

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

**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

**ORDER GRANTING THE INTERNATIONAL LONGSHORE WAREHOUSE UNION
LOCAL 19's MOTION FOR CONSENT ORDER**

On September 6, 2019, the above-captioned case was assigned to me under Section 102.35 of the Rules and Regulations of the National Labor Relations Board (the Board), for all purposes, including ruling on any pretrial motions.

On September 27, 2019, the International Longshore Warehouse Union, Local 19 (The Respondent or Union) filed a motion for consent order pursuant to *UPMC*, 365 NLRB No. 153 (2017). On October 1, I issued an Order to Show Cause as to why the Respondent's motion should not be granted, with responses due by the close of business on October 4, 2019.¹ The Charging Party Tessier (Tessier) filed a response on October 3, and the General Counsel filed a response on October 4, 2019, opposing the Respondent's motion.

On October 14, 2019, the Respondent filed a motion to modify the September 27 motion for consent order. The parties convened for hearing on October 15, 2019.² I informed the Respondent that I would not accept the proposed modification. The Respondent proposed

¹ During a prehearing conference on September 24, 2019, the Union's intent to file this motion was discussed. The parties were notified that if I received the motion by September 27, I would issue an order to show cause with an October 4 deadline.

² The Charging Party opted not to appear.

alternative language for its motion for a consent order, and I took the matter under submission.³ The parties were permitted a full opportunity to argue their respective positions at the October 15 hearing.

For the foregoing reasons, I GRANT the Respondent's motion for a consent order as modified on October 15, 2019.

A. The Respondent, the Pacific Maritime Association, and the Joint Port Labor Relations Committee

This case involves the Charging Parties' requests for minutes from the Seattle Joint Port Labor Relations Committee (JPLRC). Understanding the relationship between the Respondent, the Pacific Maritime Association (PMA), and the JPLRC is fundamentally important evaluating the various roles and obligations as they relate to the information requests at issue.

The PMA is an association of employers in California, Oregon, and Washington, operating stevedore companies and marine terminals, and equipment maintenance and repair contractors.⁴ Several ILWU locals, including the Respondent, are certified as the exclusive bargaining representatives for longshoremen and other cargo-handling employees employed by the employer-members of the PMA.

PMA member employers fill their longshore labor needs exclusively with workers dispatched out of jointly-administered ILWU-PMA dispatch halls in each local port. These dispatch halls maintain daily records of each day's dispatches, which are available upon request to all employee members.

The ILWU and PMA are parties to the Pacific Coast Longshore and Clerks Agreement, which includes the Pacific Coast Longshore Contract Document (PCLCD). Under the PCLCD's terms, the JPLRC, which is comprised of an equal number of PMA-employer members and ILWU members, meets monthly to handle, among other matters, human resources and labor relations issues with members and their employers. The JPLRC keeps minutes of their meetings.⁵

B. Overview of Complaint Allegations and Procedural History

The most recent amended consolidated complaint, issued on June 11, 2019, alleges the Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by failing to provide Charging Parties Karey Martinez (Martinez) and James Tessier (Tessier) with copies of the minutes from JPLRC and membership meetings that occurred on various dates between September 2016 through February 2018.

³ The aforementioned motions and responses are included in the hearing record at General Counsel Exhibit 1. On October 16, 2019, the General Counsel filed a joint motion to amend and correct the index and description of the formal documents, and to include certain documents. The motion is hereby granted.

⁴ The PMA's 78 employer-members can be found at <http://www.pmanet.org/member-companies>.

⁵ This is a simplified description of the JPLRC but a more complex description is unnecessary to decide this case. A more detailed description of the relationship between the Local 19, PMA, and JPLRC was set forth by Judge Sotolongo in *ILWU and Edmund Oberti*, 365 NLRB No. 149 (2017).

The initial complaint, issued on September 26, 2017 for Case 19–CB–186889, covered requests for information for JPLRC meeting minutes from February–August 2016 and the Respondent’s membership meeting minutes from January–September 2016. Martinez was the Charging Party.⁶ On July 20, 2018, Tessier, as Martinez’s representative, filed charges in Case 19–CB–224117, after the Respondent provided heavily redacted meeting minutes from a February 1, 2018 JPLRC meeting, in response to Martinez’s request for all JPLRC meeting minutes referencing his failure to secure a replacement in December 2017. As noted above, the complaint consolidating these cases issued on June 11, 2019.

On August 23, 2018, the Respondent and the Regional Director for Region 19 entered into a settlement agreement which provided the Respondent would post a Notice and comply with its terms. The substantive provisions of the Notice stated:

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with your employer on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT refuse to provide those who use our dispatch hall with information needed for them to determine if they are being treated fairly.

WE WILL provide Karey Martinez with copies of JPLRC minutes from January through August 2016, with redactions only as to personal health and medical information.

WE WILL provide Karey Martinez with unredacted copies of ILWU Local 19’s membership minutes from January through September 2016, recognizing the expectation that membership minutes are for the benefit of members and generally are not shared with employers or non-members. This expectation should not be construed as interfering with your Section 7 rights.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of your rights under § 7 of the Act.

Tessier objected, and on August 24, 2018, the Regional Director for Region 19 upheld the settlement agreement.

Tessier then appealed to the General Counsel, who, on April 5, 2019, rejected the settlement agreement. As to case 19-CB-186889, the General Counsel’s decision states:

This office has carefully considered your appeal. The appeal is sustained. We concluded that certain notice language in the Region’s settlement agreement of this matter was inappropriate and should not be included in the settlement agreement. We are remanding

⁶ The complaint was amended on January 8, 2018.

the case to the Regional Director for further action. Absent proper settlement, the Regional Director will issue a complaint and an administrative law judge will hold a hearing. Please address all further inquiries to the Regional Director.

The charge alleging the Respondent violated Section 8(b)(1)(A) by refusing to furnish the Charging Party with unredacted copies of the Respondent's membership meeting minutes from January to September 2016 in Case 19-CB-186889 has since been withdrawn at the Charging Party's request. The withdrawal was effectuated on October 10, 2019, so those complaint allegations are therefore not considered here.⁷ The language in the proposed settlement stating,

WE WILL provide Karey Martinez with unredacted copies of ILWU Local 19's membership minutes from January through September 2016, recognizing the expectation that membership minutes are for the benefit of members and generally are not shared with employers or non-members. This expectation should not be construed as interfering with your Section 7 rights

is likewise not considered, as the complaint allegations it seeks to remedy no longer exist.

Regarding Case 19-CB-224117, the General Counsel's decision states:

This office has carefully considered your appeal. The appeal is sustained. We concluded that the Charged Party arguably violated Section 8(b)(1)(A) of the Act by failing to provide the Charging Party with unredacted copies of the requested JPLRC meeting minutes. We are remanding the case to the Regional Director for further action. Absent settlement, the Regional Director will issue a complaint and an administrative law judge will hold a hearing. Please address all further inquiries to the Regional Director.

On October 14, 2019, the Respondent filed a modified motion for consent order, which changed the provision that previously stated:

WE WILL provide Karey Martinez with copies of JPLRC minutes from January through August 2016, with redactions only as to personal health and medical information.

The proposed modification added a comma, with the revised provision stating:

WE WILL provide Karey Martinez with copies of JPLRC minutes from January through August 2016, with redactions only as to personal, health and medical information.

In its motion for modification, the Respondent asserts the change stemmed from its recent discovery that Charging Party Tessier, who maintains the website <https://longshore-labor-relations.com>, had posted information regarding a sex-based harassment grievance filed under

⁷ The withdrawal, along with all of the formal documents, is contained in General Counsel Exhibit 1.

the confidential ILWU-PMA special grievance and arbitration procedure.⁸ The grievance contained a female employee's detailed account of alleged gender-based harassment by another employee, including her fears stemming from the treatment she received and its effects on her physical and mental well-being.⁹

When the parties convened for the hearing on October 15, I advised the Respondent that I would not consider granting the revised motion, because I found the term "personal information" too vague. The Respondent amended the proposed notice language, which now states:

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with your employer on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT restrain or coerce you in the exercise of the above rights.

WE WILL NOT refuse to provide those who use our dispatch hall with information needed for them to determine if they are being treated fairly.

WE WILL provide Karey Martinez with copies of JPLRC minutes from January through August 2016, and February 1, 2018, with redactions only as to:

- Confidential human resources information, where an employee has requested or been told the information will remain private, or where an employee has a reasonable expectation that it will remain private; and
- Health and/or medical information.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of your rights under § 7 of the Act.

The issue now before me is whether the Respondent's offer to provide Charging Party Martinez with the JPLRC minutes redacting only the information described directly above, and to post a notice, comports with the Board's standards in *UPMC*. As detailed below, I find it does, and in fact find it goes even further and confers a full substantive remedy under the present factual circumstances.

C. Legal Standards and Analysis

⁸ The confidential grievance procedure can be found at <http://apps.pmanet.org/pubs/ilwu/grievance/13.2-SGP-LOU-B-082201-Rev-101205.pdf>.

⁹ The post can be found at <https://longshore-labor-relations.com/?p=4585>. The Respondent was reluctant to include the post as a hard copy exhibit without a protective order, wanting to avoid further dissemination of the information. While Tessier's publication certainly let the cat out of the bag, I likewise decline to include the post as a hard copy attachment at this point. In the event the website link becomes inactive, I will upon request attach it as an exhibit after giving the parties an opportunity to address whether a protective order is warranted.

The Board's longstanding policy is to encourage settlements which effectuate the purposes of the Act. *Wallace Corporation v. NLRB*, 323 U.S. 248, 253-254 (1944). The administrative law judge may accept a proposed settlement even if the General Counsel and the charging party oppose such action. *UPMC*, supra. An unfair labor practice complaint resolved by a unilateral agreement the Respondent proposes and the administrative law judge approves "is in the nature of a consent order, and not a true 'settlement' between parties to the dispute."¹⁰ See *Electrical Workers IUE Local 201 (General Electric Co.)*, 188 NLRB 855, 857 (1971). When evaluating proposed consent orders, the Board applies the factors set forth in *Independent Stave Co.*, 287 NLRB 740 (1987). See *UPMC*, supra.

Under *Independent Stave*, the Board considers all the circumstances surrounding a settlement agreement, including: (1) whether the charging party, the respondent, and any of the individual discriminatees have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of unlawful conduct or has breached previous settlement agreements resolving unfair labor practice disputes. 287 NLRB at 743.

1. First Factor

Consistent with the Board's analysis in *UPMC*, I find that the first *Independent Stave* factor is inconclusive. While the General Counsel's and Charging Party's opposition to the proposed consent settlement agreement are important considerations weighing against approval, their opposition is not decisive or determinative under *Independent Stave*. See *UPMC*, 365 NLRB No. 153, slip op. at 7 (finding that the General Counsel's and charging party's opposition to a proposed consent settlement agreement was not conclusive under the first factor of *Independent Stave*). To find it conclusive would negate *UPMC*.

2. Second Factor

The second factor, which is the "the most important consideration when evaluating a consent settlement agreement," weighs heavily in the Respondent's favor. *UPMC*, slip op. at 8. I find the settlement agreement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of litigation.

The alleged violations involve refusal/delay or incomplete responses to requests for information, which as discussed below, the Respondent has agreed to provide in all material respects. The stage of litigation weighs in favor of approving the agreement. I opened the hearing on this matter on October 15, 2019, to consider the Respondent's revised motion for consent order. Settlement will save considerable resources by negating the need for a trial and related travel costs. As stated by a previous administrative law judge, "litigation has its expenses,

¹⁰ Solely for ease of reference, I refer to the Respondent's request as a request for a settlement agreement.

not just those of the private litigants, but also for the taxpayer. If the law can be enforced without spending money in litigation, that savings benefits everyone.” *National Telephone Services*, 301 NLRB 1, 3 (1991).

Most compellingly, I find the settlement is reasonable because it provides essentially the same remedy that would reasonably be awarded if the General Counsel fully prevailed on the complaint. In short, the Respondent offered to provide all of the Charging Parties’ requested information, redacting only confidential human resources information where privacy has been requested or conferred and/or would reasonably be expected, as well as employee health and medical information. The Charging Parties neither sought an alternative less restrictive accommodation nor persuasively explained why their need for unredacted confidential human resources information and health and medical information outweighs the Respondent’s concerns for confidentiality and privacy of its members’ sensitive personal information.

Section 8(b)(1)(A) of the Act provides that it is an unfair labor practice for a labor organization or its agents to restrain or coerce employees “in the exercise of the rights guaranteed in section 7 [section 157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.” The rights guaranteed in Section 7 include, in pertinent part, the right “to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”

As a judicially recognized protection implicit within the Act, a union has a duty of fair representation to its members. See *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). More specifically, in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), the Supreme Court defined this duty as “a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” The Board thus has determined that a union’s breach of the duty of fair representation qualifies as an unfair labor practice under the Act. See *Miranda Fuel Co.*, 140 NLRB 181, 185 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963).

The union’s duty of fair representation extends to providing members access to requested documents where warranted. See *Letter Carriers Branch 529*, 319 NLRB 879, 880 (1995). It is well settled, however, that something beyond mere negligence or the exercise of poor judgment on the union’s part is required to support a finding of arbitrary conduct. *Teamsters Local 337 (Swift-Eckrich)*, 307 NLRB 437, 438 (1992). “[A] union must be allowed a wide range of reasonableness in serving the unit employees, and any subsequent examination of a union’s performance must be ‘highly deferential’.” *Letter Carriers Branch 529*, supra, quoting *Air Line Pilots Assn. v. O’Neill*, 499 U.S. 65, 78 (1991). A union’s conduct is arbitrary “only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a wide range of reasonableness as to be irrational.” *Id.*¹¹

¹¹ In *ILWU and Edmund Oberti*, supra, Judge Sotolongo reasoned that the duty the Union owes as to actions taken by representatives of the JPLRC is materially different from the traditional duty of fair representation. The Board did not pass on the matter, but I find his reasoning persuasive and applicable to the instant case. Given the lack of direct Board authority on this issue, however, I likewise decide this

When a union refuses to supply information requested by a represented employee, the Board applies a balancing test, and considers whether the employee has communicated a “legitimate particular interest” in the information, and if so, whether the union has asserted a “countervailing interest” in refusing to provide the information.¹² *Mail Handlers Local 307*, 339 NLRB 93, 93–94 (2003).

The Charging Parties have not articulated a particular legitimate interest in portions of JPLRC minutes that discuss employee confidential human resources information or medical/health information. This really ends the inquiry.

In the event a reviewing authority disagrees with me, however, I will assume the Charging Parties have articulated a particular interest in the information the Respondent seeks to redact. There is no dispute the Respondent has raised a countervailing interest in maintaining the confidentiality of its members’ private human resources matters and personal health and medical information.¹³

A party refusing to supply information on confidentiality grounds has the burden to seek an accommodation. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). Here, the Respondent sought such an accommodation, by offering to provide the JPLRC minutes the Charging Parties requested, redacting only confidential human resources information where privacy has been requested or conferred and/or would reasonably be expected, as well as employee health and medical information. This strikes me as a perfectly reasonable compromise under the present factual context.

It would be impossible for the Respondent to delineate all of the specific scenarios that would raise legitimate privacy concerns. A distraught female employee who visits human resources to ask for counseling and time off after being raped would expect this information not to be shared with her coworkers even absent an explicit agreement or assurance of confidentiality. An employee in the process of leaving a partner due to domestic violence whose work performance and attendance is spotty because of emotional distress and the logistical hassles of moving to a shelter should by all reason feel comfortable sharing this with the Respondent and the PMA without fear it will be shared with coworkers. Consider an employee member who requests to no longer be dispatched to a certain employer because she had a previous sexual relationship with a manager who works there. How is this of any other member’s legitimate business or concern? As the Respondent notes, its confidentiality concerns here are not purely hypothetical in light of the evidence that Charging Party Tessier maintains a

case under traditional standards.

¹² The General Counsel asserts that the Union is required to provide hiring hall records. I agree, but as noted above, the hiring hall records are maintained by the PMA/ILWU dispatch halls and are available to members. This was not disputed by any party. The JPLRC minutes encompass broader information, and are not simply hiring hall records. The accommodation the Respondent offered would, under any rational construction, provide the Charging Parties with information they to determine if they were treated fairly with regard to job referrals from the dispatch hall, while respecting legitimate member/employee privacy concerns.

¹³ The privacy concerns are arguably heightened under the present arrangement, as the JPLRC’s release of confidential information would likely have implications for the employer members of the PMA.

website where he has published confidential and sensitive member information.¹⁴ “[I]n light of the factual and legal landscape at the time of the union’s actions” the Respondent’s action here was not “so far outside ‘a wide range of reasonableness’ as to be irrational.” *Mail Handlers Local 307*, supra. at 93, quoting *Air Line Pilots Assn. v. O’Neill*, supra. at 76. See also *Local Joint Exec. Bd.*, 363 NLRB No. 33 (2015), slip op. at 1 n. 1.

Finally, and significantly, in response to the Respondent’s reasonable offer of accommodation, the Charging Parties did not propose an alternative accommodation but instead insisted on unrestricted access to the JPLRC minutes.

There is no requirement under *Independent Stave* that a proposed settlement agreement provide the full measure of relief sought in the complaint. Instead, *Independent Stave* requires the settlement to be “reasonable.” The Respondent proposed a reasonable resolution, and as such, I find the second factor weighs strongly in the Respondent’s favor.

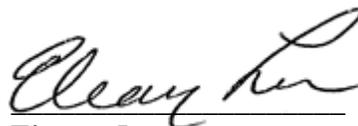
3. Third and Fourth Factors

No party submitted argument that there was fraud, any fraud, coercion, or duress by any of the parties in reaching the settlement or that the Respondent has engaged in a history of unlawful conduct or has breached previous settlement agreements resolving unfair labor practice disputes.¹⁵

4. Conclusion

The Respondent’s offer to provide the requested information with only the aforementioned redactions, considering the costs and risks involved should this case proceed to litigation, meets the standards set forth in *Independent Stave*. I therefore GRANT the Respondent’s October 15, 2019 motion for modified consent order.

SO ORDERED
October 18, 2019
San Francisco, CA



Eleanor Laws
Administrative Law Judge

RIGHT TO APPEAL

Aggrieved parties have the right to file a special appeal to the Board, pursuant to Section 102.26 of the Board’s Rules and Regulations.

¹⁴ He not only published the grievance, he disparaged the woman who filed it.

¹⁵ The General Counsel concedes these factors are not at issue in his response to the Order to Show Cause. The Charging Party does not address these factors in his response.

Service via Email:

For the NLRB

Richard C. Fiol, Esq.
Email: richard.fiol@nlrb.gov

Mary Ana Hermsillo, Esq.
Email: mary.hermosillo@nlrb.gov

For the Respondent

Robert H. Lavitt, Esq.
Email: lavitt@workerlaw.com

For the Charging Party

Jim Tessier, Esq.
Email: laborrelations@comcast.net

DiCrocco, Brian

From: DiCrocco, Brian
Sent: Friday, October 18, 2019 3:22 PM
To: Fiol, Richard C.; 'Hermosillo, Mary A.'; lavitt@workerlaw.com; laborrelations@comcast.net
Cc: Gomez, Doreen E.; Mills, Kathlyn
Subject: 19-CB-186889 - ILWU Local 19 (SSA Terminals): - ORDER GRANTING THE INTERNATIONAL LONGSHORE WAREHOUSE UNION LOCAL 19's MOTION FOR CONSENT ORDER
Attachments: 20191018 Order Granting Motion for Consent Order SSA TERMINALS.pdf

Dear Counsel,

Please see the attached document.

Brian

Brian C. DiCrocco, Legal Tech.
NLRB Division of Judges San Francisco
628-221-8821