UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 19
(SSA TERMINALS, LLC)

and Case 19-CB-186889

KAREY MARTINEZ, an Individual

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 19
(PACIFIC MARITIME ASSOCIATION)

and Case 19-CB-224117

JAMES TESSIER, an Individual

GENERAL COUNSEL'S RESPONSE TO THE ADMINISTRATIVE LAW JUDGE'S ORDER TO SHOW CAUSE

Counsel for the General Counsel ("CGC") respectfully submits this Response to the Order to Show Cause issued by Administrative Law Judge Eleanor Laws ("ALJ") on October 1, 2019 ("OSC"). On September 27, 2019, International Longshore and Warehouse Union, Local 19 ("Respondent"), filed a Motion for Consent Order ("Motion") pursuant to *UPMC*, 365 NLRB No. 153 (2017), and § 9-440 of the NLRB Division of Judges, *Bench Book: An NLRB Trial Manual* (Jeffrey Wedekind, ed.) (January 2019), requesting that the ALJ approve a settlement over the objection and without the agreement of the General Counsel and the Charging Parties, Karey Martinez and James Tessier ("Martinez" and "Tessier").

Because the General Counsel has determined that the proposed settlement agreement is insufficient to remedy the allegations in this matter, CGC submits this reply to the OSC, showing cause why Respondent's Motion to unilaterally approve Respondent's proposed settlement agreement should not be granted.

A. STATEMENT OF FACTS

Respondent operates an exclusive dispatch hall in Seattle, Washington. Respondent and several other ILWU locals are certified as the exclusive bargaining representatives for longshoremen and other cargo-handling employees employed by the employer-members of the Pacific Maritime Association ("PMA"). The PMA is a multi-employer association comprised of companies that operate steamships, stevedores, and marine terminals in California, Oregon and Washington. The PMA and the several ILWU local unions, including Respondent, are parties to a collective-bargaining agreement. Each local union, including Respondent, operates an exclusive dispatch hall for the respective port within their jurisdiction.

Each local also maintains a Joint Port Labor Relations Committee ("JPLRC") with the PMA for its respective port that is comprised of an equal number of local union and PMA-designated representatives who each have an equal vote. The JPLRC is tasked with maintaining and operating the dispatching hall, exercising control of the registered list of employees, and investigating and adjudicating all grievances and disputes. Each port's JPLRC meets monthly. Martinez, a Class A longshoreman, and a group of several other dissident members of Respondent and of ILWU Local 23 routinely associate with Tessier, a former employer representative for the PMA and former member of the JPLRC.

The charge in Case 19-CB-186889 was filed with Region 19 of the NLRB ("Region") by Martinez on October 21, 2016 alleging that Respondent violated Section 8(b)(1)(A) of the Act by failing to provide him with unredacted copies of the February through August minutes of the JPLRC and an unredacted version of Respondent's membership minutes from January to September 2016.[1] After investigating, the charge was submitted to the Division of Advice, and on August 17, 2017, Advice authorized issuance of Complaint in this matter. Thereafter, on September 17, 2017, Complaint and Notice of Hearing issued, which was amended on January 8, 2018.

The first amended charge in Case 19-CB-224117 was filed on August 13, 2018, by Tessier, as Martinez's legal representative, alleging that Respondent violated Section 8(b)(1)(A) of the Act by supplying Martinez with heavily redacted JPLRC minutes from February 1, 2018, in response to Martinez's request for all JPLRC meeting minutes referencing his failure to secure a replacement in December 2017.

Prior to the hearing in Case 19-CB-186889, Respondent signed an informal settlement agreement that the Region believed remedied the unfair labor practice. On August 15, 2018, after Tessier, acting as Martinez's representative, objected to the settlement agreement, Respondent signed the revised negotiated settlement agreement that is now before the ALJ, which permits Respondent to redact only personal health and medical information. Upon objections filed by Tessier during the seven-day acceptance period, the General Counsel rejected the proposed settlement agreement on April 26, 2019, for reasons discussed below.

[1] On September 27, 2019, Martinez requested to withdraw that portion of Case 19-CB-186889 related to Respondent's failure to provide membership minutes from January through September 2016. As of the date of this reply to the OSC, Region 19 is in the midst of processing his requested withdrawal. Accordingly, CGC moves to strike in its entirety the paragraph in the proposed Notice related to the failure to provide Martinez with unredacted copies of Respondent's membership minutes.

B. ARGUMENT

In limited circumstances only, a judge may approve a unilateral settlement by consent order offered by the respondent but approved by neither the General Counsel nor the charging party.[2] In evaluating such consent orders, the Board applies the *Independent Stave*, 287 NLRB 740 (1987), factors in evaluating such consent orders. *Independent Stave* provides that the Board will accept a non-Board settlement even if it does not provide a full remedy; rather, it would:

> Examine all the…circumstances, including, but not limited to (1) whether the charging party(ies), the respondent(s) and any of the individual discriminatee(s) have agreed to be bound, and the position of the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Id. at 743.

As an initial matter, no party to this matter has raised any issue preventing acceptance of the settlement agreement under the third or fourth factors of the *Independent Stave* analysis. Accordingly, the focus of the objection and replies are on the first and second factors.

Because the first factor clearly weighs heavily against approval where both the General Counsel and Charging Parties expressly object to the Respondent's proposal, the Board appears more likely to require that the proffered unilateral settlement address and fully remedy all the unfair labor practices alleged in the complaint. *Bench Book* at

[2] *See* § 9-440, NLRB Division of Judges, *Bench Book: An NLRB Trial Manual* (Jeffrey D. Wedekind, Ed. (January 2019).

§ 9-440. *See also Iron Workers Local 27 (Morrison-Knudson)*, 313 NLRB 215 (1993), *aff'd,* 217 F.3d 119 (9th Cir. 1995) (rejecting proposed consent order in hiring hall case because it did not provide for posting).

Considering the nature of the violations, Respondent's proposed settlement does not meet the standard required under the second factor of *Independent Stave*. When a union refuses to supply information requested by a represented employee, the Board applies a balancing test, weighing whether the employee has a legitimate interest in the information, and if so, whether the union has raised a "substantial countervailing interest in refusing to provide the information. *Postal Service,* 362 NLRB No. 103, slip op. at 6 (May 29, 2015) (quoting *Mail Handlers Local 307 (Postal Service)*, 339 NLRB 93 (2003)). Where the requested document has no bearing on the terms and conditions of employment of the employee, the Board will find the union has no duty to produce it. *See, e.g., Mail Handlers Local 307* 339 NLRB at 93.

Further, "where a union operates an exclusive hiring hall, it wield[s] additional power…by assuming the employer's role [and] its responsibility to exercise that power fairly increases rather than decreases." *Breininger v. Sheet Metal Workers Int'l Assoc. Local U. No. 6*, 493 U.S. 67, 89 (1989). Thus, in the hiring-hall context, employees have a legitimate interest in hiring hall records because often those records provide the only way to determine whether the employee is being fairly treated. Although the Board has not articulated a standard to determine what constitutes a hiring-hall record, it has found hiring-hall users are entitled to, among other things, the names, phone numbers, and addresses of other employees on the lists. *See Electrical Workers Local 24 (Mona Electric),* 356 NLRB 581 (2011): *Carpenters Local 102 (Millwright Employers Assn.*),

317 NLRB 1099 (1995) (concluding, contrary to the ALJ, that employees had no right to the social security numbers of other employees on the lists).

The JPLRC routinely hears both employer and union-initiated complaints against members for both on-the-job misconduct and violations of Respondent's hiring hall rules. In adjudicating these issues, Respondent and the PMA are empowered to request that members be suspended from using the hiring-hall. As such, JPLRC meeting minutes are hiring hall records. Applying this standard, the Charging Parties demonstrated that they had a legitimate interest in the JPLRC minutes.

The burden then shifted to Respondent to show why refusing to produce unredacted documents was necessary to vindicate a legitimate Union interest. Respondent did not meet that burden, as it has not demonstrated that it is justified in redacting all names and membership members from the JPLRC meeting minutes. Hiring-hall users are permitted access to the names and phone numbers of other hiring hall users. *See Bartenders, Local 165*, 261 NLRB 420, 423 (1982) (adopting an ALJ decision rejecting the union's argument that the data contained in its hiring-hall records was confidential where the records reflected the names and telephone numbers of applicants, reasoning that the information was readily available and would cause no harm to the applicant if released).

Respondent asserts that the General Counsel has done a "180-degree" reversal regarding Respondent's right to protect it from revealing the personal health and medical information pertaining to members. The General Counsel determined, based on his review of the minutes, that a reference only to an employee having a "medical excuse," without greater specificity, would likely not warrant redaction of the employee's

name. And, without specificity, he determined that, although the Board has recognized that there exists a legitimate aura of confidentiality where an employer refuses to supply a union with the names of employees with lung disease, *Johns-Manville Sales Corp*., 252 NLRB 368-69 (1980), the Charging Parties would be entitled to unredacted minutes.

Based upon the foregoing, Counsel for the General Counsel moves the Administrative Law Judge to issue an Order denying Respondent's Consent Order Settlement request

DATED at Seattle, Washington, this 4th day of October, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the General Counsel's Response to the Administrative Law Judge's Order to Show Cause was served on the 4th day of October, 2019, on the following parties:

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