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LODGE NO. 160, LOCAL LODGE 289

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 19

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, DISTRICT LODGE NO. 160,

Charged Party,

and

SSA TERMINALS, LLC,

Charging Party,

and

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION,

Party in Interest.

No. 19-CD-238056

**INTERNATIONAL ASSOCIATION OF
MACHINISTS DISTRICT LODGE 160,
LOCAL LODGE 289 POST-HEARING
BRIEF**

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I. INTRODUCTION

This is a jurisdictional dispute under Section 10(k) of the National Labor Relations Act to determine which union – the IAM or the ILWU – has the right to perform maintenance work at Terminal 5 in Seattle. Hearing Officer Daniel Hickey conducted three days of hearings in Seattle, on April 24, 2019, April 25, 2019, and June 6, 2019. Unusually for a jurisdictional dispute, the employer in this case refused to state an explicit preference between the two unions claiming the work. But the employer conceded that all traditionally relevant factors, including economy, efficiency, and past practice, would have compelled assignment to the IAM. The employer freely admitted, too, that it assigned the work to the ILWU based solely on advice from the multi-employer association whose *raison d'être* is to negotiate with the ILWU. The Board should issue a decision finding the work should be assigned to IAM-represented mechanics.

SSA Terminals, LLC (“SSAT”) has a collective bargaining agreement with the International Association of Machinists and Aerospace Workers, District Lodge No. 160, Local Lodge No. 289 (“IAM”). Under that agreement, SSAT must assign all maintenance and repair (“M&R”) work in its Puget Sound region terminals, including Seattle, to the IAM. That sounds simple enough, but of course, there’s more. SSAT is a member of the Pacific Maritime Association (“PMA”), an organization of steamship¹ and terminal companies. In the Pacific Coast Longshore Contract Document (“PCLCD”), PMA agreed that its members would assign certain work to the International Longshore and Warehouse Union (“ILWU”). The ILWU now claims that it is entitled to M&R work that IAM-represented employees have performed for decades, and PMA agrees. SSAT has gone along only reluctantly, because as a business decision it would have made far more sense to assign the work to the IAM-represented employees.

IAM-represented employees did the M&R work at Terminal 5 for decades. And for decades, PMA recognized the IAM’s right to that work, first as a past practice, and then as an express “red-circle” exception to its agreement with the ILWU. In 2014, however, Terminal 5

¹ The participation and control of the PMA by steamship companies which are not employers will be discussed, *infra*.

went into disuse as a container terminal, although some activity continued and the terminal has never been entirely vacant. In 2018, SSAT unveiled plans to reopen the terminal for container cargo. It planned to start on a limited basis, with one ship calling a week, by relocating Matson Lines from the adjacent Terminal 30, where the IAM mechanics perform the maintenance and repair. Since work was being relocated from Terminal 30 to Terminal 5, the IAM offered to send mechanics to keep performing the work they were already doing to Terminal 5 that was next to Terminal 18 where IAM mechanics were working. The IAM's contract indisputably entitles it to the work, and SSAT acknowledges that. In contrast, the IAM disputes whether or not the PCLCD covers the work at all. Even if it does, the IAM's claim to the work is superior. Nevertheless, PMA told SSAT that it had to assign that work to ILWU members. SSAT chose to follow PMA's directions and to repudiate its obligations to the IAM and what otherwise would have been its business decision to assign the work to the IAM-represented employees. These Section 10(k) proceedings resulted.

Now, the Board must determine which union should be assigned the work in dispute. Under the multi-factor balancing test the Board applies in Section 10(k) cases, the clear answer is the IAM. Indeed, SSAT conceded as much. Its chief operating officer, Ed DeNike, explained that:

“If we had no contract obligations and we knew – because we knew the [IAM-represented] people who had been working for us at terminal 18 and 30, yes, we – if we didn't have contract obligation to [hire ILWU-represented workers], *we would have used those guys that we already had working for us.*”

Tr. 123:20-24 (emphasis added.)

SSAT therefore knew from the start that it was more reasonable to assign the work to the IAM, and that was its business choice. The only reason we are having this proceeding is that SSAT believes it is obligated under the PCLCD to defend the PMA's decision, whether or not SSAT agrees with that decision. That decision was wrong. Under these circumstances, where the employer acknowledges that it would have assigned the work to the IAM-represented employees

but for the advice it received from the PMA, the Board is compelled to award the work to the IAM-represented employees.

II. FACTUAL BACKGROUND

A. LABOR HISTORY OF TERMINAL 5

Terminal 5 is located in the southern part of the Port of Seattle, adjacent to Terminal 18. Joint Exh. 2. The Northwest Seaport Alliance owns it, Tr. 57:2-3, and SSAT operates it. Like all cargo ports, it takes numerous kinds of workers to safely, effectively, and profitably operate. And like at many ports, different categories of workers at Terminal 5 have historically been represented by different unions. In particular, for many decades, the IAM represented the mechanics who maintained and repaired the cranes and equipment,² while the ILWU represented the longshoremen who unloaded and loaded cargo using the equipment. Joint Exh. 2, ¶ 12; Tr. 59:18-60:7. SSAT and its predecessors have used IAM mechanics at their Seattle-area terminals for over fifty years, since at least 1966. Tr. 18:25-19:6. Article 5 of the IAM's collective bargaining agreement expressly provides that "I.A.M. represented employees shall perform all M&R work, including owned and leased equipment and all M&R work on containers and chassis at all Puget Sound Region Intermodal, Marine or Container Terminals." Joint Exh. 3, p. 2:39-41.

Beginning in 1978, the ILWU began to assert jurisdiction over at least some³ new M&R jobs on the West Coast, but recognized the IAM's continued jurisdiction over terminals where it was already established. Tr. 18:10-17. Then, in 2008, the ILWU and PMA – the organization of shipping companies and terminal operators with which the ILWU negotiates – changed the PCLCD to cover M&R jobs at *all* PMA-member-run terminals and all future terminals, except for those expressly "red-circled" in a side letter, including Terminal 5. Tr. 18:17-24.

² This dispute involves equipment which was previously maintained by IAM-represented employees. SSAT is using 4 cranes at terminal 5 which were maintained by IAM mechanics. The power equipment was almost exclusively moved from terminals 18 and 30, where IAM mechanics had maintained it, to Terminal 5. Finally, the CEM work (Container Equipment Maintenance) on Matson equipment was exclusively performed by IAM mechanics.

³ As explained *infra* pp. 23-25, it is not clear exactly which jobs the ILWU asserted jurisdiction over.

One of the mechanics who worked at Terminal 5 during this time period was Aric Cook. Tr. 512:15-19. Like all mechanics there, he was represented by the IAM. Tr. 513:6-7. As a crane mechanic at Terminal 5, he was highly trained and experienced on the equipment there, including the specific programmable logic controllers (PLCs) used there. Tr. 513:8-19 (PLCs); 515:18-25 (courses on new spreader beams and elevators); *see* 294:15-19 (definition of PLC). He knew the idiosyncrasies of those cranes since had worked on them for years. At the hearing, he explained the strict procedures at Terminal 5 that kept downtime to less than half a percent – similar to the rate at SSAT’s other terminals. Tr. 526:6-21. He went into significant detail about a “redrive,” or improvement, done to the cranes in 2006-07, when he worked on retrofitting and replacing numerous parts of the cranes. Tr. 527:23-529:2. In all, Cook worked on the cranes at Terminal 5 for ten years and became intimately familiar with them. Tr. 538:8-13.

Dustin Crabtree also worked at Terminal 5 for approximately eight years. Tr. 602:23-603:2. However, he left in 2004 and was not present for the redrive. *Id.*; Tr. 513:22-514:6; 515:7-17. Mr. DeNike was not aware that Crabtree had left so long ago. Tr. 505:3-15. In 2014, Terminal 5 closed for container operations. Around the same time, it was removed from the PCLCD’s red-circle list. Tr. 374:20-25. Cook left Terminal 5 to work for SSAT at terminals 18 and 30, where he was able to apply his knowledge of the PLCs on SSAT’s equipment there. Tr. 512:20-23; 514:13-21. Other work continued on off, including for more than half a year in 2015. Tr. 599:7-600:10. Parts of it remained active throughout as a tugboat facility. Tr. 56:1-57:1.

B. SSAT PLANS TO REOPEN TERMINAL 5 ON A LIMITED BASIS TO ACCOMMODATE RELOCATING ONE SHIPPING COMPANY FROM TERMINAL 30

In 2018, as part of a plan to reorganize the Port of Seattle, SSAT developed plans to initially reopen Terminal 5 for limited container traffic. Tr. 112:1-14. The reorganization is necessary because Terminal 46, currently operated by SSAT’s competitor TTI, is closing. Tr. 116:8-25. Mr. DeNike explained the resulting game of musical ships: “That business that is at Terminal 46 will be relocated to Terminal 18. In order for that business to fit at Terminal 18, we

have to move some business out of Terminal 18 to Terminal 30. In order for that business to fit at 30, we have to move Matson out of there to Terminal 5.” Tr. 116:15-19. Matson can move to Terminal 5 now because its ships are smaller than some other companies’. Tr. 120:1-5. Larger ships cannot use the existing infrastructure at Terminal 5. SSAT intends to continue renovating and rebuilding Terminal 5 to accommodate more and larger ships. Tr. 117:21-118:10. The project will take four to five years to complete. Tr. 116:20-21. For at least two years, and possibly for longer, Matson will be the only shipping company calling at Terminal 5. Tr. 115:13-18. Terminal 5 therefore currently only services one ship a week. Tr. 530:8-10. This transitional arrangement, with one ship calling once a week, confirms the reasons discussed below why it would be far more efficient and economical to use IAM mechanics from nearby terminals 18 and 30 to do the interim M&R for the next few years, until any future remodeling is done (at which point, assuming more ships started calling at Terminal 5, more M&R employees would be needed). That possibility is years away.

C. SSAT PLANS TO USE ILWU LABOR AT TERMINAL 5; THE IAM PROMISES TO RESPOND WITH ECONOMIC ACTION

At Terminal 30, the IAM did maintenance and repair work, while the ILWU performed the loading and unloading of cargo on Matson ships. Tr. 113:7-13. The two unions have not conflicted over the work assignment at Terminal 30 and have worked well together. Tr. 113:14-21. On August 16, 2018, the IAM wrote to SSAT, explaining that its contract covered the M&R work at Terminal 5, both because of the express provision that “I.A.M. represented employees shall perform all M&R work, including owned and leased equipment and all M&R work on containers and chassis at all Puget Sound Region Intermodal, Marine or Container Terminals,” and because IAM members had the right to “follow their work” that was moving with Matson. Joint Exh. 3, p. 2:39-41; ILWU Exh. 2. The IAM told SSAT that its members were ready and willing to fill any positions at Terminal 5 as needed, pursuant to Article 5 of the collective bargaining agreement. ILWU Exh. 2; *see* Joint Exh. 3, p. 2:39-41. One of these members was Aric Cook, who had extensive previous experience on Terminal 5’s cranes as noted above.

ILWU Exh. 2, p. 5.⁴ No one would have been better suited and more immediately available to begin the crane inspection and refurbishment necessary to reopen Terminal 5.

On August 20, 2018, SSAT replied, saying that PMA was “in control of SSAT’s labor relations,” and that PMA believed the work could only be assigned to ILWU-represented employees.⁵ ILWU Exh. 3. The choice of assignment, then, was not SSAT’s business decision, but was a direction from the PMA. On March 18, 2019, the IAM wrote again to SSAT, explaining that SSAT’s refusal to assign the work to the IAM constituted a repudiation of the contract. Bd. Exh. 1. It stated that the IAM would respond with economic action, including picketing and strikes, wherever appropriate. Bd. Exh. 1. The IAM’s second letter was the basis for these proceedings.

D. SSAT’S INABILITY TO FIND MECHANICS LEADS IT TO SUBCONTRACT

Although SSAT refused to use the IAM mechanics who were readily available, it had difficulty finding ILWU mechanics. In August, it asked the ILWU to refer mechanics as required by the PCLCD. Tr. 132:9-12. The ILWU posted notices in its Seattle hiring hall, but was unable to find any qualified mechanics. Tr. 132:23-133:6. It then began posting notices all along the coast. Tr. 133:11-13. But for months, no qualified mechanics applied. Tr. 136:4-6. In October, after nearly three months, SSAT was able to hire just one steady crane mechanic, Dustin Crabtree. Tr. 611:24-612:1. Approximately six weeks later, it hired a second worker, Seth Galenis. Tr. 611:24-612:8. Galenis, however, was not a skilled crane mechanic; he primarily worked as Crabtree’s helper, performing manual labor. Tr. 426:7-427:3.

⁴ There are others who work for SSAT who had worked at terminal 5 previously and knew the facility.

⁵ Mr. DeNike stated this plainly and unambiguously, in two different letters. ILWU Exh. 3; IAM Exh. 2. But both SSAT and the ILWU, as well as PMA – which was not even a party to these proceedings – objected to Mr. DeNike testifying about the PMA’s advice. Tr. 41:7-42:10. This gives the Board the chance to dramatically simplify its disposition of this case. The Board ought to discount PMA’s advice entirely, because Mr. DeNike refused to testify about it despite its obvious relevance. The IAM has demonstrated that PMA’s advice was an insufficient reason for SSAT’s assignment to the ILWU; but without that advice, SSAT is left with *no reason at all* for its assignment. In effect the testimony should be stricken because his refusal to testify was improper.

SSAT did not find any additional qualified mechanics who were willing and able to work at Terminal 5 when it needed them. Tr. 134:6-135:3. The only even potentially qualified ILWU mechanics that it found were unavailable because they were already employed by another terminal operator, TTI, at Terminal 46. Tr. 141:21-142:7. SSAT could not interview, consider or hire any of those mechanics, since they were still working at Terminal 46. They could not fulfill SSAT's need for mechanics to open the terminal. Nor was SSAT satisfied as to which ones might be qualified for what jobs, since none of them had ever worked for SSAT before as mechanics.

Towards the end of the year, SSAT was forced to hire a subcontractor from Southern California, PCMC. Tr. 129:3-7. PMA arranged this subcontract in order to preserve the work for the ILWU, even though it was very expensive and inefficient to move mechanics from southern California to Seattle for a limited period of time. PCMC uses ILWU-represented labor. Tr. 132:2-3. SSAT and PCMC did not actually sign a contract until months later, in March. Tr. 129:8-11; IAM Exh. 3. PCMC is itself subcontracting to another company called TESI. Tr. 204:12-21. PCMC had to subcontract because of unexplained "issues" with its workers' compensation insurance. Tr. 212:16-213:7. Mr. DeNike refused to characterize these issues as "problems;" however, he also both denied and confirmed in the same sentence that they were "issues." Tr. 214:3-9. For purposes of this brief, references to "PCMC employees" include TESI employees. SSAT reopened Terminal 5 for shipping operations on April 22, 2019, just a few days before the first day of hearing in this case. Tr. 14:22-15:1. SSAT continues to subcontract to PCMC to this day, and expects to continue to use PCMC employees exclusively until approximately August. Tr. 170:22-171:4. SSAT is paying a very substantial premium for the use of contracted maintenance work. For example, it pays a 10% sales tax on all subcontracted labor. Tr. 460:4-21. That adds up to thousands of dollars a week. IAM Exh. 5, p. 5.⁶ It also pays an additional \$5,000 a week management fee. Tr. 170:4-10; IAM Exh. 5, p. 1. It also has assigned a

⁶ PCMC likely has to pay an additional tax on the subcontract with TESI, which cost it no doubt passes on to its customers. SSAT is directly paying a sales tax on any use of PCMC employees.

separate manager for the small workforce at Terminal 5, adding considerable additional expense. Tr. 394:11-395:12. Mr. DeNike also testified that, to accommodate the ILWU's insistence that "their people [be] taken care of," he agreed to hire out of Local 23 "one-on-one" to the out-of-state PCMC workers, even if he already had sufficient workers. Tr. 156:19-157:7.

E. THE IAM HAS A FULLY DEVELOPED APPRENTICESHIP AND TRAINING PROGRAM FOR MECHANICS

The IAM has a joint apprenticeship program for mechanics which includes all phases of mechanics' work, including the power shop, CEM shop⁷ and crane maintenance. The program is jointly managed with employers, including SSAT. Tr. 583:19-584:6. The program is certified by the State of Washington and has existed for approximately forty years. Tr. 584:7-10. The program trains new workers in "[a]ll aspects" of their jobs and is focused on waterfront work. Tr. 584:11-23. The program takes four years to complete and includes classes at community and technical colleges. Tr. 585:2-10. Approximately two-thirds of employees in SSAT's CEM shop are graduates of the IAM's apprenticeship program. Tr. 585:21-24.

There was no evidence regarding any apprenticeship program in the ILWU. Although the PCLCD – which, again, covers many employers in many ports – does refer in general terms to the establishment of training programs, there was no evidence about the ILWU running any such program in Seattle, or any other program that trains mechanics in the work performed at Terminal 5. *See* Joint Exh. 3, p. 57, § 9.4.

III. SUMMARY OF ARGUMENT

Under the National Labor Relations Act, 29 U.S.C. § 160(k), "it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right[,] and then specifically to award such tasks in accordance

⁷ CEM stands for "Container Equipment Maintenance." This shop repairs containers and chassis, usually belonging to the steamship companies, and charges the steamship company for this service. One of the largest components is the repair and maintenance of the refrigerated containers known as "reefers." The CEM shop contains the largest number of mechanics. It is important because when Matson Lines moved its one ship call per week from Terminal 30 to Terminal 5, its CEM work went with it. As argued throughout this brief, it made sense just to move the mechanics at Terminal 30 to 5 to continue working on the same containers they had maintained for Matson Lines for decades.

with its decision.” *NLRB v. Radio & Television Broad. Eng. Union (CBS)*, 364 U.S. 573, 586 (1961). The Board has “broad” authority to make this determination, not subject to rigid standards. *Id.* at 583; *see also Machinists, Lodge No. 1743*, 135 NLRB 1402, 1410 (1962). Instead, the Board balances the factors it deems relevant in order to make a “judgment based on common sense and experience.” *Int’l Ass’n of Machinists (IAM I)*, 355 NLRB 23, 25 (2010), *reaffirmed*, 357 NLRB 126 (2011); *see also CBS*, 364 U.S. at 583. Relevant factors include: Board certifications of the two unions; the collective bargaining agreements; the employer’s preference; past practices; the current assignment; area and industry practice; relative skills and training of workers; economy and efficiency of operations; and the risk of job loss. *IAM I*, 355 NLRB at 25-27. The Board also sometimes considers safety factors. *See, e.g., Machinists, Lodge No. 1743*, 135 NLRB at 1409.

Here SSAT has admitted that, except for PMA’s interpretation of the PCLCD, it would have assigned the work to the IAM for legitimate business reasons. These are listed below:

- The IAM is more efficient and economical. In chief operating officer Ed DeNike’s words, “The IAM is cheaper.”
- In addition, transferring IAM mechanics as needed from the neighboring terminals 18 and 30 would require hiring few, if any, additional mechanics.
- The IAM’s collective bargaining agreement, negotiated bilaterally between the IAM and SSAT, unambiguously covers the disputed work. The ILWU’s agreement was negotiated with PMA, an association dominated by companies that do not employ waterfront mechanics, and only arguably covers the work, if at all.
- The work that is in dispute involves M&R of equipment used to unload Matson ships, which work was being performed by IAM mechanics before moving to Terminal 5; thus the IAM mechanics would be following their historic work.
- The IAM represented mechanics at Terminal 5 for its entire existence as a container terminal.
- The ILWU never performed the maintenance and repair work at Terminal 5 or on Matson equipment in Seattle before the events giving rise to these proceedings last fall.
- The IAM represents mechanics at both of the other Seattle container terminals (18 and 30), both of which are operated by SSAT, and both of which are adjacent to Terminal 5.

- As Mr. DeNike’s testimony showed, SSAT actually prefers to assign this work to IAM-represented workers, although it is reluctant to anger the ILWU by saying so expressly. Mr. DeNike clearly testified that he would have undoubtedly assigned the work to the IAM mechanics, except for the direction of the PMA.
- If this work is not assigned to the IAM, SSAT employees at Terminal 30 face cutbacks in hours. The ILWU can only point to layoffs at Terminal 46, which are inevitable; Terminal 46 is operated by a completely different company, which is closing. Those have nothing to do with the movement of Matson lines from Terminal 30 to Terminal 5.
- The IAM’s apprenticeship program provides a 4 year training program for the mechanics who perform the work in dispute. The ILWU lacks any such program.
- The IAM mechanics have more skills.
- The immediately disputed work – the maintenance and repair related to Matson Lines shipping including the largest amount of work in the CEM shop – was performed by IAM-represented workers at Terminal 30.

The ILWU will argue that M&R at Terminal 5 is currently done by its members. But even that fact weighs in favor of assigning the work to the IAM-represented employees.

Mr. DeNike expressed satisfaction only with the “work” the ILWU-represented employees are doing. But he expressed no satisfaction with the substantial additional expense, lack of efficiency, and all the other reasonable factors which would require an assignment to the IAM-represented employees. Moreover, he expressed that view in light of the fact that the mechanics were employed by PCMC, and so SSAT will have to hire a new group of mechanics for reasons explained below.

Mr. DeNike repeatedly admitted that it would have been far cheaper, simpler and more efficient just to use the nearby IAM mechanics at Terminal 5 during this period when only one Matson ship a week is calling.⁸ It makes no sense to hire a substantially larger ILWU crew on a steady and separate basis.

⁸ The ILWU did establish that one overtime rate of the IAM is greater than the same shift rate for the ILWU in certain limited circumstances. Tr. 483:11-485:2. See also Tr. 500:23-502:17. The ILWU never established how often that happens. In fact since only one Matson ship calls per week, there is no evidence that any such overtime would ever be needed by the IAM mechanics. Indeed the evidence is to the contrary that it would not require any additional overtime since the workers would just be shifted from their duties at Terminal 30 where they service the Matson ship to Terminal 5. To the extent that the ILWU points this out, it works against their argument.

The ILWU may assert various reasons why the Board should find that the work be assigned to employees represented by the ILWU. But the only reason advanced by SSAT throughout the hearing is that it thought it had to in order to comply with the PCLCD. SSAT asserted no other reason. The ILWU should therefore be precluded from arguing any other reason, since SSAT has not relied on any other reason.⁹

For these reasons, the Board should find that the work be assigned to the IAM, as more fully set forth below.

IV. ARGUMENT

The Board resolves jurisdictional disputes based on “common sense and experience” in light of numerous factors. *See IAM I*, 355 NLRB at 25-27. Here, the factors strongly militating for the IAM are: (1) the IAM’s greater economy and efficiency; (2) the IAM’s unambiguous collective bargaining agreement, as compared to the ILWU’s vague and confusing one; (3) unbroken past practice at Terminal 5 – unbroken until this dispute, that is; (4) SSAT’s use of the IAM at neighboring terminals; (5) SSAT’s apparent preference for the IAM; (6) the likely reduction in IAM mechanics’ existing hours if the work is assigned to the ILWU; and (7) the IAM’s superior skills and training. Although the ILWU implied at the hearing that the IAM was less safe, this was unsupported by any actual evidence, and some evidence suggested the opposite. The only potentially neutral factor is that neither union is Board-certified as the exclusive representative, although the IAM contract more clearly covers the disputed work and the application of the ILWU agreement creates substantial questions as to its legality. The Board should exercise its broad authority, *see CBS*, 364 U.S. at 583, to assign the work to the IAM, consistent with what SSAT would have done except for the advice it received from the PMA.

A. THE IAM IS DEMONSTRABLY FAR MORE ECONOMICAL AND EFFICIENT

Extensive testimony from witnesses called by all parties showed that the IAM can perform the maintenance and repair work more economically and efficiently than the ILWU. The

⁹ If SSAT advances any other reason in its brief, that reason should be ignored because nothing in the record supports such an argument.

IAM is more efficient, above all, because it can accomplish the job with fewer workers and because its members are only paid for the time they work, unlike ILWU members. Furthermore, IAM members are materially less expensive to employ because the IAM does not have costs associated with an exclusive hiring hall or other contract obligations; because of the ease in transferring mechanics to and from the nearby terminal 18 and 30; and because there is no need to waste money on subcontracting middlemen. Again, the Board must keep in mind that the current operation at Terminal 5 involves a small transitional operation of one Matson ship a week. Although in future years it will grow, the economy and efficiency of using the approximately 120 IAM mechanics at neighboring Terminal 18 and 30 as needed is palpable. To the contrary, to hire a separate 15 person crew of ILWU mechanics who will have no other place to work makes no sense.

B. THE ILWU REQUIRES MORE WORKERS, WHO ARE PAID FOR TIME THEY DO NOT WORK

SSAT has already accrued significant unnecessary costs related to ILWU-represented mechanics at Terminal 5, and will continue to do so if the status quo remains in place. In Mr. DeNike's own words, "it's lesser cost with IAM." Tr. 361:3. Mr. DeNike summarized this case cleanly on the second day of the hearing, when the following exchange took place:

Q BY MS. MORTON: Mr. DeNike, have you ever sat down and done a cost comparison of what it would cost SSA to run the terminal with ILWU mechanics versus IAM mechanics?

A Yes.

Q And what did you determine?

A *It's lesser cost with IAM.*

Q Let me ask you -- okay so --

HEARING OFFICER HICKEY: I think -- I'm sorry. I have to follow up with that.

MS. MORTON: Okay.

HEARING OFFICER HICKEY: I need to know how much cheaper is it?

THE WITNESS: The main difference -- the hourly wages are pretty much the same and the fringes and benefits. The difference is, quite frankly, is that *the IAM works eight hours a day, gets paid eight hours a day.*

HEARING OFFICER HICKEY: Um-hum.

THE WITNESS: *The ILWU gets paid ten hours a day and works nine hours a day.* So it's -- the difference in cost is, basically, the amount of hours that is paid in a day -- in a shift.

HEARING OFFICER HICKEY: Okay.

MS. MORTON: Okay.

HEARING OFFICER HICKEY: Thank you very much.

Tr. 360:23-361:21 (emphasis added).

In fact, Mr. DeNike identified just one of the numerous ways that the ILWU's costs exceed those of the IAM. First, as Mr. DeNike explained, SSAT must pay ILWU mechanics for time they do not work. ILWU mechanics along the entire Pacific Coast are paid for ten hours a day – including two hours of overtime – even though they only work nine-hour days. Tr. 217:24-218:9. In other words, each and every full day that an ILWU mechanic works, SSAT pays for an hour of *overtime* without getting that hour of work in return. This constitutes an overpayment on labor of almost 16%.¹⁰ The IAM has no such agreement; if an IAM mechanic is paid for ten hours, it is because he or she worked ten hours. Tr. 218:10-15. SSAT would therefore save about 16% on each mechanic it hires by hiring IAM instead of ILWU in wages alone (not even including assessments to PMA and substantial unnecessary taxes, discussed *infra* pp. 16, 20).

But even more dramatically, when SSAT switches from PCMC to a permanent workforce, it will have to hire *twice* as many ILWU mechanics as it would have to if it employed IAM mechanics. Mr. DeNike testified that he currently plans to hire fifteen ILWU mechanics. Tr. 479:23-480:1. But he then testified that he could get the job done with seven or eight IAM mechanics. Tr. 481:11-23. This testimony was unrebutted. Although Mr. DeNike did not elaborate, it is clear why he would have to hire so many fewer workers: because IAM mechanics can move back and forth between nearby terminals, they can work where they are needed and never need to have down-time. ILWU mechanics, in contrast, would have nowhere else to work; if they are hired on a steady basis at Terminal 5, even though there is only one ship a week calling there, substantial time will be wasted.

¹⁰ SSAT pays 9.5 hours for the 9 hours of actual work, since the ninth hour is overtime. Then it pays an additional 1.5 hours for the tenth, unworked hour. 1.5 is 15.79% of 9.5. This also will require an additional cost of payroll taxes and workers compensation costs which Mr. DeNike did not factor in.

Furthermore, IAM mechanics can do the job more efficiently.¹¹ After all, IAM mechanics are already familiar with the cranes and other equipment at Terminal 5. For example, Aric Cook testified at the hearing that he is a crane mechanic at terminals 18 and 30. Tr. 529:7-16. Prior to 2014, he worked at Terminal 5. Tr. 512:15-21. He became deeply familiar with Terminal 5's cranes, including the programmable logic controllers ("PLC's") that were installed while he was there, and which are the same as the PLC's at Terminal 18. Tr. 513:8-514:21. It is far easier for a mechanic to do a job he has already done before, than to start at a new terminal on new equipment from scratch, as many of the ILWU mechanics would have to do.

It is beyond plain that the need to hire 15 full-time ILWU workers is massively uneconomical, especially when they would be paid an extra hour of overtime every day, incurring additional workers' compensation and payroll taxes. Because the IAM mechanics who are already at the nearby terminals 18 and 30 can be moved back and forth as needed to provide labor for Terminal 5's limited, one-ship-a-week operations, the ILWU simply cannot provide the efficiency that the IAM can.¹²

¹¹ For more on this, see *infra* pp. 37-38. The ILWU may wrongly attempt to argue that it is more efficient because when a piece of equipment that an ILWU longshoreman is using breaks down, an ILWU gearman brings the equipment to the shop, providing certain efficiencies if the mechanic is also ILWU. Tr. 279:8-15; 281:12-20. But this testimony was flatly contradicted by two other witnesses. Alfredo Silva testified that at terminal 18, IAM mechanics usually retrieve the equipment from wherever it has broken. Tr. 567:19-568:10. Tom Carroll corroborated Silva's testimony for both terminals 18 and 30. Tr. 586:13-587:24. The ILWU stevedores and IAM mechanics have worked without disputes at terminals 18 and 30 and so there is no argument that it is less efficient or that it will lead to labor strife to have IAM mechanics at Terminal 5 and ILWU represented stevedores. Tr. 206: 14-207: 3.

¹² The ILWU will argue that SSAT may use the dispatch hall to hire mechanics on a casual basis thus eliminating the need to hire steady mechanics. Mr. DeNike clearly rejected that because SSAT has never done that for mechanics although it has done so for stevedore employees. It is SSAT's intention to hire a steady crew at Terminal 5. Tr. 423: 424: 22. Although Mr. DeNike qualified that by suggesting that they would hire crane mechanics only on the day the ship docked, he admitted that they cannot find qualified crane mechanics. Tr. 424:18-427:2. In contrast SSAT has always used a "lean" crew of steady IAM mechanics without hiring temporary mechanics. Tr. 398:17-399:9. The reason is of course because mechanics can be moved back and forth as needed between Terminals 18 and 30 which would occur if the IAM were assigned the work at Terminal 5. Mr. DeNike stuck by his estimate of hiring 15 steady mechanics at Terminal 5. Tr. 307:6-8. Any supplementary workforce would be in addition to the 15 steady workforce. *Id.* Contrast again this against the situation with the 120 person IAM workforce which could move back and forth and would require the hiring of likely no additional mechanics to service Terminal 5 although with one shipping line moving from Terminal 46, that may require the hiring of additional mechanics, like CEM mechanics.

C. THE IAM DOES NOT HAVE THE EXTRA COSTS ASSOCIATED WITH AN EXCLUSIVE HIRING HALL OR OTHER UNNECESSARY OBLIGATIONS TO PMA AND THE ILWU

Besides the direct wage costs described above, the ILWU mechanics cause SSAT to incur other, indirect costs. For example, the ILWU runs an exclusive hiring hall, the costs of which are paid primarily by employers through an hourly assessment on labor. Tr. 428:11-429:5. The IAM does not run an exclusive hiring hall. In 2018, the ILWU's hiring hall costs PMA over \$32.6 million to administer. IAM Exh. 9, p. 47. That cost is factored into PMA's \$0.79 "Cargo Dues" assessment on each hour worked. Tr. 436:17-437:2; *see* IAM Exh. 9, p. 66. Setting aside the potentially debatable question of whether PMA's funding of the hiring hall is even legal, *see* 29 U.S.C. §§ 158(a)(2), 186(a)(2), it surely has not proven helpful to SSAT when it actually needed to acquire mechanics. Tr. 133:7-19.

In addition, SSAT pays an assessment to PMA for the "travel fund," which helps workers to move from one terminal to another where they are needed. Tr. 444:18-23. SSAT has used the travel fund to help *longshore* workers move, but has never used it for mechanics. Tr. 445:1-23. Using ILWU mechanics therefore incurs a cost – dues to the general travel fund – which SSAT never makes use of with regard to those workers.¹³ Although, as counsel for the ILWU pointed out, the travel fund is a "benefit" of PMA, Tr. 368:18-22, it is not a useful benefit *as it pertains to mechanics*. To the contrary, it is an additional and useless expense imposed on SSAT for mechanic hours.

Even more remarkably, Mr. DeNike testified that, because the ILWU insisted that "their people were taken care of," he would have to hire local workers "one-on-one" to the out-of-state PCMC workers, even if he already had sufficient workers – an egregious example of featherbedding. Tr. 156:19-157:7; *see* 29 U.S.C. § 158(b)(6).¹⁴ This again shows the expense and

¹³ PMA dues fund numerous wasteful projects: a travel fund that paid for no mechanics' travel; a hiring hall that provided no qualified mechanics when needed, *see* p. 20; grievance support that would not have been needed with the IAM, *see* pp. 21-22; and, notably, an attempt to play catch-up with hundreds of millions of dollars of unfunded actuarial liability, *see* IAM Exh. 9, p. 67.

¹⁴ There is no evidence that the additional employees were qualified mechanics but appear to have been just available longshore workers who were hired to satisfy the ILWU's demands for "one-to-one" hiring.

difficulty of dealing with the ILWU. It suggests strongly that SSAT does not support the decision PMA made and did so for concern that the ILWU would impose other unlawful coercion on it. This is inefficient and favors an assignment of the work to the IAM.

D. SSAT IS ALREADY FAMILIAR WITH IAM MECHANICS' SKILLS, SIMPLIFYING HIRING, AND CAN EASILY AND EFFICIENTLY MOVE THEM BETWEEN TERMINALS 18, 30, AND 5

In Mr. DeNike's words, "because we knew the people who had been working for us at Terminal 18 and 30 ... we would have used those guys that we already had working for us," if PMA had not told SSAT otherwise. Tr. 123:21-24. Mr. DeNike further testified that using "those guys" would be easier than interviewing and hiring new mechanics. Tr. 411:18-412:4. Mr. DeNike also explained that it would have been economical to move those mechanics back and forth between terminals as needed. Tr. 409:15-24. SSAT's first instinct – to use the IAM mechanics with which it was already familiar – makes sense.

After PMA advised SSAT that it could only hire ILWU mechanics, SSAT asked the ILWU to refer some mechanics. But it received no applications from qualified applicants who were able to work at Terminal 5. Tr. 132:23-133:3. SSAT was then forced to look for several months all along the coast for ILWU mechanics. Despite this tedious search, it eventually found only two qualified applicants willing to take the job, out of the 20 it was seeking.¹⁵ Tr. 133:7-19; 134:10-18; 136:12-17. Eventually it had no choice but to subcontract to PCMC.

While SSAT was searching in vain for ILWU mechanics, it continued to employ an IAM workforce just next door from Terminal 5, at terminals 18 and 30, a five- and ten-minute drive from Terminal 5 respectively. Tr. 121:2-13. The IAM had offered the names of over one hundred qualified mechanics, then employed at terminals 18 and 30, who were ready, willing and able to begin working at Terminal 5 immediately. ILWU Exh. 2. These mechanics already worked for SSAT, so SSAT knew they were qualified; some had worked for the company for 30 years or

¹⁵ Although SSAT did make a list of approximately 16 applicants that it considered qualified, the vast majority of these worked for SSAT's competitor TTI at terminal 46, so were not able to begin working when SSAT needed them. *See* ILWU Exh. 4; Tr. 366:14-23. The problem is that the list is speculative and cannot be considered until later when SSAT already knows that the IAM mechanics can be moved back and forth to Terminal 5 and are qualified.

more. Tr. 233:9-19. They would continue to work under the IAM contract using their current seniority. Among those mechanics was Aric Cook, who had worked on the cranes at Terminal 5 for ten years and had been involved in their last redrive. He was intimately familiar with the cranes' operation and would have been ready to get started right away. SSAT would not have had to conduct a long search for candidates or to interview unknown applicants. But SSAT did not bring Cook or any other IAM mechanics back to Terminal 5, solely because it believed only the ILWU could work there. Tr. 202:1-5. This highlights the inefficiency and expense of using a separate ILWU crew, rather than the readily available trained IAM mechanics who SSAT already employed.¹⁶

It would have been easy to bring workers from terminals 18 and 30 to Terminal 5, as the IAM suggested. As Aric Cook and Tom Carroll both testified, mechanics shift back and forth between terminals 18 and 30 regularly. Tr. 529:21-24; 592:5-15. They are able to do so because the cargo operations are the same at both terminals. Tr. 590:18-20. They could do the same at Terminal 5. The terminals are literally next to each other. Tr. 591:25-592:4. They have one seniority list and have for years moved back and forth. The only additional cost would be the travel time – which, as was stated repeatedly, is a few minutes which occurs regularly on these terminals. Tr. 593:24-594:5. When Mr. DeNike was asked whether it was efficient to move mechanics between those terminals, his answer was unequivocal:

Q But Mr. DeNike, is it not much more efficient and economical to move the current IAM mechanics, whose skills you know, to terminal 5 than have to interview and hire new mechanics from TTI whom you don't know?

MS. MORTON: Objection. Incomplete hypothetical.

HEARING OFFICER DICKEY: The objection is overruled. I believe that Mr. Rosenfeld's laid the foundation for the question, and I'll allow the answer.

A Yes.

¹⁶ One expense and risk Mr. DeNike forgot to mention is the significant withdrawal liability of the pension fund. See IAM Exh. 9, p. 67. By increasing its workforce, SSAT increases its contribution obligations and increases its potential withdrawal liability. The assignment of the work to IAM represented employees does not increase SSAT's withdrawal liability to the PMA-ILWU pension.

Q BY MR. ROSENFELD: And that would be true of CEM mechanics also, would it not?

A *Yes.*

Tr. 411:18-412:4 (emphasis added). Mr. DeNike also explained that, if he moved mechanics from terminals 18 and 30, there would be no need to hire additional mechanics.¹⁷ Tr. 49:16-23. Again, the reason for this is that Terminal 5 is operating only on a limited basis: one ship per week, little other work to do.

On the other hand, if ILWU continues to do the work, once Terminal 46 closes, Terminal 5 will be the sole cargo terminal in Seattle employing ILWU mechanics. SSAT will have none of the benefits of interchange between terminals in Seattle. Its only other location is Pier 91, which is a seasonal passenger terminal serving cruise ships. Tr. 61:2-8; 508:16-23. As a passenger terminal, Pier 91¹⁸ does not even *have* the cranes and equipment that are at issue in this case. Furthermore, because Pier 91 is seasonal, there *are* no mechanics there for the entire offseason, as the ILWU's counsel noted. Tr. 508:16-23. Finally, Pier 91 is on the other side of Elliott Bay from Terminal 5, substantially farther than either Terminal 18 or 30. Joint Exh. 2.¹⁹ The ILWU workforce cannot easily go back and forth when the work is so different, the schedules are so different, and the terminals are so far apart. Furthermore, using ILWU means that SSAT does not have the advantages of working with a familiar workforce.

Setting aside the cruise ships at Terminal 91 the closest ILWU *cargo* operations will be in Tacoma, 30 miles away. There was no evidence presented at the hearing that SSAT ever transfers or would transfer mechanics between Seattle and Tacoma, but if it had to, it would be a massive waste of time and expense.

¹⁷ Elsewhere, Mr. DeNike said he would likely hire seven or eight mechanics. Tr. 481:11-23. It seems likely that the discrepancy is due to inconsistencies in considering the effects of the rearrangement elsewhere in the port. *Cf.*

¹⁸ It is called Pier 91 not "Terminal 91" precisely because it is different from the container terminals at issue.

¹⁹ No ILWU mechanic is going to move to Terminal 5 where he will lose his seniority. Tr. 504:22-24.

E. USING ILWU MECHANICS HAS ALREADY COST SSAT HUNDREDS OF THOUSANDS OF DOLLARS ON SUBCONTRACTING MIDDLEMEN

SSAT hired just two ILWU mechanics to work at Terminal 5, one of whom was only a helper.²⁰ But it was unable, after a diligent search through the ILWU dispatch hall, to find any more qualified mechanics at the ILWU hiring hall that it pays for – first in Seattle, then on the entire coast. Tr. 132:9-133:18. During this time, SSAT had over a hundred IAM mechanics literally next door at terminals 18 and 30. Tr. 146:10-14. If it had used the IAM at Terminal 5, it would have been free either to assign those workers or to hire new mechanics from outside the union, who would then join the IAM. Tr. 146:15-147:5. But under the PCLCD, SSAT was forced to subcontract to PCMC, a company based in Southern California. Tr. 131:19-132:8; 151:11-3.

Mr. DeNike testified that it is cheaper to have SSAT employees do the work rather than to subcontract. Tr. 151:25-152:2. Further testimony showed just how many different, extraneous costs using PCMC imposed on SSAT. First, PCMC takes a markup, or “override,” of approximately 10% over its labor costs. Tr. 162:5-163:4. Second, PCMC charges an *additional* weekly “management fee” of \$5,000. Tr. 170:4-10. This management fee is in addition to what SSAT pays its actual manager at Terminal 5. Tr. 394:11-395:12. Third, SSAT is required to pay sales tax on its purchase of labor from PCMC, which in Seattle is approximately 10%. Tr. 460:4-21. On the first day of hearing, Mr. DeNike was not even aware that his company was paying sales tax; on the third day of hearing, he confirmed that SSAT does pay that sales tax.²¹ Tr. 173:25-175:1; 460:4-21. This was corroborated in the record by the plain language of PCMC’s contract, IAM Exh. 3, p. 9, and by receipts, *see, e.g.*, IAM Exh. 5, p. 5 (showing sales tax of \$5,233.80 for a one-week period, including \$3,538.71 sales tax on labor alone). If SSAT directly employed workers, as it could have if it used the IAM, it would not have had to pay sales tax. Tr. 175:3-7. Fourth, SSAT was forced to spend \$8,000 to \$10,000 on additional tools,

²⁰ Mr. DeNike explained that SSAT was forced to hire on a “one-on-one” ratio of Local 19. Tr. 158: 10-159:7. That didn’t solve the problem and none were qualified crane mechanics.

²¹ Since PCMC was itself subcontracting labor from TESI, and labor sales are taxable, it is possible that PCMC paid separate sales tax on the labor it purchased from TESI and passed those costs on to SSAT.

because PCMC's mechanics had to travel to Washington from Southern California and could not bring their tools on planes. Tr. 227:16-228:10. Although Mr. DeNike testified that purchasing these tools made business sense, Tr. 322:11-16, that was only true because the mechanics could not bring their own tools. Mr. DeNike also conceded that there was an efficiency in moving equipment back and forth between terminals, which is lost by assignment work to the ILWU at Terminal 5. Tr. 465: 2-10. SSAT would not have had to buy tools for the IAM mechanics, because in contrast, they bring thousands upon thousands of dollars' worth of their own tools.²² Tr. 573:11-574:13. A union that brings its own tools is favored over a union that the employer must provide tools for. *Laborers Local 833*, 297 NLRB 997, 999 (1990). And fifth, despite paying a management fee of \$5,000 a week to PCMC, SSAT *still* had to hire its own manager at Terminal 5 – a ridiculous duplicative cost. Tr. 394:11-395:12. And this additional manager will be a continuing cost to SSAT.

Furthermore, these added costs were substantial. Because SSAT refused to share important portions of its financial records, *see* Tr. 177:1-10, it is impossible to put a precise dollar figure on the amount SSAT wasted by using PCMC. But Mr. DeNike testified that SSAT will spend²³ an extraordinary total of around \$800,000 on PCMC's²⁴ services. Tr. 368:23-369:10. The 10% sales tax *alone* would have accounted for approximately \$80,000. And management fees at \$5,000 a week, from November to August, would be approximately \$180,000. The extra cost alone is \$1,000, 000 just here.

²² Although Dustin Crabtree testified that he brought his own tools, he never testified as to their value, or addressed the out-of-state PCMC workers who did not bring tools. *See* Tr. 635:3-9.

²³ PMA is paying much of this, and Mr. DeNike's testimony is based on PMA's expenditures. This adds to the lack of economy because PMA, without any explanation, is putting up this substantial sum (which SSAT is paying for in part through the cargo assessment it pays to PMA) to pay for the extra costs. Because PMA refused to comply with the subpoena served on it for its records (*see* Bd. Exh. 5(a)-(r)) and Mr. DeNike was precluded from testifying about the communications with PMA about this, the Board should not rely on any justification for the assignment based on any reason provided by the ILWU or SSAT.

²⁴ As noted above, *see supra* fn. 8, PCMC was *itself* subcontracting to another company named TESI – contributing, to its overhead.

After SSAT hires a crew of ILWU mechanics it will be paying double at least which it would have to pay IAM mechanics to take care of Terminal 5 in addition to terminals 18 and 30. The continuing additional costs include: the higher costs of ILWU mechanics; the fact that SSAT can use the regular complement of 120 mechanics at nearby terminals 18 and 30 to perform the work without hiring any new mechanics; the absence of the need for separate equipment or tools which cannot be moved back and forth between terminals 5 and 18 and 30; the requirement to pay the cargo assessment to PMA on each hour worked by the ILWU mechanics; and the need to have a separate management person at Terminal 5, among other reasons.

F. THE IAM HAS FILED NO COSTLY GRIEVANCES AGAINST SSAT, UNLIKE THE ILWU

Mr. DeNike testified that, other than this very case, SSAT has had to deal with *no* grievances, discrimination cases, or other labor relations issues with the IAM. Tr. 449:9-18; 450:21-451:1. The ILWU, in contrast, has filed grievances, which SSAT pays dues to the PMA to handle. Tr. 449:19-25. Because PMA dues come from an assessment on hours worked, this means that every ILWU-represented employee costs SSAT money for grievance handling. Even if the individual employee never files a grievance, the costs of other ILWU grievances are passed on to SSAT through its dues.²⁵

Economy and efficiency, therefore, weigh conclusively in favor of an award to the IAM. It is less efficient to hire ILWU mechanics directly, and even worse to hire them through subcontractors. Unlike the ILWU, which for months was unable to provide SSAT with sufficient qualified mechanics, the IAM is ready to provide SSAT with all the mechanics it needs, today, without exclusive hiring halls or 10-for-9 agreements. The costs of subcontracting, though temporary, are already huge. They will be massively overshadowed by the additional costs SSAT

²⁵ The ILWU pointed out that PMA provides payroll service. Tr. 352:5-6. But that is paid for out of the assessment for each hour worked. The payroll for the stevedoring employees is much more complicated, because they work from terminal to terminal on an irregular basis with many paycodes. Tr. 155:8-156:1. There would be no incremental payroll cost to using IAM mechanics. Tr. 447: 17-448:1. This just illustrates that every consideration proves using IAM mechanics is less costly and more efficient. Mr. DeNike conceded this would be an advantage to using IAM mechanics. Tr. 447:20-448:1.

continues to incur if it hires – as Mr. DeNike predicted – a full crew of 15 ILWU mechanics.
Tr. 479:23-480:1.

1. The Collective Bargaining Agreements Favor the IAM

The language and history of the collective bargaining agreements weigh in favor of assigning the work to the IAM. First, despite both unions’ stipulated assertions that their agreements cover the work, *see* Joint Exh. 2, ¶ 9, only the IAM’s agreement actually does, and does so indisputably. A recent Board decision makes clear that the ILWU’s agreement (the PCLCD) does not cover the work at all, but even if it arguably did cover the work, it does not do so clearly. Second, even if the PCLCD *plainly* covered the work – which, again, it does not – the IAM’s agreement has done so for far longer. The Board cannot allow a union to claim work that has already been promised to another union, nor allow an employer to avoid its longstanding obligations by unilaterally choosing a new union to deal with. And third, the weight of the PCLCD is diminished because it was negotiated by PMA, an association whose members do not even employ the workers at issue; indeed, the PCLCD may well be an antitrust violation.

2. The IAM’s Agreement Indisputably Covers the Work; The ILWU’s Does Not

SSAT admitted that the contract term which purportedly mandated that the work go to the ILWU was no stronger than the term which mandated that the work go to the IAM. Tr. 496:8-16. But in fact, the IAM’s contract is *far* stronger. That agreement provides that “I.A.M. represented employees shall perform all M&R work, including owned and leased equipment and all M&R work on containers and chassis at all Puget Sound Region Intermodal, Marine or Container Terminals.” Joint Exh. 3, 2:39-41. Mr. DeNike testified that the crane work, for example, “came completely within the scope of the IAM contract,” for the simple and clear reason that the IAM has jurisdiction over work on equipment that SSAT owns or leases. Tr. 123:25-124:8.

In contrast to the clarity of the IAM’s agreement, it requires some mental gymnastics to come to the conclusion that the ILWU has jurisdiction over M&R work. The PCLCD does appear – at first glance – to generally grant the ILWU jurisdiction over M&R work. Joint Exh. 3,

p. 9, §§ 1.7-1.71. However, the contract goes on to explain that this jurisdiction is designed to combat displacement due to “robotics and other technologies.” Joint Exh. 3, p. 9, § 1.72.

Furthermore, the contract does *not* give the ILWU jurisdiction over M&R work at terminals that were “‘red-circled’ in the July 1, 2008 Letter of Understanding on this subject.” Joint Exh. 3, p. 12, § 1.81. That letter (which is in fact dated July 28, not July 1) explains that, beginning in 2008, PMA members would assign M&R work to the ILWU in order “to offset the introduction of new technologies and robotics that will necessarily displace/erode traditional longshore work and workers.” Joint Exh. 3, p. 229. The letter defines the scope of work as including the “maintenance and repair ... of all present and forthcoming technological equipment related to the operation of stevedore cargo handling equipment and its electronics.” Joint Exh. 3, p. 230.

Nine years ago, the Board considered these same contracts in a dispute between these same parties at the nearby Pier 91. That terminal “had previously been used as an open pier and yard for cargo ships,” but after significant construction, SSAT turned it into a passenger terminal. *IAM I*, 355 NLRB at 24. The Board concluded that the IAM’s agreement “indisputably” covered the work, while the ILWU had only “asserted at least a colorable contract claim to the work in dispute.” *Id.* at 25. Because the IAM’s stake in the work was unmistakable, while the ILWU’s was plausible but uncertain, the Board found that this factor weighed in favor of the IAM. *Id.*

The next year, the Board examined the language of the ILWU’s contract in greater depth, and determined that it did not cover electrical work at a Kinder Morgan terminal in the Port of Vancouver. *Int’l Bhd. of Elec. Workers, Local 48 (Kinder Morgan)*, 357 NLRB 2217, 2219-20 (2011). The Board interpreted the contract to cover only “new work to be based on the introduction of new technologies.” *Id.* at 2219. The disputed electrical work, in contrast, was no different than it had been for decades. *Id.* at 2219-20. For this and other reasons, the Board did not assign the work to the ILWU. When the ILWU continued to use proscribed means to try to acquire the disputed work, the Board reaffirmed its decision. *Int’l Longshore & Warehouse Union (ILWU I)*, 367 NLRB No. 64, 7 (Jan. 31, 2019) (explaining that its prior decision had

determined that the PCLCD agreement in § 1.71 to assign M&R work to longshoremen was “limited to that work resulting from the future introduction of robotics and other new technologies”). In doing so, the Board admonished the ALJ for having improperly strayed from the Board’s prior decision. *Id.* at 5-6. *See also Everport Terminal Servs., Inc.*, No. 32-CA-172286, 2018 WL 3655798 (July 27, 2018) (finding that M&R work was not covered by the PCLCD, and distinguishing *Pacific Maritime Association*, 256 NLRB 769 (1981) as being about a terminal that “converted from traditional [break-bulk] stevedoring services to a modern container system” just before the dispute in question).

The Board must respect this recent precedent. Here, exactly as in the *Kinder Morgan* case, the ILWU is attempting to misuse its contract in order to claim work that rightfully belongs to the Machinists. *See id.*; Joint Exh. 3, p. 9, § 1.72. SSAT has not implemented any new technology at Terminal 5 that was not already in use at terminals 18 or 30. Tr. 243:24-244:1. And the record does not refer to “robots” or “robotics” even once. Precisely because PMA and the ILWU have negotiated one contract for the entire coast, the contract must be interpreted in the same way in Seattle as it is three hours away in Vancouver. The ILWU simply never negotiated for any M&R work other than that “resulting from the future introduction of robotics and other new technologies.” *ILWU I*, 367 NLRB No. 64 at 7.

Therefore, because the IAM’s contract undeniably covers the work and the ILWU’s does not, this factor strongly favors the IAM. The Board should respect recent precedent and come to the same conclusion that the IAM’s contract is indisputably clearer than the ILWU’s, and that this factor favors the IAM. *See IAM I*, 355 NLRB at 25.

3. The ILWU’s Contract Cannot Be Interpreted to Accrete Jobs Represented by the IAM

A second and independent reason not to interpret the PCLCD to cover the mechanic jobs at Terminal 5 comes from a different line of cases. These cases regard the addition of jobs into an existing bargaining unit by the process of accretion, that is, addition without an election. Under the accretion doctrine articulated in *Safeway Stores, Inc.*, 256 NLRB 918 (1981), “the

Board permits accretion only when the employees a party seeks to add to the existing bargaining unit have little or no separate identity and where the two groups share an overwhelming community of interest.” *Recology Hay Road*, 367 NLRB No. 32 (Feb. 27, 2019). The ILWU cannot accrete the Terminal 5 mechanic jobs into its unit, because mechanics have a distinct identity from longshoremen, and lack any overwhelming community of interest with longshoremen.

Last year, the D.C. Circuit enforced the Board’s decision that the ILWU unlawfully attempted to accrete jobs in Oakland and Tacoma that had previously been filled by IAM-represented mechanics. *ILWU v. NLRB (ILWU II)*, 890 F.3d 1100 (D.C. Cir. 2018), *enf’g* *PCMC/Pac. Crane Maint. Co. (PCMC)*, 362 NLRB 988 (2015), *aff’g* 359 NLRB 1206 (2013). The ILWU argued that it could properly add these positions to its bargaining unit when the docks changed ownership, but the Board did not allow it to do so. “[B]ecause accretion essentially deprives employees of their statutory right to choose their bargaining representative,” it is disfavored. *Id.* at 1111. Because the “IAM was the legitimate union representative of the M&R mechanics at [the disputed] locations before March 31, 2005,” and because they “perform[ed] the same work at the same location ... working under separate immediate supervision from the ILWU-represented employees,” accretion into the ILWU was inappropriate. *Id.* at 1112.

Even more recently, the Board has reaffirmed that accretion is disfavored when it is used to combine workers of one type into a bargaining unit of a different type. *Recology Hay Road*, 367 NLRB No. 32 (Feb. 27, 2019). In *Recology Hay Road*, the union attempted to accrete two material receiving coordinators (MRC’s) into a unit of other landfill laborers. *Id.* at 1. MRC’s never performed work in other classifications, or vice versa, although they interacted with other classifications daily. *Id.* The Board refused to allow accretion. “The burden to show that accretion is appropriate is ‘heavy’ and it falls on the requesting party.” *Id.* at 3. Accretion of one group of workers into another unit is only appropriate when the employees are interchangeable and have common day-to-day supervision. *Id.* Although other factors may be relevant, and could defeat a claim of accretion, these factors are *necessary*, and their absence does ordinarily defeat a

claim of accretion. *Id.* The Board expressly held that “functional integration is a factor independent from interchange, and employee ‘contact’ alone does not constitute interchange.” *Id.*

Here, the ILWU argues that it necessarily has jurisdiction over all work at Seattle port facilities that are not “red-circled” under the terms of the PCLCD. But the ILWU’s sweeping interpretation of its contract, apparently forced on SSAT by PMA, is invalid under settled labor law principles, even if it were a plausible reading of the contractual text – which, again, it is not. An expansion of the contract to cover mechanics would accrete those mechanics’ jobs into the longshoremen’s unit, and the ILWU has not met its “heavy” burden to justify such accretion. *Id.* Even more plainly than in *ILWU II*, where the IAM had been the legitimate representative prior to 2005, here, the IAM was the uncontested representative as recently as 2014. *See* Joint Exh. 2, ¶ 12; *ILWU II*, 890 F.3d at 1112. Furthermore, mechanics and longshoremen, though they work side by side, do not do the same work and are not interchangeable. The contact they have – even if necessary and extensive, *cf.* Tr. 641:4-12 – does not make them part of the same unit.²⁶

As in *ILWU II*, the ILWU is simply continuing to try to expand its jurisdiction with no regard for past practices or longstanding relationships. The Board should not allow this.

G. THE PCLCD WAS NEGOTIATED BY PMA, NOT SSAT

The PCLCD is a coastwide document, negotiated on one side by PMA “on behalf of its members,” and on the other by the ILWU. Joint Exh. 3, p. 1. PMA has approximately 70 members, of which SSAT is one. Tr. 17:18-25. These members include steamship companies, terminal operators, and a few M&R companies. However, the board of directors, which negotiated the PCLCD, is dominated by steamship companies. Mr. DeNike testified that the board of directors consisted of eleven companies – two terminal operators and nine steamship companies. Tr. 72:14-74:3. *See* IAM Exh. 9, p. 6 (showing Board of Directors).

PMA’s control over the PCLCD dramatically weakens that document’s force as a basis for deciding. To the contrary, the PCLCD is a classic unlawful agreement in restraint of trade. 15 U.S.C. § 1. It unlawfully sets wages, benefits, and costs. It unlawfully prohibits

²⁶ SSAT’s recognition of the ILWU was a violation of 29 U.S.C. § 158(a)(2).

subcontracting to persons or employers who are not signatories to the PCLCD. And it unlawfully restrains its signatories from permitting the hiring or use of mechanics employed by a non-signatory, or even employed by a signatory such as SSAT, if they are not working under the PCLCD's terms. Normally, of course, a collective bargaining agreement would be exempt from such scrutiny. *See, e.g., Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). But here there are non-employers, the steamship companies, which are signatories and enjoy the benefits of these restrictions on trade and commerce. Tr. 48:19-49:1. Although counsel for the ILWU tried to stop Mr. DeNike from clearly stating that the steamship companies do not employ longshore workers, Tr. 74:4-75:3, the truth came out a few minutes later, when Mr. DeNike admitted that the international carriers had created separate companies to handle their terminal operations. Tr. 79:22-80:12. Whether or not non-employers actually "control" the PMA, the PCLCD has no statutory protection because non-employers are signatory. *See USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Const. Trades Council*, 31 F.3d 800, 806 (9th Cir. 1996).; *see also* 29 U.S.C. § 101 et. seq.

Here, the unlawfulness under the antitrust laws is heightened by PMA's and the ILWU's assertions that the PCLCD applies in unlawful situations. *See ILWU I*, 367 NLRB No. 64 (ILWU illegally attempted to use the PCLCD to "relitigate" Board's prior decision to assign work to IBEW); *Ports America Outer Harbor, LLC*, 366 NLRB No. 76 (May 2, 2018) (finding violation of NLRA, when employers refused to recognize IAM and recognized ILWU under PCLCD); *Pac. Crane Maintenance Co.*, 362 NLRB 988 (2015) (same). Indeed, even where the Ninth Circuit *applied* an antitrust exemption to the PCLCD – which it only did because the plaintiff was a PMA member, unlike here, *see ILWU v. ICTSI Oregon, Inc.*, 863 F.3d 1178, 1194 (9th Cir. 2017) – it still noted that much of the underlying conduct was likely illegal. *Id.* at 1190-93.

Moreover, because the non-employers do control the PMA, it is an even more direct unlawful antitrust conspiracy and agreement. When the ILWU joins with those shipping companies that are attempting to control the industry coastwide, making non-ILWU contractors "ineligible to compete for a portion of the available work," that "has substantial anticompetitive

effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions.” *Connell Const. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 625 (1975). To summarize, because the PMA membership consists of non-employers, and because those non-employers in fact control the PMA, the restraints on trade are unlawful. The PCLCD therefore cannot be a valid reason to award the disputed work to the ILWU.

Second, setting aside the legality of the contract, it is undeniable that the steamship companies have different interests from terminal operators. The PMA has a strong interest in maintaining work for ILWU members in order to grow its assessment base; it makes no money when IAM members work. But SSAT’s interest is only in hiring workers who will do the best job at the best price, which might not always be ILWU workers. SSAT objected to the 2008 changes to the PCLCD because it was satisfied with its IAM workforce and did not want to create legal issues down the road. Tr. 105:20-107:17. Yet here we are, at precisely that legal issue down the road, as SSAT predicted a decade ago. Moreover, we know that SSAT once sought to leave PMA. Tr. 352:7-8. The Board should give little weight to the PCLCD, in light of SSAT’s persistent reluctance to go along with that document which it did not negotiate. The Board should instead look to Mr. DeNike’s declaration that were it not for PMA’s directions, “we would have used those [IAM] guys that we already had working for us.” Tr. 123:11-24.

Finally, SSAT, joined by the ILWU, objected when questions were asked of Mr. DeNike about his conversations or communications with PMA officials. They repeatedly asserted the *Berbiglia* privilege. *Berbiglia, Inc.*, 233 NLRB 1476 (1977). Mr. DeNike, on advice of counsel and based on that privilege, declined to testify about his communications with PMA. The Board must strike and ignore the contractual argument that the agreement favors assignment to the ILWU. The board must also strike any other explanation asserted by SSAT or the ILWU, since the IAM was prohibited by these instructions from probing the reasons for the assignment, the reason extraordinary sums of money were spent, and the other factors which weigh in favor of

assignment to the IAM. Neither the ILWU nor SSAT should benefit from their refusal to allow cross-examination of the only employer and key witness as to the work assignment issue.²⁷

1. The IAM Was Assigned This Work In The Past

The parties stipulated that the maintenance and repair work at Terminal 5 was performed by IAM mechanics prior to 2014. Joint Exh. 2, ¶ 12. “Past practice” is always considered separately from “current assignment.” *See IAM I*, 355 NLRB at 25-26 (finding past practice favored the IAM although current assignment was to the ILWU). The current assignment to the ILWU in no way alters SSAT’s unbroken past practice of assigning container-related maintenance work to the IAM. SSAT *never* assigned any maintenance or repair work in Seattle to the ILWU prior to 2008. Tr. 24:3-19.

The ILWU may argue that a past practice has developed during the years when Terminal 5 was closed for container traffic and some work was assigned to the ILWU. Tr. 599:7-600:10. But as the ILWU stipulated, that was not container work. Nor was it SSAT’s work. The fact that some ILWU members have worked at Terminal 5 doing unrelated work for another employer does not create a past practice.

Little more needs to be said. Past practice unambiguously favors the IAM.

2. The IAM Does This Work at All Relevant Nearby Facilities

When considering the factor of “area practice,” the Board has examined “areas” of immensely varying size, providing little guidance. *See, e.g., Laborers’ Int’l Union of N. Am.*, 336 NLRB 358, 363 (2001) (“area” was the Cleveland airport); *Iron Workers Local Union No. 112*, 346 NLRB 953, 956 (2006) (“Peoria-East Peoria area,” a metropolitan area of

²⁷ The IAM takes exception to the Hearing Officer’s Order dated June 20 regarding the subpoena issues. He finds the material covered by the subpoenas as “cumulative.” There is nothing in the record including the assertions by PMA or SSAT or the ILWU that the information is merely cumulative, meaning duplicative. To the contrary it may well undermine and contradict any testimony by Mr. DeNike. We submit it will prove that SSAT, the ILWU and PMA knew that the assignment of the disputed work at Terminal 5 to the ILWU was inefficient, uneconomical and without any business justification. It will show that the decision was made solely to keep the ILWU happy and to avoid any unlawful job actions by the ILWU if the work was assigned to the IAM. It will further show that Mr. DeNike and SSAT preferred the IAM but were pressured by the PMA and ILWU to state otherwise.

approximately 373,000 people); *Iron Workers, Local 29*, 199 NLRB 313, 318 (1972) (“Oregon-Washington area”). In order to determine an appropriate reference area, the Board should return to the reason for considering area practice in the first place, which is to promote efficiency and economy. Otherwise, this factor would serve no purpose other than to nakedly award work to whoever already dominates the industry. Because workers can easily and economically move back and forth within the Port of Seattle – and in fact do so, *see supra* § 1(d) – the Port of Seattle is the appropriate area for comparison.

The Port of Seattle includes four cargo terminals: 18, 30, 46, and now 5. Pier 91, where the ILWU represents mechanics, is a seasonal passenger terminal serving cruise ships, not container ships. Tr. 61:2-8. It therefore does not have the same cargo handling equipment including the crucial hammerhead cranes which lift containers off and on container ships. It is irrelevant to area practice. Currently, IAM mechanics perform the maintenance and repair work at terminals 18 and 30, while ILWU mechanics do the work at Terminal 46. Terminal 46, however, is closing. Tr. 116:8-14. If the IAM is assigned the work at Terminal 5, therefore, mechanics at *all* three remaining cargo terminals will be represented by the IAM. If the ILWU is assigned the work, on the other hand, Terminal 5 will be the *only* cargo terminal where the work is performed by employees represented by the ILWU.²⁸

Furthermore, although the ILWU represents some mechanics in Tacoma, 30 miles away, it does not represent all of them because the IAM represents some of them. *See* Tr. 287:1-4; *see IAM I*, 355 NLRB at 26; *Int’l Bhd. of Elec. Workers*, 358 NLRB 903, 906 (2012) (area practice does not favor ILWU when many port facilities on the West Coast are excluded from ILWU jurisdiction). In fact, the Board recently concluded that “the M&R employees at [certain] Oakland and Tacoma ports were not part of the ILWU’s West Coast-wide bargaining unit and the Employer [had a] duty to bargain with the existing IAM bargaining unit” *ILWU II*, 890 F.3d at 1112. Therefore, looking to Tacoma would not provide any semblance of uniformity

²⁸ Historically, the IAM performed the M&R work at Terminal 5. Furthermore, Terminal 5 as noted above is currently a minimal operation with only one ship calling each week.

or efficiency. To the extent the Board seeks local uniformity and efficiency, it can achieve it by assigning this work to the IAM, and ensuring that the IAM does M&R work at all cargo handling terminals in the Port of Seattle. Area practice therefore favors the IAM.

3. **SSAT Prefers To Hire IAM Mechanics; Although It Declined To Say So At The Hearing, the Record Shows SSAT Prefers the IAM**

“The Board generally gives considerable weight to an employer's uncoerced preference in making work assignment awards.” *Graphic Commc'ns Int'l Union, Local 508M* (“*GCIU*”), 331 NLRB 846, 848 (2000). This is an unusual case because SSAT's representative, Ed DeNike, refused to state any preference to the Board. Tr. 384:6-16. He explained that because SSAT works with hundreds of workers from both unions on a continuing basis, he did not want to “irritate” either union by stating a preference for the other. Tr. 384:17-21. But when the Board weighs the factor of employer preference, it is not limited to considering only the employer's representative's statements at the hearing. *See Teamsters Local 636*, 251 NLRB 1329 (1980). Rather, it may consider all the evidence presented at the hearing. Because Mr. DeNike explained that he only refused to state a preference because he feared irritating either union – rather than for a legitimate, traditional, and uncoerced reason – that testimony should be discounted. *See GCIU*, 331 NLRB at 848. Instead, the Board should consider the uncontradicted evidence showing that SSAT does prefer to assign the work to the IAM. The Board may easily infer that if not for the contract, SSAT would have made a different assignment consistent with economy, efficiency and many other advantages of using the IAM workforce.²⁹

In *Teamsters Local 636*, the employer took the official position that it had no preference between the Teamsters and SEIU. 251 NLRB at 1330. However, two of the employer's witnesses testified that they preferred to assign the work to the Teamsters. *Id.* The Board credited this testimony and found that employer preference favored the Teamsters, notwithstanding the employer's official position. *Id.* at 1332.

²⁹ Again, Mr. DeNike conceded that the PCLCD obligated him to defend PMA's work assignment decision. This is different than agreeing that the PCLCD requires assignment to the ILWU represented employees.

In *GCIU*, the employer preferred to assign the work to the GCIU rather than the Cincinnati Typographical Union (CTU). 331 NLRB at 847. However, the employer preferred the GCIU only because it thought the GCIU was a “stronger, better union.” *Id.* at 847-48. The Board declined to give the employer’s preference any weight. It explained that the reason it looks to employer preference is because the employer’s preference is “typically based on legitimate, traditional factors relevant to awarding work in dispute.” *Id.* at 848; *see also NLRB v. Plasterers’ Local 79*, 404 U.S. 116, 124-25 (1971) (stating that while some employers may be neutral, others are not because of “economic interests”). These traditional factors include “industry practice, relative skills involved, the economy and efficiency of operation, and safety factors.” *GCIU*, 331 NLRB at 847 n.5, citing *Jack Ebert & Co.*, 226 NLRB 242 (1976) (awarding work to the Plasterers where all the cited factors weighed towards Plasterers, even though employer had assigned work to Painters). Where the employer simply preferred a “stronger, better union,” the Board gave no weight to that preference. *Id.* at 848.

In a previous dispute between the same three parties as the present case, at Pier 91 in Seattle, the Board assigned the work to the ILWU. *IAM I*, 355 NLRB at 23. There, Mr. DeNike testified that he preferred to assign the disputed work to the ILWU because of SSAT’s commitments as a member of PMA, and that it was “in the best interests of the industry for the employer to go along with that commitment.” *Id.* at 26. Although the IAM argued that PMA coerced SSAT into choosing the ILWU, the Board rejected that argument. *Id.* It is important to emphasize that SSAT has abandoned that position here. It no longer asserts the “best interests of the industry.” The abandonment of the preference stated in *IAM I* is palpable and directly controlling.

Here, unlike nine years ago at Pier 91, Mr. DeNike stated no preference. Tr. 384:6-16; *see IAM I*, 355 NLRB at 26. However, the IAM presented testimony by Alfredo Silva that Mr. DeNike preferred, “all things being equal,” to assign the work to the IAM. Tr. 569:22-570:1. There was no parallel testimony suggesting that SSAT preferred the ILWU. Silva’s testimony was fully consistent with Mr. DeNike’s refusal to officially “pick any sides” on the record.

Compare Tr. 569:25-570:1 *with* Tr. 384:17-21. Silva’s testimony was completely un rebutted, as neither SSAT nor the ILWU chose to cross-examine him. Tr. 579:23-580:2. Furthermore, Mr. DeNike testified that “if we didn’t have [a] contract obligation to do so, we would have used those [IAM] guys that we already had working for us.” Tr. 123:11-24. As in *Teamsters Local 636*, where testimony that the employer preferred the Teamsters was decisive even where the employer took an official position of neutrality, here, Silva’s testimony shows that SSAT really did prefer the IAM. *See Teamsters Local 636*, 251 NLRB at 1332. Mr. DeNike’s reason for refusing to state a preference – his fear of irritating whichever union he spurns – is not a “legitimate, traditional factor[] relevant to awarding work in dispute.” *See GCIU*, 331 NLRB at 848. As explained throughout this brief, those legitimate factors weigh strongly in favor of the IAM. It would be unreasonable to conclude that SSAT would choose the ILWU based on the balance of these factors.

Mr. Silva’s testimony was not rebutted. Furthermore, it is probative of Mr. DeNike’s mindset unlike in *Teamsters Local 636*, where *management* witnesses testified that they preferred the Teamsters. *See* 251 NLRB at 1330-32. Silva testified as to statements by Mr. DeNike, which Mr. DeNike did not deny. Surely Mr. DeNike’s testimony that “if we didn’t have [a] contract obligation to do so, we would have used those [IAM] guys that we already had working for us” was practically an admission that he preferred the IAM on all factors except the PMA’s recommendation. Had Mr. DeNike simply been forthright, we could have used his testimony, but we are left with Silva’s testimony as the best alternative. *See* Tr. 384:15-20. Silva’s testimony was not hearsay because it was the statement of a party opponent. *See* Fed.R.Evid. 802(d)(2)(A). But it would be admissible in this administrative hearing even if it were hearsay, because it is “rationally probative in force and [] corroborated by something more than the slightest amount of other evidence.” *A.S.V., Inc.*, 366 NLRB No. 162, n.57 (Aug. 21, 2018). It is corroborated by the numerous legitimate factors – especially efficiency, economy, past practice, and the collective bargaining agreement – that an employer would “typically base[]” its preference on. *See GCIU*, 331 NLRB at 848. It is further corroborated by

Mr. DeNike's testimony that "if we didn't have [a] contract obligation to do so, we would have used those [IAM] guys that we already had working for us." Tr. 123:11-24.

No clearer statement of preference could have been made by Mr. DeNike except to have said "we would have used those [IAM] guys we already had working for us."

Although SSAT obviously did choose the ILWU, it did so solely on the basis of PMA's recommendation, not of its own free business will. *See* IAM Exh. 2; ILWU Exh. 3. Mr. DeNike did not express that any factor which the Board looks to favors assignment to the ILWU. Even though the PMA's influence does not constitute unlawful coercion. *See IAM I*, 355 NLRB at 26. PMA's influence simply implies a distance between the factors of "employer preference" and "current assignment." SSAT assigned the work to the ILWU, *even though* it would have preferred the IAM, because PMA told it to. The Board need not find "coercion" to recognize this. Moreover, as noted above, SSAT has not expressed the argument that the "best interests of the industry" supports assignment to the ILWU, *Cf. IAM I, supra*. This important change in position from the earlier Pier 91 case leaves SSAT with no argument except that the PCLCD requires it to support the assignment; it makes no arguments as to the merits of the assignment.

Finally, the fact that SSAT is defending its assignment in this case does not suggest that it prefers that assignment. SSAT is only defending its assignment pursuant to its contractual obligation to do so to defend PMA's decision. Tr. 456:11-25; *see* Joint Exh. 3, p. 11, § 1.76. Once SSAT assigned the work to the ILWU pursuant to PMA's directions, it was required under the PCLCD to defend that assignment. But the reason for defending the assignment once made is not a reason for making the assignment in the first place. Mr. DeNike testified that the assignment was based *only* on the contractual language, Tr. 235:17-23, and that he would otherwise have chosen the IAM, Tr. 123:11-24.³⁰ Furthermore, his choice was based on advice from PMA, as he stated unambiguously in letters presented by both unions. IAM Exh. 2, ¶ 5;

³⁰ The IAM contract does not contain the same express obligation to defend a work assignment. But the reference to the obligation to defend means SSAT, under the contract with the ILWU, has to defend PMA's decision even if it makes no business sense and is contrary to SSAT's interests.

ILWU Exh. 3, ¶ 1. Most people have done, and defended, something that they preferred not to do because they thought a contract or their superior demanded it. Some people do so every day. SSAT did so here. Of course, as explained above, SSAT was *actually* required to assign the work to the IAM, but its mistake is correctable in these proceedings.

H. SSAT WILL REDUCE HOURS AT TERMINAL 30, RESULTING IN LOSS OF WORK FOR IAM MEMBERS IF THEY DO NOT GO TO TERMINAL 5

An adverse impact on current employees favors an award of disputed work to those employees. *See, e.g., Iron Workers Local 40*, 317 NLRB 231, 233 (1995). Mr. DeNike testified that, because Matson is moving from Terminal 30 to Terminal 5, some hours will be lost at Terminal 30. Tr. 414:22-415:8. Although he does not plan to lay anyone off, Tr. 414:11-16, and does expect some growth at that terminal in the future, Tr. 414:17-21, the fact remains that hours will be cut when Matson moves, which is a loss of work and an adverse impact. This factor therefore favors assignment to the IAM.

The ILWU will argue that the opposite is true. After all, the workers currently performing maintenance and repair at Terminal 5 are ILWU-represented. But they are also exclusively PCMC employees, who are only expected to remain at Terminal 5 until August. Tr. 170:23-171:4; 300:25-301:3. The hearing in this case closed in June, and briefs are being submitted in mid-July. If the Board acts expeditiously, it can make an award such that PCMC employees leave work at the time they expect to, IAM employees come in, and no one will be laid off. Therefore, this factor does not favor the ILWU.

The ILWU may also point to TTI's impending layoffs of mechanics at Terminal 46, who could conceivably be hired directly by SSAT. *See* Tr. 141:21-142:7. At the hearing, counsel for ILWU even described those layoffs as inevitable "unless they obtain new steady employment." Tr. 477:17-19. But this mischaracterized the immediately preceding testimony, which made clear that the mechanics at Terminal 46 have *already* received their layoff notices from TTI. Tr. 477:8-11. Those layoffs – from a company which is not part of these proceedings – will occur whether or not the mechanics are *re*-hired at Terminal 5, and are therefore irrelevant. In any case,

the immediately subsequent testimony also made clear that those mechanics can continue to work out of the dispatch hall. Tr. 477:20-25. It is not the Board's job in a jurisdictional dispute to try and find work for employees who will be laid off by another, unrelated employer.³¹

I. THE IAM-REPRESENTED WORKERS HAVE STRONGER RELATIVE SKILLS AND AN APPRENTICESHIP PROGRAM

Despite the ILWU's insinuations that the IAM is unsafe, the record shows the opposite is true: The IAM-represented workers are safer and more skilled than the ILWU's workers. The Board regularly looks to unions' apprenticeship programs in Section 10(k) cases. *E.g.*, *Michigan Laborers Dist. Council*, 368 NLRB No. 18, at 8 (July 3, 2019); *Sw. Reg'l Council of Carpenters*, 348 NLRB 1250, 1255 (2006). As Tom Carroll testified, the IAM has a four-decade-old apprenticeship program that lasts four years and has trained two-thirds of SSAT's CEM mechanics. Tr. 583:19-585:24. Since the majority of mechanics are CEM mechanics, this means that the IAM's apprenticeship program has trained a substantial part of all mechanics on the dock. Tr. 588:15-19.³² The program is also geared towards the heavy duty mechanic which encompasses the work of the power shop. Tr. 584: 18-23. There was no evidence in the record about any apprenticeship program in the ILWU. The IAM's apprenticeship program favors an award of the work to the IAM.

Furthermore, testimony from several witnesses on the third day of hearing showed that the IAM workers are more skilled than the ILWU workers. First, Aric Cook testified that vessel planners have been frustrated with operation at Terminal 5 under the ILWU, and would prefer the IAM, because of the longer breakdown times with the ILWU workers. Tr. 533:23-534:3; *see* Tr. 526:6-21. The ILWU did not offer any testimony about its breakdown times. Cook then examined records kept by Dustin Crabtree, the ILWU crane mechanic. IAM Exh. 10; Tr. 545:17-

³¹ In fact, they will go back to the ILWU-PMA dispatch hall and be eligible to be dispatched as a longshore worker or mechanic.

³² Since the CEM shop is the largest on the docks, the importance of the IAM apprenticeship program is magnified, since two-thirds of the CEM mechanics went through that program. Tr. 585:21-24. This involves repair of refrigerated containers, which are found off dock, so the apprenticeship program trains many apprentices who are trained in this critical and needed skill. The ILWU lacks any such training program.

19. These records showed work that needed to be done on the cranes. Cook began to describe each task, which he could do because he had himself worked on those cranes for ten years, and explained how long the tasks would take, in his best estimation. Tr. 552:2-554:8. After reviewing the documents in full during a break, Cook concluded that the work should have taken about a week per crane. Tr. 557:21-558:3. Though the hearing officer did not allow Cook to complete his testimony,³³ Cook was confident that the ILWU workers were slower than they should have been, and the ILWU failed to offer any reason why the work has taken as long as it has.

Tom Carroll corroborated Cook's testimony. He recounted comments by an SSAT supervisor, Darryll Stephens, who said in January that "progress wasn't moving along as swiftly as anticipated." Tr. 594:6-595:14. Stephens reiterated his disappointment with the ILWU's progress in February. Tr. 596:22-597:11. At that second meeting, Stephens explained that the manufacturer of one crane component, ABB, was going to have to "come in and take over" from the ILWU workers who were unable to handle the work. Tr. 597:12-598:1. The IAM mechanics, who work with ABB components at the other terminals, would have been prepared to do this work. Tr. 598:2-6; 514:11-21 (Cook testifies that he maintains ABB PLC's at Terminal 18).

There are other facts which demonstrate that IAM represented mechanics have the better skills: (1) Only the IAM has a jointly administered state sponsored apprenticeship program for mechanics and many of SSAT's mechanics have gone through that program; (2) IAM mechanics provide far more extensive tools for their work than ILWU mechanics; (3) IAM mechanics work in many off dock locations doing similar reefer, power and related mechanical work and are available to work at SSAT or on the docks; (4) SSAT could not find available mechanics from the ILWU dispatch hall until it located one (Dustin Crabtree)³⁴ and one helper; (5) the only

³³ The hearing officer cut off the questioning of Cook before it could conclude. Tr. 557:21-558:11. The hearing officer improperly cut off this line of questioning. As he repeatedly stated at other points in the hearing, the purpose of a hearing is to provide the Board with all relevant evidence, and the rules of evidence are not strictly adhered to. Tr. 534:15-19. Cook's testimony that he was familiar with the specific tasks in Crabtree's notes, and that they should have taken less time than they did, was relevant to an evaluation of the unions' relative skills.

³⁴ Mr. Crabtree had quit his mechanic job to be available for his family, so it suggests he took the job to help out on a temporary basis and will return to longshore work which is intermittent. Tr. 629: 3-9

available mechanics were employed by PCMC ; (6) the mechanics working at TTI were already employed and not available;³⁵ (7) SSAT could not finish the crane repair without hiring the outside contractor PCMC who brought mechanics up from Southern California.

The IAM workers' superior skills, and the IAM's apprenticeship program, favor an award of the work to the IAM-represented workers.

J. THE ILWU'S BOARD CERTIFICATION DOES NOT COVER THIS WORK

In the earliest days of the National Labor Relations Act, the Board certified the ILWU to represent longshoremen on these docks – not mechanics. *See Shipowners' Ass'n of the Pac. Coast*, 7 NLRB 1002 (1938). The original nature of that agreement did not include any understanding that the ILWU would engage in maintenance and repair work. The ILWU was certified as the exclusive representative of all “workers who do *longshore work*.” *Id.* at 1041 (emphasis added). The Board has previously described this description of the bargaining unit as “vague and not controlling,” and has given the ILWU's certification little weight in jurisdictional disputes, even when the disputed work fell within the traditional definition of longshore work. *Longshoremen's & Warehousemen's Union, Local 119 (ILWU III)*, 266 NLRB 193, 196 (1983). That traditional definition consists of transporting and handling waterborne cargo – not maintaining and repairing machinery. *Id.*; *see Int'l Bhd. of Elec. Workers*, 358 NLRB 903, 905 (2012) (finding that the PCLCD did not cover reefer work because “the work at issue did not exist at the time of the 1938 certification, and the unit employees were those of a multiemployer association other than the PMA.”). Here, it is undisputed that the work at issue is M&R work, not longshore work. *See, e.g.*, Tr. 272:9-17, 278:14-17 (distinguishing “longshoremen” from “mechanics”). Because the ILWU was certified as the representative of cargo handlers, not of mechanics, this factor does not favor the ILWU.

³⁵ We assume, as does SSAT, that some of the TTI mechanics have relevant skills; but that is all speculative to some degree, since none was employed by SSAT. SSAT had not interviewed or hired any of them. They, like Mr. Crabtree, can work out of the hall as longshore or mechanics and may be unavailable.

K. THE ILWU’S ARGUMENT THAT IT WILL PERFORM THE WORK MORE SAFELY IS INCOHERENT

On the last day of hearing, the ILWU elicited testimony from Kurt Harriage, the day business agent of ILWU Local 19, which suggested that it would be unsafe to have mechanics and longshoremen from different unions working at the same terminal. Tr. 644:3-646:15. Harriage explained the importance of communication between mechanics and longshoremen, and stated his view that “there’s more understanding between two people that know each other intimately” such as through their mutual union. Tr. 646:13-15. This last-ditch argument directly conflicted with testimony by Mr. DeNike, which established that IAM mechanics and ILWU longshoremen interact “harmoniously” at terminals 18 and 30. Tr. 206:14-207:3; *see also* Tr. 113:14-21. It also conflicted with the history of Terminal 5, where the IAM and the ILWU long worked side by side. Tr. 59:18-60:7. Furthermore, even standing alone, Harriage’s testimony was questionable. Although he implied that shared union membership creates the “intimate” relationships he described, the only concrete example he pointed to was his friendship with Dustin Crabtree – an intergenerational friendship that predated either of their memberships in the ILWU. Tr. 646:7-8. No other testimony corroborated any failure of communication between IAM and ILWU workers. The IAM respectfully submits that Harriage’s statement that “I’m not going to sit here and say that I can’t communicate with other mechanics” was the only plausible part of his testimony. Tr. 646:4-5.

The ILWU also elicited testimony from Harriage that he had heard from Mike Waldrop, a Local 19 shop steward, about unsatisfactory maintenance and recordkeeping by the IAM at terminals 18 and 30. Tr. 660:17-661:12; 664:21-665:15. Waldrop did not testify, and the ILWU did not even attempt to offer a reason for his absence. This self-serving hearsay, by and for Local 19, was uncorroborated by even the “slightest amount of other evidence” that the Board requires. *A.S.V., Inc.*, 366 NLRB No. 162, n.57. To the contrary, it was contradicted by Mr. DeNike’s statement that “SSAT is very satisfied” with the IAM’s work at terminals 18 and 30. Tr. 228:14-21. Harriage’s testimony was therefore inadmissible, and should be given no weight. Furthermore, even if Harriage’s testimony *were* credited, it would still weigh in favor of the

IAM. If there *were* any chronic maintenance issues at terminals 18 and 30, the people most familiar with those issues, and best able to interpret any idiosyncratically kept records, would be the people who maintained that equipment and records – IAM mechanics.

Finally, although the ILWU suggested the IAM was unsafe, the PMA Annual Report shows that ILWU mechanics were among the most injured longshore occupations in 2018, with 70 lost-time injuries. IAM Exh. 9, p. 69. This undercuts any argument by the ILWU that it can perform the work more safely.

Therefore, there was no competent, credible evidence in the record that safety factors favor the ILWU. Indeed the only evidence in the record which is the PMA Annual Report suggests that the IAM mechanics are much safer.

L. THE CURRENT WORK ASSIGNMENT TO THE ILWU DOES NOT WEIGH IN FAVOR OF AN ASSIGNMENT TO THE ILWU

The parties stipulated that SSAT has assigned the work to employees represented by the ILWU. Joint Exh. 2, ¶¶ 6, 17. Of course, the IAM disputes the ILWU’s right to that assignment, which is the basis for these proceedings.

Mr. DeNike testified that he is “satisfied” with the decision to assign the M&R work at Terminal 5 to the ILWU. Tr. 381:8-18. However, an employer’s satisfaction is typically tied to the quality and efficiency of the work, and in August, SSAT will lose the expensive but apparently qualified mechanics imported by PCMC. SSAT will be forced to hire a new batch of ILWU mechanics. SSAT may or may not be satisfied with those mechanics. But SSAT could have had certainty and consistency had it allowed the IAM mechanics to work at Terminals 5, 18 and 30 interchangeably from the beginning.

Furthermore, when Mr. DeNike was pressed on this issue, he limited SSAT’s satisfaction to the “current work.” Tr. 489:14-20. See also Tr. 286: 12-16 (“happy with the work.”) The reference to the “current work” was after the terminal opened in late April and not before when there was extreme frustration in getting the terminal ready. Tr. 295:13-24 and 298: 8-13. See Tr.

594:6-595:14 and 596:22-597:11 (Manager Stephens expressed satisfaction) and Tr. 533:23-534:3 and 526:6-21 (SSAT vessel planners expressed dissatisfaction with ILWU mechanics).

Mr. DeNike expressed no satisfaction with the additional costs, the additional projected costs, the necessity of hiring unknown and new employees, and the inefficiency of using a separate crew of ILWU represented employees and all the other factors weighing against this arrangement detailed above. His “satisfaction” thus grew out of his desire not to offend, not any business judgment. Finally, because his satisfaction comment was only on the work force at the time the question was asked, it is of no value as to the future work since the mechanics were all employed by PCMC. SSAT would have to go through the hiring process to complete its crew of mechanics. Thus Mr. DeNike was not commenting on whether the work in the future with an entirely new group would be satisfactory. In fact this uncertainty, when compared with using the IAM workforce in all three terminals, 5, 18 and 30 interchangeably with which he is familiar and satisfied, makes this factor favor the IAM.

Insofar as the Board considers the current assignment as a factor separate from past practice or employer preference, when the current assignment is the *sole* factor favoring the incumbent union, the need to act is even more obvious. The IAM has shown that it has a far greater contractual claim, that it will perform more economically, that area practice and past practice favor it, and that SSAT prefers it. To sustain PMA’s installation of the ILWU at Terminal 5 in the face of all these reasons militating otherwise, simply because it has already happened, would be patently absurd.

V. **SSAT AND THE ILWU SHOULD BE PRECLUDED FROM ARGUING THE MERITS OF THE DISPUTE BECAUSE OF THEIR REFUSAL TO ALLOW MR. DENIKE TO TESTIFY ABOUT COMMUNICATIONS WITH THE PMA AND THE PMA REFUSE TO COMPLY WITH THE SUBPOENA**

SSAT rests its decision to assign the work solely on the advice it received from the PMA. Everytime counsel for the IAM sought to inquire into communications with the PMA, SSAT asserted the *Berbiglia, supra* privilege. Tr. 429:16-432:12. 457: 2-459:12. The ILWU joined in that privilege. The assertion of that privilege at Tr. 457:2- 459:12 went to the core of the reasons

for the advice from the PMA as to the decision to assigning the work initially to the ILWU. SSAT continued to assert that privilege in opposing the subpoena served on it. See Board Exhs. 5(g) and (i). The PMA asserted the same privilege. See Board Exhs. 5(a) through 5(d).

The privilege does not apply and was waived in any case.³⁶ See Board Exh. 5(b). The refusal of SSAT and PMA joined in by the ILWU to provide such testimony foreclosed testimony on the critical issue of why the PMA advised SSAT to assign the work. In light of that posture, both should be foreclosed from making any argument based on the PCLCD or any reasons for the assignment. They should be foreclosed from advancing any argument that the decision is based on industry preference or for the good of the industry, See *IAM I*, or any other factor.

VI. CONCLUSION

Terminal 5 continues to serve one ship a week during this transitional period. It makes no sense to hire a crew of 15 ILWU mechanics at a cost of at least \$250,000 each³⁷ when the 120 IAM mechanics who work *next door* at terminals 18 and 30 can do the work. It makes even less sense when the CEM work, which is directly for Matson equipment, was so recently performed at Terminal 30 and the IAM mechanics who did *that very work* could have just moved as needed to Terminal 5 to work.

The evidence presented at the hearing demonstrated that the IAM can perform the disputed work at Terminal 5 far more economically and efficiently than the ILWU. It demonstrated that the IAM's contract, and not the ILWU's contract, covers the work in question and predates any ILWU claim to the work. It demonstrated that the IAM is the only union that has performed this work in the past, and that the IAM currently performs similar work at adjacent terminals. The evidence further demonstrated, both through direct testimony and the totality of the circumstances, that the employer prefers the IAM. On the other side, no factor weighs in favor of the ILWU including the current assignment.

³⁶ It is not necessary to test any attorney client privilege issue. Further we note that the PMA's Motion to Quash the Subpoena was late filed.

³⁷ Based on estimated costs from IAM Exhibit 9, page 62-66.

The IAM seeks a relatively narrow remedy. Pursuant to the Board’s usual practice, it only seeks an award of the maintenance and repair work at Terminal 5. *E.g., Michigan Laborers Dist. Council*, 368 NLRB No. 18, at 9 (July 3, 2019). Although an areawide award would actually be justified because the Puget Sound ports have clearly been the site of “continuous ... controversy,” and the ILWU does have a “proclivity to engage in further unlawful conduct,” the IAM requests that the work in dispute be assigned to it at Terminal 5. *Id.; ILWU I*, 367 NLRB No. 64, at *8 (“ILWU violated Section 8(b)(4)(ii)(D) by continuing to pursue the relevant grievances under the 2008 PCLCD after the Board issued the 10(k) award”).

Mr. DeNike asked that “the Board [] make a decision on the case itself with the employer preference.” Tr. 384: 19-20. If SSAT had applied any rational business decision it would have assigned the work to the readily available IAM bargaining unit. Its only expressed reason was based on advice from the PMA concerning complying with the ILWU contract a claim which must be rejected.

SSAT’s chief operating officer, Ed DeNike, explained that:

If we had no contract obligations and we knew – because we knew the [IAM-represented] people who had been working for us at terminal 18 and 30, yes, we – if we didn’t have contract obligation to [hire ILWU-represented workers], *we would have used those guys that we already had working for us.*

Tr. 123:20-24 (emphasis added.)

The expressed wishes of SSAT favor the IAM. The “merits” clearly and completely favor the IAM.

For the reasons stated above, the IAM respectfully requests that the Board find that: (1) employees of SSA Terminals, represented by the International Association of Machinists, District Lodge No. 160, Local Lodge 289, are entitled to perform the maintenance and repair work on SSA Terminals’ cranes, power equipment, and CEM shop at Terminal 5 in Seattle, Washington; (2) the International Longshore and Warehouse Union is not entitled by means

proscribed by Section 8(b)(4)(D) of the Act to force the Employer to assign the disputed work to workers represented by it.

Dated: July 16, 2019

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction this service was made. I am over the age of eighteen years and not a party to the within action.

On July 16, 2019, I served the following documents in the manner described below:

INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT LODGE 160, LOCAL LODGE 289 POST-HEARING BRIEF

- (BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 16, 2019, at Alameda, California.

/s/ Karen Kempler
Karen Kempler