondents' argument that Everport is a perfectly clear successor to PMA in the coastwide unit utterly neglects the basic idea behind perfectly clear successorship which focuses on how and whether the incoming successor communicates with the incumbent predecessor's employees and whether their hiring is inevitable.<sup>59</sup> Further, the extent to which Everport made clear to non-mechanic ILWU-represented employees that they would continue to be subject to the PCL&CA after the transition from MTC and MMTS to Everport is entirely beside the point, and was not established by Everport at the hearing in any event given that Everport did not call any ILWU-registered mechanics to testify about what Everport told them about their anticipated working conditions.<sup>60</sup> The ALJ appropriately applied the *Burns* framework to assess whether Everport is a successor to the MTC and MMTS units. Here, while it is perfectly clear that Everport recognized the ILWU before it even hired any employees, this unambiguous nature of

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1975) (perfectly clear successorship exception does not apply where the successor clearly announces its intent to establish a new set of conditions before inviting former employees to accept employment).

<sup>59</sup> See, e.g., *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 7 (2016) (perfectly clear exception is intended to prevent employer from inducing possibly adverse reliance upon the part of employees it lulled into not looking for other work); *Data Monitor Systems, Inc.*, 364 NLRB No. 4 (2016); *Ford Motor Company*, 367 NLRB No. 8 (2018).

<sup>60</sup> The sole case cited by Everport, *Road and Rail Services, Inc.*, 348 NLRB No. 77 (2006), provides no support for Everport's position. In *Road and Rail*, 20 of the 23 employees who accepted employment with the successor had worked for the predecessor immediately prior to the transition, which is quite different from the discriminatory hiring scheme found by the ALJ in the instant case by which Everport ensured at all times that the mechanic unit never exceeded 49% IAM-represented mechanics. See *Love's Barbecue*, supra, 245 NLRB at 79 (1979). The Board in *Road and Rail* stressed that "this is not a case where the employees' continued employment was contingent on their acceptance of a successor's unilateral changes to their employment terms" (slip op. at 3), whereas in the instant case Everport made clear to all of the IAM-represented mechanics that it interviewed that their potential employment was subject to their agreeing to work under the terms of the Herman Flynn letters, which dramatically restricted their career mobility, as well as the terms of the PCL&CA which were significantly different from the terms and conditions of employment they enjoyed for over forty years under the collective-bargaining agreements between MTC or MMTS and the IAM, and which contained a union security clause requiring the payment of dues to the ILWU.

its conduct does not legitimize its premature recognition. The perfectly clear successorship doctrine is simply not applicable on the facts at hand.<sup>61</sup>

However, the ALJ correctly noted that Everport's perfectly clear successorship argument contained admissions against interest. ALJD 59. To the extent that Everport argues it was required to employ already-registered longshoremen from the joint dispatch hall by virtue of having joined PMA, Everport effectively admits that it was a successor by as early as the June 30, 2015 date on which Everport was admitted into membership in PMA, a date long before Everport had begun normal operations at the NT or had a substantial and representative complement of (or indeed any) non-managerial, non-supervisory employees. For all of these reasons, the ALJ properly rejected Respondents' contention that Everport constituted a perfectly clear successor to PMA rather than a traditional *Burns* successor to MTC and MMTS.

**D. The ALJ Correctly Found that Everport Discriminatorily Refused to Hire IAM Mechanics to Evade a *Burns* Successor Bargaining Relationship with the IAM (Everport Exceptions 6, 12, 18, 39, 42-44, 50-51, 53-57, 67-72, 76-88, 91-96, 98-106, and 109; ILWU Exception 1)**

The ALJ appropriately concluded that Everport engaged in a discriminatory hiring scheme in violation of Section 8(a)(3) of the Act in two distinct ways. First, it is undisputed that Everport recognized the ILWU prior to employing any employees and it initially only considered for hire in its M&R workforce mechanics in the PMA-ILWU joint dispatch hall, thereby

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<sup>61</sup> The essence of the perfectly clear successorship cases is the inevitability of the hiring of the employees. In the instant case, by contrast, the record clearly establishes that Everport did not hire all of the ILWU-registered mechanics from the joint dispatch hall or all of the IAM-represented mechanics from MTC and MMTS who applied for positions with Everport. In perfectly clear successorship cases such as *Cadillac Asphalt Paving Company*, 349 NLRB 6 (2007) and *Paragon Systems, Inc.*, 364 NLRB No. 75, slip op. at 2-3 (2016), it is evident that perfectly clear successorship applies where the hiring is an inevitability and the submission of applications or resumes is a formality, not where (as here) hiring interviews are conducted and the employer has the discretion and ability to hire certain applicants and reject others. The uncertain status of the effort to subcontract M&R work to a Gregorio company only further detracted from any air of inevitability. The ALJ therefore properly concluded that Respondents' perfectly clear successorship argument was misguided and inapplicable. ALJD 66-68.

discriminating against the former MTC and MMTS mechanics. Indeed, it determined to only hire and consider IAM-represented mechanics after posting the positions at the joint dispatch hall where only ILWU-registered mechanics were likely to see them, and only considered and hired IAM-represented mechanics after exhausting the ILWU-registered mechanics from the joint dispatch hall. That it mistakenly believed it was obligated to do so under the PCL&CA is no defense. Here, Everport concedes that there was never a possibility that it would recognize the IAM. Thus, as the ALJ found, by prematurely recognizing ILWU and evading its statutory obligations to the IAM as a *Burns* successor, Everport engaged in a discriminatory hiring scheme even before Choi made his unlawful percentage statements.<sup>62</sup> Secondly, after already effectively granting a preference to ILWU-registered applicants by virtue of the exhaustion of the dispatch hall, Everport did little to nothing to encourage IAM applicants to apply. Moreover, even when Everport started interviewing the former IAM-represented mechanics, Everport clearly strategized to ensure its workforce would be comprised of a majority of ILWU-registered employees, even after it was not entirely satisfied with the qualifications of the initial group of ILWU-registered mechanics who applied. Everport also provided multiple opportunities to ILWU but not IAM to furnish additional potential candidates. Everport's efforts to ensure that it did not inadvertently hire IAM mechanics as a majority of the mechanics working at the NT (as exemplified by Choi's remarks regarding the need to ensure the hiring of no more than 49% IAM mechanics or no less than 51% ILWU mechanics) were simply an additional precaution and icing on the cake. *Pressroom Cleaners*, 361 NLRB 643, 669-671; *U.S. Marine Corp.*, 293

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<sup>62</sup> See ALJD 60. "By granting recognition to ILWU at a time when Everport neither employed a substantial complement of the M&R workforce nor was engaged in normal business operations, Everport prematurely recognized ILWU in violation of Section 8(a)(2) and applied the union security clause and Herman Flynn requirements in violation of Section 8(a)(3)."

NLRB 669, 670 (1989), *enf'd*, 944 F.2d 1305 (7<sup>th</sup> Cir. 1991).<sup>63</sup> Choi's statements, as testified to by three credited employee witnesses, are evidence of animus as well as overt acts evidencing a discriminatory motive. The fact that the ratio of ILWU-registered mechanics to IAM-represented mechanics ended up being so close to that mentioned in Choi's statements,<sup>64</sup> supports the ALJ's reasonable determination that Everport further conducted its hiring so as to preclude the IAM mechanics from being a majority.

The record contains ample evidence of the awareness and sensitivity of both Everport and ILWU to the prospect of there being insufficient numbers of qualified ILWU-registered applicants, particularly in more technically challenging positions like the crane and power shops. ILWU, through Mackay and Ferris, was intimately involved in Everport's hiring process and colluded with Leonard and Choi. Indeed, Ferris' willingness to leave his secure and comfortable job at Trapac to apply at Everport in order to "secure the jurisdiction" for ILWU speaks volumes. Choi and Leonard's self-serving testimony to the effect that ILWU did not dictate exactly which ILWU-registered mechanics Everport should hire (Tr. 1089-1091, 3410) does not detract from the otherwise abundant evidence of collaboration between ILWU and Everport throughout the hiring process (particularly the latter stages when Everport informed ILWU that it was not fully satisfied with the qualifications of the ILWU-registered applicants that had applied thus far).

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<sup>63</sup> In a successorship context, the traditional failure-to-hire-test derived from *FES*, 331 NLRB 9 (2000), *enf'd*, 301 F.3d 83 (3d Cir. 2002) does not apply. Instead, as established in *Planned Building Services, Inc.*, 347 NLRB 670 (2006), a discriminatory refusal to hire requires the General Counsel to prove only that the employer failed to hire employees of its predecessor and was motivated by antiunion animus. 347 NLRB at 673. Further, in a successorship context, the General Counsel is not required to show that the employer knew of the alleged discriminatees' individual union activities and was motivated by animus towards those particular activities. *Lemay Caring Center*, 280 NLRB 60, 69 (1986), *enf'd*, 815 F.2d 711 (8<sup>th</sup> Cir. 1987).

<sup>64</sup> See GC Exh. 86 (December 7, 2015 email from Leonard to Lang and Ron Neal announcing Everport's plan to hire 4 ILWU-registered and 3 Herman Flynn crane mechanics and 11 ILWU-registered and 9 Herman Flynn mechanics in the remaining three shops at the NT); Tr. 3347-3348.

Everport cannot plausibly assert that the MTC and MMTS mechanics were not qualified for the jobs given Everport's numerous concessions as to the adequacy of their work (and even the arguable superiority of their work as shown in Everport's records). Choi's ad hominem attacks on MTC mechanic applicants Jack Sutton Jr., Jack Sutton Sr. and Brandon Tavares from the witness stand were not corroborated by other witnesses and were correctly found to be pretextual by the ALJ. ALJD 56-57.<sup>65</sup> Everport did not show or even attempt to show that it refused to hire any ILWU-registered applicants for reasons comparable to those on which it claims to rely as to Sutton Jr., Sutton Sr. and Tavares. See also *Mammoth Coal Co.*, supra, 354 NLRB at 707 (supervisor's negative assertions about qualifications of certain predecessor employee candidates undermined by supervisor's demeanor and lack of prior disciplinary actions against such employees for their supposed performance problems).<sup>66</sup>

Respondents argue that Everport did not engage in a discriminatory hiring scheme because its actions or inactions to conceal the existence of available mechanic jobs at the NT from the IAM-represented mechanics were not as egregious or as extensive as those of the employer in *Love's Barbecue*. Incredulously, Everport describes its hiring process as regular, open and fair. (Brief pg. 41) As noted above, Everport violated Section 8(a)(2) and 8(a)(3) of the Act by its premature recognition of the ILWU in derogation of its statutory obligation to the IAM. However, even setting this aside for the moment, the ALJ correctly found that Everport's actions plainly demonstrated a discriminatory hiring process as contemplated by the *Love's Barbecue* standard. See ALJD 57. In this regard, the ALJ properly relied upon Everport's

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<sup>65</sup> Everport's claim on Brief pg. 43 that some IAM mechanics supported complaints about the work performance of other IAM mechanics not hired by Everport is entirely unfounded and based on hearsay. The transcript cites relied upon by Everport are entirely from wholly discredited witness Choi. Nor did Everport call any employee witness or produce any documents to show any of the alleged performance issues that Choi claimed to have had with particular IAM applicants that Everport did not hire.

failure to advertise the mechanic positions or post them at the NT where they were likely to be seen by IAM mechanics. Tr. 543, 1361, 1566, 3341, 3471.<sup>67</sup> Instead, Lang admits he merely relied upon “word of mouth” as a basis for any IAM mechanics learning of the job opportunity. Tr. 1566. The ALJ also properly relied on the evidence of the alleged misplacing of or failure to receive copies of resumes from IAM mechanics (see GC Exhs. 65, 93), the failure to interview certain IAM-represented applicants (e.g., Pat Fenisey) (Tr. 309, 315), only telling a single IAM mechanic (Ray MacDonald) about the potential positions, the failure to interview the vast majority of the IAM-represented applicants until the predecessors’ very last day at the NT, the tracking of the union affiliation of the applicants, and the application of different hiring criteria to the ILWU and IAM applicants.<sup>68</sup> ALJD 53. See *Mammoth Coal Co.*, supra, 354 NLRB at 706-707, 709-712 (2009) (successor employer who failed to seek most qualified workers and avoided forms of recruitment that were most likely to alert the majority of predecessor unit employees to employment opportunities failed to prove that any predecessor applicants had not filed applications); *Pressroom Cleaners*, supra 361 NLRB at 672 at 30 (employer’s decision to “ignore the obvious choice” of hiring an experienced and available workforce supports a reasonable inference that its decision was motivated by animus towards the union); *Eastern Essential Services, Inc.*, 363 NLRB No. 176, slip op. at 11-12, 14 (2016) (successor employer

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<sup>66</sup> Everport cannot claim that it had fewer jobs than there were predecessor applicants when the posting of 27 initial jobs was expressly premised on that being the size of the MTC and MMTS units.

<sup>67</sup> Because of Everport’s failure to post the positions at the NT, certain IAM mechanics were left largely dependent on the PMA-ILWU joint dispatch hall posting. Tr. 364. While Leonard testified there was no posting at the NT because it’s “not required” (Tr. 3341), there was certainly no prohibition on Everport posting the positions at the NT in order to provide maximum possible exposure to MTC and MMTS applicants, particularly after the initial 10-day posting period from November 11 to 21, 2015 at the hall had passed. That Lang never ordered that any photo of the postings be removed from the NT is of no import since there is no indication that he knew of the existence of any such photo at the time. Tr. 3731.

<sup>68</sup> See, e.g., Tr. 1164 where Choi admitted to considering how IAM applicants got along with each other but made no effort to ascertain whether ILWU-registered applicants interrelated with each other.

found to have engaged in haphazard, frenzied, unsystematic hiring effort despite having available, experienced and trained incumbent workforce). In short, one need not prove that Everport refrained from hiring all of the IAM-represented mechanics in order to conclude that it discriminated against them. See *Voith*, supra, 363 NLRB No. 116, slip op. at 8 (2016) (fact that some of the Teamsters-represented employees of predecessor Auto Handling, Inc. applied for and received positions with successor Voith after Voith prematurely recognized UAW did not dispel the “climate of futility” engendered by the premature recognition of UAW); *Mammoth Coal Co.*, 354 NLRB 687, slip op. at 19; *M. Mogul Enterprises, Inc. d/b/a MSK Cargo/King Express*, 348 NLRB 1096 (2006) (successor unlawfully refused to hire 9 of predecessor’s employees despite including 8 of predecessor’s employees among 21 employees it hired); *Daufuskie Island Club & Resort*, 328 NLRB 415 (1999), enf’d, 221 F.2d 196 (D.C. Cir. 2000) (employer who purposely hired 48.5 percent of predecessor’s employees violated the Act).<sup>69</sup> Here, far from a fair and regular process, the ILWU-registered applicants received every conceivable advantage in comparison to the IAM applicants.

Further, an employer’s discriminatory tactics need not be identical to those in *Love’s Barbecue* in order for the violation to be established. For example, in *CNN America, Inc.*, 361

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<sup>69</sup> Although not expressly relied upon by the ALJ in her decision, the record also contains evidence that Everport supervisor Craig Dillenbeck sent an email to Leonard on November 12, 2015 (GC Exh. 82) in which he informed Leonard that he had been approached by IAM mechanics Preston Humphrey and Kevin Bono but that Dillenbeck “said nothing.” Then, on November 14, 2015, Dillenbeck emailed Leonard to inform him that Dillenbeck had been approached by IAM mechanics Jack Sutton Sr. and Jr. and that he “said nothing and didn’t know anything to them.” GC Exh. 83. While Everport sought to distance itself from Dillenbeck by claiming he had no direct role in overseeing mechanics (Tr. 3346), it is clear that Leonard was Dillenbeck’s supervisor at the time of these emails, that Dillenbeck sent these emails because he believed this was a matter of interest to Leonard, and that Leonard then forwarded the emails to Lang. Everport failed to call Dillenbeck as a witness and therefore failed to dispel the inference that Lang and Leonard were highly interested in ensuring that IAM applicants did not apply.

NLRB No. 47 (2014), enf'd in pertinent part, 865 F.3d 740 (D.C. Cir. 2017),<sup>70</sup> CNN, like Everport herein, decided to take certain production work in house rather than continue to utilize a unionized subcontractor. CNN also implemented a discriminatory hiring plan designed to limit the number of discharged predecessor employees it hired for its in-house operations. CNN also made remarks akin to Choi's §8(a)(1) statements, and argued it would be utilizing different technologies than had the predecessor employees. Despite these claims, the Board concluded that the work (filming, editing and ultimately showing televised news stories) was fundamentally the same as it always had been. 361 NLRB No. 47, slip op. at 21. In an extensive analysis of *Love's Barbecue, CNN America* made clear that an employer can have an unlawful motive to avoid a successor bargaining obligation, and thereby forfeit the right to set initial terms and conditions of employment, even if it ultimately hires a majority of the predecessor's employees. 361 NLRB No. 47, slip op. at 18 n. 36 (discussing *U.S. Marine Corp.*, 293 NLRB 669 (1989) and *Planned Building Services, Inc.*, 347 NLRB 670, 674 (2006)). *CNN America* reconfirms that when an employer attempts to evade a bargaining obligation by discriminatorily refusing to hire employees of the predecessor, the Board will presume that the employer would have employed the predecessor employees in its unit positions. 361 NLRB No. 47, slip op. at 18; *U.S. Marine Corp.*, supra, 293 NLRB at 672. The inference of discrimination and intent to discriminate is not dispelled if the successor employer accidentally hires predecessor employees as a majority of the successor unit. In other words, as long as the intent to discriminate is present, the actual numbers do not matter. See *The Parksite Group*, 354 NLRB 801, 812 (2009) (two-person Board decision) (successor set up hiring process intended to avoid obligation to bargain and would have wound

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<sup>70</sup> While the D.C. Circuit reversed the Board on a joint employer finding, it upheld the Board's conclusions with respect to successorship and a discriminatory hiring scheme.

up with 14 predecessor employees and 15 non-predecessor employees but for five of the non-predecessor employees unexpectedly rejecting their job offers).

Finally, there is no significance to ILWU's argument that the majority of subsequent cases citing *Love's Barbecue* do not involve an unlawful premature recognition. Cases such as *Voith*, supra, 363 NLRB No. 116, slip op. at 31 (2016) and *Systems Management, Inc.*, 292 NLRB 1075 (1989), enf'd 901 F.2d 297 (3d Cir. 1990) demonstrate that the *Love's Barbecue* analysis applies irrespective of whether the Employer is angling for no union or its favored union. The injury to the affected mechanics is the deprivation of their chosen bargaining representative and the loss of all of the seniority and pension benefits that they had accrued as IAM-represented employees, a blow in no way softened by the prospect of eventual representation by a completely different union they know little to nothing about.

**E. Everport Violated Section 8(a)(5) of the Act by Imposing Initial Terms and Conditions of Employment on the Nutter Terminal Mechanics without Bargaining with the IAM as Their Collective-Bargaining Representative (Everport Exceptions 4 and 11)**

Because Everport unlawfully and prematurely recognized ILWU in violation of Section 8(a)(2) of the Act and discriminated against employees in violation of Section 8(a)(3) of the Act, Everport forfeited the normal *Burns* right of a successor to establish initial terms and conditions of employment. See *W&M Properties of Connecticut, Inc.*, 348 NLRB 162, 176-177 (2006); *Galloway School Lines*, supra, 321 NLRB at 1425 (1996). Given that forfeiture, both the original application of the PCL&CA to the mechanics working at the NT after December 5, 2015 as well as any additional unilateral changes to the terms and conditions of employment of the NT mechanics made since that time, all constitute unlawful unilateral changes in violation of Section 8(a)(5) of the Act. In the course of its duty to restore the status quo ante, the ALJ properly ordered Everport to restore the terms and conditions of employment as they existed immediately

prior to December 5, 2015 under the collective-bargaining agreements between IAM and MTC and IAM and MMTS that had formerly been applied to the M&R mechanics at the NT.

**F. The ALJ's Credibility Determinations Relevant to the Violations Found Should Not be Overturned (Everport Exceptions 15, 44, 49, 53, 56-64, 66-68, 70-74, 77-86, 88, 92, 97 and 106)**

The ALJ properly credited the testimony of General Counsel witnesses Don Crosatto, Preston Humphrey, Ray MacDonald, Jack Sutton, Sr., and Patrick Fenisey.<sup>71</sup> The General Counsel's employee witnesses were subject to a sequestration order. The ALJ properly took into account that General Counsel witness Preston Humphrey remained employed by Everport at the time he testified. The Board and courts have historically recognized that the testimony of such witnesses that is adverse to their employer is particularly reliable. *Homer D. Bronson Company*, 349 NLRB 512, 534 (2007), enf'd, 273 Fed. Appx. 32 (2d Cir. 2008). CGC also notes that General Counsel witnesses Patrick Fenisey and Ray MacDonald each obtained and retained other jobs at the Port of Oakland since December 5, 2015, and thus had no incentive to falsify their testimony in an effort to escape prolonged unemployment. Conversely, the ALJ properly discredited much of the testimony from Everport witnesses David Choi, George Lang and Randy Leonard as well as ILWU witnesses Melvin Mackay, Ed Ferris and Leal Sundet for reasons explained in the ALJD, including the vast amount of questions that Everport witnesses were unwilling or unable to answer,<sup>72</sup> and the persistent use of leading questions by Respondent's

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<sup>71</sup> The ALJ appears to have discredited certain of the testimony from General Counsel witness Jack Sutton, Jr. and declined to find an 8(a)(1) violation in the complaint with respect to a statement made by Choi to Sutton, Jr. in Sutton, Jr.'s hiring interview. ALJD 39. The General Counsel has not excepted to the ALJ's failure to find this specific 8(a)(1) violation. In any event, the remedy as to any such violation would be cumulative given the very similar 8(a)(1) violations which the ALJ did find to have been established, which findings were correct as explained further herein.

<sup>72</sup> Tr. 482, 483, 497 (twice), 499, 501, 502, 506, 507, 508, 523 (twice), 527, 535, 541 (twice), 543, 544 (twice), 546, 551, 552 (three times), 557, 575, 581, 583, 587, 594, 595, 600, 622 (twice), 623, 625, 626 (three times), 627 (twice), 629 (four times), 630 (twice), 631 (three times), 632, 653, 656, 661 (twice), 702, 704 (twice), 722 (twice), 723, 730, 731, 733 (three times), 736, 737, 739, 752, 753 (twice), 755, 761,

counsel.<sup>73</sup> The ALJ also properly discredited the bulk of the testimony from key ILWU officials Melvin Mackay and Ed Ferris. ALJD 38-39. Much of the testimony provided by Mackay was unworthy of belief, evasive, and reflected impatience with being questioned. See Tr. 2892-2893, 2919, 2921-2922, 2930, 2935-2937, 2989, 2941, 2943-2947, 2969, 2978, 3003-3005, 3018, 3068-3070, ILWU Exh. 5 at pgs. 158-159, GC Exhs. 47 and 108. Most importantly, the ALJ astutely refused to accept the absurd claims by Mackay and Ferris of a lack of interest in and ongoing role in Everport's efforts to ensure that the maximum amount of mechanics from the joint dispatch hall were hired, given the overwhelming documentary evidence to the contrary.<sup>74</sup>

The Board's established policy is not to overrule an administrative law judge's credibility determinations unless the clear preponderance of all relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3d

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763, 766, 770, 779, 792 (three times), 797 (twice), 801, 804 (three times), 805, 812, 815, 819, 827, 829, 837, 863 (twice), 866, 868 (three times), 888, 905, 916, 919, 926 (twice), 984, 993, 995, 1020, 1029, 1039, 1041 (twice), 1044, 1055, 1059, 1067 (twice), 1072, 1078, 1094, 1126, 1129, 1130, 1132, 1138, 1154, 1165, 1170; Tr. 507, 534, 536, 537, 538, 540, 552 (three times), 562, 572, 573, 580 (twice), 581, 583 (twice), 590, 604, 605, 606 (three times), 623, 626, 636, 654, 701, 720, 723, 730, 770, 771, 779, 783, 787, 788, 794, 807, 812 (three times), 814, 815, 817, 818, 820, 829, 837 (twice), 838 (twice), 857, 858, 864, 870, 874, 875, 876 (twice), 885 (twice), 887, 906, 907, 977, 979, 983, 987, 1001 (twice), 1007, 1011, 1032, 1033, 1038, 1039, 1041, 1046, 1049, 1053, 1067, 1132.

<sup>73</sup> See Tr. 894, 898, 899, 902, 905, 909, 916, 920, 925, 979, 985, 988, 989-991, 999, 1000, 1006, 1008-1011, 1015, 1021-1022, 1033-1035, 1594, 2128-2129, 2378-2380, 2382, 2686, 3292-3294, 3295-3297, 3299, 3300, 3303, 3308-3309, 3314-3315, 3323, 3325-3326, 3330, 3331, 3335-3336, 3341, 3350-3353, 3357, 3360, 3364-3365, 3367, 3370, 3374, 3567, 3570, 3602, 3609, 3610-3611, 3614, 3617, 3623-3625, 3628, 3630-3635, 3639, 3641, 3654, 3656, 3663, 3666-3667, 3672-3673, 3676, 3680, 3683, 3697-3701, 3708, 3713, 3719-3720, 3723-3724, 3726, 3729, 3740, 3745-3748, 3750, 3754, 3784, 3785-3786, 3809, 3810-3811, 3812, 3814, 3818-3822, 3985-3986, 3991-3992, 3994, 4004, 4019, 4027, 4031, 3331; Tr. 3602, 3609, 3610-3611, 3614, 3617, 3623-3625, 3628, 3630-3635, 3639, 3641, 3654, 3656, 3663, 3666-3667, 3672-3673, 3676, 3680, 3683, 3697-3701, 3708, 3713, 3719-3720, 3723-3724, 3726, 3729, 3740, 3745-3748, 3750, 3754, 3784, 3785-3786, 3809, 3810-3811, 3812, 3814, 3818-3822, 3985-3986, 3991-3992, 3994, 4004, 4019, 4027, 4031.

<sup>74</sup> The ALJ also correctly opted to give little weight to the ostensible expert testimony of long-time ILWU official Leal Sundet with respect to the PCL&CA and practices under it. ALJD 39. Much of the testimony from Sundet was conclusory, lacking in details, engendered through leading questions, and derived from ports other than the Port of Oakland (See Tr. 1965, 2040, 2709-2710, 2750-2751) and from the separate clerks agreement (ILWU Exh. 6) and walking boss agreement (ILWU Exh. 12) rather than

Cir. 1951). The *Standard Dry Wall* established policy is particularly forceful in the circumstances of this case where the ALJ presided over an exhaustive 19-day hearing from February to August 2017 in which she had ample opportunity to repeatedly observe the demeanor of key witnesses over multiple days.

**G. The ALJ Properly Found that Everport Violated Section 8(a)(1) of the Act During Communications with IAM Mechanic Applicants (Everport Exceptions 7, 58-66, 70-74, 77-79, 86, 89-95, 97 and 107-108)**

In accordance with the ALJ's credibility determinations, the ALJ properly concluded that Everport made the statements to various employees (employees MacDonald, Sutton Sr. and/or Fenisey) that Everport could not hire less than 51% ILWU-registered mechanics or more than 49% IAM mechanics, and the remarks to all IAM applicants with respect to the need to accept the terms and conditions of employment imposed by the Herman Flynn restrictions, all of which remarks tended to interfere with, restrain and/or coerce employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act, and there is no basis for overturning her credibility resolutions. See *Allegheny Graphics, Inc.*, 307 NLRB 984 (1992), enf'd, 993 F.2d 878 (3d Cir. 1993) (employer statement that it "was going to hire 50 percent of the girls" conveyed to employees they would not be hired if they continued to support a union); *New Silver Palace Restaurant*, 334 NLRB 290, 296 (2001) (employer's statement that it intends to hire a fixed percentage of union employees violates §8(a)(1)); *Mammoth Coal Co.*, supra, 354 NLRB 687, 704-705 (when predecessor employee applicant suggested to successor supervisor that shortage of experienced miners could be addressed by hiring more predecessor employees,

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the PCLCD covering mechanics. See Tr. 2025, 2037, 2057, 2084, 2087-2088, 2093-2094, 2101, 2123, 2806-2808.

successor supervisor told applicant that successor owner was “a smart man, he’s not going to let the numbers go against him.”)<sup>75</sup>

**H. ILWU Violated Section 8(b)(1)(A) and 8(b)(2) of the Act by Accepting Unlawful Assistance and Recognition from Everport at a Time when Everport Had Not Hired Any Employees or Begun Normal Business Operations (Everport Exceptions 3, 7 and 11; ILWU Exceptions 1, 3-5, and 7-8)**

Because Everport prematurely recognized ILWU at a time when ILWU did not represent an uncoerced majority of the mechanics working at the NT and it was not yet engaged in normal business operations at the NT, the ALJ correctly concluded that ILWU violated Section 8(b)(1)(A) of the Act when it demanded recognition in August 2015 and accepted recognition by no later than November 11, 2015 (when it posted the NT mechanic positions at the PMA-ILWU joint dispatch hall) at a time that Everport was not yet engaged in normal business operations and did not yet employ a representative complement. See *Voith*, supra, 363 NLRB No. 116, slip op. at 34 (2016). Further, because the PCL&CA has a union-security clause, and because the Herman Flynn mechanics are bound to the working conditions set forth in the PCL&CA even during their initial probationary and subsequent B registration status, irrespective of their ILWU membership status, the ALJ correctly concluded that ILWU’s conduct also violated Section 8(b)(2) of the Act. In *R.J.E. Leasing Corp.*, 262 NLRB 373 (1982), both the respondent employer and the union with which it was aligned argued that even if the employer recognized

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<sup>75</sup> Telling applicants that Everport was limited in how many non-ILWU registered mechanics it could hire is not meaningfully different from telling employees that an employer has no interest in having a union or does not want union members (*K-Air Corp.*, 360 NLRB 143 (2014)) or telling applicants that it would not hire anyone affiliated with a union (*J & R Roofing Co.*, 350 NLRB 694 (2007)). See also *Williams Enterprises*, 301 NLRB 167, 167-168 (1991), enf’d in part, 956 F.2d 1226 (D.C. Cir. 1992) (statement by successor employer that it intended to operate as non-union plant coercive and unlawful since it announced to prospective employees its intention to remain non-union and implicitly conveyed a message that any conduct which is not consistent with that stance may jeopardize their employment possibilities or security”); *Kessel Food Markets*, 287 NLRB 426, 427 (1987), enf’d, 868 F.2d 881 (6<sup>th</sup> Cir.

the union prematurely, the grant of recognition should not be considered a violation because the lack of a union-security clause in the recognition agreement established that the agreement was not coercive. The Board rejected this argument as without support in Board law and noted that the very existence of a collective-bargaining agreement with a minority union, although not enforced, is still sufficient to warrant finding a violation because such a document can be asserted as a bar to a representation petition filed by another union. Accordingly, the union-security clause in the instant cases was coercive on this basis even if it had not yet been applied to the Herman Flynn mechanics during their probationary periods. The mere maintenance of a union-security clause even without evidence of enforcement is sufficient to establish the violation.<sup>76</sup> *Raymond Interior Systems*, 354 NLRB No. 85 (2009) (two-person Board decision), subsequently adopted at 355 NLRB 1278 (2010) and 357 NLRB 2044 (2011).

**III. The ALJ's Recommended Remedies are Appropriate (Everport Exceptions 110-112; ILWU Exceptions 6 and 8)**

Other than as set forth in CGC's limited exceptions on October 26, 2018, CGC asserts that all remedies ordered in the ALJD 74-85, despite their characterization as "sweeping" by Everport (Brief pg. 16) are appropriate, customary and necessary in a case of this type and magnitude, particularly the issuance of an affirmative bargaining order, the rescission of all unilateral changes to unit employees' terms and conditions of employment on and after December 5, 2015, and that each Respondent be required to post a copy of the other

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1989); *Capital Cleaning Contractors*, 322 NLRB 801, 807 (1996), enf'd in part, 147 F.3d 999 (D.C. Cir. 1998).

<sup>76</sup> It is also clear that all of the formerly IAM-represented Herman Flynn mechanics made it through their probationary periods and qualified for their Class B registration, at which time they were each required to fill out forms (see ILWU Exh. 55) authorizing payroll reductions for their pro rata share of the cost of operating the PMA-ILWU joint dispatch hall. See Tr. 2573, 2755, 3249. They were effectively subject to a union-security clause no later than April or May 2016 notwithstanding Respondents' claim that mechanics only become eligible for ILWU membership upon elevation to Class A status.

Respondent's notice given the close interrelationship between each Respondent's unfair labor practices in these cases. The ALJ also appropriately ordered notice readings under *Voith* and *Emerald Green Building Services*, 364 NLRB No. 109 (2016). ALJD 78.<sup>77</sup>

#### IV. CONCLUSION

The General Counsel respectfully submits that Respondents Everport and ILWU have violated the Act in all respects found in the ALJD and that the Board should consequently reject Respondents' exceptions and adopt the ALJD as modified in minor respects to correct certain inadvertent omissions as requested in the General Counsel's separately filed limited exceptions on October 26, 2018.

**DATED AT** Oakland, California, this 9th day of January, 2019.

Respectfully submitted,

/s/ D. Criss Parker

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D. Criss Parker  
Coreen Kopper  
Counsel for the General Counsel

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<sup>77</sup> With respect to the ALJ's issuance of a broad order against ILWU (ALJD 79), the General Counsel adheres to its position from its post-trial brief to the ALJ, namely that it is appropriate to issue an order requiring that ILWU renounce its recognition by Everport as the exclusive collective-bargaining representative of employees in the M&R unit and that ILWU decline any offer of recognition as the exclusive bargaining representative of employees in this unit unless and until it has been certified by the Board as representative of those employees. However, the General Counsel does not take any position for or against the position espoused by IAM and ultimately adopted by the ALJ by which ILWU would be foreclosed from accepting recognition in any case unless the ILWU can establish through a Board conducted election that it is the majority representative of a unit of employees.

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

**EVERPORT TERMINAL SERVICES, INC.**

**and**

**INTERNATIONAL ASSOCIATION OF MACHINISTS  
& AEROSPACE WORKERS, DISTRICT LODGE 190,  
LOCAL LODGE 1546, AFL-CIO, AND  
INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS, DISTRICT LODGE  
190, LOCAL LODGE 1414, AFL-CIO**

**INTERNATIONAL LONGSHORE  
AND WAREHOUSE UNION**

**and**

**INTERNATIONAL ASSOCIATION OF MACHINISTS  
& AEROSPACE WORKERS, DISTRICT LODGE 190,  
LOCAL LODGE 1546, AFL-CIO, AND  
INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS, DISTRICT LODGE  
190, LOCAL LODGE 1414, AFL-CIO**

**Cases: 32-CA-172286**

**32-CB-172414**

**Date: January 9, 2019**

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING  
BRIEF TO RESPONDENTS' EXCEPTIONS TO THE RULINGS AND DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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January 9, 2019

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Date

Ida Lam, Designated Agent of NLRB

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Name

/s/ Ida Lam

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Signature