

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

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EVERPORT TERMINAL SERVICES, INC.	)	No. <u>20-1411</u>
<i>Petitioner,</i>	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD,	)	
<i>Respondent.</i>	)	

**PETITION FOR REVIEW**

Pursuant to 29 U.S.C. § 160(f) and Rule 15(a) of the Federal Rules of Appellate Procedure, Everport Terminal Services, Inc. petitions the Court to review and set aside the Decision and Order by the National Labor Relations Board in *Everport Terminal Services, Inc. and International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 156, AFL-CIO and International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1414, AFL-CIO*, 370 NLRB No. 28 (Sept. 30, 2020), finding that Everport violated the National Labor Relations Act.

A copy of the Board's Decision is attached hereto as Exhibit 1. The Decision is a final order over which this Court has jurisdiction under 29 U.S.C. § 160(f). Everport is aggrieved by the Decision, which is not supported by substantial evidence and does not have a reasonable basis

in law. Everport asks the Court to grant this petition for review, set aside the Decision, bar the Board from seeking enforcement of the Decision, and dismiss all claims against Everport with prejudice.

Respectfully submitted,

s/Jeffrey S. Bucholtz

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*Counsel for Petitioner*

October 9, 2020

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Everport Terminal Services, Inc., certifies that it is a wholly owned subsidiary of Evergreen Marine Corporation (Taiwan), Ltd., a publicly traded Taiwanese company.

Respectfully submitted,

s/Jeffrey S. Bucholtz  
Jeffrey S. Bucholtz

*Counsel for Petitioner*

October 9, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that October 9, 2020, I electronically filed the foregoing Petition for Review with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I also caused the foregoing Petition for Review to be served upon the following:

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**EXHIBIT 1**

*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

**Everport Terminal Services, Inc. and International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1546, AFL–CIO and International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1414, AFL–CIO.**

**International Longshore and Warehouse Union and International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1546, AFL–CIO and International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1414, AFL–CIO.** Cases 32–CA–172286 and 32–CB–172414

September 30, 2020

DECISION AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND MCFERRAN

On July 27, 2018, Administrative Law Judge Sharon Levinson Steckler issued the attached decision, and on

August 8, 2018, she issued an errata. Respondent Everport Terminal Services, Inc. (Everport) filed exceptions and a supporting brief, and Respondent International Longshore and Warehouse Union (ILWU) filed a joinder to Respondent Everport’s exceptions and brief. Respondent ILWU filed separate exceptions and a supporting brief. The General Counsel and the Charging Parties each filed an answering brief to the Respondents’ exceptions briefs. Respondent Everport filed a reply brief to the General Counsel’s answering brief, Respondent ILWU filed a joinder to Respondent Everport’s reply brief to the General Counsel’s answering brief, Respondent Everport filed a reply brief to the Charging Parties’ answering brief, and Respondent ILWU filed a reply brief to the Charging Parties’ answering brief. The General Counsel filed limited exceptions and a supporting brief. The Charging Parties filed cross-exceptions and a supporting brief, Respondent Everport filed an answering brief, and the Charging Parties filed a reply brief.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.<sup>2</sup>

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,<sup>3</sup> and conclusions<sup>4</sup> and to

<sup>1</sup> On February 4, 2019, the Charging Parties filed a notice of supplemental authority with the Board. In the filing, the Charging Parties contend that the Board’s recent decision in *International Longshore & Warehouse Union & International Longshore & Warehouse Union Local 4*, 367 NLRB No. 64 (2019), relates to its argument concerning the application of Sec. 8(e), as well as remedies as to Respondent ILWU. On February 26, 2019, the Charging Parties further filed a notice indicating that Respondent ILWU filed a petition for review in that case. We have accepted the Charging Parties’ submissions pursuant to *Reliant Energy*, 339 NLRB 66 (2003).

The Charging Parties also filed a request for the Board to take administrative notice of a dismissal letter from the Associate to the General Counsel. We deny the request as the letter is not related to the issues before us.

<sup>2</sup> Chairman Ring is recused and took no part in the consideration of this case.

<sup>3</sup> The Respondents have excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Pursuant to the General Counsel’s exceptions, we have corrected several inadvertent errors made by the judge in her decision, which have not affected our disposition of this case.

<sup>4</sup> For the reasons set forth by the judge, we adopt the findings that Respondent Everport lost the right of a successor employer, under *NLRB v. Burns International Security Service*, 406 U.S. 272 (1972), to set initial terms and conditions of employment because it used a general discriminatory hiring plan, applicable to *all* applicants from the predecessor workforce, in order to prevent former employees from constituting more than 49 percent of the new workforce. Respondent Everport’s unlawful actions make it impossible to determine whether its workforce would

have consisted of all or substantially all of the predecessor employees if it hired applicants on a nondiscriminatory basis. It thus violated Sec. 8(a)(5) and (1) by imposing initial terms without bargaining with the Charging Parties. See *Love’s Barbeque Restaurant No. 62*, 245 NLRB 78, 82 (1979), enf. in part sub nom. *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981), and the appropriate remedy is to order restoration of the predecessor’s terms and conditions of employment until such bargaining takes place. We note that *Ridgewood Health Care Center, Inc.*, 367 NLRB No. 110 (2019), does not apply in these circumstances. The Board there found that the successor employer did not forfeit its *Burns* right to set initial terms because its discriminatory hiring practices involved only a few applicants from the predecessor workforce. Even if those few applicants were hired on a nondiscriminatory basis, it was clear that the successor employer would not have hired all or substantially all of the predecessor’s employees—at most, only about half of the predecessor’s employees would have had jobs with the successor. Id., slip op. at 7.

Member McFerran adheres to her dissent in *Ridgewood*, but she acknowledges that it is extant law and agrees that it is distinguishable.

Even assuming Respondent Everport retained the *Burns* right to set initial terms prior to bargaining with the Charging Parties, we would still adopt the judge’s findings that Respondent Everport unlawfully recognized Respondent ILWU at a time when it did not represent a majority of Respondent Everport’s employees and unlawfully applied the terms of the ILWU–PMA collective-bargaining agreement. Accordingly, the same remedies—rescission of the unilaterally imposed contract terms and make-whole remedies for related losses—would be appropriate and consistent with precedent holding that a *Burns* successor cannot set initial terms that violate Sec. 8(a)(2). See *Ports America Outer Harbor, LLC*, 366 NLRB No. 76, slip op. at 6 (2018) (ordering that successor employer “rescind any departures from terms and conditions of employment that existed immediately prior to its . . . unlawful recognition of the ILWU,” where it unlawfully recognized ILWU and applied the ILWU–PMA Agreement to unit employees), enf. denied on other grounds sub

adopt the recommended Order as modified and set forth in full below.<sup>5</sup>

#### ORDER

A. The National Labor Relations Board orders that the Respondent, Everport Terminal Services, Inc., Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees and/or prospective employees that it has a hiring plan to limit the number of employees hired from one union in favor of another union.

(b) Telling employees and/or prospective employees that it cannot hire them because of obligations to Respondent International Longshore and Warehouse Union (ILWU) or any other unlawfully recognized union.

(c) Dominating, interfering with, or contributing support to Respondent ILWU or any other labor organization.

(d) Refusing to hire bargaining unit employees of MTC and MMTS, the predecessor employers, because of their union-representation status in the predecessors' operations, or otherwise discriminating against employees to avoid having to recognize Charging Parties International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1546, AFL-CIO, and International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1414, AFL-CIO (collectively, the Machinists).

(e) Failing and refusing to bargain in good faith with the Machinists as the exclusive collective-bargaining representatives of its employees in the following appropriate units:

i. Maintenance and repair unit previously employed by MTC:

All employees performing work described and covered by Section 1 of the collective-bargaining agreement between MTC and the IAM effective by its terms for the period July 1, 2011 to June 30, 2016; excluding all other employees, guards, and supervisors as defined in the Act.

ii. Crane maintenance and repair unit previously employed by MMTS:

All employees performing work described in and covered by Section 1.4 of the collective-bargaining agreement between MMTS and the IAM effective by its terms for the period June 2, 2015 to May 31, 2016; excluding all other employees, guards, and supervisors as defined in the Act.

(f) Withdrawing recognition from the Machinists as the exclusive collective-bargaining representatives of the unit employees.

(g) Granting assistance to Respondent ILWU and recognizing it as the exclusive collective-bargaining representative of the unit employees at a time when Respondent ILWU does not represent an unassisted and uncoerced majority of the employees in the units and when the Machinists are the exclusive collective-bargaining representatives of the unit employees.

(h) Unilaterally changing the terms conditions of employment of the unit employees without first notifying the Machinists and giving them an opportunity to bargain.

(i) Applying the terms and conditions of employment of the PMA-ILWU collective-bargaining agreement, or any extension, renewal, or modification thereof, including

nom. *International Longshore & Warehouse Union v. NLRB*, 971 F.3d 356 (D.C. Cir. 2020).

Member Emanuel disagrees with his colleagues that Respondent Everport lost the right of a successor employer under *Burns* to set initial terms and conditions of employment. Like in *Ridgewood*, Respondent Everport's discriminatory failure to hire *some* of the predecessors' unit employees "created no uncertainty whether [Respondent Everport] planned to retain all or substantially all of the predecessor[s'] unit employees." 367 NLRB No. 110, slip op. at 9. However, even though Respondent Everport had the right to set initial terms and conditions of employment, it was not free to recognize Respondent ILWU at a time when Respondent ILWU did not represent a majority of its employees or to apply the terms of the ILWU-PMA collective-bargaining agreement to its employees. Member Emanuel agrees with his colleagues that Respondent Everport violated the Act by doing so. Accordingly, the proper remedy for those violations is to order Respondent Everport to rescind its imposition of the ILWU-PMA collective-bargaining agreement and to make affected employees whole for any losses resulting from its unlawful imposition of that agreement.

<sup>5</sup> In adopting the judge's affirmative bargaining order, we order Respondent Everport to bargain with the Charging Parties for a reasonable

period of time, rather than the 12-month period recommended by the judge. See *Ports America*, above, 366 NLRB No. 76, slip op. at 4-5.

The General Counsel excepts to the judge's inadvertent omission of discriminatees Michael Tavares and Brent Zieska from the recommended Order as well as inadvertent misspellings of the names of discriminatees Tye Gladwill, Matthew Polcer, and Nenad Milojkovic. We grant this unopposed exception and shall modify the Order accordingly.

The Charging Parties cross-exception to the judge's proposed remedy, specifically her failure to order certain additional extraordinary remedies. We believe that the existing remedies and our standard remedial language are sufficient to remedy the violations found.

We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute new notices to conform to the Order as modified.

Member Emanuel would find that the notice-reading remedies are unwarranted in this case. He does not believe that the Respondents' violations are "so numerous and serious" as to render the Board's standard notice-posting remedy insufficient to dissipate their effects, nor do they rise to an "egregious" level of misconduct. See *Postal Service*, 339 NLRB 1162, 1163 (2003).

EVERPORT TERMINAL SERVICES, INC.

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its union-security and hiring hall provisions, to the unit employees at a time when Respondent ILWU does not represent an unassisted and uncoerced majority of the employees in the units.

(j) Unilaterally laying off unit employees without first notifying the Machinists and giving them a meaningful opportunity to bargain regarding the decision to lay off unit employees.

(k) Bypassing the Machinists and directly offering unit employees continued employment in the units on the basis of terms and conditions of employment different from those enjoyed under predecessor employers MTC and MMTS on the condition that they be represented by Respondent ILWU.

(l) Discriminating against unit employees in regard to their hire and tenure of employment in order to encourage membership in Respondent ILWU.

(m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold recognition from Respondent ILWU as the exclusive collective-bargaining representative of the unit employees, unless and until Respondent ILWU has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

(b) Refrain from applying the terms and conditions of employment of the PMA-ILWU collective-bargaining agreement with Respondent ILWU, including its union-security and hiring hall provisions, to the unit employees, unless and until Respondent ILWU has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

(c) Recognize and, on request, bargain with the Machinists as the exclusive collective-bargaining representatives of the employees in the following appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in signed agreements:

i. Maintenance and repair unit previously employed by MTC:

All employees performing work described and covered by Section 1 of the collective-bargaining agreement between MTC and the IAM effective by its terms for the period July 1, 2011 to June 30, 2016; excluding all other employees, guards, and supervisors as defined in the Act.

ii. Crane maintenance and repair unit previously employed by MMTS:

All employees performing work described in and covered by Section 1.4 of the collective-bargaining agreement between MMTS and the IAM effective by its terms for the period June 2, 2015 to May 31, 2016; excluding all other employees, guards, and supervisors as defined in the Act.

(d) Jointly and severally with Respondent ILWU, reimburse all unit employees for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA-ILWU collective-bargaining agreement, with interest.

(e) Notify the Machinists in writing of all changes made to the unit employees' terms and conditions of employment on or after December 4, 2015, and, on request of the Machinists, rescind any departures from terms and conditions of employment that existed immediately prior to December 4, 2015.

(f) Make unit employees whole, with interest, for any losses sustained due to the unlawfully imposed changes in wages, hours, benefits, and other terms and conditions of employment, in the manner set forth in the remedy section of the decision.

(g) Make all unit employees laid off since December 4, 2015, whole for any loss of earnings and other benefits suffered as a result of Respondent Everport's actions, in the manner set forth in the remedy section of the decision, plus reasonable search-for-work and interim employment expenses.

(h) Make unit employees whole for any loss of earnings and other benefits suffered as a result of Respondent Everport's unlawful failure to hire, in the manner set forth in the remedy section of the decision, plus reasonable search-for-work and interim employment expenses.

(i) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

(j) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failures to hire and layoffs, and within 3 days thereafter, notify the affected employees in writing that this has been done and that the unlawful failures to hire and layoffs will not be used against them in any way.

(k) Within 14 days of the date of this Order, offer employment to the following named former unit employees of the predecessors, and any other similarly situated employees who would have been employed by Respondent Everport but for the unlawful discrimination against them, in their former positions, or, if such positions no longer

exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their place. The employees are: Kevin Bono; James Bouslog; Timothy Burns; Patrick Fenisey; Tye Gladwill; Preston Humphrey; Wade Humphrey; Steven Likos; George Lingenfelter; John McDaniel; Michael Meister; Matthew Polcer; Juan Salas; Steven Sanders; Jack Sutton Jr.; Jack Sutton Sr.; Brandon Tavares; Matthew Tavares; James Anthon; Dean E. Compton; Guilherme "Gil" Freitas; Raymond MacDonald; Nenad Milojkovic; Brian Tilley; Michael Tavares; and Brent Zieska.

(l) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(m) Within 14 days after service by the Region, post at its Nutter Terminal facility in Oakland, California, copies of the attached notice marked "Appendix A."<sup>6</sup> Copies of the notice for Appendix A, on forms provided by the Regional Director for Region 32, after being signed by Respondent Everport's authorized representative, shall be posted by Respondent Everport and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent Everport customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent Everport to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent Everport has gone out of business or closed the facility involved in this proceeding, Respondent Everport shall duplicate and mail, at its own expense, a copy of the notice to all current and former unit employees employed by Respondent Everport at its Oakland, California terminal at any time since December 4, 2015.

<sup>6</sup> If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting

(n) Within 14 days after service by the Region, post at the same places and under the same conditions as in the preceding subparagraph signed copies of Respondent ILWU's notice to employees and members marked "Appendix B."

(o) Within 14 days after service by the Region, hold a meeting or meetings during working hours at the Nutter Terminal, which will be scheduled to ensure the widest possible attendance of unit employees, at which time the attached notice marked "Appendix A" is to be read to its employees by Vice President Randy Leonard (or, if he is no longer employed by Respondent Everport, by a high-ranking responsible management official of Respondent Everport) in the presence of a Board agent, or, at Respondent Everport's option, by a Board agent in the presence of Leonard (or another management official if Leonard is no longer employed by Respondent Everport).

(p) Promptly furnish the Regional Director for Region 32 with signed copies of Respondent Everport's notice to employees marked "Appendix A" for posting by Respondent ILWU at its offices and meeting halls where notices to employees and members are customarily posted. Copies of the notice, to be furnished by the Regional Director, shall be signed and returned to the Regional Director promptly.

(q) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent Everport has taken to comply.

B. The National Labor Relations Board orders that the Respondent, International Longshore & Warehouse Union, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting assistance and recognition from Respondent Everport as the exclusive collective-bargaining representative of employees in the units described below at a time when Respondent ILWU does not represent an uncoerced majority of the employees in the units and when the Machinists are the exclusive collective-bargaining representatives of the employees in the units:

i. Maintenance and repair unit previously employed by MTC:

of paper notices also applies to the electronic distribution of the notice if Respondent Everport customarily communicates with its members by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

All employees performing work described and covered by Section 1 of the collective-bargaining agreement between MTC and the IAM effective by its terms for the period July 1, 2011 to June 30, 2016; excluding all other employees, guards, and supervisors as defined in the Act.

ii. Crane maintenance and repair unit previously employed by MMTS:

All employees performing work described in and covered by Section 1.4 of the collective-bargaining agreement between MMTS and the IAM effective by its terms for the period June 2, 2015 to May 31, 2016; excluding all other employees, guards, and supervisors as defined in the Act.

(b) Maintaining and enforcing the PMA–ILWU collective-bargaining agreement, or any extension, renewal, or modification thereof, including its union-security and hiring hall provisions, so as to cover the unit employees, unless and until Respondent ILWU has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

(c) Attempting to cause Respondent Everport, or any other employer, to deny employment to or otherwise discriminate against employees who have not been dispatched through the Joint Dispatch Hall.

(d) In any other manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Decline recognition as the exclusive collective-bargaining representative of the unit employees, unless and until Respondent ILWU has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

(b) Jointly and severally with Respondent Everport, reimburse all present and former unit employees for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA–ILWU collective-bargaining agreement, with interest.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director for Region 32 may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records,

including an electronic copy of such records if stored in electronic form, necessary to analyze the amount due under the terms of this Order.

(d) Within 14 days after service by the Region, post at all of its offices and meeting halls copies of the attached notice marked “Appendix B.”<sup>7</sup> Copies of the notice for Appendix B, on forms provided by the Regional Director for Region 32, after being signed by Respondent ILWU’s authorized representative, shall be posted by Respondent ILWU and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if Respondent ILWU customarily communicates with its members by such means. Reasonable steps shall be taken by Respondent ILWU to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 14 days after service by the Region, post at the same places and under the same conditions as in the preceding subparagraph signed copies of Respondent Everport’s notice to employees marked “Appendix A.”

(f) Within 14 days after service by the Region, hold a meeting or meetings during working hours at the Nutter Terminal, which will be scheduled to ensure the widest possible attendance of unit employees, at which time the attached notice marked “Appendix B” is to be read to Everport mechanics by Respondent ILWU’s President in the presence of a Board agent and a representative of the Machinists, or, at Respondent ILWU’s option, by a Board agent in the presence of Respondent ILWU’s President and a representative of the Machinists. In addition, within 14 days after service by the Region, hold a meeting or meetings at the Local 10 union hall, which will be scheduled to ensure the widest possible attendance of members, at which time the attached notice marked “Appendix B” is to be read to its member by Respondent ILWU’s President in the presence of a Board agent, or, at Respondent ILWU’s option, by a Board agent in the presence of Respondent ILWU’s President.

(g) Promptly furnish the Regional Director for Region 32 with signed copies of Respondent ILWU’s notice to employees and members marked “Appendix B” for posting by Respondent Everport at its facility where notices to

<sup>7</sup> If Respondent ILWU’s offices are open to members and employees, the notices must be posted by Respondent ILWU within 14 days after service by the Region. If the offices involved in these proceedings are closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the offices reopen and a substantial complement of members and employees have returned to accessing the offices. Any delay in the physical posting of paper notices also

applies to the electronic distribution of the notice if Respondent ILWU customarily communicates with its members by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

employees are customarily posted. Copies of the notice, to be furnished by the Regional Director, shall be signed and returned to the Regional Director promptly.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent ILWU has taken to comply.

Dated, Washington, D.C. September 30, 2020

\_\_\_\_\_  
Marvin E. Kaplan, Member

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William J. Emanuel, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

#### APPENDIX A

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us 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 tell you that we have a hiring plan to limit the number of employees hired from one union in favor of another union.

WE WILL NOT tell you that we cannot hire you because of obligations to International Longshore and Warehouse Union (ILWU) or any other unlawfully recognized union.

WE WILL NOT dominate, interfere with, or contribute support to ILWU or any other labor organization.

WE WILL NOT refuse to hire bargaining unit employees of MTC and MMTS, the predecessor employers, because of their union-representation status in the predecessors' operations, or otherwise discriminate against employees to avoid having to recognize International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1546, AFL-CIO, and International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1414, AFL-CIO (collectively, the Machinists).

WE WILL NOT fail and refuse to bargain with the Machinists as the exclusive collective-bargaining representatives of the employees in the following appropriate bargaining units concerning wages, hours, and other terms and conditions of employment:

i. Maintenance and repair unit previously employed by MTC:

All employees performing work described and covered by Section 1 of the collective-bargaining agreement between MTC and the IAM effective by its terms for the period July 1, 2011 to June 30, 2016; excluding all other employees, guards, and supervisors as defined in the Act.

ii. Crane maintenance and repair unit previously employed by MMTS:

All employees performing work described in and covered by Section 1.4 of the collective-bargaining agreement between MMTS and the IAM effective by its terms for the period June 2, 2015 to May 31, 2016; excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT withdraw recognition from the Machinists as the exclusive collective-bargaining representatives of the unit employees.

WE WILL NOT grant assistance to ILWU and recognize it as the exclusive collective-bargaining representative of the unit employees at a time when ILWU does not represent an unassisted and uncoerced majority of the employees in the units, and when the Machinists are the exclusive collective-bargaining representatives of the unit employees.

WE WILL NOT unilaterally change your terms and conditions of employment without first notifying the Machinists and giving them a meaningful opportunity to bargain.

WE WILL NOT apply the terms and conditions of employment of the PMA-ILWU collective-bargaining agreement, or any extension, renewal, or modification of that agreement, including its union-security and hiring hall provisions, to the unit employees at a time when ILWU

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does not represent an unassisted and uncoerced majority of employees in the units.

WE WILL NOT unilaterally lay off unit employees without first notifying the Machinists and giving them a meaningful opportunity to bargain regarding the decision to lay off unit employees.

WE WILL NOT bypass the Machinists and directly offer you continued employment in the units on the basis of terms and conditions of employment different from those enjoyed under predecessor employers MTC and MMTS on the condition that you be represented by ILWU.

WE WILL NOT discriminate against you in regard to your hire and tenure of employment in order to encourage membership in ILWU.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL withdraw and withhold recognition from ILWU as the exclusive collective-bargaining representative of our employees in the units described above, unless and until ILWU has been certified by the National Labor Relations Board as your exclusive collective-bargaining representative.

WE WILL refrain from applying the terms and conditions of employment of the PMA–ILWU collective-bargaining agreement with ILWU, including its union-security and hiring hall provisions, to the unit employees, unless and until ILWU has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

WE WILL recognize and, on request, bargain at reasonable times and places and in good faith with the Machinists as the exclusive collective-bargaining representatives of our employees in the units described above concerning wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody the understanding in signed agreements.

WE WILL, jointly and severally with ILWU, reimburse all unit employees for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA–ILWU collective-bargaining agreement, with interest.

WE WILL notify the Machinists in writing of all changes made to the unit employees' terms and conditions of employment on or after December 4, 2015, and WE WILL, on request of the Machinists, rescind any departures from terms and conditions of employment that existed immediately prior to December 4, 2015.

WE WILL make you whole, with interest, for any losses sustained due to our unlawfully imposed changes in wages, hours, benefits, and other terms and conditions of employment.

WE WILL make all unit employees laid off since December 4, 2015, whole for any loss of earnings and other benefits suffered as a result of our actions, plus reasonable search-for-work and interim employment expenses.

WE WILL make unit employees whole for any loss of earnings and other benefits suffered as a result of our unlawful failure to hire them, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful failures to hire and layoffs, and WE WILL within 3 days thereafter, notify the affected employees in writing that this has been done and that the unlawful failures to hire and layoffs will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer employment to the following named former unit employees of our predecessors, and any other similarly situated employees who would have been employed by us but for our unlawful discrimination against them, in their former positions, or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their place. The employees are: Kevin Bono; James Bouslog; Timothy Burns; Patrick Fenisey; Tye Gladwill; Preston Humphrey; Wade Humphrey; Steven Likos; George Lingenfelter; John McDaniel; Michael Meister; Matthew Polcer; Juan Salas; Steven Sanders; Jack Sutton Jr.; Jack Sutton Sr.; Brandon Tavares; Matthew Tavares; James Anthon; Dean E. Compton; Guilherme "Gil" Freitas; Raymond MacDonald; Nenad Milojkovic; Brian Tilley; Michael Tavares; and Brent Zieska.

EVERPORT TERMINAL SERVICES, INC.

The Board's decision can be found at [www.nlr.gov/case/32-CA-172286](http://www.nlr.gov/case/32-CA-172286) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.



## APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us 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 accept assistance or recognition from Everport Terminal Services, Inc. as the exclusive collective-bargaining representative of the employees in the following appropriate units at a time when we do not represent an uncoerced majority of employees in the units and when International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1546, AFL-CIO, and International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1414, AFL-CIO are the exclusive collective-bargaining representatives of the employees in the units:

- i. Maintenance and repair unit previously employed by MTC:

All employees performing work described and covered by Section 1 of the collective-bargaining agreement between MTC and the IAM effective by its terms for the period July 1, 2011 to June 30, 2016; excluding all other employees, guards, and supervisors as defined in the Act.

- ii. Crane maintenance and repair unit previously employed by MMTS:

All employees performing work described in and covered by Section 1.4 of the collective-bargaining agreement between MMTS and the IAM effective by its terms

for the period June 2, 2015 to May 31, 2016; excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT maintain and enforce the PMA-ILWU collective-bargaining agreement, or any extension, renewal, or modification of that agreement, including its union-security and hiring hall provisions, so as to cover the unit employees, unless and until we have been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

WE WILL NOT attempt to cause Everport, or any other employer, to deny employment to or otherwise discriminate against employees who have not been dispatched through the Joint Dispatch Hall.

WE WILL NOT in any other manner restrain or coerce you in the exercise of the rights listed above.

WE WILL decline recognition as the exclusive collective-bargaining representative of the employees in the above units, unless and until we have been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

WE WILL, jointly and severally with Everport, reimburse all present and former employees in the units described above for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA-ILWU collective-bargaining agreement, with interest.

## INTERNATIONAL LONGSHORE AND WAREHOUSE UNION

The Board's decision can be found at [www.nlr.gov/case/32-CA-172286](http://www.nlr.gov/case/32-CA-172286) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*D. Criss Parker and Coreen Kopper, Esqs.*, for the General Counsel.

*Joseph Akrotirianakis and Brigham Cheney, Esqs.*, for the Respondent Everport Terminal Services, Inc.

*Robert Remar and Emily Maglio, Esqs.*, for the Respondent International Longshore and Warehouse Union.

*David Rosenfeld, Esq.*, for the Charging Parties.

*Jonathan Fritts, Esq., limited appearance*, for Pacific Maritime Association.

EVERPORT TERMINAL SERVICES, INC.

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## DECISION

SHARON LEVINSON STECKLER, ADMINISTRATIVE LAW JUDGE. This case is yet another concerning who performs maintenance and repair work at the Oakland, California docks, this time at the Ben E. Nutter Terminal (the Terminal). General Counsel primarily alleges Respondent Everport Terminal Services, Inc. (Everport), a successor employer, violated Section 8(a)(1), (2), (3), and (5) by discriminatorily refusing to hire a majority of the predecessor's Machinist-represented employees and instead prematurely recognizing hiring a majority of Respondent International Longshoremen Workers Union (ILWU) represented employees. In doing so, Respondent Everport allegedly unlawfully avoided a bargaining obligation to the Machinists and made unilateral changes by implementing a different collective-bargaining agreement. General Counsel further alleges that Respondent ILWU violated Section 8(b)(1)(A) and (2), by unlawfully accepting recognition. Respondents deny all violations. I find that Everport violated Section 8(a)(1), (2), (3), and (5) and ILWU violated Section 8(b)(1)(A) and (2).

## STATEMENT OF THE CASE

This case was tried in Oakland, California 19 days between February 2017 and August 2017. Charging Parties International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1546, AFL-CIO and International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1414, AFL-CIO (Machinists) filed the initial charge against Respondent Everport on March 21, 2016. The Machinists filed a second amended charge and a third amended charge respectively on May 31, 2016 and October 31, 2016. The Machinists filed the charge against Respondent ILWU on March 22, 2016.

General Counsel issued the complaint against both Respondents on December 21, 2016 and filed an amendment on February 7, 2017. Respondents deny all allegations of wrongdoing.

The parties filed timely briefs, which I carefully considered.<sup>1</sup> By agreement of all parties, briefs were limited to 150 pages, not including cover pages, tables of contents, tables of authorities and appendices. In addition to its brief, Respondent Everport filed a Compendium of Testimony, covering 257 pages. The Compendium includes excerpts from testimony in support of its points, to which Everport cited in the brief. The Machinists filed

<sup>1</sup> In response to issuance of new cases, the parties submitted letter briefs during June 2018.

<sup>2</sup> Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303-305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that

a Motion to Strike the Compendium; the Motion stated Everport avoided putting in transcript references by using the Compendium and was a deliberate attempt to avoid the page limitations. In its Opposition to the Charging Parties' Motion to Strike, Everport denied the Compendium was for the purpose of avoiding page limitations because its brief was 23 pages less than the limitation and the Compendium "merely contains compilations of cited testimony for the convenience of the Administrative Law Judge in analyzing the parties' briefs." Everport contends the Compendium is an appendix or an exhibit, which was not limited. Everport also requests that, should I strike the Compendium, it be permitted to refile its brief in identical form with the direct transcript citations.

I grant the Machinists' Motion to Strike the Compendium. Respondent Everport's reliance upon the Compendium allows it to avoid inclusion of more direct quotes from the transcript into its brief, and as such, the Compendium violates the spirit and letter of the page limitations. I deny Everport's request to refile the brief as the brief itself was filed timely and contains relevant argument, which I have considered. The brief also cites exhibits. I read the transcript and exhibits and analyzed the briefs without assistance from Everport's Compendium. I therefore make the following

FINDINGS OF FACT<sup>2</sup>

## I. JURISDICTION AND UNION STATUS

Respondent Everport admits, and I find, that it is an employer within the meaning of Section (2), (5), and (6) of the Act. I also find that the Machinists, ILWU and ILWU Local 10 are labor organizations within the meaning of Section 2(5) of the Act.

## II. BACKGROUND

*A. Operations at Ben E. Nutter Terminal in Oakland, California*

The Port of Oakland leases berths to marine terminal operators. Berths 35-38 are known as the Ben E. Nutter Terminal (the Terminal). Oakland granted a lease to the Terminal to Evergreen Shipping. The working area for the Terminal is approximately 20 acres, with additional acreage used as a wild area. (Tr. 3985.) For several years, Evergreen Shipping contracted the stevedoring work at the Terminal to STS,<sup>3</sup> and the maintenance and

a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Testimony from current employees tend to be particularly reliable because it goes against their pecuniary interests when testifying against their employer. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972).

<sup>3</sup> Seaside Transportation Services (STS) was a joint venture/partnership between Marine Terminals Corporation (MTC) and Evergreen Marine/Evergreen Lines. Evergreen Lines is a Taiwanese shipping

repair work at the terminal was contracted to MMTS and MTS. STS and Ports America both controlled the Terminal.

Marine terminal operators, such as Everport, unload from and load customers' containers onto shipping vessels. Trucks deliver export containers, filled with goods, usually 2 weeks in advance of loading the containers onto shipping vessels, or take out filled containers. Empty containers are also kept at the port; truckers may pick up empty containers to take to a shipper and return it with goods for export or the empty containers may be shipped back on the vessel. (Tr. 988.)<sup>4</sup> Port management designates specific areas to load or unload containers with cranes. Given the number of machines necessary to operate the terminal, it is not surprising that the terminal has maintenance and repair work on these machines.

Evergreen created Respondent Everport as a subsidiary to operate terminals. In 2012, Evergreen assigned the Terminal lease to Everport and Everport continued the relationship with the predecessors. In 2015, Everport, dissatisfied how the Terminal was operated, began plans to operate the Terminal itself. The predecessors discontinued operations after December 4, 2015. Although Everport began full operations in January 2016, it began to receive containers to ship for exporting about December 22, 2015. Many maintenance employees began work on January 4, 2016 and the first ship for leaving the Terminal was on January 8, 2016.

#### *B. History of Operations for Maintenance and Repair Work at the Terminal*

Before Everport took over daily operations at the Terminal, two employers employed mechanics at the Terminal. The Machinists, in two different lodges, represented the mechanics.

##### *1. MTC and the power, chassis, and refrigeration shops*

Marine Terminals Corporation (MTC) unit consisted of power mechanics, chassis and container mechanics and refrigeration ("reefer") mechanics. These mechanics worked on all phases of equipment, maintenance, and repair at the terminal. This unit was represented by the Machinists<sup>5</sup> since 1968 and before Everport's operation of the terminal, employed about 20 mechanics. Before December 5, 2015, this unit's average seniority was roughly 15 years. The last MTC-Machinist collective-bargaining agreement was effective from July 1, 2011 through June 30, 2016. (GC Exh. 50.)

The power shop maintained and repaired all machines with combustion engines, including machines that pick up containers from the top (top picks or top handles), machines that pick up empty containers from the side (side handlers or side picks), transtainers, forklifts, yard trucks, and man lifts. These mechanics needed mechanical abilities, including working on electrical systems, welding, and fabrication; for some of the equipment, they also worked on the air conditioning systems. It also shared responsibility with the crane shop for the rubber-tired gantries (RTGs). Engineer Robin Hsiegh interacted with the power shop

foreman and directed some of the power shop work, including reading meters for preventative maintenance and reviewing the shop's daily reports. He also contacted the power shop foreman a few times per day regarding equipment reports and asked when equipment would be repaired.

The chassis mechanics repair and maintain trailers/chassis that are used in over the road trucking. Apparently, the containers are placed upon the chassis for transportation. Chassis mechanics work on braking systems, such as air brakes, wheel bearings, lighting circuits and breaking signals. Skills necessary are mechanical, electrical, and fabrication. These mechanics also performed 90-day and annual inspections. The power and chassis shops were supervised by Maintenance and Repair Manager Brad Goetz, who reported to Manager Mike Cassell. Cassell reported to Willy Wong, located in Southern California.

The reefer shop mechanics maintain and repair refrigerated container units and the electrical generators supplying electricity to the chassis or container (gensets). A genset is a portable generator that mounts to a chassis or other container that allows over the road travel with the refrigeration unit with an electrical power supply to maintain refrigeration. Reefers must be able to understand electrical theory, read schematics, work on refrigeration units, handle refrigerants and be licensed by the state to handle refrigerants. They also must be able to recover refrigerant in a system for repair without environmental contamination. They also have to be able to work the refrigerated containers and the gensets.

##### *2. MMTS and the crane shop*

Miles Motor Transport System (MMTS), a wholly owned subsidiary of MTC, employed seven crane mechanics in the second unit. The Machinists represented this unit since at least 1973. The last MMTS-Machinist collective-bargaining agreement was effective from June 1, 2015 through May 31, 2016. (GC Exh. 51.) Crane mechanics maintain and repair RTGs and container cranes. They must have electrical skills, be able to read and understand schematics (both electrical and hydrolic), and work from technical manuals.

The crane shop was supervised by Maintenance and Repair Superintendent Mike Casall, who report to Maintenance and Repair Manager Willy Huang. Huang was also responsible for the power shop. Casall also reported to the Terminal manager, Mark Simpson. STS employed Mark Simpson.

The MMTS crane shop foreman interacted with the engineer, the last being Robin Hsiegh. Hsiegh was involved with ensuring parts inventory, such as purchasing. He assisted in translating mechanics' questions about Chinese manuals and instructions and contacted Chinese manufacturers with questions. He then communicated the answers back to the mechanics. Hsiegh communicated almost daily with the crane shop foreman, either through calls or emails. Hsiegh reported to Captain Huang, who was in charge of the Terminal for STS at the time. The crane shop foreman also interacted with a vessels superintendent,

company. MTC was sold in spring 2007 to the Ports America Group through another joint venture. (Tr. 948-949.)

<sup>4</sup> Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "ILWU Exh." for Respondent ILWU's Exhibit; "Everport Exh." for Respondent Everport

Exhibit; "Jt. Exh." for Joint Exhibit; "CP Exh." for Machinists' Exhibit; "GC Br." for the General Counsel's posthearing brief; "Everport Br." for Everport's posthearing brief; "ILWU Br." for ILWU posthearing brief; and, "CP Br." for Charging Parties Machinists' brief.

<sup>5</sup> Local 1414 was the representative.

David Choi. Choi asked the crane mechanics to check equipment and sometimes provided work instruction, such as moving a crane.

*C. In June 2015 Everport Joins Pacific Maritime Association*

In June 2015, Everport became a member of a multi-employer group, Pacific Maritime Association (PMA). PMA is a non-profit mutual-benefit corporation composed of foreign shipping lines, terminal operators, stevedoring companies, and maintenance and repair companies. The foreign shipping lines include Evergreen, the parent company of Respondent Everport, Maersk, and MSE. Terminal operators who are PMA members include Stevedoring Services of America (SSA), Ports America, Total Terminals International and at least one other Evergreen subsidiary. (Tr. 2241.) Terminal operators like Evergreen and eventually Everport manage facilities at the port employ longshore labor to load and unload cargo to the docks at the ports. Stevedoring companies also may serve as terminal operators. The stevedoring company contracts to work at either a private or public facility to unload and deliver or load cargo. An example of a maintenance and repair company with PMA membership is PCMC, owned by Joe Gregorio. CEO Lang testified that one of the reasons he decided to become a PMA member was to hire good people: “The caliber of the people is awfully important. Crane operators, the skilled jobs, you can’t find those. . . . Good skilled guys don’t grow on trees.” (Tr. 3982–3983.)

Everport maintained that much of its actions in hiring mechanics at the Terminal were directed by its membership in PMA and PMA’s relationship with ILWU. The next sections deal with the agreement between PMA and ILWU, its Joint Dispatch Hiring Hall, hiring of mechanics who are not registered with the Joint Dispatch Hall, and the exclusion of certain facilities from the requirements of hiring ILWU-represented mechanics in provisions known as “red circle.”

*D. The Multi-Employer Agreement and the Joint Dispatch Hiring Hall*

PMA and the ILWU have collective-bargaining agreements that dictate the terms and conditions of employment, including operation of Joint Dispatch Halls to supply labor at the ports. For purposes of this decision, the Pacific Coast Longshore Contract Document (PCLCD), which covers stevedoring and maintenance and repair employees, is called the PMA–ILWU Agreement. The individual ports also maintain agreements with Mechanic Port supplements. For ILWU Local 10 in Oakland, the mechanic port supplement expired in 2014 but has been extended. Each port has a Joint Port Labor Relations Committee (JPLRC) in which PMA speaks for employers and maintains records such as meeting minutes.

The JPLRC has authority over the registered longshore lists and operation of the Joint Dispatch Hall. For the Port of

Oakland, a Joint Dispatch Hall, operated with ILWU Local 10 personnel, supplies stevedore and maintenance and repair employees.<sup>6</sup> The dispatchers are annually elected. Jobs for steady longshoremen are posted at the Hall. A steady position means a worker is sent to an employer for a longer position without needing further dispatch from the Joint Dispatch Hall. (Tr. 2056.)<sup>7</sup>

In order for the Joint Dispatch Hall to refer an individual for bargaining unit work, the individual must be registered. (Tr. 2046.) Any longshoreman going from one steady job to another is required to wait in the hall for 28 days before the next dispatch. (Tr. 3098.) The employer determines the number of positions and employees needed and submits job postings. The positions are posted for a minimum of 10 days, at which time an employer has the “right to select and move forward.” (Tr. 2469.) Once the employer makes its selection,<sup>8</sup> it then notifies both PMA and ILWU.

*E. Hiring Non-Registered Mechanics under the Terms of the PMA–ILWU Agreements*

Another portion of the PMA–ILWU Agreement compares the status of Class A and Class B registered longshoremen.<sup>9</sup> Class B mechanics are entitled for full health and welfare benefit the first of the month following registration date, but receive no benefits during their probationary periods.

If not registered, an individual must proceed either as a casual longshoreman or through the Herman/Flynn process, named for the letters establishing the process. (Tr. 2047.) These letters are part of the PMA–ILWU Agreement and local agreements. Herman/Flynn status is a probationary status for 90 days before the employees are allowed to register with PMA and ILWU. A probationary employee may be terminated and ILWU may or may not represent the probationary employee. (Tr. 2994.) PMA tests each Herman/Flynn candidate for physical qualification and drug and alcohol screening; it provides each with orientation, including safety training, and the ILWU PMA Handbook. After the Herman/Flynn employee successfully completes the probationary period, the employer sends a request for registration to PMA and the International. (Tr. 2991.)

Herman/Flynn mechanics are always hired for steady positions. (Tr. 2636.) A Herman/Flynn mechanic is required to work for 12 years for that same employer on a steady basis. If the Herman/Flynn mechanic is unable to complete the requirement for 12 years with the same employer due to lack of work and returned to the hall, the mechanic must spend total of 15 years as a Herman/Flynn class B mechanic. (Tr. 2147.)<sup>10</sup> The rationale is that hiring Herman/Flynn mechanics causes “significant cost concerns” such as training, and

. . . [T]here’s costs because the individuals who are already covering such work maintaining skill sets from an efficiency standpoint, if those individuals don’t have that opportunity to . . .

<sup>6</sup> In Oakland, clerks are assigned through another Joint Dispatch Hall run by a different ILWU Local. The clerk unit is not at issue. Also, not at issue are the 9.43 men, who are equipment operators, and the walking bosses.

<sup>7</sup> The Joint Dispatch Hall also has “hall” positions, which require the potential employee to check back with the hall for dispatches as needed. These are not at issue either.

<sup>8</sup> The Agreement permits posting for up to 30 days. PMA, Everport, and ILWU contend that the Agreement requires an employer to consider and hire the qualified individuals referred from the hall before considering any other candidates.

<sup>9</sup> Class A and Class B also are called respectively fully registered and limited registered.

<sup>10</sup> In contrast, casuals who become class B have none of the obligations of the Herman/Flynn mechanics.

continue to do those works then there's a loss of that skill set and a required retraining. So, there's a significant amount of discussions and costs that go into that.

(Tr. 2631.) Herman/Flynn employees also pay a pro rata share for the hiring hall when working. (Tr. 2573–2574, 2994.)

*F. The “Red Circle” Provisions of the PMA–ILWU Agreement*

The PMA–ILWU Agreement includes provisions and letters of agreement regarding a number of Pacific coast facilities that employ mechanics who are not represented by ILWU. These facilities are “red circled.” The letter states:

During the course of the 2008 . . . negotiations, the Parties discussed the assignment of maintenance and repair work to the ILWU coastwise bargaining unit to offset the introduction of new technologies and robotics that will necessarily displace/erode traditional longshore work and workers. The scope of ILWU work shall include the pre-commission installation per each Employer's past practice (e.g., OCR, CPS, MODAT and related equipment, etc. excluding operating system, servers and terminal infrastructure, etc.), post-commission installation, reinstallation, removal, maintenance and repair and associated cleaning of all present and forthcoming technological equipment related to the operation of stevedore cargo handling equipment and its electronics in in [sic] all West coast ports except for those, and only those, specific marine terminal facilities listed as “red-circled” below: . . . Oakland . . . Ben Nutter/Evergreen Berth 35–38 Red circle. . . .

(ILWU Exh. 5, p. 218–219, 221.)

PMA–ILWU Agreement Section 1.81 states:

ILWU jurisdiction of maintenance and repair work shall not apply at those specific marine terminals that are listed as being “red-circled” in the July 1, 2008 Letter of Understanding on this subject. Red-circled facilities, as they are modified/upgraded (e.g., introduction of new technologies), or expanded, while maintaining the fundamental identity of the pre-existing facility, shall not result in the displacement of the recognized workforce and shall not be disturbed, unless as determined by the terminal owner or tenant.

PMA–ILWU Agreement Section 1.731 provides for exceptions when red circling does not apply: “[T]he maintenance and repair work on all new marine terminal facilities that commence operations after July 1, 2008, shall be assigned to the ILWU. New marine terminals shall include new facilities, relocated facilities, and vacated facilities.”

Some historical context for red circling is provided in a letter attached to the PMA–Local 10 agreement, dated January 14, 1980, from ILWU President Herman to PMA President Flynn:

. . . [I]t is our intent to conform to the contract provisions negotiated in 1978, specifically Section 1.7, 1.71 and 1.8. Those provisions prohibit us from interfering with or “raiding” if you please, maintenance and repair operations involving non-longshoremens which were in existence as of July 1, 1978.

<sup>11</sup> Humphrey testified that, as an Everport mechanic and no longer a leadman, he was not supposed to interact directly with Hsiegh—that job was supposed to be left to the leadman as the non-leadmen were not supposed to talk with the superintendents or upper management. Hsiegh still

The record in the 1978 negotiations clearly indicates that the union understood the limitations of the new contract provisions covering maintenance and repairs of containers and chassis.

This is not a new problem in labor relations between the ILWU and the PMA. The parties were confronted by a similar situation with respect to waterfront crane operations in the 1960's and Phase I type registration procedures were utilized then in the same manner which we propose to use them now.

In addition, the ILWU as a labor organization has held that raiding of one union by another is detrimental to the interests of working people.

We are still committed to that principle.

(ILWU Exh. 10 at ILWU (ETS) 000900.)

The PMA–ILWU Agreement also permits worker travel between ports and allows workers to work in different jobs when available. Opportunities for mechanics' intraport transfers are limited. (ILWU Exh. 10 at ILWU (ETS) 000932.)

III. EVERPORT'S MANAGEMENT STRUCTURE AND HIRES FROM PREDECESSORS FOR MANAGEMENT

Everport's Chief Operating Officer (CEO) is George Lang, who joined Everport in April 2015. Lang reports to the Chairman of the Board, Eric Wang. Lang also supervises Senior Vice President Randy Leonard, who joined Everport on April 5, 2015. Leonard oversees Everport's operations, maintenance and repair, safety and security and information technology for the Ports of Los Angeles and Oakland. At the time of the interviews for mechanics, Ron Neal, the general manager, reported to Leonard. Dennis Delgado was a terminal manager.

Everport made a number of hires in anticipation to operate the Terminal. Everport kept the predecessor's stevedoring employees, who already were represented by ILWU. It also hired a number of managers from STS, MTS, and MMTS. According to CEO Lang, Captain Huang was offered his position on December 11 and began work on December 14, 2015. However, Lang had no documentation of the offer. (Tr. 3863–3864.) Captain Huang's office remained in the same location. A number of “walking bosses” who worked for the predecessors came to work for Everport.

Engineer Robin Hsiegh reported to Captain Huang. Hsiegh, previously an engineer for the predecessors, is position with now is Everport's in-bound manager, overseeing parts, tool ordering, equipment, and history of equipment. As he did with the predecessors, Hsiegh contacts the power shop mechanics about parts and non-working equipment; he now contacts them about tooling.<sup>11</sup>

Brandon Olivas was a marine manager for STS and now works for Everport. Weidu Du was a yard superintendent for STS and is now a marine manager for Everport.

Mike Andrews had several titles when he worked for the STS/Ports America. One was chief security officer and another was operations manager. He was a terminal manager for

contacts Humphrey when the leadman is not in the shop or when the leadman does not know the answers on equipment and parts ordering. (Tr. 362–363.)

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predecessors, as he is for Everport. Mark Simpson was also a terminal manager at Everport.

Everport hired David Choi in mid-October 2015. While Choi worked for the predecessors as dayside superintendent, he interacted daily with the general foreman about equipment problems, such as vehicle computer repair or replacing lost keys. Immediately after his hire to Everport, Vice President Leonard supervised Choi. Choi reported to Leonard about what was going on in the Terminal. At time of hearing Choi was working as the maintenance and repair manager for 5 months and he was supervised by Michael Andrews.<sup>12</sup> Andrews reported to Captain Huang, who was previously superintendent for Everport, and supervised by Brandon Olivias. Before he was employed by Everport, he worked at the Terminal as a vessel superintendent for MTC and Ports America. Superintendents might cover when the maintenance and repair managers and superintendents were not present at the Terminal. (Tr. 176.) Choi had no maintenance and repair experience before he worked for Everport. (Tr. 893.)

Before and after the transition, stevedoring was done through MTC and used ILWU labor.

## IV. THE ILWU OFFICERS AND AGENTS

The international president is Bob McEllrath. Ray Familiathe is the international vice president. Willie Adams is the international secretary or treasurer. (Tr. 2869.) John Castanho, who is a member of ILWU Local 10, also serves as the ILWU international benefits specialist for the west coast. (Tr. 2869, 2989.) Leal Sundet, retired at the time of the hearing, had been a coast committeeman.

At Local 10, the full-time positions for officers include president, secretary/treasurer, business agents, and seven dispatchers. The president may serve for two consecutive terms, then leave the position for another year before serving again. During 2015 and early 2016, Melvin MacKay served as ILWU Local 10 president; Ed Ferris served as vice president.

MacKay had served in a variety of positions with ILWU Local 10: President, Vice President, Business Agent, executive board, and caucus delegate. MacKay served as two terms as president. MacKay served as president from 2008 through 2010, and again in 2014 through early 2016. The role of the president involves enforcement of the contract, arbitration preparation, attending and convening meetings. At time of hearing MacKay was employed by Everport as a chassis mechanic and lead man for a year and a few months and was back to vice president.

While MacKay served as president of ILWU Local 10, Ed Ferris served as vice president. The duties of vice president are to assist the president, business agent and other officers. He assists with labor relations and reviews complaints drafted by an employer or the union. The office of local vice president position is not full-time. Ferris took over the presidency at the end of January 2016. Before becoming an ILWU member, Ferris was represented by the Machinists and knew a number of the mechanics working for the predecessors at the Terminal. (Tr. 2997.)

<sup>12</sup> As of December 5, 2015, Andrews was Everport's terminal manager. (GC Exh. 67.)

## V. EVERPORT'S PLANS FOR THE TERMINAL

Each week, three container vessels visit the Terminal, as it did before Everport began operating the terminal. (Tr. 3867.) The number of containers on the ships varies. The amount of work is measured in lifts, which is removing or putting a container on a ship. Everport's ultimate goal is to have 300,000 lifts per year. However, in 2016, the Terminal had approximately 167,000 lifts. In 2015, the number of lifts was 140,000; however, this number represents only approximately 11 months of operations. CEO Lang testified that sometimes December could be busy because business was not lineal.

Everport presented drawings, dated 2007, reflecting planned changes for 250,000 lifts and 350,000 lifts, neither of which came to fruition. Everport updated the plans to accommodate 300,000 lifts. (Tr. 3987–3990; Everport Exhs. 22–23.) Everport Exh. 23, reflecting Everport's updated plan, is undated. CEO Lang testified that the document was made "on the fly." (Tr. 4015.) At the time of the conclusion of the hearing, approximately 1½ years after Everport began operations, these plans were not implemented. In January 2017, Evergreen estimated that up to 20 to 30 percent of the Terminal's volume could be diverted elsewhere. (GC Exh. 79.) If so, that difference might change the number of lifts.

New equipment arrived at the terminal in June and September 2015, including some top handlers. The crane mechanics would operate the cranes but power mechanics would assemble them. However, the Machinist-represented mechanics still working with the predecessor were told by Engineer Robin Hsiegh to stop because it could create a jurisdictional issue and Evergreen (not Everport) was bringing in all new equipment. (Tr. 188–189, 191–192.)

In July 2015, Everport received cost maintenance estimates and comparisons from Kalmar RTGs. (Everport Exh. 25.) However, Lang testified that he eventually used Terex RTGs instead. (Tr. 4001–4002.) Everport did not provide the receipts or billing information to show when it obtained the Terex RTGs. In October 2015, Everport Vice President Leonard met with PCMC representatives about leasing equipment, and Everport subsequently leased some equipment, such as panel trucks and possibly a tire machine. Leonard testified vaguely that the maintenance and repair department was performing more work than when Everport began operation of the Terminal. (Tr. 3309.)

During December 2015, Everport did not buy or lease much more equipment for the maintenance and repair shops. It purchased some fixed insulation equipment, but CEO Lang could not recall whether that was in December or later. (Tr. 3966–3967.)

As before Everport took over, three container ships visit the Terminal each week.<sup>13</sup> Lang stated that purchases and leases of additional equipment and land should increase capacity. About July 12, 2017, CEO Lang testified that Everport was in process of leasing additional acreage to the Terminal to reach its goal of 300,000 lifts per year. (Tr. 3807–3808.) At the same time, in July 2017, Everport was in process of purchasing four additional used transtainer cranes, with better technology that would be

<sup>13</sup> The only exception occurred during Chinese New Year, when less cargo came to port.

able to allow more containers in each stack of containers, e.g., higher stacks. (Tr. 3809–3810.) However, as late as October 2016, CEO Lang characterized its timing for market entry as one of the worst in history. (GC Exh. 91.)

STS operated with 11 tophandler cranes. By June 2016, Everport operated 13 tophandlers, and added two more in December 2016. (Tr. 3812–3813.) STS operated three ship-to-shore cranes. Everport intended to add a fourth ship-to-shore crane, which was present from STS but still inoperable until spring 2017. Everport was using 34 tractors, 28 bomb carts,<sup>14</sup> 2 roll-off trailers, 4 large heavy lifts, 4 small lifts, 2 fuel trucks and an industrial sweeper, all of which were the same or similar as what was used before. Everport purchased about 45 new pickups; MTC used about 50. Everport also leased 10 to 13 fully-equipped service vans; MTC used 6.

Preston Humphrey, who worked for MTC and now works for Everport, testified little changed regarding the skills needed to work in each shop and the daily routines essentially were unchanged. The equipment he used, except for what the predecessors took, was the same. Little changed about the location of the shops as well.

The mechanics, both before and after Everport began operations, performed tire changes on vehicles, which was essentially unchanged despite having newer equipment. (Tr. 758–759, 3968.) However, before Everport's takeover, chassis tires were not repaired by the mechanics. The work went to an outside vendor. After Everport began its operations, the chassis tire work, including mounting of tires, stayed in-house. (Tr. 3823–3824.) However, the mechanics who worked for STS had experience changing tires, which Lang stated was similar to changing tires on cars. (Tr. 3968.)

Reefer containers constitute about 5 to 10 percent of cargo. The containers are plugged and unplugged to ensure that the container and its cargo are kept at the appropriate cool temperature. (Tr. 747.) Temperatures are monitored through an electronic system instead of manually documenting the temperatures. (Tr. 749.) Under the predecessors, the guards plugged and unplugged reefers and checked and recorded temperatures and vent settings. (Tr. 745.) The nature of the reefer work had not changed except reefer mechanics now use computers instead of paper to monitor the reefers. (Tr. 3866.) These skills presumably were not new for the reefer mechanics as they maintained and repaired the reefers, which would require plugging and unplugging the reefers and monitoring temperatures. As of July 2017, Everport was considering the possibility of adding more reefer plugs. (Tr. 4038.) The reefer shop location was unchanged.

Everport used different technology than the predecessors to track the containers and trucks. Every terminal has a terminal operating system, local area network and optical recognition cameras. (Tr. 4036–4037.) With this technology, trucks have radio-frequency identification (RFID) chips to check data, such as driver, license plate, and monitor the truck's location. By using

this technology, marine clerks were no longer needed to monitor this activity. The mechanics were not involved with tracking of any RFID chips.

CEO Lang stated the Kalmar system, which tracked the RFIDs, was technologically superior to the system previously in place.<sup>15</sup> Kalmar was considered an upgrade in technology. Because it was new technology, all mechanics hired by Everport required training. (Tr. 3973.) However, Humphrey testified the Kalmar operation was the same but had more equipment, such as more cameras. As of late July 2017, Lang testified that the Kalmar system still had operational flaws, which prevented Everport from effectively marketing the Terminal and its services. (Tr. 3886.)<sup>16</sup>

The mobile data terminal (MDT) also monitors where the container is going next and tells the crane operator which container to give to the truck. Mechanics install the MDTs, but do not use them in their daily work. (Tr. 4036.) Systems using optical character recognition (OCR) are on the cranes to recognize containers. The mechanics install the OCR systems on the cranes, clean the lenses and perform any other preventive maintenance work, but otherwise do not use OCR in their normal scope of work. (Tr. 4035–4036.)

Mechanics performed preventive maintenance by schedule. The actual work itself on the chassis did not change from the predecessors to Everport. State law requires inspections of chassis twice per year, which was unchanged from the predecessor's practices. Chassis mechanics also perform roadability checks on the chassis. (Tr. 751, 756.) Roadability requires that chassis are checked for any possible mechanical issues and then repairing the problems. As of 2015, the PMA–ILWU Agreement requires mandatory roadability checks. (Tr. 3869.) Mandatory roadability means that all chassis that do not have exceptions (e.g., long-term lease or an owned chassis) are checked for any possible issue. (Tr. 2693, 3817–3818.) Roadability involves an 8-point inspection, which takes less than 5 minutes. Should the chassis need work, more time is needed. (Tr. 3969.) The chassis repair itself was unchanged for MTC to Everport, as they did the same mechanic function. (Tr. 3970.) Before Everport operated the facility, changing chassis tires was subcontracted to a third-party vendor. (Tr. 3968.) Under the predecessors, roadability was only voluntary, occurring only when a truck driver requested it or if a mechanic spotted a problem. Because of the requirement in the PMA–ILWU Agreement, the demand for roadability services increased under Everport.<sup>17</sup> Whether Everport actually planned for the increase in roadability is far from apparent: As early as January 13, 2016, a little more than a week after Everport began normal operations, the roadability process, at best, was chaotic. (GC Exh. 78.) Everport continued to have significant problems into early 2017, about a year after it opened for full operations. (GC Exh. 79.)

All leadmen now have internet access for looking up parts and enter requests for parts, which apparently go to Hsiegh. Work is

<sup>14</sup> Humphrey testified that the predecessor MTC used 43 bomb carts.

<sup>15</sup> STS had a similar system that did not have the latest technologic upgrades. (Tr. 3973.)

<sup>16</sup> Humphrey testified that the Kalmar system had problems daily. (Tr. 399.)

<sup>17</sup> Everport contends it intends to use roadability as a revenue stream. However, it was not present in the 2007 plans and when Everport posted for jobs initially, no roadability jobs were posted.

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logged into a computer, which each mechanic uses to obtain templates.

In April 2016, Everport and Evergreen Shipping Agency (America) Corp. entered into an equipment maintenance agreement, effective December 5, 2015 through December 4, 2016, for the Terminal. The attached rates were effective from January 11, 2016 until July 2016. (GC Exh. 49.)

Since beginning operations, Everport has not sent maintenance and repair employees to work at some other port. Humphrey testified that he had no opportunity to obtain hall work because he worked 50 out of 52 weekends to make up for the difference in wages between MTC and working as a Herman/Flynn mechanic. A few mechanics had done so, but not to any large extent.

VI. EVERPORT DETERMINES IT MUST USE THE ILWU-REPRESENTED MECHANICS INSTEAD OF PREDECESSORS' MECHANICS

For the maintenance and repair work, Everport assumed it needed 27 steady mechanics, the same number employed by the predecessors. Everport claims it intended to contract the maintenance and repair work at the Nutter Terminal and engaged in talks with Joe Gregorio, who operated two companies, one of which could have maintained the predecessor bargaining unit as Machinists, and apparently is what Everport told the Machinists. Gregorio remained embroiled in the litigation regarding his two maintenance companies (*PCMC*),<sup>18</sup> one of which did not employ any Machinists in Oakland. Because of the litigation, Gregorio would have to start a new company if he was awarded the maintenance contract.

On September 2, 2015, Lang met with PMA representatives and Gregorio about staffing the Terminal.<sup>19</sup> Lang also testified generally that on or about September 2, 2015, he was aware that he would utilize ILWU-represented employees because the red-circle language did not apply to this Terminal. (Tr. 3926–3927.) He did not inform the Machinists. According to Everport CEO Lang, about October 25, 2015, Gregorio called him directly and declined to accept a contract to provide maintenance and repair work with Everport at the Terminal. (GC Exh. 64.)

No later than November 11, 2015, PMA's position was that the Terminal was no longer a red-circle facility because Everport had no prior agreement with any union at the Terminal and the Terminal was vacated. ILWU had presented PMA with reasons and PMA–ILWU Agreement sections, including Section 1.731 and 1.81 (both of which deal with subcontracting), regarding why the Terminal was no longer considered “red circled.” PMA considered these reasons and determined it would be unlikely to prevail in arbitration on this matter. (Tr. 2600.)

On about November 11, 2017, Everport posted for 27 mechanic positions in the PMA–ILWU Joint Dispatch hall. Everport maintains that it never made promises to the mechanics themselves or their bargaining representatives with the Machinists to hire any of the predecessors' mechanics. Instead on November 19, 2015, Everport advised the Machinists that it intended to rely upon the hiring hall requirements in the PMA–

ILWU Agreement.

In examining this issue, I will discuss the Machinists' efforts to retain the jurisdiction and ILWU's efforts to obtain the jurisdiction. In each area, Everport responses, which sometimes involved PMA, are discussed.

*A. The Machinists Want to Retain Representation at the Terminal*

In early June 2015, Machinists Business Representative Don Crosatto, with Machinists Local 1494 Business Representative Kevin Kucera, arranged to meet with Everport CEO Lang and their attorneys, Atkinson and Akrotirianakis, at the attorneys' Los Angeles office. Crosatto ostensibly wanted to discuss “items of concern that our members have about their employment relationships at the Terminal, if and when contemplated changes take place with the various entities that currently perform work for the Evergreen Lines.” (GC Exh. 60 at 2.) Crosatto had concerns, based upon rumors, that Everport would displace the Machinist-represented mechanics. He intended to convince Everport that the best course of action would be to continue to employ the maintenance and repair employees already working at the Terminal. (Tr. 954.)

On June 11, 2015, the parties met. At the meeting, Crosatto presented Everport with copies of the collective-bargaining agreements and discussed the advantages of keeping the current mechanics employed, particularly with an average seniority of 15 years and the experience that went with the seniority. He also stated he believed the Machinists' benefit package was cheaper than ILWU's. Crosatto discussed the Machinists apprenticeship program, which would continue to supply mechanics as the higher seniority employees retired. (Tr. 955–956.) Crosatto further mentioned that he had heard rumors that ILWU was pressuring Everport to recognize it for maintenance work. He also raised the Oakland Port Living Wage ordinance (Measure I), which could create an awkward situation should Everport fail to hire the existing workforce. Lastly, Crosatto raised a pending Board decision involving PCMC, which also involved alleged unfair labor practices against employer PCMC and the ILWU in Oakland. Everport explained that it had not made a decision regarding the maintenance work.

Within a week of Crosatto's meeting with Everport and its attorneys, the Board issued the decision in *PCMC*. Crosatto contacted Everport attorney Atkinson about the Board's latest decision. Upon Atkinson's request, Crosatto emailed Atkinson a copy of the PCMC decision.

Sometime between August 5 and 7, 2015, Crosatto again contacted Attorney Atkinson after hearing rumors that ILWU Local 10 President Melvin Mackay was telling the employees that they would be losing their places as the maintenance provider in November or December, and ILWU would be taking over the maintenance work, so the employees had better join ILWU if they wanted to work. (Tr. 960.) Atkinson said it was a possibility, but nothing had been decided. He further stated Everport and the concession provider (Gregorio) were still in discussions

employed ILWU-represented mechanics, I ruled that the meeting was covered by privileges.

<sup>18</sup> The case has a long history. The Board decision issued that year was 362 NLRB 988 (2015).

<sup>19</sup> We are not privy to what happened at that meeting. Because PMA was present and Gregorio also had a separate maintenance company that

about whether the concession provider would continue to provide the services. (Tr. 961.)

Shortly thereafter, Shop Steward Steve Sanders notified Crosatto that he and the employees were notified that their employer was vacating the facility within 120 days. Crosatto again called Atkinson, who told Crosatto that it was not the final word and perhaps reconciliation was possible. In this conversation or the previous one, Crosatto mentioned that he would be attending meetings with PCMC regarding the Board's recent case and possible settlement.

On August 18, 2015, about 2 weeks before PMA, Lang and Gregorio met, Crosatto and other Machinists officials, including Machinists' attorney Rosenfeld, met with PCMC's attorneys, banker and PCMC officials, including PCMC CEO Joe Gregorio. About September 1, 2015, Crosatto advised Atkinson that Everport might try to contract its maintenance work to SSA.

About October 5, 2015, the predecessors' mechanics, represented by the Machinists, received letters stating partnerships between Ports America, MTC and/or Evergreen was ending and they would be laid off in 60 days. As of December 5, they would not have jobs. Although Crosatto received notice that Everport would most likely not continue its contractual relationship with STS and the subcontracts with the predecessors, Crosatto received no such notification from Everport. Until late October 2015, Everport allegedly was attempting to subcontract the mechanics' work to PCMC and Gregorio and no other word was sent to Crosatto. Part of the plan required Gregorio to start a company with a name other than PCMC and Gregorio would have to convince ILWU that it was not in their best interests to seek the work at Everport. (CP Exh. 1.)

Lang maintained that, in late October, he received a short, agitated call from Gregorio. According to Lang, Gregorio said he could not take on the mechanic work at the Terminal, without any explanation. Lang never explored subcontracting maintenance work with any other companies other than with Gregorio's.

On about November 19, 2015, over a week after Everport posted positions at the PMA-ILWU Joint Dispatch Hall, Everport advised Machinists Business Representative Crosatto that Everport would hire mechanics through the PMA-ILWU Joint Dispatch Hall and that the Machinist-represented mechanics would receive consideration without regard to their prior union representation.

*B. No Secrets on the Waterfront:<sup>20</sup> ILWU Prepares to Take Jurisdiction for the Terminal's Maintenance and Repair Work*

Everport was not admitted to PMA membership until June 2015. Nonetheless, Everport CEO Lang instructed Vice President Leonard to meet ILWU Local 10 officials. Leonard telephoned Local 10 President MacKay to set up a meeting for upcoming changes at the Terminal. On May 22, 2015, ILWU Local 10 Vice President Ferris sent an email to Local 10 President

MacKay, ILWU President Bob McEllrath, ILWU Coast Committeemen Leal Sundet and Ray Ortiz, and Ray Familathe, International Willie Adams and Castanho about the upcoming meeting. Ferris' email stated Everport entered into a lease agreement for the Terminal and, "Based upon this fact, I'm optimistic and hopeful that we can expand our jurisdiction and eliminate another Red Circle here in Oakland." (GC Exh. 99.)

At the May 27, 2015 meeting, ILWU Local 10 was represented by Ferris and MacKay; Everport was represented by Vice President Leonard. Leonard testified they primarily discussed the type of equipment it intended to use at the Terminal and if Local 10 had any preferences. Local 10 questioned whether Everport would use ILWU mechanics. Leonard advised ILWU that no decision was made and that he wanted to meet with Local 10 officials again after Everport was admitted to PMA membership. (GC Exh. 85, May 27, 2015 memo.)<sup>21</sup>

On August 19, 2015, ILWU President McEllrath sent the PMA president and Everport CEO Lang a letter stating the red circle exception, which would have permitted an employer to continue a bargaining relationship with a non-ILWU union for maintenance and repair work, no longer applied. He wrote that the subcontracting relationship with MTC was gone and the PMA-ILWU Agreement required Everport to fill all jobs with registered personnel, including mechanics. McEllrath further stated:

I am concerned, however, that the Union has not received any communication from you concerning Everport's transition in its operations, and in particular, the effects of such on the ILWU-PMA coastwise bargaining unit. As you know, the Employer has [sic] an obligation to discuss such matters with the ILWU before making any changes of this kind. I must advise that failure to comply with the full terms of the [PMA-ILWU Agreement] will result in the Union pursuing all available remedies.

Please also be advised that the affected locals will, if they haven't already, be demanding meetings with you to discuss and work out all the details of this transition at Everport facilities. Your full cooperation with them is expected and appreciated.

(GC Exh. 74.)

MacKay testified that he had heard rumors that PCMC might make a deal with Machinists. He also heard rumors that the Machinists could perform the maintenance work at Everport. (Tr. 3017-3018.) He discussed the rumors with Local 10 Vice President Ferris, Sundet, and Ray Ortiz.

On August 20, 2015, Local 10 President MacKay, by email, told Sundet that his help was needed because he heard Gregorio of PCMC "was trying to fuck Local 10." However, MacKay testified that the email was about a rumor of settlement involving

<sup>20</sup> MacKay testified, "There's not too many secrets on the waterfront. And when you hear something, it's passed along." (Tr. 2877.) ILWU Attorney Remar also stated, on and off the record, "There are no secrets on the waterfront."

<sup>21</sup> ILWU claims it did not ask who would perform maintenance and repair work at the Nutter Terminal. However, contradictory testimony

from Ferris shows his "understanding" was that Everport was seeking counsel and had not made a business decision. I therefore credit Leonard's testimony over ILWU Local 10's responses, particularly based upon the May 22 email in which Ferris already expected to get rid of the Terminal's red circle status.

the lengthy litigation of a case against PCMC and ILWU.<sup>22</sup> (GC Exh. 100; Tr. 2876–2877, 3017.) On the same date, MacKay sent to Everport CEO Lang a letter and, referring to ILWU President McEllrath’s August 19 letter, re-emphasized:

Everport has a contractual obligation under Section 1 of the [PMA–ILWU Agreement] to employ only longshoremen and mechanics in the ILWU-PMA coastwise bargaining unit for all longshore and M&R jobs at the Everport facility in the Port of Oakland. Everport’s failure to comply with the full terms of the [PMA–ILWU Agreement] will result in Local 10 pursuing all available remedies.

We expect Everport to deal only with Local 10, and no other union, as to longshore and mechanics jobs in the Port of Oakland and we have much to discuss and work out with you. Our upcoming meeting will be a good start, but we expect there to be follow-up discussions to work everything out.

(GC Exh. 75) (emphasis in the original).

ILWU claimed that, in September 2015, it was not aware whether it would represent the maintenance and repair employees at the Terminal. (Tr. 2879.) In an email, dated September 30, 2015, to a retired longshoreman inquiring whether ILWU would “get the M&R work when [Evergreen] take[s] over the terminal,” MacKay stated Everport could not “talk this until they finish with PCMC and the law suit with the [Machinists].” (GC Exh. 101.)

Everport stated in hearing its intent to subcontract the maintenance and repair work to one of Joe Gregorio’s companies, one of which was the subject of the litigation in PCMC and no longer had any employees in Oakland, and PMMC, which was a PMA member. According to Everport CEO Lang, Gregorio telephoned him in about late October and stated he could not be the subcontractor for maintenance and repair work. Lang thought Gregorio could perform the maintenance and repair work with the Machinists-represented workforce under the PMA–ILWU Agreement’s red circle language. However, Lang testified that since on or before a September 2, 2015, meeting with PMA, he understood Gregorio could not subcontract with a Machinist-represented work force; Everport could only employ the ILWU-represented maintenance and repair workforce because of the red circle language in PMA–ILWU agreement. (Tr. 3925, 3627.)

On October 21, ILWU Local 10 Vice President Ferris sent to California Coast Committee member Frank Ponce De Leon a text message, in which Ferris remarked he had heard the Machinists were negotiating with PCMC (one of Gregorio’s companies) for the work at the Terminal in Oakland. Ferris texted, “With MTC leaving Berth 37 [sic, the Terminal], the red circle exception should end.” (Tr. 3101–3012; GC Exh. 111.)

On October 22, 2015, President MacKay, Vice President Ferris, and International Vice President Castanho exchanged emails about Everport’s hiring for mechanics. Ferris stated he spoke with a friend at the Terminal. He learned the MMTS contract for cranes and transtainers expired in June 2015 and that an Everport attorney contacted the Machinists representative. Although he

admittedly did not know what happened with the Everport attorney and Machinists representative, Ferris texted:

. . . [A]ny argument that the [c]ranes/transtainers are not our[s] {sic} is bullshit. Wouldn’t working 6 months without a contract kill the Measure I argument (especially if these guys become ILWU mechanics?)

Castanho responded, “If this were happening in LA, the sky would be falling.” MacKay replied, “The sky will fall [John Castanho] when I put my picket signs up Everport and PCMC.” (GC Exh. 109.)

The ILWU text discussion continued into October 23. Ferris questioned whether the mechanics working for MTC were bargaining for effects. He then turned his attention to a situation with APL leaving Oakland and SSA taking over mechanic work at that terminal. Ferris notably pointed out that he could not recall any discussion of Measure I but instead SSA contracting with the Machinists and the previously employed APL workforce, represented by ILWU, receiving severance packages. (GC Exh. 109.) On October 23, 2015, Sundet emailed MacKay a copy of the Measure I ordinance, stating, “Here is the [Measure I] ordinance that PMA, PCMC and Everport are saying is the reason that they can’t go ILWU at [the Terminal].” (GC Exh. 97.)

On October 29, 2015, Choi emailed Leonard and Neal about a Port Efficiency Meeting, attended by Mark Simpson and Local 10 President MacKay. Simpson reported to Choi that MacKay announced that the Terminal was no longer going to be a “red circle” facility. Simpson further reported that MacKay stated Local 10 would not work on certain tracking stations and monitors supposed to “be installed by IAM mechanics currently at [Everport] Oakland,” and he saw MacKay actively discussing the matter with the Port of Oakland staff who attended the meeting. (GC Exh. 65.)

On November 11, 2015, during a local PMA meeting with ILWU, ILWU made clear its position that the red circle language did not permit Everport to use non-ILWU mechanics. The “employers,” including CEO Lang, agreed that that they were unlikely to prevail on this issue in arbitration. ILWU said “most of the steady mechanic positions with Everport will be filled by qualified longshore workers and asked that any remaining vacancies be filled in keeping with the Herman-Flynn provisions. . . . Everport agreed that qualified longshore bargaining unit workers will receive first consideration for steady mechanic jobs at [the Terminal] . . . . “and it would “likely try to hire [predecessor] mechanics for any remaining positions.” (GC Exh. 72.)

#### VII. EVERPORT DESIGNS ITS HIRING PROCESSES OF MECHANICS TO ENSURE ILWU RECOGNITION

Everport began its hiring process by first selecting ILWU mechanics and then interviewing some of the predecessors’ mechanics.<sup>23</sup> Everport maintained close communication with ILWU Local 10 during its hiring process. Before the Machinists were advised that PCMC was no longer in the running as a possible subcontractor, Everport posted for positions at the Joint

<sup>22</sup> See *PCMC/Pacific Crane Maintenance Co.*, 359 NLRB 1206 (2013), reaffirmed in 362 NLRB 988 (2015).

<sup>23</sup> Leonard testified that he, Neal, and Choi reviewed the applicants after all interviews were conducted and selected the candidates. The documentary evidence suggests that the order of events was more complex.

Dispatch Hall. Leonard, Ron Neal, and David Choi, in various permutations, interviewed candidates and ultimately made hiring decisions, first selecting ILWU mechanic applicants, and then the second group, consisting of predecessors' Machinist-represented mechanics. (Tr. 3405–3406.) Leonard left his interview sheets in Choi's custody. (Tr. 3560.) Whether Everport delivered a complete set of interview notes and other documents is unknown, as Choi apparently did not take care in preserving the documents. By December 7, 2015, Everport decided some of the mechanics to hire.

*A. Everport Posts Positions for Mechanics at the PMA–ILWU Joint Dispatch Hall*

In October or early November 2015, CEO Lang instructed Vice President Leonard to “hire sufficient ILWU mechanics for the Terminal.” (Tr. 3301.) CEO Lang spoke only to Vice President Randy Leonard about the hiring process for mechanics. According to Leonard, Lang told Leonard to set up an ILWU shop.

Leonard testified the purpose of the hiring process was to get the most qualified people. CEO Lang instructed Leonard to first exhaust the Joint Dispatch Hall candidates, and go through and interview all the ILWU applicants first to make sure Everport had the right qualified complement “because we don't know how many qualified people we're going to get out of the hall.” (Tr. 3847.) Failing that, Leonard could “go to the next process” if the positions were not filled by the ILWU applicants. (Tr. 3845–3846.) Shortly thereafter, Leonard testified Lang gave no instructions regarding the candidates employed by the predecessors. (Tr. 3847.)

Leonard, in interpreting his instructions, believed that Everport was contractually obligated to hire from the ILWU candidates first and then could look at other candidates. (Tr. 3333.) ILWU Local 10 President MacKay, like Lang, expected Everport to exhaust the mechanic applicants through the Joint Dispatch Hall before Everport could consider any other applicants.<sup>24</sup> This plan is consistent with the terms of the PMA–ILWU Agreement.

Vice President Leonard sent to PMA the requests, dated November 11, 2015, for 27 mechanic positions. The postings requested seven crane mechanics, eight power mechanics, six chassis mechanics, and six refrigeration (reefer) mechanics, with a few of those positions on a night shift. The postings did not request any applicants for a tire shop or roadability checks. The closing date of the postings was November 23, 2015. (GC Exh.

<sup>24</sup> MacKay testified that ultimately the number of Local 10 mechanics Everport hired did not matter to him. (Tr. 2893.) The testimony rings false when examining the correspondence between MacKay, Ferris, and other ILWU officials.

<sup>25</sup> Neither MacKay nor Ferris testified credibly about not knowing what “securing the jurisdiction” meant. They communicated frequently about getting rid of the Terminal's “red circle” status and staffing with ILWU mechanics. They both knew enough that their applications to Everport might be needed and had information about the number of applicants. MacKay denied that he had any idea of what securing the jurisdiction meant, then gave argumentative answers. (Tr. 3012–3013.) MacKay then testified contradictorily that he ever had a discussion about keeping a majority of ILWU-represented workers or keeping the Machinists out. (Tr. 3028.) Ferris would have given up a number of years

37.) Everport did not post the positions on its website or otherwise advertise. (Tr. 3471.)

ILWU Local 10 President MacKay encouraged individuals to apply, including contacting individuals directly and providing individuals with Vice President Leonard's contact information. On November 18, Leonard asked if all forwarded resumes were ILWU. On November 19, 2015, Local 10 Vice President Ferris sent to ILWU Local 10 President MacKay an email requesting the names or resumes of interested mechanics for the Everport positions. MacKay explained that Local 10 did not have to allocate a certain number of mechanics and Local 10 just tried to meet the requirements, or else Local 10 would be in violation of Section 8.51 of the PMA–ILWU Agreement. Section 8.51 states: “Each dispatching hall shall furnish on any day required up to at least the agreed to number of gangs and supporting men, as well as up to any number agreed to, or arrived at through Contract procedures, in the future.”

On November 20, 2015, ILWU Local 10 Vice President Ferris emailed MacKay that, so far, only 10 mechanics applied to Everport from the Joint Dispatch Hall. Ferris admittedly was concerned that not enough ILWU-represented mechanics applied for the positions, because he wanted all positions filled with “ILWU members, class A, class B.” (Tr. 3090.)

Ferris' concern is reflected again when he told MacKay via email, “We may have to send in our resumes.” (GC Exh. 104.) MacKay responded the same day: “I applied with [Everport Vice President] Randy Leonard first posting request and insist he request my work history from PMA.” Ferris, responding a few minutes later, said, “Cool. If needed to secure this jurisdiction I will leave, but I would prefer to stay at TraPac.” (GC Exh. 104.) Ferris testified that that ILWU needed to have at least a majority. (Tr. 3091.) Ferris testified he was willing to leave his job, where he held seniority, because he did not want a large number of Herman/Flynn mechanics and those from the Joint Dispatch hiring hall asked to apply were not applying. (Tr. 3200.)<sup>25</sup>

MacKay applied for a position at Everport by submitting his welding certificates and had an in-person interview with Vice President Leonard at some unknown time. MacKay advised Vice President Leonard to obtain his work history from PMA; he did not hear from Leonard whether that was sufficient. Leonard never asked for a resume. MacKay told Leonard he could not begin his work at Everport until his term of office was complete, to which Leonard agreed.<sup>26</sup>

of employer seniority to move from his employment with TraPac to Everport. Ferris initially testified that, on advice of counsel, a majority was needed. Off the record and out of the presence of the hearing, ILWU counsel was permitted to instruct Ferris about attorney-client privileged information during his testimony. (Tr. 3095.) Upon return, Ferris' verbal tone and manner changed: Before the instruction, he seemed cooperative and earnest; afterwards, he was hostile, almost sullen. After instruction and in response to whether the use of the term “jurisdiction” specifically referred to the maintenance and repair work, Ferris then testified, “I said the words mean what they say.” (Tr. 3096.) His later answers, however, showed that he knew exactly what jurisdiction meant when he talked about applying for a position with Everport. (Tr. 3200.)

<sup>26</sup> As Everport promised, MacKay did not start his employment with Everport until after he completed his presidential term in February 2016.

On November 19, Choi, in an email to Frank Gaskin at ILWU Local 10, stated, “[F]or those Local 10 members interested in sending in their resumes for the mechanics positions at [the Terminal], you can have the guys scan and email their resumes to me at [email address] or they can give them to me in person at [the Terminal]. He also included his cell phone number (Tr. 558–559; GC Exh. 18.) In response, Gaskin sent more ILWU resumes to Choi. Melvin MacKay also sent resumes. Choi only spoke with MacKay, who also sent resumes to Choi. (GC Exhs. 21, 22, 23.) Choi forwarded these resumes to Leonard.

#### *B. Everport’s Interview Process*

Elaine Logan, in Human Resources from Everport’s Los Angeles office, and Choi scheduled the interviews. Ron Neal and Choi assisted Leonard with the interviews. Choi and Neal had prior experience with maintenance and repair work; Choi did not. Leonard did not interview all candidates, but only interviewed approximately 15 candidates in early December 2015.

According to Vice President Leonard, Choi set up the interviews for the “Herman/Flynn” a/k/a Machinist-represented, candidates. Choi believed he scheduled interviews with every applicant whose resume Leonard provided him. Choi also testified that he interviewed all persons who dropped off applications, but also testified that if he received an application, he only interviewed those with impressive credentials.

Choi conducted some interviews without Leonard. Choi said he probably received 100 resumes. He got confused about whether he interviewed 100 for mechanics positions, or 100 overall. Choi contended that he interviewed perhaps 80–100 ILWU candidates for mechanic positions, but did not have additional documents, which may have been lost. (Tr. 789–790.) Leonard testified that only 25 to 30 resumes were received in response to the postings at the Joint Dispatch Hall and believed he was contractually obligated to interview all of those candidates. (Tr. 3318, 3321.) Leonard testified the records were kept in a file cabinet at the Terminal.

Everport retained 22 interview sheets labeled “IAM.” Choi also testified that he received 19 applications for “Herman/Flynn” positions. (Tr. 1015.) Choi testified he could not tell the percentage of ILWU to Machinists hired because he lost interview sheets. He also testified inconsistently between his affidavit and the stand on the number. (Tr. 873.)

Choi was aware around mid-November of that year that the Terminal would be closed, and the Evergreen container ships diverted elsewhere temporarily. Choi used the same processes for the cargo handlers as when he worked at Ports America. He had responsibilities for setting up. Although on board in mid-October 2015, Choi maintained he did not know that the Machinist-represented mechanics would be laid off.

#### *C. Everport Obtains ILWU Applicants*

On November 24, 2015, Everport began interviews with ILWU applicants from the Joint Dispatch Hall. On November 24, 2015, International Vice President Castanho also sent Choi Ryan Skidmore’s resume for a chassis or diesel mechanic position. Additionally, Leonard began interviews at the Terminal. Later that same day, Vice President Leonard sent to MacKay and Ferris an email about a “rough list” of mechanics and requested that they confirm whether one in particular was ILWU.

MacKay’s name was included on the list. (GC Exh. 106.)

Choi stated it was “general knowledge” that he was required to interview ILWU applicants first before considering others, and he learned of this sometime in 2015, after he was employed by Everport. Even at the date of hearing, he was not familiar with the hiring hall procedures and somewhat familiar with the PMA–ILWU Agreement. (Tr. 507–508.) He later testified that, because Everport was a PMA member, he had a general understanding from Leonard that ILWU-represented candidates were supposed to have the “first shot.” Choi did not ask what that meant. (Tr. 1052–1053.) When interviewing, Choi was not aware of any special requirements, such as reefer mechanics needing Freon and certain chemical training; he only knew all were required to have the welding certificates. However, he denied, somewhat obtusely, that he hired anyone for reefer work that did not have the necessary certificates for that work, but the denial was weak because he wasn’t sure. (Tr. 501.)

Also, on November 24, Everport Vice President Leonard emailed Local 10 officers MacKay and Ferris with a list of 23 persons who applied for mechanic positions and requested that they confirm whether one candidate, Ryan Skidmore, was ILWU. (GC Exh. 71.) Leonard testified that the purpose of the email was to confirm that these candidates were registered longshoremen. In addition to Skidmore, ILWU found another candidate, Brian Fowler, who was not registered. By this time, Leonard had interviewed Brian Fowler, but said it had been a mistake because Fowler was not registered with the Joint Dispatch Hall. (Tr. 3326–3327.) Leonard sent the list to ILWU instead of PMA so that he could obtain a quicker answer. (Tr. 3323.)

At some point before December 4, Leonard conducted a telephone interview with ILWU Local 10 President MacKay. Everport produced no notes reflecting that MacKay was interviewed. (Tr. 624; also see Everport Exh. 27 first entry.) Leonard and Lang discussed hiring ILWU Local 10 President MacKay, but with a start date after January 4, so that MacKay could complete his term as president. Lang said he did not want to discriminate against MacKay because of his ILWU activities and that MacKay was a skilled mechanic with years of experience. (Tr. 3859.) Leonard said, in the long run, waiting for MacKay would be worth it, and MacKay “was actively paying attention to Everport; the mechanics that would be in the chassis shop knew that he was going to by then take office.” Leonard also said that he had no good second choice, and he was impressed with MacKay from his dealing with him since mid-summer 2015. (Tr. 3491–3493.) MacKay would not start until February 6, 2016, and shortly thereafter was appointed foreman in the chassis shop. (GC Exh. 32.)

During the hiring process, Leonard and Local 10 President MacKay communicated about the candidates; MacKay told Leonard “if they were good people or a good candidate, they got it.” In contrast, MacKay denied that Choi communicated with ILWU Local 10 or that he had knowledge regarding which steady mechanics Everport wanted to hire. However, on December 11, a Joint Hiring Hall dispatcher forwarded to MacKay an email from Choi that listed 15 names for mechanic positions. (GC Exh. 107.) MacKay then forwarded the email to Ferris. (Tr. 2917–2918.) MacKay denied that, in December 2015, ILWU Local 10 was keeping track of the number of persons hired, but admitted

that he had a list identifying the mechanics for each shop. He initially denied that they were identified by union, yet the list shows otherwise. (Tr. 2919; GC Exh. 108.)

On December 14, 2015, ILWU Local 10 Vice President Ferris sent Castanho an email about the “new jurisdiction” (the Terminal), stating he would not adhere to the PMA–ILWU Agreement hiring hall rule requiring longshoremen (in which ILWU also included mechanics) to wait in the hall for 28 days before they were dispatched to an employer (e.g., Everport). (Tr. 3098; GC Exh. 110.) Yet on December 15, the PMA Coast Steering Committee, a management committee, approved Everport’s request to hire 12 “Herman/Flynn” mechanics. (Tr. 2493–2494; ILWU Exh. 47.)

MacKay testified that he was not concerned that there were too few ILWU mechanics hired in the power shop. In contradiction to this testimony, a December 21, 2015 email shows MacKay did not like that only two ILWU Local 10 candidates were hired for the power shop, while the remainder were “new” personnel. In addition, the list from Local 10 highlighted the names that were not ILWU. (GC Exh. 108; Tr. 3008.) He did not raise the qualifications of those who were not represented by ILWU and did not know whether any of those were unqualified. (Tr. 3009.)

*D. Everport Interviews Predecessors’ Mechanics as They Face Layoffs*

1. Everport fails to notify predecessors’ Machinist-represented mechanics of hiring

In mid-November 2015, word came to a few of the Machinist-represented mechanics that positions for their jobs at the Terminal were posted at the PMA–ILWU Joint Dispatch Hall. Ray MacDonald, the crane shop foreman, made copies and posted at least in the crane and power shops. MacDonald noted that Everport’s address was on the posting and sent a copy of the posting to Business Manager Crosatto. Crosatto, at some point, conducted a lunchtime meeting at the Terminal with about 20 of the bargaining unit mechanics. Crosatto asked that the mechanics provide him with their resumes to submit to Everport. MacDonald submitted his resume by mail to the Everport address on the posting and sent a copy of his resume to Business Manager Crosatto sometime in November.

On November 18, 2015, 7 days after the dated postings for the Joint Dispatch Hall, the Machinists’ attorney demanded recognition and bargaining with Everport for the two mechanic units. The letter was sent to Everport’s attorney. Attorney Rosenfeld, on behalf of the Machinists, contended that Everport assured the mechanics that they had nothing to worry about and that they would be hired, or in the alternative, Everport was a joint employer with STS and Evergreen Shipping. He also warned that recognition of the ILWU violated the Act and the Terminal was exempt based upon the red circle language of the PMA–ILWU Agreement. (GC Exh. 63.)<sup>27</sup> The next day, Everport’s attorney responded, denying that any promises were made about hiring

<sup>27</sup> As with the resumes for the Machinist-represented mechanics, Everport Vice President Leonard denied seeing the letter. However, Respondent did not ask whether Leonard was told of the letter or its contents. (Tr. 3337.)

the predecessors’ mechanics because no hiring decisions were made and any deal with Gregorio fell apart. Everport’s attorney also stated: “PMA has informed Everport that M&R work at the Terminal is covered by the hiring hall provisions of the [PMA–ILWU Agreement].” He also denied joint employer status. He cited PMA’s interpretation of the red circle status, claiming the “red circle designation was based upon [Ports America’s] pre-existing, direct bargaining relationship with IAM, the red-circle will not apply after [Ports America] stops performing M&R services at the Terminal. . . . I trust you understand that Everport’s action in this transition are not driven by any union animus or labor cost.” (GC Exh. 64.)

On November 24, Machinists Business Manager Crosatto sent, by certified mail, a package of Machinist-represented resumes from Terminal mechanics to Vice President Leonard. The certification reflects delivery to Leonard on November 24, 2015. (GC Exhs. 65, 93.) Although Leonard denied receiving this package, the certification reflects the package delivery to his office address.

In approximately early November, Choi was aware that Everport would hire mechanics, but did not notify the predecessor staff until about early December 2015. Choi admitted Everport never posted the positions so that the predecessors’ maintenance and repair employees would see them.

As far as Choi knew, every Machinist-represented mechanic probably could have filled the mechanic positions and he never told Leonard that any were unqualified. (Tr. 857, 3537.) Leonard never told Choi that the Machinist-represented candidates lacked the technical qualifications. However, neither Leonard nor Choi contacted Machinists’ Business Representative Crosatto to send in resumes. (Tr. 561.) Choi testified he would tell the mechanics to apply, but only recalled notifying Ray MacDonald by telling him to “spread the word.” (Tr. 857.) He did not know why it took him so long to talk to MacDonald after the jobs were posted at the Joint Dispatch Hall. (Tr. 542–543.)

When Choi received resumes, he forwarded them to Vice President Leonard. Leonard, however, testified that the Everport managers should not deal with the predecessors’ mechanics as they “had no business how the applications—to discuss with them.” He also denied telling Choi to tell the predecessors’ mechanics to apply. (Tr. 3462–3463.) Based upon his experience and interpretation of the PMA–ILWU Agreement, Leonard testified he could have started interviewing and hiring Machinist-represented mechanics after the 10-day Joint Dispatch Hall posting period expired. (Tr. 3548.) But that is not what happened.

2. After interviewing 22 ILWU-represented candidates, Everport interviews some of the predecessors’ Machinist-represented mechanics

On December 3, with the December 5 layoffs looming for the Machinist-represented mechanics, with the exception of one, Everport began to interview those candidates. (Everport Exh. 27.)<sup>28</sup> By December 3, 2015, Everport likely interviewed at least 22 registered Joint Dispatch/ILWU longshoremen for mechanics

<sup>28</sup> General Counsel objects to the admission of this document. The document was admitted as a summary of what Respondent Everport believed to be its interview and hiring schedule, and I admitted for that purpose alone.

positions and one who was not registered or employed by the predecessors. Following its hiring plan, Everport only began interviewing the predecessors' mechanics after it interviewed the bulk of candidates from the Joint Dispatch Hall.

During the interviews of the Machinist-represented candidates, Everport's interviewing representatives asked each of predecessors' mechanics for their welding (3G/4G) certifications, preferences for shifts, and whether they would submit to the Herman/Flynn processes for non-registered mechanics. They also may have been asked in what shops they currently worked and what skillset each brought. The Herman/Flynn questions and certifications were not asked of the ILWU candidates as "they didn't have to have them." (Tr. 3556–3557.) One pre-hiring condition placed upon any candidate represented by the Machinists was submission to the PMA/ILWU requirements known as "Herman/Flynn" letters (Herman/Flynn). The provisions require any new mechanic to begin as a probationary employee, then a Class B employee. The Class B mechanic must stay employed with the same employer for 12 years before he is imbued with the benefits and seniority of a Class A mechanic. If for any reason the Class B mechanic is released or decides to return to the hiring hall to seek work with another employer, the Class B mechanic must work 15 years before becoming a Class A mechanic. Choi was nonresponsive regarding his understanding of the provision. (Tr. 657–658.)

Some of the predecessors' mechanics testified about their interviews and other circumstances surrounding the interviews:

*a. Ray MacDonald*

On December 3, 2015, Choi called Ray MacDonald, the crane foreman, and asked if MacDonald was available for an interview. MacDonald already knew Choi through his work at MMTS as a crane maintenance foreman. They met in a trailer after lunch. MacDonald saw Preston Humphrey coming out as he went in. Choi was in the trailer with another man, who was introduced as Randy Leonard. Choi told Leonard that MacDonald was the current crane foreman. They told MacDonald they wanted to hire him and Leonard asked him if he understood what the Flynn letters were. MacDonald said he did. He was asked whether he had a problem becoming a longshoreman. MacDonald said no. Leonard said they would be in touch. Notably, MacDonald was not asked about his welding certificates during that interview, nor were his qualifications and working conditions or criteria for hiring discussed. The conversation was no longer than 5 minutes. He understood that whatever the PMA–ILWU Agreement said would be his pay.

MacDonald called Choi later during the same day and told him that Tilley wanted to interview. Choi said he had been really busy and said he had to hire 51 percent ILWU mechanics and 49 percent Machinists' mechanics. MacDonald told Choi that Tilley should be included in the 49 percent IAM mechanics because he was skilled and been there for some time. Choi said he would try to reach out to Tilley.

MacDonald worked until December 11, 2015. On his last day, MacDonald brought some paperwork to the accounts payable office and went into the main building to say goodbye to a number of people, including Mark Simpson, Mike Andrews, Captain Huang, and Robin Hsiegh. Upon reaching the third floor,

MacDonald saw Mark Simpson, Mike Andrews, and Brandon Olivas. Simpson was going back to his office and MacDonald followed him. When they arrived at the office, Simpson, who was wearing an Everport jacket, asked him to close the door. The conversation began with some pleasantries and then Simpson said, "Yeah, it's a real shame what's happening to you guys. They're breaking up this solid core of guys that have worked together all these years. But you understand that they have to hire 51 percent ILWU and 49 percent [Machinists]." MacDonald said he was aware of that. Simpson then said, "Well, maybe you'll be one of those guys." (Tr. 154–155.)

*b. Preston Humphrey*

Preston Humphrey, the power shop foreman, overnighted his resume to Everport. In early December or possibly the end of November he received a call from "an Everport lady," who I infer was Elaine Logan, to set up an interview; they set up a date and time. About an hour later, she called back and she asked if Humphrey was an ILWU longshoreman mechanic. When he answered no, she said at that time Everport was only interviewing Local 10 mechanics and she would call him later to set up an interview.

On December 3, 2015, Choi called Humphrey and asked for an interview. They set an interview Everport brought into the Terminal. Choi introduced him to Leonard; they had a copy of his resume. They said if he wanted a job with Everport, would he be willing to become a longshoreman and fall under Herman/Flynn. Humphrey, who was reluctant to lose benefits and seniority but needed a job, said yes. Nothing else was mentioned about wages, hours or terms and conditions of employment. The interview lasted 5 minutes. Choi and Vice President Leonard spent at most 5 to 10 minutes interviewing Humphrey. (R. Exh. 27.) They had a copy of his resume. They asked if he wanted a job, would he be willing to become a longshoreman and become "Herman/Flynn."

He did not work for MTC after December 4, 2015, but received calls from Spencer about the keys to the shop and other items. Hsiegh also contacted him several times about the value of the power shop buildings and equipment, which Humphrey told him was not worth much. Hsiegh told him Everport was considering purchasing the tooling already on site. About December 8 or 9, 2015, Hsiegh, now an Everport employee, contacted Humphrey after layoff about the power shop buildings and tooling equipment, which Everport was thinking about buying. Humphrey answered, but said that he was not getting paid to help them out. The phone calls stopped after that. Ports America removed some tooling but left some behind, and those were in use at the facility.

About December 14 or 15, Choi called Humphrey, offered him a position in the power shop and asked for Humphrey to email his welding certifications. Choi advised him he would receive a packet in the mail and he would work after he passed physical agility and drug tests. His estimated start date was January 4, 2016.

Later that day, MacDonald called Choi about another mechanic, Brian Tilley, who had not been called for an interview. Choi told MacDonald that he had been really busy and that he could only hire 51 percent ILWU mechanics to 49 percent

Machinists mechanics. MacDonald told Choi that Tilley should be included in the 49 percent. Choi said he would try to get in touch with Tilley. (Tr. 153.)

About December 4, 2015, some of the predecessors' mechanics approached Choi about interviews for positions with Everport. These included: Jack Sutton Jr. (Sutton Jr.), Jack Sutton Sr. (Sutton Sr.), Michael Meister (chassis mechanic), Tim Burns (refrigeration mechanic), Brent Zieska (reefer).

*c. Jack Sutton Sr.*

Sutton Sr. was a power shop mechanic for MTC. He spoke with Choi about Choi's car, giving him advice. Choi and Terminal Manager Mark Simpson also asked him how soon equipment would be repaired. He also frequently gassed up Captain Huang's vehicle. He was absent on disability for much of 2015, until early October of that year. When he returned from disability, he spoke with Captain Huang, who was not employed by Everport at that time. Huang advised him that PCMC was probably going to take over the mechanical work and the Machinist-represented mechanics would stay in place. (Tr. 1438.) He later would participate in Crosatto's meeting in the power shop regarding collection of resumes. He was never contacted for an interview, despite submitting his resume to Shop Steward Steve Sanders to give to Crosatto and separately sending a copy of his and Sutton Jr.'s resume by Federal Express to the Everport address.

On December 4, after he asked Choi for an interview, Choi asked him if he had heard of Herman/Flynn and when Sutton said yes, Choi then asked if he had a problem with it. Sutton Sr. said he did not. Choi then asked for welding certificates. Sutton Sr. said he was going to get certified the following day, to which Choi said okay. Choi asked Sutton Sr. with whom he liked to work. Sutton Sr. listed a few names from the seniority list, and then asked Choi what kind of a question was that. (Tr. 1443–1444.) Sutton Sr. noticed that Choi was nervous and asked whether Choi was all right. Choi said he hated doing "this." Sutton Sr. asked whether Choi was interested in what he could fix and asked whether Choi was in possession of his resume. Choi said he did not have the resume. Sutton Sr. then asked how many people Everport intended to hire. Choi told him that the PMA ruling said they have to hire 51 percent ILWU and 49 percent "IAM." (Tr. 1445.) Sutton Sr. asked what that meant and how many of "us" would he hire. Choi said Everport naturally was hiring the foremen and then filling out the rest. Sutton Sr. asked specifically how many would be hired in the power shop, to which Choi said 4. Choi continued repeating that he hated doing this and Sutton Sr. got up. Choi had spent no longer than 5 minutes with Sutton Sr. (R. Exh. 27.)

When he left the trailer, Sutton Sr. waited in the parking lot for his son. While waiting with another mechanic, Captain Huang drove by. Captain Huang asked him if he was going to be hired. He briefly related some of the interview and concluded to Huang he probably would not be hired. Captain Huang then asked, "Is it the 51/49 thing---PMA—is it the 51/49 PMA thing?" Sutton Sr. said he guessed so. Captain Huang said "Shit" and drove off. (Tr. 1446.) Sutton Sr. never received an offer to work.

*d. Jack Sutton Jr.*

Sutton Jr. had experience in the power shop first and then became a chassis mechanic. While working regularly in the chassis shop, he continued to work weekends in the power shop. He also attended the College of Alameda for 4 years and had on the job training. Sutton Jr. had provided a resume to Crosatto after the meeting. Sutton Jr. noticed that Choi had a copy of his resume in front of him. Choi started Sutton Jr.'s interview with asking if he knew what the Herman/Flynn Act was and if he was ok with it, because the Terminal would be "48 percent" of the existing crew, plus 51 percent longshoremen. Choi asked which shop he was applying for and he said power or chassis. Choi made some notations, which Sutton Jr. could not see. Choi did not discuss what Herman/Flynn meant, the percentages, working conditions, criteria used to determine how to hire, qualifications, or request any certificates. Sutton Jr.'s interview lasted about 5 to 6 minutes. Sutton Jr. never heard anything from Everport about a position.

Tim Burns and Brad Zieska, who were interviewed afterwards, were ultimately employed by Everport.

*E. Everport Selects Its Mechanics*

Leonard, Neal, and Choi made the hiring decisions. The process, per Choi, was to interview and consider for hire all applicants from the Joint Dispatch Hall first before considering outside candidates. (Tr. 556.) Choi was unfamiliar with criteria for specific positions, other than welding certifications; as an example, he did not know that reefer mechanics required specialized training in handling refrigerants. (Tr. 500–501.) Post-interview, about mid- to late December, Choi marked the candidate evaluation forms in a different color than the interview notes, noting which candidates were represented by ILWU. (Tr. 568; GC Exh. 24.) He maintained he made the notations because he already selected the non-registered individuals he wanted to hire and he needed to submit these to PMA, and he claimed this was the only reason for these notations. (Tr. 568, 1005.) However, he also marked a group with "IAM" for Machinists. (Tr. 1005; GC Exh. 25.) Leonard testified that the list probably had to be balanced.

Choi testified that he did not have the entire decision to offer positions to potential Herman/Flynn mechanics who worked for the predecessors. Choi claimed he gave the same criteria to assess all candidates, except for the Herman/Flynn question he asked of the Machinist-represented candidates and for welding certificates. (Tr. 793.) Choi was nonresponsive regarding his understanding of the provision. (Tr. 657–658.) Choi's direct contact for more power shop applicants with Ferris occurred in spite of having six qualified predecessor Machinist-represented candidates for the power shop. (Tr. 828.) Everport never re-interviewed any of the predecessor mechanics, ostensibly because Choi believed the Machinist-represented candidates were a known quantity to him. (Tr. 586, GC Exh. 27.) Choi instead re-interviewed three ILWU-represented crane mechanics and hired them.

Leonard testified that the "Herman/Flynn" mechanics were reviewed differently, including ensuring they would meet the criteria required for vetting through the Substeering and Coast Steering Committees. Choi contended that he had additional criteria for judging the Machinist-represented candidates, such as

whether they “got along” and “attitude,” for which he had no basis to judge the ILWU-represented candidates. Choi believed that these candidates were quiet during their interviews and probably were not a good fit for the department. Choi looked at the evaluation forms, spoke with Randy Leonard and Ron Neal, and agreed that some candidates should be extended an offer, then created the approved list. Leonard testified that he had no knowledge of the prior productivity of the predecessors’ mechanics. (Tr. 3500.) Everyone that Choi recommended was hired, except Ed Oliver, a registered longshoreman. (Tr. 1041.) Choi said he interviewed Oliver with Leonard or Neal and could not recall why Oliver was not hired.

Conflicting testimony infers that Choi failed to share with Leonard most specific concerns about the predecessors’ mechanics. Regardless of Choi’s alleged concerns about the predecessors’ mechanics, Choi also testified that everyone was talking smack about each other, but then testified he did not hang around the shops to determine what the specific complaints were. (Tr. 1163–1164.)

After determining the acceptable ILWU candidates, Everport selected among the additional mechanic candidates who were primarily predecessors’ Machinist-represented employees. This batch of candidates had different hiring criteria than the ILWU candidates. As dictated by the Herman/Flynn requirements, these applicants had to have 3G and 4G welding certifications to pass the Herman/Flynn requirements of the Substeering and Coast Steering Committees. (Tr. 3407.) Once decided, Everport notified PMA for the committee process to start the Herman/Flynn procedures, including processing in safety class and drug and physical agility testing. If a candidate did not pass any of these tests, the candidate could not work for Everport.

Brian Fowler and Oliver were referred by Local 10 President MacKay. According to Choi, neither was hired. (Tr. 993; GC Exhs. 42–43.) Choi could not recall why he did not hire Fowler, who was interviewed on November 24, 2015. However, Everport also identified that he was not registered, nor was he a predecessor mechanic. Everport’s list states Fowler was not only offered a job but was engaged as a steady mechanic. (Everport Exh. 27.)

A number of ILWU candidates were not hired because they lacked technical expertise. Choi believed, “We asked [PMA] for [ILWU represented candidates’] citation records” and denied that he consulted with PMA about candidates who were not ILWU. Although Choi requested disciplinary records from PMA for the ILWU candidates, Choi did know whether the ILWU candidates were disciplined because he did not review the records. (Tr. 654.) Leonard, who knew the PMA records were requested, did not know whether the records were even received and had no recollection of reviewing any such records. (Tr. 3402–3403.) Despite lack of evidence that anyone at Everport reviewed the requested PMA records, Leonard stated the objective hiring criteria were

... years of experience, particular experience to shops that we needed to fill. Their PMA record. Their shift that they requested they were currently on and preferred to work. So it would be practical experience from their interview.

(Tr. 3404.)

At unknown times Choi marked the interview/evaluation forms with different color inks for ILWU and “non-registered” candidates. However, the markings were labeled “ILWU” for the Longshore-represented candidates and “IAM” for the Machinists who worked for the predecessors. Choi testified he did so to determine who was included in the “non-registered” personnel he intended to hire and ensure he had the correct information to submit to PMA. (Tr. 568–569; GC Exh. 24.)<sup>29</sup>

The interview sheets for the “IAM” candidates indicate those interviews took place on December 3 and 4. Among the predecessors’ mechanics, Choi did not for certain remember who he knew before December 4. Choi did not know whether disciplinary records were sought from the predecessors, or any other entity for the Machinist-represented mechanics. (Tr. 787.) Despite Choi also testifying he knew little of the maintenance and repair workers employed by predecessors, Choi did not ask many questions to the Machinist-represented candidates because he knew of their communication abilities and may not have asked anything about areas of development. (Tr. 786.) Choi also testified he made notes on personality because he wanted a group of employees that worked well, or “would be able to gel well together” for productivity purposes. (Tr. 897.) Twenty-one of the 22 “IAM” interview sheets noted the applicant would accept Herman/Flynn status. (GC Exh. 25.)

In considering the candidates, he considered qualifications, but separately considered the Machinist-represented candidates from the ILWU-represented candidates. (Tr. 1055–1056.) Choi also was not familiar with the Herman/Flynn requirements at the time he interviewed candidates. (Tr. 921.) However, Choi testified that he had a list of all northern California ILWU registered longshoreman and compared resumes against this list. He separated out the resumes by checking against the list. (Tr. 1070.) Choi then remembered that the resumes would also list whether the applicants were registered longshoremen. (Tr. 1072.) He then contradictorily testified that he wanted to hire the most qualified, but then to a leading question, testified that he considered all the mechanics together and then decided who was the best to hire. (Tr. 1076.) However, this testimony was also contradicted by going back to ILWU before he ever interviewed any of the predecessors’ maintenance and repair employees. Choi wrote several times that he identified Machinists-approved names but said these were the Machinist-represented mechanics to whom he wanted to extend an offer. (Tr. 1090–1091.)

Choi estimated that he spoke with ILWU Local 10 President MacKay approximately five times over the course of a month about the postings and interviews. (Tr. 578.) MacKay had possession of Everport’s mechanic selection list. Choi believed he

<sup>29</sup> On voir dire, before admission and after some leading by Everport counsel, one document may have been from Ron Neal, who also was involved in the interview process. (Tr. 572–573; GC Exh. 24.) Additional lists were provided to General Counsel with markings on them, but neither Choi nor Leonard could identify them. I discredit Choi and

Leonard as to their understanding of the lists as the lists were kept and maintained in the course of business and obviously created in a sequence to determine who was being hired with notes of which union was involved. See GC Exhs. 38–41.

may have provided MacKay with a copy of the selection list, and I find that he did so. (Tr. 583; GC Exh. 26.) The list consisted of Choi's two written pages: one page listed 27 ILWU-represented candidates and the other, 19 Machinist-represented candidates who worked for the predecessors. For both lists, Choi listed candidates and marked candidates with yes or no.<sup>30</sup>

At the time Choi interviewed Machinist-represented mechanics, the Terminal would not totally reopen for another month. Yet one of Choi's concerns was being able to staff the Terminal when it reopened. (Tr. 1135.) Having difficulty finding good crane mechanics, Choi contacted Local 10 Vice President Ferris to advise that the ILWU candidates were poor. He hired ILWU candidate Peponis because he thought Peponis was a crane leadman at another terminal. Because the crane mechanics from the Joint Dispatch hiring well were not as qualified, Everport initially selected a majority of the crane mechanics who were represented by the Machinists. (Tr. 826.) That did not last long.

By December 5, 2015, the first day of Everport operations, the posting period at the Joint Dispatch Hall had been over for 12 days and Everport still had not hired for all positions. Choi testified he was still conducting interviews of the Machinist-represented candidates.

On the same day, Choi sent to Vice Presidents Leonard and Neal an email advising that he completed interviews but did not have a sufficient number of ILWU crane and power shop applicants. He further stated that he had spoken with Local 10 Vice President Ferris and informed him that the candidates for the crane positions were poor. (GC Exh. 27.) Overall, Choi identified, specifically by union representation, 25 ILWU applicants and 19 Machinist applicants, and identified by name the 15 ILWU applicants and 12 Machinist candidates who were acceptable. The list had positions specifically for both the tire shop and roadability checks, neither of which were included in the Joint Dispatch Hall postings. Apparently, all Machinists' mechanics would have been qualified for roadability and tires but Choi did not recall offering it to them and misdirected his initial answer. (Tr. 857.)

Examining his December 5, 2015 email to Leonard, Choi could recall MacDonald, the predecessor crane shop foreman, who was extended an offer for a crane mechanic. Regarding the Machinist-represented list for the crane shop, he recalled Nenad "Nash" Milojkovic and Steve Sanders.

On December 7, 2015, Vice President Leonard notified CEO Lang that the mechanic hiring complements were:

Crane Shop

4 ILWU

3 Herman Flynn

Reefer, Chassis and Power

11 ILWU

9 Herman Flynn

(GC Exh. 86.) Leonard also advised he submitted the "Herman/Flynn" candidates to the PMA for approval that same day and he apprised ILWU Local 10 Vice President Ferris of the hiring plans. (GC Exh. 86.) This letter makes no mention of hiring

<sup>30</sup> Choi testified he did not know what the markings meant, despite the obvious meaning. This denial cannot be credited.

mechanics for the tire or roadability functions, which Everport claims are part of its well-developed plans for the Terminal.

In response to Choi's email, Leonard told Choi to re-label the Machinists-represented candidates as "Herman Flynn." (GC Exh. 28.) On December 23, 2015, Choi sent an email to Mark Simpson regarding approved names for "steady hires" and listed 15 "ILWU Approved names" and 13 "IAM Approved names." However, the list had an error—Steve Sanders, who had worked for predecessor, was included in both lists, bringing the number for ILWU approved names down to 14. (GC Exh. 29; Tr. 592–593.) On Wednesday, December 30, 2015, Choi asked a PMA representative if Sanders, who was a personal friend of ILWU Local 10 Vice President Ferris, could change his start date to January 4, 2016 instead of Jan 11, 2016 in order not to affect his seniority. (GC Exh. 30.)

Per his list, Choi identified the predecessors' mechanics to be hired as Gil Freitas, Ray MacDonald, Preston Humphrey, Wade Humphrey, John McDaniel, Kevin Bono, Dean Compton, Tim Burns, Tye Gladwill, James Bouslog, and James Anthon. (Tr. 980 et seq., referring to GC Exh. 26.) However, Choi said he told these people during their interviews that there was a strong likelihood that they would be hired; he did not say he had to discuss with anyone else or how they would be notified. (Tr. 982.) Although the "Herman/Flynn" hires included predecessors' foremen, such as Preston Humphrey and Ray MacDonald, none were offered lead positions for Everport. (Tr. 995–996, 998.)<sup>31</sup>

In the meantime, Local 10 President MacKay demanded that Everport hire two more ILWU mechanics. Everport would not comply with the demand and MacKay "backed down." (Tr. 3476–3477; GC Exh. 163.) On December 22, 2015, Choi notified Vice President Leonard that he located resumes for Brandon Tavares and Steve Likos, two predecessors' mechanics, but had no interview records for them. (GC Exh. 163.)

*F. Everport Interviews One More Predecessor Mechanic*

In early January 2016, Choi talked with a predecessor power shop/chassis mechanic, Patrick Fenisey. Fenisey separately sent his resume to Everport Vice President Leonard through Federal Express and additionally sent one through Crosatto. He had 4 ½ years' experience working in the power shop and chassis. Fenisey worked on a variety of equipment: trainstainers; top-picks; side-picks; forklifts; uploaders; buses/vans and pickup trucks. Fenisey had heard nothing from Everport about his resumes, so he dropped by to see Choi while applying with another employer on the docks. He knew Choi from working on weekends, when Choi asked Fenisey to handle flat tires and a computer system not working in a truck. However, Choi and Fenisey did not interact too often.

When Fenisey found Choi in early January 2016, they talked in the terminal building. Choi said he had all the people he could hire and he couldn't hire any more outside people because of the percentage factor that he had to keep with the ILWU. Fenisey told him he would take a job doing anything at the Terminal and to call him. Fenisey called Choi to check on job availability about every other week. Towards the end of February 2016,

<sup>31</sup> The PMA-ILWU Agreement precluded such an assignment for the predecessors' mechanics.

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Choi called and offered him a job, requesting his 3G and 4G welding certificates. (GC Exh. 6.) Fenisey did as asked. Later the same day, Choi called Fenisey back: Choi said he couldn't be hired because he sent Fenisey's resume to PMA, which sent it to ILWU; then the president of ILWU called him and said no hiring except from the Joint Dispatch hiring hall, due to closure of Ports America-Outer Harbor (PAOH) and they had to hire those first. Choi denied any knowledge that Ferris expressed any unhappiness about filling jobs when PAOH closing, yet knew PAOH was closing per rumors. (Tr. 606.) Choi recalled that he requested Fenisey's welding certificates but did not know why he was not hired. (Tr. 701 et seq.)<sup>32</sup>

VIII. IN MID-DECEMBER 2015, EVERPORT STARTS PUTTING ILWU MECHANICS TO WORK

Choi testified that the terminal opened on December 5, 2015 but no mechanics worked until December 14, 2015. On that day, 14 mechanics from the Joint Dispatch hall, all registered ILWU steadies, began their work. (Tr. 1040.) The mechanics were involved with yard/gate operations. (Tr. 3360.) Twelve of predecessors' mechanics were scheduled to start on January 4, 2016.

Before allowing the "Herman/Flynn" mechanics to work, ILWU Local 10 President MacKay told Choi a special labor relations committee meeting was required before the Herman/Flynn mechanics could begin work. On December 30, 2015, Choi sent an email to Matt McKenna, a PMA labor relations specialist, to verify. McKenna, replying on the same day, stated that was not the case, that he reviewed prior minutes and could find nothing to support MacKay's claim. Choi responded that MacKay told him that the "[Herman Flynn] guys would not be available to work unless the LRC was done." (GC Exh. 31.) Choi, in response to leading questions, stated that the Herman/Flynn mechanics could not start until January 4 because they had to take drug tests, attend safety training, and submit welding certificates. (Tr. 984-985.)

On January 4, 2016, when Everport began its full operation of the Terminal, it had hired 27 mechanics. It also began operations with 20 to 30 steady longshoremen, separate from the mechanics. (Tr. 3413-3414.)<sup>33</sup> Everport did not have a supervisor for the mechanics. For that time, Choi acted as supervisor. (Tr. 522.) When a supervisor was hired, he lasted only 3 weeks. In the meantime, Robin Hsiegh and Choi supervised. Choi assisted Hsiegh by doing payrolls, driving around the yard to ensure mechanics were working, and ordering labor. Choi testified that, as of January 4, in addition to supervising mechanics, he was setting up the yard, which was already receiving export containers and empties. After January 4, Choi worked vessel operations and assisted in the yard.

ILWU and Local 10 now represented the employees who were previously represented by the Machinists. The former Machinist-represented employees now entered their probationary periods, during which time they did not receive benefits. They had

<sup>32</sup> I credit Fenisey's testimony over Choi's. Choi later testified that he did not want to hire Fenisey because: He would only repair pickup truck and was not good at fixing anything else; he did not come out and help with some other repair jobs. (Tr. 1065.) Choi thought Fenisey was likeable; but if Choi called when a top pick was down, he would not come out, but he would come out for a pickup truck. (Tr. 1161.) I do not credit

to pay out of pocket for health insurance. The PMA-ILWU Agreement now applied to the former Machinist-represented hires. As a result, this group of Everport mechanics suffered losses in overtime, holiday pay, and, when they received benefits at the end of their probationary periods, payment to benefit funds and changes in insurances. Those who were leadmen for predecessors were not allowed to become leadmen, despite their in-depth knowledge of the operations, because the PMA-ILWU Agreement required leadmen to be ILWU and not "Herman/Flynn." They were subject to the union security and dues deduction provisions of the PMA-ILWU Agreement and for fees and fines ILWU required.

Preston Humphrey, now a power shop mechanic for Everport, reported on January 4, 2016. He was working in the same location when he worked with MTC. Ray MacDonald reported, but then declined the position. MacDonald replaced the open crane mechanic position with Anthon, who also declined to begin work, and then Milojkovic. However, Choi also contradictorily testified that these were employees recommended for hire as of December 5. (Tr. 1045; GC Exh. 27.)

In a meeting on January 6, 2016, the Labor Relations Committee for PMA and ILWU Local 75 met. (Jt. Exh. 2.) The parties included language that MTC ceased doing business and Everport took over and the red circle status of the Terminal no longer existed, meaning:

ILWU Local 10 mechanics would not only be awarded all of the [maintenance and repair] work traditionally performed by the [Machinists] but also the plugging and unplugging traditionally performed by ILWU Local 75 watchmen.

(Everport Exh. 2.)

By January 2016, Lang did not know how many more mechanics would be needed; only after volume decisions were made would any decision on increasing the number of mechanics be made. (Tr. 3978.) After January 2016, Everport hired mechanics only through the Joint Dispatch Hall, particularly because Ports America, another operator that utilized ILWU-represented mechanics, closed. Anyone applying outside of the Joint Dispatch Hall, according to CEO Lang, would not have been hired. (Tr. 3974-3976.) MacDonald, who eventually took a position elsewhere, was replaced with Anthon, who also declined to begin work, and then Milojkovic. Anthon was offered a crane mechanic position. However, Choi also contradictorily testified that these were employees recommended for hire as of December 5. (Tr. 1045; GC Exh. 27.)

MacKay, after concluding his term as ILWU Local 10 president, began work as an Everport leadman around February 8, 2016 and worked as leadman most of the days. He also became the shop steward.

Lang testified he would only consider any resume sent directly to Everport if the Joint Hiring Hall was exhausted. No Herman/Flynn mechanics were hired after January 2016,

this shift in testimony, particularly against Choi requesting Fenisey's welding certificates. Since Fenisey was interviewed in January 2016 and offered a job the next month, he does not appear on Everport Exh. 27, which is limited to Everport's interviews in November-December 2015.

<sup>33</sup> This number included the clerks.

particularly as Ports America Outer Harbor closed and plenty of mechanics were displaced. On February 9, 2016, Choi posted positions for the Joint Hiring Hall for three chassis journeymen mechanics. (GC Exh. 33.) Similarly, he posted a position for a journeyman reefer mechanic on February 5, 2016. (GC Exh. 34.) About February 10, 2016, Choi, via email, notified Vice President Leonard that he held a discussion about hiring leadmen and additional mechanics during the previous evening with MacKay, who agreed to having one leadman for both the chassis and roadability department and MacKay told Choi that he, MacKay, would be the lead in chassis. Choi arranged for MacKay's internet access in the office Choi claimed not to know what role MacKay had with Local 10, but he apparently had enough knowledge to talk with him earlier about LRC. (GC Exh. 32.)

In February 2016, Everport had problems with equipment that could not be fixed quickly. Hsiegh notified a number of executives, including Lang and Neal, about the difficulties and stated he was hesitant to obtain mechanics from the Joint Dispatch hall due to the costs and questions about qualifications. (GC Exh. 90.) As late as October 2016, CEO Lang, when discussing mechanic costs, bemoaned that the "change over has been difficult from IAM to ILWU and cost differences significant." (GC Exh. 91.)<sup>34</sup>

On April 4, 2016, Choi recommended, by email, to Matthew McKenna at PMA that 11 Herman/Flynn mechanics satisfactorily completed their 90-day probationary periods, having started on January 4, 2016, and "proceed in the Herman Flynn process." (GC Exh. 14, Tr. 525–526.) After the 90-day probationary period, the predecessor's employees who became Everport employees were known as "registered B men." They now received health and welfare benefits, which were different than what they received with the predecessors' contracts with the Machinists.

Everport employed 40 mechanics by June 2016. All additional mechanics, hired after the January 4, 2016 opening date, were hired through the Joint Dispatch Hall. At times, Everport would have to go to the Joint Dispatch hall on weekends to obtain labor—Choi did not sound sure where else the hall mechanics might work. As previously noted, Everport was not thrilled with going to the hall obtain mechanics due to quality and cost issues.

Tim Burns, previously employed by predecessors and now with Everport, took additional training for skills such as forklift driver. He was able to work extra shifts elsewhere on the docks, but apparently did not do so frequently. Zieska worked as a dispatcher.<sup>35</sup>

## ANALYSIS

### I. CREDIBILITY

A number of facts are not in dispute. The mechanics, as employed by the predecessors, were represented by the Machinists

<sup>34</sup> Lang reported anecdotally that production of mechanics at Oakland could not be compared to Los Angeles or Tacoma as Ports America complained about the increase in costs with the Local 10 mechanics. (GC Exh. 91.)

<sup>35</sup> ILWU offers evidence that the ILWU steady mechanics work a "mean" of 8.42 ports throughout their careers, with a standard deviation of below 6 to approximately 11 ports. The Herman/Flynn mechanics with 12 or more years of experience work at 6 ports, with a standard

in two bargaining units.

Everport was already a member of PMA at the time of most events affecting this Terminal. No later than October 2015, Everport decided to rely upon the PMA–ILWU agreement for hiring mechanics at the Terminal. Everport applied the PMA–ILWU agreement to its hiring procedures for the mechanics, starting with posting positions only at the Joint Hiring Hall. The PMA–ILWU Agreement contained both union-security and hiring hall provisions.

CEO Lang instructed Vice President Leonard to exhaust the Joint Dispatch hiring hall first. Everport kept notes of interviews and who was hired. It designated the initial hires all ILWU. Everport never posted mechanic positions at the Terminal for predecessors' employees to see. Everport's notes kept during the hiring tracked percentages of the ILWU-represented mechanics versus those employed by the predecessors. Whether Everport retained all its interview documents is questionable. For the mechanics employed by the predecessors, when they were ultimately interviewed, Everport representatives asked if they would consent to the Herman/Flynn provisions of the PMA–ILWU agreement. A cadre of ILWU-represented mechanics started work at the Terminal on December 14, 2015.

#### A. Everport's Witnesses

Choi was more sure when he was examined by his own counsel, yet still had problems. He had difficulty recalling why he did what he did during postings interviews and selection of the mechanics. His direct testimony for his employer included much leading. For example, Choi initially testified that he and Leonard did the interviews, but later testified to Everport's leading questions that Ron Neal, another Everport vice president, also participated in interviews and made notes. (Tr. 572–572; GC Exh. 24.) Then Choi said Neal conducted approximately 15–20 interviews with him in Oakland. (Tr. 575.) Leading questions suggesting the answers provide little credible evidence.

During cross-examination, he became defensive and argumentative about loss of interview sheets and whether all ILWU-represented candidates were interviewed.

Q. Did you ever call Mr. Ferris up or Mr. Gaskin and say, Oh, I screwed up badly, I just found six resumes that I had misplaced and put under something else? You didn't do that, did you? You didn't do that, did you, Mr. Choi?

A. Well, I—no, I don't think I did.

Q. And did the ILWU ever file a grievance against you for ignoring resumes that were properly and timely submitted?

A. The ones that I, that I probably lost?

Q. No.

A. I think they were—

deviation of approximately 1 to slightly above 10. The Herman/Flynn mechanics with less than 12-years experience typically work at 1.80 ports in their careers. It then compared the Everport steady hires to number of ports dispatched, which was over 14 ports, but gave little evidence of what happened at Everport. (ILWU Br. at 17–19.) Whether these careers lasted 30+ years for the steady non-Herman/Flynn mechanics is not explained, nor does it explain whether reassignment was due to closures.

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Q. That wasn't the question, sir. My question is, did the ILWU, as mean and aggressive and militant as they are—take the word “mean” away—aggressive and militant,<sup>36</sup> because they are, did they ever file a grievance saying that there were some resumes you missed or ignored?

A. I think they gave me a little leeway because they saw how stressed out I was during that time period.

Q. That wasn't the question, sir.

A. That's how I'm answering it.

Q. Did they ever file a grievance?

A. No. Maybe you should have seen me during that time period and cut me a little slack as well.

(Tr. 830.) His defensiveness on cross-examination, compared to a more sure footing when asked leading questions, makes much of his testimony suspect.

Choi also had difficulty recalling whether applicants for mechanic positions were told in interview that the shops with available positions were power, chassis, reefer, crane, and roadability/tires. He first leaned towards Leonard telling applicants from ILWU of all of these available shops, then did not recall. (Tr. 875.) He was not sure whether he forwarded all non-ILWU resumes and applications to corporate offices in Los Angeles, but he believed he sent most of them because that was his practice. (Tr. 875.) Choi denied that he told applicants he had to keep 51 percent ILWU to 49 percent Machinist ratio. (Tr. 1049.) Given Choi's confusion about events during the hiring period, I do not credit his denial.

I do not credit Vice President Leonard's denials that Everport did not have a plan to staff a percentage of persons from ILWU versus the Machinists. First, he was undermined by Choi's and Mark Simpson's statements of the 51 percent ILWU to 49 percent Machinist hiring plan. He waffled about when he learned about a potential dispute with the Machinists about representation of the mechanics, first saying “give or take, before or after” about the time the interviews with mechanic candidates were underway, then shifted to late summer or early fall 2015. (Tr. 3510–3512.)

Leonard was not internally consistent about whether he had concerns that the hiring plans that could affect the mechanics' representation. Leonard denied that he had any concerns here. Leonard admitted that CEO Lang told him to begin posting the positions “and set the shops up as ILWU” but then stated he had no idea about the union choices and had no hand in the decision. (Tr. 3517–3518.) He also testified he was instructed to “exhaust” the Joint Dispatch Hall and to set up an ILWU shop. He admitted no notification to the Machinist-represented predecessors' mechanics, including lack of advertising. He asked applicants whether they could be Herman/Flynn and longshoremen, which is diametrically the opposite of not caring what type of union was in the shop. He instructed Choi to call the Machinist-represented candidates “Herman/Flynn,” which is another nod to following instruction to create an ILWU shop. Regarding the qualifications for the predecessors' mechanics, Leonard testified that he did not have any conversations about their qualifications.

He denied that he knew each would be qualified, but admittedly had no information that these potential candidates were unqualified. (Tr. 3537–3538.) Further, he knew the PMA records for the ILWU-represented applicants were requested, but never bothered to read them, much less see if they ever arrived for review.

CEO Lang remained cordial and retained his sense of humor on the witness stand. Much of his testimony was credible. For example, despite not in Everport's interest, Lang was honest about setting up certain plans “on the fly” and the age of other plans for Everport. The biggest question is, in late October 2015, whether Gregorio actually called him to decline the mechanics' subcontracting at the Terminal. Little demonstrates that Gregorio and Lang were having conversations about the subcontracting except for Lang's testimony and possibly one meeting between PMA, Everport and Gregorio. The contents of that meeting are unknown as Gregorio also had a company that was a PMA member and it was unlikely that Gregorio was present representing the non-PMA company. In this case, I give Lang the benefit of the doubt.

In at least one respect, Lang and Leonard were inconsistent about the instructions on mechanic hiring: Lang testified that he instructed Leonard to exhaust the Joint Dispatch hiring hall; Leonard seemed to slip when he testified Lang told him to set up the mechanics as an ILWU shop. Leonard's representation that he was told to set up an ILWU is an admission against interest.

#### *B. ILWU and Local 10 Witnesses*

ILWU Local 10 President MacKay had difficulty answering questions and made clear he wanted to avoid answering some of them. He could not answer whether he was subpoenaed to appear and instead of answering yes or no, said he was “asked to come,” and continued to be evasive. (Tr. 2865, 2950–2951.) He was asked whether he knew if, in September 2015, it was possible that the Machinists would continue to represent the maintenance and repair workers and denied that he knew it was a possibility. He was discredited by his September 30, 2015 email. (GC Exh. 101.) When asked about whether he and Choi had contacts during the interviewing process and when Everport took over, MacKay instead answered that he texted Choi to obtain parts for the shop, again avoiding an answer until General Counsel presented emails subpoenaed from Mackay and Local 10. (Tr. 2943.) Other credibility determinations have been made in the facts.

When he was asked about the number of Local 10 names under the power shop, General Counsel asked him whether the remaining names were formerly represented by the Machinists, and he said they were not, they were Herman/Flynn mechanics and he claimed he did not know at the time they were Machinists. Given MacKay's noted antipathy towards the Machinists union and his desire to secure this jurisdiction, I doubt these denials because Choi sent Ferris and MacKay lists of potential employees during the interviewing process.<sup>37</sup> Similarly, I cannot credit MacKay's explanation of GC Exh. 104, in which he and Ferris discussed the number of applicants at Everport and whether to

<sup>36</sup> This statement is a paraphrase of Counsel for Respondent ILWU's description of ILWU as a “strong and militant” union.

<sup>37</sup> The transcription at Tr. 2921 reflects GC saying “formally,” when she actually said “formerly.”

apply for positions. MacKay denied that the discussion was about mechanics, but this explanation rings false: Both he and Ferris were mechanics. Mechanics are paid at a higher rate than stevedore employees. Further, the stevedore work with the predecessor belonged to ILWU, so securing a jurisdiction already represented by the ILWU was not at issue. Therefore, it was highly unlikely that either would apply for stevedore work if they believed the jurisdiction was well secured for ILWU. For similar reasons and those listed in the Facts Section, I discredit Ferris' hostile testimony, particularly when contradicted by contemporaneous documentary evidence.

ILWU called Leal Sundet primarily to support its defense of the historical coastwise unit. I found little of his testimony helpful to the analysis. Sundet, who retired after the events herein, was pleasant and non-argumentative but sometimes had difficulty with his recollection.

#### C. General Counsel Witnesses

Crosatto's testimony was comprehensive and he did not stray from the timeline of the case. He was able to answer questions completely during cross-examination, without any flip flops. I fully credit his testimony.

I credit most of Ray MacDonald's testimony. ILWU attempted to discredit him on the statement he heard from Choi, and attempted to use Crosatto's affidavit do so. That was not permitted. MacDonald could not be swayed.<sup>38</sup> I also credit Sutton Sr.'s description of his interview and statements to him about the percentages of which union to be hired. I do not credit Sutton Jr.'s version of the 51/49 statement, which as 51/48. Humphrey also was credible throughout his testimony.

#### D. Possible Adverse Inferences

Another issue is whether I should take an adverse inference in ILWU and Local 10's failure to produce certain documents to me for privilege review and to provide certain redacted copies to the General Counsel. I provided ILWU and Local 10 with several opportunities to comply with my orders, but they did not do so. They exercised their rights to a special appeal to the Board.

On August 15, 2017, the Board issued an unpublished Order denying the special appeal. General Counsel apparently has not sought to enforce the Board's Order. I have considered the need to give evidentiary sanctions, but find the evidence strongly supports my findings and does not necessitate making those determinations.

### II. PARTIES' POSITIONS

General Counsel maintains that Everport is a Love's Barbeque successor because it engaged in discriminatory hiring, designed to thwart recognition of the Machinists and to favor ILWU in violation of Section 8(a)(2) and (3). General Counsel also alleges that Everport prematurely recognized to the ILWU under Section 8(f), but Everport cannot fall under Section 8(f) because it is not a building contractor. General Counsel contends that Everport's use of the PMA-ILWU Joint Hiring Hall and its reliance upon the PMA-ILWU agreement for its actions are

evidence of unlawful recognition of the ILWU at a time when a majority of the bargaining unit was not in place. General Counsel also alleges number of statements as 8(a)(1) violations. By accepting such recognition and applying the terms and conditions of the PMA-ILWU Agreement, General Counsel contends ILWU violated Section 8(b)(1)(A) and (2).

Respondents Everport and ILWU generally maintain a common defense theory. Everport defends that, as PMA member, it became perfectly clear successor with intent to hire a majority of the predecessor longshore bargaining unit. Because it was a PMA member and did not subcontract the mechanic work, the PMA-ILWU agreement required to Everport to utilize the PMA-ILWU Joint Dispatch hall. Everport therefore had no successorship obligation to recognize or bargain with the Machinists. The operation of the Joint Dispatch hall is non-discriminatory and had the dispatch hall not been able to provide sufficient number of qualified individuals, Everport was free to obtain unregistered mechanics through the Herman/Flynn procedures. (R. Br. at 16).

Respondents contend that the predecessors' bargaining units were accreted into the bargaining unit described by an agreement between the Pacific Maritime Association (PMA) and the ILWU. Both Respondents also argue that the history of the ILWU on the Pacific Coast requires the mechanics to be represented by the ILWU. The predecessors' bargaining units of mechanics were accreted into NLRB certified, coastwise longshore and marine clerk bargaining unit per *Shipowners' Assn. of the Pacific Coast*, 7 NLRB 1002 (1938) and later cases. It also contends that the predecessors' employees would not have been a majority in "any" appropriate bargaining unit. (R. Br. at 2).

ILWU puts forth an additional affirmative defense: The charge against it is barred by Section 10(b) of the Act, because Everport became PMA member in June 2015, more than 6 months before charges filed.

In approaching the alleged violations, I discuss successorship in two parts, with the second part covering whether Everport discriminatorily hired ILWU-represented mechanics over the predecessors' Machinist-represented mechanics. The 8(a) allegations are covered under the discriminatory hiring analysis. I then turn to whether Everport prematurely recognized ILWU. I also discuss the standards for finding violations of 8(b)(1)(A) and 8(b)(2). I deal with Respondents' defenses, which overlap various issues of successorship, alleged discriminatory hiring, and premature recognition.

### III. THE SUCCESSORSHIP QUESTION—PART ONE

#### A. Applicable Law

Industrial peace remains the overarching goal of the National Labor Relations Act. *Harter Tomato Products Co. v. NLRB*, 133 F.3d 934, 937 (D.C. Cir 1998), citing *Brooks v. NLRB*, 348 U.S. 96, 103 (1954). Maintaining industrial peace remains a goal when an existing bargaining unit is subject to a shift in the employer. Successorship doctrine presents a rebuttable presumption that the new employer must bargain with the union in place

<sup>38</sup> General Counsel filed for injunctive relief in Federal district court, which is how respondents had copies of some affidavits before the witnesses testified. Although MacDonald's testimony does not mesh with

Crosatto's reports about the 51/49 statement, Sutton Sr.'s version remains intact.

with the predecessor if the new employer is a successor in fact to the prior employer and the majority of its employees were employed by the prior employer. *Harter Tomato*, supra, citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 39–41 (1987). The determination is based upon the totality of the circumstances. *Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1060 (D.C. Cir. 2009), enfg. 350 NLRB 48 (2007).

Despite a new employer taking over an enterprise, a change in ownership or the employees does not necessarily cancel out the predecessor employees' choice of union. *Fall River Dyeing*, 482 U.S. at 37, citing *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272, 279 (1972). The factors to consider are whether the successor has substantial continuity of the enterprise and hires a majority of the predecessor's workforce. *NLRB v. Simon DeBartelo Group*, 241 F.3d 207, 210 (2d Cir. 2001), enfg. 325 NLRB 1152 (1998). These factors are viewed from the predecessor employees' perspective, or whether employees who are retained will view the job situation as "unaltered." *Fall River Dyeing*, 482 U.S. at 43, quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973) (quotes omitted). The bargaining unit also must be an appropriate unit. If the new employer, or successor, discriminatorily refuses to hire the predecessor's employees and hires employees to avoid its bargaining obligation with the predecessor employees' collective-bargaining representative, the successor and the new union accepting recognition may have violated a number of the Act's provisions.

Therefore, the analysis in this section concentrates on whether Everport maintained substantial continuity. Whether it hired a majority complement of predecessor employees is discussed with discriminatory hiring. In examining whether Everport hired a majority of predecessor employees, I consider whether Everport discriminatorily failed to hire a number of those employees and whether the ILWU accepted unlawful recognition. I also consider whether the historic units remained appropriate.

#### *B. Everport Maintained Substantial Continuity with the Predecessors*

##### 1. Substantial continuity

Substantial continuity between two enterprises inquiry is factual and based upon the totality of circumstances. *International Union of Petroleum & Indus. Workers v. NLRB*, 980 F.2d 774, 779 (D.C. Cir. 1992). The inquiry asks when the new company acquires substantial assets of its predecessor and whether it continues, without interruption or change, the predecessor's business operations. *Fall River Dyeing*, 482 U.S. at 43. The factors considered are:

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

*Harter Tomato Products*, 133 F.3d at 937, citing *Fall River Dyeing*, 482 U.S. at 43. See also *Ports America Outer Harbor*, 366

NLRB No. 76, slip op. at 2 (2018) (generally perform same tasks, under generally same working conditions and under most of predecessor's supervisors).

No single factor is awarded controlling weight. *Pennsylvania Transformer Technology, Inc. v. NLRB*, 254 F.3d 217, 223 (D.C. Cir. 2001), enfg. 331 NLRB 1147 (2000). The substantial continuity examination is taken with an emphasis upon the employees' perspective the employees' perspective and asks if employees would understand that their jobs situations were unaltered. *Pennsylvania Transformer*, supra, citing *Harter Tomato Products*, 133 F.3d at 937–938; *DeBartolo*, 241 F.3d at 210; *Petroleum & Indus. Workers*, 980 F.2d at 779.

Everport agrees that it maintained substantial continuity with the predecessors. The employers performed the same business: Providing stevedoring services to shipping lines, with the mechanics maintaining and repairing the equipment necessary to make it happen. The primary customer bringing containers to the Terminal was Evergreen. Although it maintains it obtains additional contracts with different shipping lines, the business remains unchanged. None of the additional jobs mechanics are performing are significantly different than what they previously did. The tasks were essentially unchanged. *Staten Island Hotel*, 318 NLRB 850, 853 (1995).

Chassis roadability checks are now mandatory because the PMA–ILWU Agreement requires it. The checks take about 5 minutes each to perform and the chassis mechanics performed voluntary roadability previously and Everport did not initially post for roadability or tire work positions. The mechanics already knew how to change tires. Regarding the reefer mechanics now plugging in the refrigerated containers, the task is not dissimilar to what they performed as part of their maintenance and repair duties and neither respondent identified how much additional time is needed to perform the jobs.<sup>39</sup> Updating some of the technology, such as the Kalmar system, required training for all mechanics, not just the former Machinist mechanics. Even with some updated technology, Respondents never demonstrate that the tasks performed were "significantly different" from prior work. *Ports America*, 366 NLRB No. 76, slip op. at 2.

Obtaining the assets of the predecessor does not require purchase of predecessor's assets, only acquisition of the assets. The plain English definition of "acquire" is "to come into possession, control or power of disposal of often by some uncertain or unspecified means." *Harter Tomato Products*, 133 F.3d at 938 (cite omitted). Leasing is an acceptable form of acquisition. *Id.* The direct transfer of assets to a successor is not a prerequisite to a finding of successor status. *Harter Tomato Products Co. v. NLRB*, supra. Here, Everport leased quite a bit of equipment from the predecessors and the employees found very little changed by January 4, 2016. It used similar trucks and vans. Although Everport contends it purchased a significant amount of new equipment, the type of equipment purchased was similar to the equipment upon which the predecessors' mechanics worked. *Banknote Corp. of America v. NLRB*, 84 F.3d 637 (2d Cir. 1996), enfg. 315 NLRB 1041 (1994), cert. denied, 519 U.S. 1009 (1996).

<sup>39</sup> Everport confirms that the equipment is similar. (Everport Br. at 84–86.)

General Counsel points out that substantial continuity may exist even when supervisors are not the same. I concur. *Van Lear Equipment*, 336 NLRB 1059, 1063–1064 (2001). The same managers did not supervise the mechanics when Everport took over operations. A number of managers employed in the previous iteration, such as Mike Andrews, Weida Du, Tom Favila, Brandon Olivas, and Mark Simpson, stayed on with Everport. Choi, after some movement among managers, supervised the mechanics and Robin Hsiegh continued with frequent contacts.

Hiatus has an impact on the analysis only if other indicia of discontinuity are present. *Pennsylvania Transformer*, 254 F.3d at 224–225. Everport’s 1-month hiatus in operations is not significant. It opens with only a 1-month hiatus for activities such as taking stock. Mechanics were called in with duties 10 days after Everport shut down the Terminal. It began accepting cargo containers at the Terminal for shipping out in less than 3 weeks from its takeover. It loaded cargo and by January 8, 2016, the cargo ships left port. This break does not hamper a finding of substantial continuity as Everport engaged in the same business and employed some of the same supervisors, albeit some in different roles. It was no secret on the docks that Everport intended to reopen shortly after it closed. Nothing shows that the hiatus required mechanics to perform different jobs. *Banknote Corp. of America*, 84 F.3d at 646–647. See generally *Pennsylvania Transformer*, 254 F.3d at 225.

Reviewing the substantial continuity factors here under the totality of circumstances and taken from the predecessor employees’ perspective, little has changed with the transition to Everport.<sup>40</sup>

## 2. Hiring a substantial and representative complement of mechanics

Everport contends that the correct time for determining the substantial and representative complement was June 8, 2016, when Everport reached a mechanic number of approximately 40. In contrast, General Counsel contends the correct date was January 4, 2016.

General Counsel is correct. Everport began partial operations by mid-December 2015 when it accepted cargo for shipping. By January 4, 2016, 27 mechanics were hired for work, albeit MacKay’s start date was delayed until February 2016. However, I find that Everport engaged in discriminatory hiring, which precluded hiring a substantial and representative complement when it began operations. This analysis discussed below. Further, the delay Everport proposes depends upon showing a plan to do so.

As noted above, Everport’s plans were not concrete. One of the planks of this plan was it increased the shifts from one to two. However, the additional shift placed 27 mechanics between the two shifts at the get-go on January 4, 2016, not later. Everport further contends that buying additional new equipment to handle the increased cargo demands. However, this again proves faulty because the new equipment should have less problems, which would require less work for mechanics.<sup>41</sup> As for Everport

entering into the additional cargo alliances to obtain more volume, a significant increase in lifts was not visible in Everport’s first year of operations, much less by June 2016 and Lang testified that the volume could be cyclical. The Kalmar system, which should have assisted in marketing, was not operating as it should, according to Lang, and not helping the marketing plan. Increased needs for mechanics to perform roadability work is a function of the PMA–ILWU Agreement, which I later find is unlawfully applied. *Ports America Outer Harbor*, 366 NLRB No. 76, slip op. at 14 (2018).

### C. The Historic Bargaining Units Remain Appropriate

“Critical to a finding of a successorship is a determination that the bargaining unit of the predecessor employer remains appropriate for the successor employer.” *Banknote Corp. of America*, 315 NLRB at 1043. The Machinists unions, rather than ILWU, were the appropriate representatives in appropriate unit of the Terminal’s mechanics. Everport was not at liberty to recognize ILWU nor was ILWU able to accept recognition. See generally *ILWU v. NLRB*, 890 F.3d 1100 (D.C. Cir. 2018). Respondents contend that the bargaining units were no longer appropriate due to the history of cases involving the Pacific coast docks, which requires mechanics to be included into the large ILWU workforce. See, e.g.: *Pacific Maritime Assn.*, 256 NLRB 769 (1981); *Shipowners’ Assn. of the Pacific Coast*, 7 NLRB 1002 (1938). They also contend the mechanics were accreted into the larger longshore unit, which would make the prior units inappropriate when Everport began operations. (See, e.g., Tr. 3840.) I will first discuss the appropriateness of the predecessor bargaining units, respondents’ accretion argument, and then Respondents’ reliance upon historic case law.

When a group of employees has a “significant history of representation by a particular union presumptively constitute an appropriate bargaining unit.” *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1085 (D.C. Cir. 2003). The party contesting the presumption must demonstrate compelling circumstances to overcome the significance of bargaining history. *Id.*; *ILWU v. NLRB*, 890 F.3d at 1111, citing *Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 39 (D.C. Cir. 2015). The matter was recently discussed in *Walden Security, Inc.*, 366 NLRB No. 44, slip op. at 11–12 (2018):

Critical to a successorship finding is whether the bargaining unit of the predecessor employer remains appropriate for the successor employer. *Paramus Ford, Inc.*, 351 NLRB 1019, 1023 (2007). In *Paramus Ford*, the employer challenged the appropriateness of a historical unit of service and parts department employees. *Id.* . . . Under extant Board law, the unit sought by the Union and alleged in the complaint need not be the only or even the most appropriate unit; all that is required is that the unit be *an* appropriate unit. (Emphasis in original.) *Id.*, citing *Bartlett Collins Co.*, 334 NLRB 484 (2001); *Gregory Chevrolet, Inc.*, 258 NLRB 233, 238 (1981).

<sup>40</sup> Everport itself considered the Terminal to be a continuation, as noted when Choi, in late October 2015, called the Terminal “[Everport] Oakland.” (GC Exh. 105.) Everport admittedly was interested in not proceeding with ILWU mechanics, but PMA stated a victory in arbitration was unlikely.

<sup>41</sup> Testimony indicated that new equipment would have preventive maintenance schedules, and some work would be warranty work with the manufacturer.

Regarding the appropriateness of historical units, the Board's longstanding policy is that a "mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness." 351 NLRB at 1024. The party challenging a historical unit bears the burden of showing that the unit is no longer appropriate. *Id.* The evidentiary burden for such a showing is heavy, requiring "compelling circumstances" to overcome the significance of bargaining history. *Id.* citing *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 9 (2007).

Respondents do not overcome this heavy evidentiary burden. In this case, bargaining history demonstrates that the predecessor units remain appropriate. The bargaining history is long, in that at least one of the historic units has been represented by the Machinists since about 1968, or at the time Respondents claimed to accrete the unit, about 47 years. The other unit was not much shorter. *ILWU v. NLRB*, 890 F.3d at 1112 (40-year history of Machinist unit before employer unlawfully recognized ILWU historically appropriate, insufficient to overcome presumption). In addition, during hiring, Everport, in Leonard's December 7, 2015 letter, continued to group the mechanics as they had been grouped with predecessors, with the crane unit separate from the power, chassis and listing out the number of ILWU versus "IAM" in each group. This grouping reflects that Everport thought either that the units were appropriate or was just ensuring that each unit had a majority of ILWU mechanics hired. In either case, with the Machinists' long history representing the two bargaining units, Respondents do not overcome this significant bargaining history. *ILWU v. NLRB*, supra. I further analyze the traditional community of interests because Respondents contends the maintenance and repair units were accreted into the larger ILWU unit.

Everport argues that it had such a well-defined plan to increase its capacity, including changes to the mechanics' work, that it overcomes the bargaining history. I examine this plan from the time Everport denied recognition of the Machinists, which occurred on November 19, 2015. The evidence shows much of Everport's expansion at the Terminal is an on-going project. Lang credibly testified that plans were made "on the fly," which does not inspire any confidence that Everport had a well-developed plan. Everport's plans to meet its goal of 300,000 lifts is aspirational but indefinite. Everport has been hampered by technological issues, such as the Kalmar system, and continued to have problems even at the time of the hearing. At the time of hearing, Everport was continuing to purchase and/or lease machines. The expansion of the Terminal was continuing into 2017, when Everport leased more land from the Port of Oakland. Part of the plan Everport relied upon was from the previous decade, year 2007. Lang testified credibly that in January 2016 he could not estimate the number of mechanics needed and that was pending further decisions on volume. Everport also talks about the increases in roadability, but the plans do not reflect that was an active revenue stream. The plans to hire roadability appears to be an afterthought, as Everport failed to post for roadability

jobs and only designated a few employees to it in a document after the jobs were posted. Roadability and tires employees were not included in Vice President Leonard's December 7, 2015 letter to CEO Lang, which separated the mechanics into the traditional bargaining units. Further, mandatory roadability is a requirement in the PMA-ILWU Agreement, and application of the agreement is an unlawful unilateral change. *Holly Farms Corp. and Its Successor, Tyson Foods, Inc.*, 311 NLRB 273, 279 (1993), *enfd.* 48 F.3d 1360 (4th Cir. 1995), *cert. granted in part*, 516 U.S. 963 (1995) and *affd.* 517 U.S. 392 (1996).

Everport also claims that the reefers had increased work due to assignment of unplugging and plugging in the refrigerated containers. However, Everport did not have approval to have mechanics do that work until January 6, after the Terminal reopened for normal operations. Without an agreement to allow mechanics to do such reefer work until after the opening, Everport and ILWU cannot contend that Everport had a well-developed plan for more reefer tasks. Even by October 2016, Lang maintained that Everport entered the market at one of the worst times in history. How Everport intended to defeat these market forces was not detailed, and certainly does not bode well for reaching 300,000 lifts in light of a likely decrease in volume. As noted above, the work of the mechanics had little change as the work was performed in the same location, with primarily the same type of equipment. Everport had the same clients delivering cargo at the Terminal as before. *ILWU v. NLRB*, supra.

Regarding large scale renovations, which Everport contends are part of the reason the bargaining history is overcome, Everport relies upon *AG Communication Systems*, 350 NLRB 168, 172 (2007), *rev. denied sub nom. IBEW Local 21 v. NLRB*, 563 F.3d 418 (9th Cir. 2009). The Board there decided that two employers were merged into a single employer, which merged two bargaining units. *Id.* at 169-170. The single employer reduced duplicative corporate departments as part of the merger. Labor costs were not a factor, but the integration "involved large-scale organizational restructuring conducted by joint teams" of the two previously separate management groups. *Id.* at 172. In contrast, Everport came in as a single employer. Unlike *AG*, 350 NLRB at 172, Everport did not engage in large-scale organizational restructuring.<sup>42</sup>

I find that the Respondents do not overcome the burden of bargaining history. Examination of Respondents' defenses show why they did not overcome the heavy evidentiary burden, and as part of that review. To demonstrate further, I review the traditional community of interest factors, which also demonstrate later that the mechanics' bargaining units were not accreted into a larger unit.

The factors applied the traditional community of interest are: bargaining history; integration of operations; centralization of management and administrative control; geographic proximity; similarity of working conditions; skills and functions; common control of labor relations; degree of separate daily supervision; and the degree of employee interchange. *NV Energy, Inc.*, 362 NLRB 14, 16 (2015), *citing, inter alia, Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001). Bargaining history is given

<sup>42</sup> The Board in *AG* also found the employer violated Sec. 8(a)(5) by failing to bargain over the effects of the merger. *Id.* at 172-173.

significant weight to such an analysis. *PCMC*, 359 NLRB at 1211. Bargaining history is treated the same, regardless of whether the unit was certified or voluntarily recognized. *NLRB v. Hudson River Aggregates, Inc.*, 639 F.2d 865, 871 (2d Cir. 1981), enfg. 246 NLRB 192 (1979). The bargaining unit need not be the most appropriate unit, but an appropriate unit. *Id.* The existing bargaining units themselves are evidence of the appropriateness of the separate bargaining units. *NLRB v. ADT Sec. Services, Inc.*, 689 F.3d 628, 634 (6th Cir. 2012). Respondents are required to demonstrate compelling circumstances to overcome this presumption. *Community Hospitals of Calif.*, 305 F.3d at 1085.

Everport's accession to the PMA–ILWU Agreement caused a number of changes. The rationale given by CEO Lang was to staff the maintenance and repair positions as soon as possible and to exhaust the ILWU hiring hall. I discredit the rationale of staffing as soon as possible as the easier route would have been to hire the existing workforce. Lang testified that the skills were important, and Choi testified that all the predecessors' mechanics had the skills needed to perform work. Costs of training and keeping up the skills of the existing ILWU mechanics were reasons for avoiding hiring Herman/Flynn mechanics, yet the qualifications placed upon them should have negated any of these concerns. As will be seen, the implementation of the PMA–ILWU Agreement in a number of areas created unlawful unilateral changes, which cannot be the basis for recognizing a different unit or creating an accretion.

As discussed above, Respondents do not overcome the long bargaining history or show why these units would be inappropriate. The mechanics, as with the predecessors, performed duties and, as previously noted, their working conditions essentially did not change. See generally *NLRB v. ADT Sec. Services, Inc.*, 689 F.3d at 634 (respondent unlawfully withdrew recognition of an existing unit when the employees continued to exercise similar skills and duties in their own geographic areas). Mechanics had significantly different qualifications than the longshoremen operating equipment. For example, although mechanics must be able to operate the equipment in order to repair it, Respondents do not show that any stevedore would be required to handle refrigerants like the reefers or are required to weld any equipment. The mechanics continued to work in most of the same areas of the Terminal as they did before Everport began operations.

The maintenance and repair functions were separately supervised at Everport, as it had been with the predecessors. The control of labor relations was now with Everport and PMA, as required by the PMA–ILWU Agreement. However, day-to-day relations appears to sit with Choi. Everport admits that Choi and Hsiegh supervise the mechanics. If Choi is believed, he had some contacts with the predecessor mechanics. Similarly, employees testified that they had contacts with other managers, retained by Everport, about when equipment would be repaired and available for use.

Everport and ILWU both contend that the work of the mechanics was “indistinguishable” from other longshoremen. To begin with, I find no stevedore longshoreman, much less the clerks, requiring welding qualifications. Although the mechanics need to be able to operate the machines, the stevedoring staff does not maintain and repair the machines. Any interchange

with stevedores coming into the mechanic staff would be limited, even under the PMA–ILWU Agreement allowing the mechanics to work in other jobs around the Terminal. As noted before, it is part of the PMA–ILWU Agreement, which constitutes an unlawful unilateral change.

For the proposition that the working condition changes were so significant, Everport cites a representation case in which the Board directed an election in a combined unit. *General Electric Co.*, 185 NLRB 13 (1970). There the employees from the San Francisco shop, who outnumbered the Oakland shop employees, were transferred to the Oakland shop upon the San Francisco shop's closure. The employees in each location previously had separate representation. The Board treated the consolidation of the shops as “comparable to a new operation.” The San Francisco employees greatly outnumbered the Oakland employees, so the Board directed an election with the representative of the San Francisco unit on the ballot, without the Oakland representative. *Id.* at 13–14. Here, no such shop consolidation takes place to raise a question concerning representation. Everport's contentions also are denied support in *Westinghouse Electric Corp.*, 144 NLRB 455 (1963). Another representation case, the Board ordered two unions on the ballot for the question concerning representation. *Id.* Going to an election for two possible representatives, without hiring to “balance” the units, is inapposite to the facts of this case.

Two additional factors are considered for the community of interest analysis, including in an accretion analysis: Employee interchange and common day-to-day supervision. *Frontier Telephone of Rochester*, 344 NLRB at 1271 and fn. 7. Their presence does not guarantee a finding of lawful accretion. *Id.* For interchange, two varieties are considered: temporary transfers and permanent transfers. Of the two forms of interchange, permanent transfers and less significant of actual interchange. *Id.* at 1272, citing *Novato Disposal Services*, 330 NLRB 632, 632 fn. 3 (2000). Choi testified that no mechanic went to a different port, and the documentary evidence shows limited movement. Interchange did not exist before that agreement was in place: Everport applied the PMA–ILWU agreement, and even afterwards, as Humphrey testified, he was spending more time making overtime to make up their decreased wages than being available to work in other jobs at the terminal. Two other “Herman/Flynn” worked erratically for other employers at the dock, but this evidence only demonstrates temporary, and none for permanent interchange. Choi stated that no one went to work at other locations, particularly the other two Everport locations. *Armco, Inc. v. NLRB*, 832 F.2d 357, 363 (6th Cir. 1987), reh'g en banc denied (6th Cir. 1988), cert. denied 486 U.S. 1042 (1988). Thus, no permanent interchange took place and temporary interchange was not significant. Even if it was, it was the result of the unlawful application of the PMA–ILWU Agreement and cannot be relied up to establish integration of the units. *PCMC*, 359 NLRB at 1211.

I therefore find that the previous bargaining units remained “an appropriate unit” and the Machinists remained the exclusive bargaining representative. The next phase of the successor inquiry delves into Everport's discriminatory hiring, with ILWU assistance, which requires Everport to recognize and bargain with the Machinists.

IV. THE SUCCESSORSHIP QUESTION—PART TWO: EVERPORT ENGAGED IN DISCRIMINATORY HIRING AND IS A *LOVE'S BARBEQUE* SUCCESSOR

A. *Applicable Law*

Normally a successor has no obligation to hire the predecessor's employees, but in doing so, its hiring practice may not discriminate against union employees. *Adams & Associates Inc. v. NLRB*, 871 F.3d 358, 369–370 (5th Cir. 2017), citing *Fall River Dyeing*, 482 U.S. at 40. A respondent successor employer has an obligation to bargain with the predecessor employees' exclusive bargaining representative when the successor hires a majority of employees employed by the predecessor. *Pennsylvania Transformer*, 254 F.3d at 223. Change in bargaining unit size alone does not destroy "otherwise substantial continuity between old and new employees." *DeBartolo*, supra, at 212. The factors usually examined here are whether job classifications designated for the operation were filled or substantially filled and whether the operation was in normal or substantially normal products and issues related to expansion with a larger workforce. *Id.* at 223. Normally a *Burns* successor would have the right to make unilateral changes when it announces hiring. *Systems Management*, 292 NLRB 1075, 1095 (1989), *enfd.* in rel. part 901 F.2d, reh'g and reh'g en banc denied (3d Cir. 1990). When an employer acts with discriminatory motives, the chance to make those unilateral changes is gone and it cannot set initial terms of hiring. 292 NLRB at 1095, citing, inter alia, *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 62 (1979), *enfd.* in rel. part sub nom *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

When the employer is faced with two rival unions, the employer should remain neutral. *Ralco Sewing Industries, Inc.*, 243 NLRB 438, 442 (1979). If the predecessor's employees' union activity, including union affiliation, is a substantial or motivating factor for the successor's refusal to hire, it might violate Section 8(a)(3) of the Act, unless the successor can prove, by a preponderance of the evidence, that its actions would have been no different and for "wholly permissible reasons." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399 (1983). However, if the successor's reasons are pretextual, the successor commits an unfair labor practice. *Id.* at 398.

In such a situation, the successor employer's alleged failure to hire predecessor employees in order to avoid a bargaining obligation is examined through the traditional burden-shifting test in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *W&M Properties of Connecticut*, 348 NLRB 162, 163 (2006). General Counsel has the burden of showing that the successor employer failed to hire the predecessor's employees and did so due to antiunion animus. *Id.* The burden then shifts to the successor employer to show "it would not have hired the predecessor's employees even in the absence of its unlawful motive." *Id.*; *Adams & Associates*, 871 F.3d at 370.

Protected activity, which is representation by the Machinists, and knowledge are established. *Yonkers Associates*, 94 L.P., 319

NLRB 108, 111 (1995). Here, the predecessors' employees were represented by the Machinists, which Everport knew through correspondence with the Machinists and meetings with Crosatto. The lists that Everport compiled during the hiring process and the December 7, 2015 letter to Lang also were marked by union representation, also demonstrating knowledge. For assessing animus, the factors to consider include:

[S]ubstantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.

*Id.*, citing *U.S. Marine Corp.*, 293 NLRB at 670. In examining each factor, I examine Respondents' defenses.

B. *Analysis of the Factors Shows Everport Engaged in Discriminatory Hiring to Avoid Substantial Complement*

1. Evidence of union animus

Everport's animus is evident in repeated 8(a)(1) violations and other admissions. The statements are examined in the "totality of circumstances" and not for evidence of actual intimidation. *Raymond Interior Systems, Inc. v. NLRB*, 812 F.3d 168, 179 (D.C. Cir. 2016). The violations of Section 8(a)(1) show Everport intended to avoid hiring predecessors' employees. Such statements demonstrate Everport's discrimination against predecessor employees unless they consented to ILWU's representation. See generally *Western Plant Services*, 322 NLRB 183, 194 (1996) (telling unionized applicants they would have to consent to working in a non-union environment). I examine three groups of statements, which demonstrate preferences for ILWU and enforcing conditions of the PMA–ILWU Agreement upon predecessors' Machinist-represented mechanics.

The first class of statements demonstrates Everport's intent to maintain a majority of ILWU-represented mechanics. First, Choi said he had to hire ILWU 51 percent to predecessor, Machinist-represented employees 49 percent. Mark Simpson also admitted that it was a shame that Everport couldn't hire the team that worked well together and then said Everport had to hire 51 percent ILWU to 49 percent Machinist. These statements demonstrate that Everport intended to hire less than a majority of predecessor's employees to avoid its bargaining obligation. It also demonstrates that Everport had a preference for the ILWU over the Machinists. *Triple A Services, Inc.*, 321 NLRB 873 (1996), citing *U.S. Marine Corp.*, 293 NLRB 699, 671–672 (1989), *enfd.* 944 F.2d 1305 (7th Cir. 1991) (en banc). I cannot credit Choi's denials because he is not a disinterested witness, but a member of management, and he had significant problems with credibility. *Turnbull Cone Baking Co. of Tennessee*, 778 F.2d 292, 297 (6th Cir. 1985), *enfg.* 271 NLRB 1320 (1984), cert. denied, 476 U.S. 1159 (1986).<sup>43</sup> The statements

not being able to hire all applicants. After all, this was his first hiring experience." (ILWU Br. at 40.) I disagree on two levels: First, Choi was a supervisor and/or agent of Everport at the time he made the

<sup>43</sup> ILWU suggested if I find Choi made the alleged statements, he did not establish a company scheme and the circumstances compel a conclusion that made it up as an excuse to "assuage his personal discomfort in

independently violate Section 8(a)(1).<sup>44</sup>

The second class of statements occurred during the interviews. When an employer places conditions upon the employees, it must “bear ambiguity in its message.” *Raymond Interiors*, 812 F.3d at 179, citing *ACME Tile & Terrazzo Co.*, 318 NLRB 425, 427–428 & fn. 8 (1995), enfd. 87 F.3d 558 (1st Cir. 1996) (internal quotes omitted). Leonard and Choi admitted that when they interviewed predecessors’ mechanics, they asked them to agree to accepting ILWU as their bargaining representative and the Herman/Flynn requirements as a condition of working for Respondent Everport. Predecessors’ employees’ assent to this requirement was documented on Everport’s interview sheets. This statement is coercive because it reflects Everport’s intent to require potential employees to agree to the ILWU’s representation of maintenance and repair employees working at this terminal. *W&M*, 348 NLRB at 174. Similarly, telling the predecessors’ employees during job interviews that they would have to become “Herman/Flynn” was synonymous with telling them their hiring was contingent upon representation by the ILWU, which is coercive and violates Section 8(a)(1). The statements also constitute unlawful assistance to the ILWU, in violation of Section 8(a)(2). *A.M.A. Leasing*, 283 NLRB 1017, 1022–1023 (1987).

A third type of independent 8(a)(1) violation occurred when Choi told Fenisey he could not hire him because he was not ILWU. For Fenisey, who was interviewed and considered after Everport began operations, Choi admitted to him that he could only hire through the Joint Dispatch Hall. Similarly, when Elaine Logan asked Humphrey whether he was a longshoreman and discovered he was not, she said he could not be interviewed because he was not ILWU and only were interviewing ILWU. She promptly canceled the interview. These statements are coercive and violate Section 8(a)(1) because they demonstrate Everport’s preference for ILWU-represented mechanics and lack of consideration for anyone otherwise represented.

Consistent with the finding that Everport intended to keep a hiring ratio of 51 percent ILWU to 49 percent Machinists, Everport maintained lists of applicants and hires with union affiliations noted. Choi’s inability to confirm when he made the notes on the lists of applicants and acceptable applicants demonstrates an increased likelihood that he was monitoring the numbers closely. Further, he shared his information with ILWU. Respondent Everport also failed to timely notify the predecessor employees, who were integrally involved in the maintenance and repair work, when it decided to hire. The evidence also supports a conclusion that Everport prematurely recognized ILWU, before it hired any mechanics. Everport admitted that it relied upon the PMA–ILWU Agreement for hiring.

Statements from Lang, Choi and Leonard demonstrate Everport’s unlawful motivation. *Western Plant Services, Inc.*, 322 NLRB at 194. Leonard testified he was instructed to set up an “ILWU shop.” CEO Lang instructed Vice President Leonard to

statements, with apparent and actual authority, and thereby having the ability to bind Everport; second, although Choi seemed nervous to Sutton Jr., it does not mean that he would have made up this story. It also does not jibe with Simpson’s statement.

<sup>44</sup> General Counsel does not allege that Captain Huang’s 51/49 statement to Sutton Sr. also is a violation. (GC Br. at 38 fn. 68.) Captain Huang’s status as an agent of Everport, effective December 4, 2015, is

exhaust first the PMA–ILWU Joint Hiring hall first, apparently before anyone was hired as a mechanic. These statements demonstrate a preference for the ILWU-represented mechanics from the Joint Dispatch hiring hall, instead of the predecessor’s employees, who were represented by the Machinists. Although Everport contends it was obliged to follow the PMA–ILWU Agreement, it also constitutes premature recognition, which violates Section 8(a)(2). See generally *British Industries*, 218 NLRB at 1141–1142 and the discussion of premature recognition below.

The posting process also demonstrates animus towards the predecessors’ Machinist-represented mechanics. Leonard never bothered to provide notification to the Machinist-represented mechanics or their bargaining agent. Choi’s contradictory statements of telling perhaps one employee to “spread the word” likewise is not the same as making a posting at a hiring hall or at a workplace. Everport created two classes of applicants: those represented by ILWU; and the remainder, primarily the predecessors’ mechanics, represented by the Machinists. *New Breed Leasing Corp.*, 317 NLRB 1011, 1023 (1995), enfd. 111 F.3d 1460 (9th Cir. 1997), cert. denied 522 U.S. 948 (1997).

Vice President Leonard instructing Choi to call the predecessor candidates “Herman/Flynn” instead of Machinists or “IAM” does not improve Everport’s situation. Telling employees so demonstrates an effort to inculcate the predecessors’ mechanics to the ways of ILWU and that the mechanics had no choice. *Pace Industries v. NLRB*, 118 F.3d 585, 591 (8th Cir. 1997). In addition, after operations began, Choi told Fenisey that he was not eligible for hire because, according to information from ILWU, he was required to use the Joint Dispatch Hall. In addition to showing a distinct preference for only ILWU-represented candidates over any Machinist-represented candidates, it further demonstrates ILWU’s directions on hiring, which Choi followed.

## 2. Lack of a convincing rationale for refusal to hire predecessor’s employees

First, Everport excuses its conduct with reliance upon the PMA–ILWU Agreement at a time when it had not hired employees for the maintenance and repair work. A number of the Machinist-represented applicants were qualified. When one qualified Machinist declined employment, another was put in his place, and again. While Everport was having problems obtaining good candidates from the Joint Dispatch hall, and giving ILWU more chances, Everport refused to hire qualified mechanics.

Secondly, Choi testified contradictorily about his familiarity with the predecessor employees. He had no problems with their work and in many respects, had no idea what qualifications were needed for positions. Choi used “attitude” for Tavares and associated him with Sutton, Jr., tarring him with guilt of association. For Sutton Sr., Choi testified that he smelled of alcohol and had

questionable. In addition, to find another violation leads to a cumulative remedy. Everport suggested that Sutton Sr.’s testimony regarding Huang’s statement be discredited because General Counsel did not call Huang. However, Huang is an Everport employee and Everport did not call him to deny the statement either. I find that it lends itself to ILWU’s statement that the docks hold no secrets.

no problems with his work. Sutton Sr. also was about to obtain his re-certifications the weekend following the interview. For Fenisey, I cannot credit Choi's belated reasons when he initially did not know what was going on and had requested Fenisey's welding certificates; I instead credit that Choi admitted the true reason---that Choi was only allowed to hire from the Joint Dispatch hall and the ILWU would not allow Choi to submit anyone else for approval. These excuses are ironic given that Everport never reviewed the disciplinary records for the ILWU-represented applicants, so Everport could not have known whether anything similar occurred with those applicants. These excuses, particularly lack of review of the PMA records on discipline, evince a double standard and do not satisfy why predecessors' mechanics were not hired. *Staten Island Hotel*, 318 NLRB at 853.

3. Inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive

In addition to Leonard setting up an ILWU shop, Lang's clear instruction to exhaust the Joint Dispatch hiring hall first and the 8(a)(1) violations above, Everport, with the ILWU's assistance, engaged in other inconsistent hiring practices and conduct that evinced the discriminatory motivation. These hiring practices, such as late and limited notification to the predecessor's candidates, tracking the candidates by union representation,

Before examining its options to hire predecessors' mechanics, Everport extended the time for the posting at the Joint Dispatch Hall. Consistent with Everport's desire to set up the ILWU mechanic shop, Leonard admittedly did not examine the predecessors' mechanics when the 10-day posting period ended and he could have done so. Instead of communicating through PMA, Everport repeatedly communicated directly with ILWU Local 10 to obtain more candidates and discussed which type of mechanics were needed.

Keeping track of the ratio and the names of acceptable candidates gives Everport the "means of controlling the process so that it could fulfill the goal of ensuring that it did not hire too many predecessor employees." *Waterbury Hotel Management*, 333 NLRB 482, 527 (2001), *enfd.* 314 F.3d 645 (D.C. Cir. 2003), citing *Precision Industries*, 320 NLRB 661, 661 fn. 5 (1996). Omissions in applications by ILWU or less qualified are also evidence of a discriminatory motive. *Pace Industries, Inc. v. NLRB*, 118 F.3d 585, 591-592 (8th Cir. 1997), *enfg.* 320 NLRB 661 (1996), *cert. denied* 523 U.S. 1020 (1998). Everport's determination to use the Joint Dispatch Hall and exclude as long as possible consideration of predecessors' employees for maintenance and repair work shows premature recognition of the ILWU as the bargaining representation. *General Cinema Corp.*, 214 NLRB 1074, 1075 (1974), *enfd. in rel. part* 526 F.2d 427, *reh'g denied* 529 F.2d 523 (5th Cir. 1976). Premature recognition is discussed below in more detail.

Advancing "spurious reason[s]" for not meeting with or interviewing predecessor's work force supports an inference of the unlawful motive. *Waterbury Hotel Management*, 333 NLRB at 528. Everport made little effort to reach out to potential

candidates employed by predecessors. Choi testified that he could recall telling one Machinist-represented mechanic. Everport did not post positions. Everport's "fall back" reason for any late interviewing was that it was following the PMA-ILWU Agreement, but that agreement could not be applied lawfully due to premature recognition in historically appropriate bargaining units (see below).

Everport's inconsistent application of hiring criteria favored ILWU candidates. Choi and Leonard were inconsistent about the hiring criteria. Choi did not know all the Machinist-represented candidates but testified that he examined how these candidates got along with others. He had no such knowledge about the ILWU candidates. He also maintained that he requested ILWU mechanic candidates' disciplinary records, but never looked at them. Leonard knew PMA records were requested and had no idea whether Everport even received them, much less examined them. In comparison, Choi belatedly testified that certain Machinist candidates had certain problems and likely did not communicate at least a number of those to Leonard. Leonard also relied upon MacKay for determining whether ILWU candidates were good people and took his word towards hiring those. Similarly, Everport communicated directly with ILWU and Local 10 officials during the hiring period because it believed that ILWU would respond more quickly than PMA, which apparently is not the method stated in the PMA-ILWU Agreement.

Everport Vice President Leonard denied that Everport received the package of predecessor mechanics' resumes from Crosatto or the Machinists' demand to bargain. The certified receipts show Everport received the resume package. Everport admits its attorney received the demand to bargain. I discredit these denials and determine that Everport ignored the resumes.

Choi testified Everport needed candidates quickly for the January 2016 opening, yet Everport waited at least an extra month to bring on board MacKay, the outgoing ILWU Local 10 president, as a foreman. CEO Lang testified that MacKay was a highly qualified mechanic and did not want to exclude him because of his union activity, yet Lang, who was not involved with most of the hiring process, permitted it. MacKay had intermittently worked as a mechanic due to his stints as union president and did not have the same experience as the Machinists-represented candidates. Leonard stated it was a good decision but gave little reasoning behind that statement. He believed MacKay would be a good choice because of his interactions with him during the summer of 2015. Those interactions do not demonstrate MacKay's abilities as a mechanic.<sup>45</sup>

4. Evidence showing that Everport conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority to avoid application of the Board's successorship doctrine

Interview sheets and notes were labeled by either IAM or ILWU, indicating which union was representing which applicant at the time of the application. Choi and Leonard could not identify when the documents were so labeled and color-coded, but this labeling served Everport's purposes to keep track of which

<sup>45</sup> This cognitive bias is called the halo effect. See [https://en.wikipedia.org/wiki/Halo\\_effect](https://en.wikipedia.org/wiki/Halo_effect).

mechanic was hired and the numbers were easily identified. Everport was supposed to send its lists of desired hires to PMA, but instead sent the list to ILWU for approval. The rationale for doing so, allegedly for expeditious treatment, demonstrates that Everport was not following the rules for hiring, and neither was ILWU. In addition, Everport maintains it was in a hurry to staff the Terminal's maintenance and repair work, yet waited until February 2016, for MacKay to complete his term as ILWU Local 10 president and then brought him on to become the foreman of that shop.

Everport's defense that it was expanding in the immediate future and needed the Joint Dispatch hiring hall is a double-edged sword.<sup>46</sup> The evidence shows much of Everport's expansion at the Terminal is an on-going project. Everport's plan to meet its goal of 300,000 lifts is aspirational but indefinite. Everport's correspondence shows a likely 20 to 30 percent decrease in volume and its belief it picked the worst time to get into the business in Oakland. Everport has been hampered by technological issues, such as the Kalmar system, and continued to have problems even at the time of the hearing. At the time of hearing, Everport was continuing to purchase and/or lease machines. The expansion of the Terminal was continuing into 2017, when Everport leased more land from the Port of Oakland. Part of the plan Everport relied upon was from the previous decade. Its plan was made "on the fly," which does not inspire any confidence that Everport had a well-set plan. Choi and Leonard's testimonies about the confusion of the times for interviews reflects a situation much of their own making in their efforts not to hire too many of predecessor's employees. Everport's hurry to staff through the ILWU to meet such indefinite aspirational goals points toward pretext.<sup>47</sup>

Advancing "spurious reasons" for not meeting with or interviewing predecessor's work force supports an inference of the unlawful motive. *Waterbury Hotel Management*, 333 NLRB at 550 (2001), citing *Precision Industries*, 320 NLRB 661, 661 fn. 5 (1996). Everport's explanations are not convincing as it claims it did nothing to suppress applications. Everport made little effort to notify the predecessor employees of the positions available or schedule interviews, all in an effort to avoid hiring them. Despite evidence demonstrating Everport received Crosatto's certified package containing the predecessor mechanics' resumes, Everport Vice President Leonard claimed it could not consider them because it never received them. Nor did Everport post any notices to the predecessor employees; instead it claims telling one of predecessor's mechanics was sufficient to give notice. Similar to *Waterbury Hotel Management*, 333 NLRB at

491 et seq., with the exception of one, Everport did not interview the predecessor's employees until the Terminal was about to shut down, about December 3 or 4, 2015. *Id.* at 496-497, 502 (successor hotel holding two job fairs to obtain candidates instead of trying to interview predecessor's employees). But for some of the predecessor employees showing up at the trailer where Everport was conducting interviews, they may not have been interviewed at all. Everport also relies upon ILWU Local 10's president and vice-president telling Machinist-represented mechanics to apply, but in reality very few were told; reliance upon ILWU to tell Machinist-represented candidates to apply is rather ironic, given ILWU's desire to take the jurisdiction.

Everport also relies upon the late notification from Gregorio to obtain a subcontractor to comply with the PMA-ILWU Agreement on hiring. Choi also maintained that things got crazy. If circumstances were indeed crazy, hiring the predecessors' mechanics should have deflated some of the insanity by having a skilled workforce in place.<sup>48</sup> However, the almost non-existent notification to the predecessors' employees and the short length of the screening interviews of the predecessor's mechanics shows cursory treatment. *Waterbury Hotel Management*, 333 NLRB at 515-516. Rather than a selection process, Everport implemented more of a "deselection process." *Id.* at 516.

Everport stayed in close contact with ILWU Local 10 to monitor the hiring process and asked for more candidates, even after Everport's posting period expired. Ferris admitted that Local 10 was having problems scraping together worthy applicants. By ordering the interviews such that Everport had hired a majority of ILWU-represented employees before interviewing predecessor, Machinist-represented mechanics, Everport also ensured that it hired the ILWU majority in the new unit and did not hire a majority of predecessor employees.<sup>49</sup>

By creating and closing monitoring the lists with mechanic applicants marked by union representation, Everport kept a lid on the ratio of ILWU to Machinists in the workforce. On December 7, 2015, the list submitted to Lang broke up the mechanics by the predecessors' units and then listed by union representation, showing ILWU with a majority in each unit. Because the December 7 list identified the historical bargaining units, Everport particularly remained engaged to ensure it set up an ILWU unit.<sup>50</sup>

### C. The Reasons Given by Respondents are Pretextual

For each factor above, Everport and, in some cases, ILWU, gave legitimate business reasons, but none of these reasons overcomes the evidence of animus. I also find that these reasons are pretextual.

<sup>46</sup> Later, when Everport's maintenance and repair work fell behind, Everport managers were reluctant to use the Joint Dispatch hiring hall due to expense and lack of qualifications of hall mechanics.

<sup>47</sup> Everport and ILWU's reliance upon the PMA-ILWU Agreement is akin to saying the "devil made me do it." If either Everport's expansion plans or the reliance upon the PMA-ILWU agreement was Everport's reason to recognize ILWU before such an expected expansion, in which it could predict "with reasonable certainty" on obtaining qualified employees, Everport violated Sec. 8(a)(2): Everport recognized ILWU as a majority representative at a time when it did not employ "a substantial and representative complement of employees in that unit." *O-J*

*Transport, Inc.*, 333 NLRB 1381, 1389-1390 (2001). See further discussion on premature recognition, *infra*.

<sup>48</sup> As in *Shortway Suburban Lines*, 286 NLRB 323, 326 (1987), *enfd.* 862 F.2d 309 (3d Cir. 1988), Everport decided not to hire predecessor employees they knew were experienced and, per Choi, competent.

<sup>49</sup> That the ratio is not 51 to 49, as stated by Choi and Simpson, is not necessary to make these findings

<sup>50</sup> Everport claims that it made offers to a large number of the Machinist-represented candidates. However, that statement hides that Everport only offered a certain number after it determined the ILWU hires, and only placed in Machinist-represented candidates in a slot when another Machinist-represented candidate declined a position.

Pretext may be inferred when a respondent provides false reasons for its actions in hiring practices. See generally *Waterbury*, 333 NLRB at 550, citing *Love's Barbeque*, 245 NLRB 78, 80 (1979). In *W&M*, 348 NLRB at 163, the Board agreed that the respondent employer's reasons for failing to hire predecessor's employees were pretextual and failed to rebut General Counsel's prima facie case. There respondent did not hire its predecessor's unionized employees because anyone hired would have to be nonunion or they would not be hired at all. The respondent employer did as it stated. *Id.* Some of the reasons given by respondent was the condition of the facility when taking over. The respondent employer claimed it wanted to keep as many of the predecessor employees to make a smooth transition. It had a number of factors it examined, such as experience, training, licenses, "eager and interested individuals," and "no disciplinary issues or timeliness problems." *Id.* at 169.

Similar to *W&M*, supra, many of the reasons are pretextual. Despite any reasons given by Everport for not hiring certain predecessor employees, Everport's unlawful conduct demonstrates it intended to staff the maintenance and repair areas with as many ILWU mechanics as it could, and at least enough not to recognize the Machinists.<sup>51</sup> Choi stated all were qualified and Everport utilized different standards to judge the Machinist candidates. Everport's internal documentation had a preference for keeping the mechanic units as they existed, stating it wanted to find a way to make ILWU understand it would not be in its interests to seek the maintenance and repair work. To then shift to the additional reasons demonstrates pretext. I find that General Counsel carried its *Wright Line* burden of proof and Everport's reasons, as described above, are pretextual and insufficient to demonstrate that it acted lawfully. *Id.* at 163.

Everport's brief contends it was not anti-union or anti-Machinists. However, this position ignores that Everport's actions were pro-ILWU. Everport did not remain neutral and its selection of a bargaining agent for the employees is unlawful. I therefore find that evidence of Everport's union activity, knowledge, and animus during Everport's unlawful hiring, and pretextual reasons demonstrate preferential hiring of an ILWU-represented workforce for mechanics in violation of Section 8(a)(2) and (3). As Everport pursued an unlawful hiring scheme, it is the successor to the predecessors of the Machinist-represented units: It incurs bargaining obligations with the Machinists, not ILWU. *Love's Barbeque*, supra. Had it not engaged in an unlawful hiring scheme, Everport would have hired a majority of employees from predecessors' mechanics workforce. *Smith & Johnson Construction Co.*, 324 NLRB 970, 970.<sup>52</sup>

V. EVERPORT PREMATURELY RECOGNIZED ILWU BEFORE HIRING ANY MECHANICS AND ILWU ACCEPTED RECOGNITION

A. *Applicable Law for Premature Recognition*

Section 8(a)(2) of the Act states that an employer commits an

unfair labor practice when it acts:

To dominate or interfere with the formation or administration of any labor organization or contribute financial or other supporter to it: Provided, That subject to rules and regulations made and published by the board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay . . .

Section 8(a)(2) prohibits an employer from contribution support to a labor organization, which can take the form of giving a union recognition when it is not the majority representative. An employer's recognition of a minority union and/or premature recognition of a union are unlawful because "the union so favored is given 'a marked advantage over any other in securing the adherence of employees.'" See generally *International Ladies Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731, 738 (1961) ("*Bernhard-Altman*"), citing *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267 (1938). The union that accepts recognition when it is not the majority representative violates Section 8(b)(1)(A) and (2).

The Board applies a "totality of the circumstances" standard to reviewing 8(a)(2) violations. *Dr. Pepper Snapple Group*, 357 NLRB 1804, 1813 (2011) (cites omitted). Scierer is not an element required to prove these violations, nor is a good faith belief a defense to these violations. *Bernhardt-Altman*, 336 U.S. at 737-738. To allow such a defense impermissibly undermines the Act's promise to permit "employees freedom of choice and majority rule in employee selection of representatives." *Id.* at 738-739. The union is not required to make an explicit demand when it discriminates and "intent . . . may be inferred from the circumstances." See generally *Teamsters Local No. 980 (Auburn Constructors)*, 268 NLRB 894, 900 (1984).

An employer violates Section 8(a)(1) and (2) of the Act by recognizing a union that does not represent a majority of the employees in an appropriate bargaining unit. See *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737-38 (1961). And a union without majority support violates section 8(b)(1)(A) of the Act by accepting such recognition. See *id.* at 738. When an employer and a minority union enter into a contract that contains a union security provision, the employer violates section 8(a)(3) of the Act, and the union violates section 8(b)(2) of the Act. See *Local Lodge No. 1424, Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411, 412-14 (1960).

*Int'l Union of Petroleum & Indus. Workers v. NLRB*, 980 F.2d 774, 778 (D.C. Cir. 1992).

To determine whether Everport avoided prematurely granting recognition to ILWU, a two-pronged test is applied:

(1) An employer must employ a substantial and representative complement of its projected workforce, that is, the jobs or job classifications designated for the operation

disability. Up to six of those mechanics were receiving disability. Everport still does not overcome the pretext for failing to hire the predecessors' mechanics, and 21 were still eligible for hire. I find that the liability of backpay for those mechanics will be determined at a compliance hearing, if necessary.

<sup>51</sup> Nothing indicates that the applicants not offered jobs would have turned down the positions. This uncertainty is resolved against Everport. *Western Plant Services*, 322 NLRB at 195-196, citing *State Distributing Co.*, 282 NLRB 1048 (1987).

<sup>52</sup> Everport contends that it would not have hired a majority because some of the Machinist-represented mechanics were off work due to

must be substantially filled, and

- (2) The employer must be engaged in normal business operations.

*Elmhurst Care Center*, 345 NLRB 1176, 1184 (2005), enfd. 303 Fed. Appx. 895 (D.C. Cir. 2008); *Hilton Inn Albany*, 270 NLRB 1364, 1365 (1984). No exact mathematical formula is needed to demonstrate for premature recognition. *Id.* Failure to meet either of these prongs of the test results in a determination that the grant of recognition was unlawful. *Elmhurst Care Center*, 345 NLRB at 1177. The ultimate inquiry is whether employees “realistically have an opportunity to select a bargaining representative.” *Id.* at 1184.

*B. Everport Prematurely Recognized ILWU and ILWU Accepted Recognition for the Mechanics Units*

The test for premature recognition is taken at the time of recognition, and whether the positions “designated for the operation involved are filled or substantially filled and the operation is in normal or substantially normal production.” *British Industries Co.*, 218 NLRB 1127, 1141 (1975), citing *Hayes Coal Co., Inc.*, 197 NLRB 1162, 1163 (1972). Determining the point at which an employer hires a representative complement of employees to determine its bargaining obligation varies from case to case and is fact specific. *NLRB v. Hudson River Aggregates, Inc.*, 639 F.2d 865, 870 (2d Cir. 1981). At any of several potential points, Everport’s actions fail to meet either prong of the test. These dates include:

- In June 2015, when Everport was admitted to PMA.
- Before September 2, when Lang admits he knew he would be utilizing the ILWU workforce, at least for longshoremens;
- In late October 2015, when Gregorio allegedly informed CEO Lang that he would be unable to provide such services;
- On November 11, 2015 and following through December 4, when Everport posted positions for the maintenance and repair unit at the Joint Dispatch Hall and through the interviews, in its efforts to “exhaust the hiring hall” and set up the ILWU unit; and,
- On January 4, 2016, when Everport resumed normal operations at the Terminal.

At the first four instances, Everport did not employ the maintenance and repair workforce,<sup>53</sup> nor was it engaged in operating the terminal at all. ILWU contends (as part of its “perfectly clear” successor argument) that by accepting the terms of the PMA it agreed to recognize ILWU. If one accepts the argument that Everport was obliged to recognize ILWU as the labor

<sup>53</sup> Everport admits it did not have any employees at the Terminal when it joined PMA. (Everport Br. at 77.)

<sup>54</sup> Everport also now implies it was required to do so because it joined PMA, but this contradicted many of the facts. I find this shift downgrades Everport’s credibility.

<sup>55</sup> Then-Chairman Kaplan recently indicated some disagreement with the current “perfectly clear” standards for determining what a successor does to “express[ ] an intent to hire.” *Walden Security, Inc.*, 366 NLRB No. 44, slip op. at 1 fn. 4 (2018). He suggested that a perfectly clear successor “unequivocally offered to employ any interested employee of the predecessor employer without indicating prior to or simultaneously

organization representing the mechanics when it became a PMA member, it re-emphasizes that Everport was not engaged in operations nor did it employ any of the mechanics at the Terminal. Between September until at least late October 2015, when Gregorio advised Lang that his companies could not subcontract maintenance work, Everport was not engaged in its normal operations, nor had it hired mechanics. The history here, as reported by Lang, is Everport determined to use ILWU mechanics in accordance with the PMA–ILWU Agreement only after Gregorio extricated himself from the running as a possible subcontractor.<sup>54</sup> It was only after that point, in late October and/or early November 2015, Lang stated to exhaust the hall in accordance with the terms of the PMA–ILWU Agreement. Leonard clearly understood he was to set up the mechanics as an ILWU bargaining unit.

Everport also relied upon PMA’s determination that the employer could not win in arbitration against ILWU regarding application of red circle language and staffing the Terminal with Machinists. Everport and ILWU’s reliance upon the PMA–ILWU Agreement is akin to saying the “devil made me do it.” Reliance upon the PMA–ILWU agreement was Everport’s reason to recognize ILWU before any hiring took place, yet it could not predict “with reasonable certainty” that Everport would obtain qualified employees. Everport therefore violated Section 8(a)(2): Everport recognized ILWU as a majority representative at a time when it did not employ “a substantial and representative complement of employees in that unit.” *O-J Transport, Inc.*, 333 NLRB 1381, 1389–1390 (2001).

Everport’s arguments that it is a perfectly clear successor, also discussed above, provide admissions against interest. Everport contends that its entry into PMA in June 2015 were preceded by its discussions with ILWU the previous month, when Everport Vice President Leonard told Local 10 officials that Everport intended to employ longshoremens. These discussions continued on August 28 of the same year, when Everport CEO Lang told ILWU that it looked forward to its continued relationship. It also relies upon terminating the subcontract with STS and that the “red circle” exception no longer applied. (Everport Br. at 52.) However, these admissions, when applied to the predecessors’ mechanics units represented by the Machinists, contradict Everport’s prior position that its discussions with Gregorio may have led to a subcontract for predecessors’ mechanics to be retained.<sup>55</sup>

On November 11, 2015, at the time of the postings at the Joint Dispatch Hall, until about December 4, 2015, when the Terminal closed, Everport was not engaged in its normal business,<sup>56</sup> but was hiring only ILWU-represented mechanics with the goal of having an ILWU unit. By posting at the Joint Dispatch Hall,

with that offer there would be new terms and conditions of employment.” *Id.* Even if the Board later narrows to this standard, it could not apply here as the “likely” offers to predecessors’ employees were part of Everport’s discriminatory hiring practices and premature recognition, at which time none of the predecessors’ mechanics were advised little of the new terms and conditions of employment and those contained unlawful conditions: The “likely” offers required the Machinist-represented mechanics to agree to representation by ILWU.

<sup>56</sup> See Everport Br. at 19 regarding lack of Everport operations through December 4, 2015.

Everport applied the terms and conditions of the PMA–ILWU Agreement to the mechanics’ units. Similarly, Ferris’ testimony demonstrates that the Joint Dispatch hall was having problems finding qualified mechanics who wanted to work for Everport.

The hiring practices, discussed above as part of Everport’s discriminatory hiring, show that Leonard and Choi monitored the number of ILWU-represented mechanics it intended to hire versus the predecessors’ Machinist-represented mechanics. Everport ensured it would hire a majority of ILWU-represented mechanics when it resumed operations on January 4, 2016. Everport required any predecessor mechanic applicant to comply with the Herman/Flynn requirements and the other terms and conditions of the PMA–ILWU Agreement, including the union security clause.

Even if I credited Leonard’s denial of receiving the Machinists demand to bargain, no bargaining demand from Crosatto and the Machinists is necessary as the discriminatory hiring scheme made any demand futile. *Smith & Johnson Construction Co.*, 324 NLRB 970, 970 (1997). Everport gave no timely notification to Crosatto as Everport notified Crosatto only after it posted for the mechanic positions at the Joint Dispatch Hall and determined to “exhaust the hall first.” Once Everport determined to employ a majority of ILWU-represented mechanics and refused to discuss matters further with the Machinists, the Machinists no longer had an obligation to request bargaining. *Sun-Maid Growers of Calif. v. NLRB*, 618 F.2d 56 (9th Cir. 1980) (joint employer terminated IBEW-represented employees, denied rumors of such, and, claiming accretion, recognized Machinists for unit).<sup>57</sup>

By granting recognition to ILWU at a time when Everport neither employed a substantial complement of the maintenance and repair workforce nor was engaged in normal business operations, Everport prematurely recognized ILWU, in violation of Section 8(a)(2), and applied the union security clause and Herman/Flynn requirements, in violation of Section 8(a)(3). The employees had no choice but to accept ILWU as their exclusive bargaining agent as Everport made its determination. Thus, recognition was premature and the application of the PMA–ILWU Agreement to the mechanics is “void.” *Elmhurst Care Center*, 345 NLRB at 1179. By accepting such recognition, ILWU violated Section 8(b)(1)(A) and 8(b)(2) of the Act. *Int’l Union of Petroleum & Indus. Workers*, supra.

### C. Respondents’ Defenses to Premature Recognition

Respondents do not demonstrate that its pre-majority recognition of ILWU is permitted by Section 8(f) of the Act, which permits a construction employer to execute a pre-hire agreement for union representation before a majority is established. *NLRB v.*

<sup>57</sup> Everport contends the Machinists made a demand to bargain when Everport hired no employees and had made no representations about hiring employees, nor did it employ any of the mechanics. It then characterizes the demand as unlawful, and that any later demands were too late. (Everport Br. at 111–112.) Everport’s argument backfires. It met with ILWU representatives many times about the Terminal and in particular ILWU demanded the maintenance work early in the meetings and correspondence. See, e.g., MacKay’s August 2015 letter regarding its rights to the mechanic work. Everport does not characterize ILWU’s demands as unlawful. Everport determined to “set up an ILWU shop” for maintenance and repair before it posted positions at the Joint Dispatch hiring

*Pacific Erectors, Inc.*, 718 F.2d 1459, 1462 (9th Cir. 1983), enfg. 256 NLRB 421 (1981). Everport is not an employer involved in construction, so it could not recognize the ILWU or apply the terms and conditions of the PMA–ILWU Agreement to the mechanics, beginning with Everport’s decision to use the Joint Dispatch Hall for mechanics. When Everport recognized ILWU and posted the positions, it did not employ any mechanics at the Terminal, nor was it engaged in normal business operations. It then engaged in unlawful hiring practices to ensure that it hired a majority complement of ILWU-represented mechanics instead of predecessors’ mechanics.

Respondents’ reliance upon the PMA–ILWU Agreement and its red circle language does not dictate a different result as the “private resolution . . . contemplates a result contrary to established Board law.” See generally *A to Z Maintenance Corp.*, 309 NLRB 672, 675 (1992).<sup>58</sup> Everport maintains that it was willing to subcontract to PCMC (in its new iteration), which might retain the predecessors’ mechanics, until Gregorio notified CEO Lang otherwise in October 2015. The possibility of subcontracting and retaining the predecessors’ employees continued several months after Everport joined PMA, and therefore is contradictory to Everport’s position that the red circle language no longer applied as of June 2015.

### VI. ILWU VIOLATED SECTION 8(B)(1)(A) AND (2) REGARDING ASSISTING WITH HIRING AND ACCEPTING RECOGNITION

I have already found that ILWU violated 8(b)(1)(A) and 8(b)(2) in a number of ways. I write additionally to be clear that ILWU violated the Act. “An 8(b)(2) violation can be established by direct evidence that the union sought to have the employer discriminate, or by sufficient circumstantial evidence to support a reasonable inference that the union requested that the employer discriminate.” *International Union of Operating Engineers, Local 12 (Kiewit Industrial)*, 337 NLRB 544, 545 (2002). “An express demand or request is not essential to a violation of Section 8(b)(2) of the Act. It suffices if any pressure or inducement is used by the union to influence the employer.” *Operating Engineers, Local Union No. 3 (Joy Engineering)*, 313 NLRB 25, 33 (1993). Historically, a strong indication of animus towards individuals occurs when a union that ignores its hiring hall rules. See generally *International Brotherhood of Electrical Workers, Local 1579 (CIMCO)*, 311 NLRB 26, 30 (1993).

On August 19, 2015, McEllrath notified CEO Lang that ILWU expected cooperation. MacKay’s August 20, 2015 letter to CEO Lang twice stated that ILWU would take seek all available remedies should Everport not hire all employees through the Joint Dispatch Hall. MacKay notably did not limit his remedies

hall. If one relies on Everport’s logic, the ILWU made unlawful demands to bargain by demanding the work in August 2015 and proves further that Everport prematurely recognized ILWU.

<sup>58</sup> General Counsel cites representation cases regarding an employer not privileged to bind employees in an existing bargaining unit to a multi-employer collective-bargaining agreement without the employees’ consent. See, e.g., *Comtel Systems Technology*, 305 NLRB 287 (1991). The Board found, inter alia, that a majority of the employer’s employees supported union in place, before the employer joined the multi-employer unit. *Id.* Supporting this point, also see *Pepsi-Cola Bottling Co. of Kansas City*, 55 NLRB 1183 (1944).

to the extent of the law. Thus, ILWU notified that it was willing to take any action necessary to ensure that Everport complied with the expectations to hire ILWU-represented workers.

Internally, ILWU worked in derogation of the Machinist-represented mechanics' rights when it demanded and effectuated hiring first through the Joint Dispatch Hall. Everport's cooperation to hire ILWU-represented mechanics allowed Local 10 officers MacKay and Ferris to examine possible hiring lists and, in an admission against interest, tell Choi he could not hire Fenisey because Fenisey was not coming out of the Joint Dispatch hall. Ferris also determined to ignore the requirements of the hall to send the Ports America mechanics, when that port closed, to Everport. ILWU considered throwing up pickets if events did not turn its way at the Terminal.

These actions, in conjunction with Everport's assistance, tell applicants and employees who are not represented or have representation other than ILWU that they no longer are permitted to support their bargaining agent and are required to acquiesce to representation by the ILWU.<sup>59</sup> As previously noted, ILWU benefited from enforcement of the PMA-ILWU Agreement, including the union security provisions, and the hiring processes. ILWU readily accepted recognition. These are violations of 8(b)(2) and (1)(A) of the Act. *Operating Engineers Local No. 3*, 313 NLRB at 34.

#### VII. APPLICATION OF THE PMA-ILWU AGREEMENT CAUSES ADDITIONAL VIOLATIONS

Having found that Everport unlawfully refused to hire the predecessors' mechanics and Everport is a successor per *Love's Barbeque*, I turn to the alleged violations of Section 8(a)(5), 8(b)(1)(A) and 8(b)(2). Everport violated Section 8(a)(5): It could not refuse to recognize the Machinists or make unilateral changes to wages, hours and terms and conditions of employment. *Gallion Point, LLC*, 359 NLRB 699, 699 (2013), incorporated 361 NLRB 1167 (2014), enfd. 665 Fed.Appx. 443 (6th Cir. 2016) (discriminatory hiring practices made unlawful unilateral setting of initial terms and conditions); *Western Plant Services*, 322 NLRB at 196. The record reflects a number of unilateral changes from the Machinists' collective-bargaining agreements to the PMA-ILWU Agreement. These changes include, but are not limited to: wages and overtime payment; holiday pay and holidays; health insurance; and payment to funds.

Not only did Everport and ILWU rely upon the PMA-ILWU Agreement while hiring the employees, the agreement contained a union security clause. Everport's selected hires were presented with the requirement of their bargaining agent and paying dues when the ILWU did not represent an uncoerced majority of employees. *NLRB v. Cen-Vi-Ro Pipe Corp.*, 457 F.2d 775, 776 (9th Cir. 1972), enfg. 180 NLRB 344 (1969). Everport unlawfully assisted ILWU by requiring predecessors' employees to agree to the terms of the PMA-ILWU Agreement, including its Herman/Flynn requirements. Therefore, Everport again violated Section 8(a)(2), (3), and (5) by applying the union security requirements to the bargaining unit it hired. ILWU violated

Section 8(b)(1)(A) and (2) by accepting Everport's assistance, including employees who required to pay initiation fees, dues, and other charges from these employees. *ILWU v. NLRB*, 890 F.3d at 1106 fn. 7.

#### VIII. RESPONDENTS' DEFENSES

The defenses put forth include that the mechanics unit was accreted into the larger stevedore unit, labor history of the long-shoremen on the west coast, and the parties were required to do so due to the "red circle" language. A 10(b) defense maintains that Everport's entry into PMA I find Respondents' do not overcome the General Counsel's case.

#### *The Predecessor Bargain Units were not Accreted into the Larger ILWU Unit*

##### 1. Applicable law for accretion

Accretion is a "narrow exception" to premature recognition and use of a pre-hire agreement. *Safeway Stores*, 256 NLRB 918 (1981). Accretion is defined as "the addition of a relatively small group of employees to an existing unit where these additional employees share a community of interest with the unit and employees and have no separate identity." *Safety Carrier, Inc.*, 306 NLRB 960, 969 (1992) (emphasis added). Accretion may occur when a new group of employees develops after recognition or during the term of a collective bargaining agreement. *Kaiser Foundation Hospitals*, 343 NLRB 57, 64 (2004). However, if the employees historically have been excluded at the time of recognition, accretion is not likely to apply. *Id.* at 64.

The accretion policy is applied restrictively because accreted employees are deprived of the choice of whether they wish to be represented by a labor organization as opposed to maintaining industrial peace. *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005), enfd. 181 Fed. Appx. 85 (2d Cir. 2006). These restrictions on accretion preclude cutting off employees' rights. *Comar, Inc.*, 339 NLRB 903 (2003), enfd. 111 Fed. Appx. 1 (D.C. Cir. 2004). If the employer improperly "accreted" employees into a bargaining unit, it violates Section 8(a)(3) and (1); the union accepting such recognition violates Section 8(b)(1)(A) and (2) of the Act. *Kaiser Foundation Hospitals*, 343 NLRB at 63.

Everport and ILWU, who contend that the maintenance units were merged into the larger ILWU unit, have the burden of proof to demonstrate that compelling circumstances overcome the significance of the bargaining history. *PCMC/Pacific Crane Maintenance Co.*, 359 NLRB 1205, 1211 (2013), incorporated in 362 NLRB 988 (2015), reconsideration denied (unpub. Dec. 2016), enfd. *ILWU v. NLRB*, 890 F.3d 1100 (D.C. Cir. May 29, 2018). The accretion could take place with the smaller group of employees, here the 27 mechanics, placed into the larger stevedore unit if "the added employees (1) do not constitute a separate bargaining unit, and (2) do not outnumber the employees who belong to the existing unit." *SEIU Local 144 v. NLRB*, 9 F.3d 218, 233 (2d Cir. 1993), enfg. *Brooklyn Hospital Center*, 309 NLRB 1163 (1992).

<sup>59</sup> ILWU contends that neither it nor Local 10 knew of any alleged hiring quota of the 51/49 statements or participated in any scheme, and therefore is relieved by liability under *Love's Barbeque*. I apply the standard to the facts as a whole, not just the 51/49 statement. Evidence

shows ILWU wanted the jurisdiction, and getting the jurisdiction meant getting in at least a simple majority of ILWU mechanics. Otherwise, why would Ferris and MacKay discuss applying when mechanics from the Joint Dispatch hiring hall were reluctant to apply.

If an employer determines to merge two separately represented work forces, an employer usually may not choose between the competing representational claims. *Metropolitan Teletronics Corp.*, 279 NLRB 957 (1986), enfd. mem. 819 F.2d 1130 (2d Cir. 1987); *Boston Gas Co.*, 221 NLRB 628, 629 (1975). A valid accretion defense is attainable only when the additional employees “have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted.” *Safety Carrier, Inc.*, 306 NLRB 960, 969 (1992). Traditional community of interest factors are examined to determine whether the predecessor bargaining units remain appropriate when Everport took over, as part of the “changed circumstances.” *PCMC*, 359 NLRB at 1211. The nature of the operations at the time of the withdrawal of recognition are also examined; Everport must show that it had a well-defined plan or timetable to achieve “fuller functional integration.” *PCMC*, 359 NLRB at 1211 fn. 20, citing *Comar*, 339 NLRB at 910.

Everport and ILWU contend the predecessors’ mechanics unit is accreted into the larger workforce of stevedores and clerks. This argument ignores that the predecessors’ arrangement, in which the stevedores, who made up the majority of employees at the Terminal, were already represented by ILWU. They have always been separate and continue to be separate. As examined above, the traditional community of interest analysis demonstrates that the predecessor bargaining units remained appropriate and that, in particular, Respondents did not overcome the heavy burden of bargaining history in the predecessor mechanic units. Therefore, accretion is not an appropriate defense.

2. Labor history of the Pacific coast docks does not dictate a different conclusion

Respondents contend that the historical context of a number of cases dictates that the ILWU must represent these employees, particularly in a pre-existing coast-wide unit of longshoremen. Respondents argue that the Board must acquiesce 80 years of binding precedent. ILWU implies that all PMA members historically are required to assign maintenance and repair work to ILWU, but then states that the PMA–ILWU Agreement has sometimes grandfathered in certain mechanic work. (ILWU Br. at 7–8.) The case law cited by Respondents, however, does not dictate such a conclusion: The case review actually reveals that the presence of the PMA–ILWU Agreement and the case history does not require any deviation from prior Board precedent.

Foremost among the cited cases is *Shipowners’ Ass’n of the Pacific Coast*, 7 NLRB 1002 (1938). There the Board stated that longshore work on Pacific Coast ports for certain employer associations belonged to an appropriate unit. The term longshoremen may have included everyone working on board ship or the docks, but divided further into longshoremen, dock workers, grain handlers etc. and may vary port to port. 7 NLRB at 1005. The decision discusses the maximum load of slings that longshoremen could handle or dangerous cargo. 7 NLRB at 1010. Oakland itself is not discussed, although the hiring hall for San Francisco covered the entire San Francisco Bay area. The definition of longshoremen, at best, is vague.

The contention that the historical cases require a monolithic

coastwide unit is undermined by PMA–ILWU Agreement itself and case law. The red-circle language, which is part of the PMA–ILWU Agreement, recognizes that a number of maintenance and repair bargaining units were not historically represented by ILWU. The red-circle language would have been unnecessary if *Shipowners’ Ass’n* and progeny applied to mechanics. Because the predecessors’ mechanics units, represented by Machinists, were not accreted into the larger unit and the historical cases do not show that mechanics were always included in the ILWU units, the historical bargaining units remain appropriate.

*ILWU Local 13 (California Cartage)*, 208 NLRB 994 (1974), enfd. 515 F.2d 1018 (D.C. Cir. 1975), cert. denied 424 U.S. 942 (1976) was cited by ILWU. It discussed 8(b)(4) and 8(e) allegations, none of which are relevant here, as the issue was the unions’ refusing to handle cargo stuffed by non-ILWU labor. Notably was the Board’s statement that “The history of labor relations in that industry has been fraught with extraordinary problems, which have extended beyond the customary employer-employee relationship.”

Everport maintains that *Pacific Maritime Assn.*, supra, also is “strikingly similar” to this case. (Everport Br. at 8–10.) However, certain distinctions must be made. First, as pointed out by Everport, the terminal in question converted from traditional stevedoring services to a modern container system. No such conversion took place in this case. PMA had no successorship issues. The employer fired the subcontractors. Secondly, the case was limited to whether the certain clauses in the PMA–ILWU Agreement violated the “hot cargo” provisions in Section 8(e). 256 NLRB at 769–770. Interpretation of the PMA–ILWU Agreement and its present iteration, which are not the same as the clauses presented in 1981 and are superseded in 2008 with red circle language, do not support Respondents’ contention that the historic unit requires inclusion of mechanics into a unit represented by ILWU.

*IAM District Lodge No. 94, Local Lodge No. 1484 v. ILWU Local 13*, 781 F.2d 685 (9th Cir. 1986) also does not support a historical preference for a bargaining unit represented by ILWU. It instead reemphasizes the principles that employees “have the freedom to choose their exclusive bargaining agent” and the employer has a duty to bargain with only that selected representative. Id. at 690. There the two union locals entered into a jurisdictional agreement that allegedly Local 13 violated and Local Lodge 1484 sought permanent injunctive relief. ILWU was the certified representative of the unit. The court determined that the local agreement was subordinate to the ILWU’s agreements with PMA and dismissed the injunction to enforce the local agreement. *IAM District Lodge No. 94*, supra.

In two recent jurisdictional dispute cases involving the port in Portland, Oregon, electricians represented by International Brotherhood of Electrical Workers, not ILWU, historically performed dockside reefer work. See: *International Longshore and Warehouse Union (Port of Portland)*, 363 NLRB 121, (2015), and *International Longshore and Warehouse Union (ICTSI)*, 363 NLRB 460 (2015). In these cases, a new lessee retained the historical IBEW units rather than acquiesce to the demands of ILWU for recognition.

Everport cites *ILWU (Port of Portland)*, supra, to demonstrate

that the employer was bound by the PMA–ILWU Agreement, but neither that case or nor the numerous others cited for the same principle provide support for such a proposition. A number of these cases arise as jurisdictional disputes under Sec. 8(b)(4)(D). See, e.g.: *ILWU Local 10 (Matson Navigation Co.)*, 140 NLRB 449, 453–454 (1963) (work awarded to historical and best qualified, which was the carpenters instead of longshoremen); *IBEW Local 48 (Kinder Morgan)*, 357 NLRB 2217 (2011) (work awarded to IBEW instead of longshoremen). *ILWU Local 10 (Matson)*, supra, also highlights that *Shipowners'* definition of longshoremen is vague and does not include the type of work at issue, carpentry, yet respondent union maintained that this case supported their claim for carpentry work.

Everport also cites another jurisdictional dispute case, *IAM Lodge 160, Local Lodge 289*, 355 NLRB 23 (2010), on reconsideration after *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, in 356 NLRB 288 (2010), vacated and remanded 356 NLRB 1282 (2011). The employer opened work at a new terminal for cruise ships and assigned the maintenance and repair work to the ILWU, specifically one full-time and one part-time mechanic. The employer still had work at its previous terminal and did not stop recognizing the Machinists as the representative of the 30 mechanics at the old terminal. In assessing the jurisdictional dispute, the Board found that a few factors weighed in favor of the Machinists, e.g., existence of the collective bargaining agreement with the Machinists (and discounting the red circle language to a “colorable contract claim to the work in dispute,” and employer past practice. However, employer preference (which plays no role in our case’s analysis) was heavily weighted in favor of ILWU. It does not support the proposition that the ILWU coastwise unit is preferred, as the Board found area and industry practice shows both unions performed the work in dispute. *Id.* at 26.<sup>60</sup>

This defense was rejected in *PCMC*, 359 NLRB at 1209 (judge’s reliance upon defense overturned). Respondents do not prevail on their arguments that the mechanics units historically are represented by a monolithic coastwise ILWU unit.

### 3. Everport is not a “perfectly clear” successor

To be a “perfectly clear” successor, “the new employer has either actively, or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.” *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enfd. per curiam* 529 F.2d 516 (4th Cir. 1975). The successor must express intent to retain the predecessor’s employees and usually states new terms of employment. *Creative Vision Resources, LLC*, 364 NLRB No. 91, slip op at 2–3 (2016), *enfd.* 882 F.3d 510 (5th Cir. 2018). Thus, the perfectly clear successor exception applies when it is ‘perfectly clear’ that the union’s majority status will survive the transition from predecessor to successor, which includes where it is clear

that the successor intends to retain a majority of the predecessor’s employees. *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), *enfd.* 540 F.2d 841 (6th Cir. 1976), *cert. denied* 429 U.S. 1040 (1977). To begin consideration whether an employer is a perfectly clear successor, the first step is looking at the “the composition of the successor’s work force.” *Creative Vision Resources, LLC v. NLRB*, 882 F.3d at 526, citing *Fall River Dyeing*, 482 U.S. at 46 (internal quotes omitted). Only after that factor is met will I consider whether the terms and conditions come into play. *Road & Rail Service, Inc.*, 348 NLRB 1160 (2006).

Respondents diverge on their rationale on why Everport is a perfectly clear successor. ILWU contends that Everport gave ILWU notice it intended to hire ILWU for the entire work force, long before Everport contends it made the decision for the mechanics. Everport disagrees that it did so. I do not credit the ILWU on this point as it requires Lang to have gone through talks with Gregorio as a sham.

Everport fails to demonstrate that it became a perfectly clear successor. Everport generalizes that the appropriate unit was the entire workforce at the Terminal to be represented by ILWU, instead of recognizing that it had two historical mechanic units represented by the Machinists. It also failed to give notice to the Machinist-represented mechanics of its intent to hire them, and only advised of the necessity of accepting the condition of being a “Herman/Flynn” employee to those it interviewed. In doing so, Everport failed to establish the PMA–ILWU Agreement, which may have applied to the only to the predecessor’s stevedores, also applied to the mechanics. See generally *Paragon Systems*, 364 NLRB No. 75 (2016).

Examining the composition of the hired workforce of mechanics, Everport was dealing with a number of bargaining units, such as the stevedores who were represented by ILWU at the predecessors, and the predecessors’ maintenance and repair units who were not represented by the ILWU. Everport generalized that it is permitted to change the mechanics’ units because it gave ILWU, not the Machinists, its intent to hire with the same terms and conditions, which was the application of the PMA–ILWU Agreement. However, Everport does not differentiate between the bargaining units, and therein lies the flaw as the mechanic units remained appropriate. Everport never gave any indication that it intended to hire all of the predecessors’ mechanics. Everport’s initial intent was to subcontract the mechanic work, and the hiring of employees then would have been within the subcontractor’s power, not Everport’s. Everport intended to “exhaust” the Joint Dispatch Hall first. It made no specific announcement that it would retain the majority of the predecessors’ workforce. Instead, it avoided interviewing the prior workforce and ensured it kept the ratio between ILWU and the Machinists below a point where it might be required to recognize the Machinists as the exclusive bargaining agent. Nor can Everport rely upon its conduct in the interviews with the predecessors’ employees—that they would be subject to the Herman/Flynn provisions of the PMA–ILWU Agreement, as it was an unlawful

<sup>60</sup> ILWU argues again that the documents from the Pension Benefit Guaranty Corporation be admitted to show the stability of the multi-employer pension plan and that ILWU’s plan operates under an exemption. It also argues that it would endanger the PMA employers’ abilities to

maintain funding levels for existing pensions. (ILWU Br. at 47–41.) I stand by my ruling to reject these documents. The PBGC does not administer the NLRA.

statement.

Everport's overarching contention here is that the mechanics belong in the historical coast-wide unit, and it has been traditionally represented by the ILWU. Everport admits that it never communicated to the predecessors' mechanics themselves that it intended to employ any of the Machinists-represented mechanics. Instead, Everport contends it advised the employees that they would be retained and that that it would apply the PMA-ILWU Agreement. (Everport Br. at 22, citing GC Exh. 64 at 2.) It also contends that by it evinced a clear intent to hire ILWU employees from the Joint Dispatch Hall and apply the PMA-ILWU Agreement to the workforce. The events cited are: becoming a member of PMA in June 2015; terminating its subcontract with STS; entering discussion with the ILWU as early as May 2015 (before PMA membership was approved) and promising to utilize only the PMA-ILWU Agreement for terms and conditions of employment; and posting notices for mechanic employment at the Joint Dispatch Hall. (Everport Br. at 52.) Although Everport does not overcome that the predecessors' bargaining unit were appropriate, in an abundance of caution I discuss why these contentions are misguided.

The November 11 posting at the Joint Dispatch Hall, according to Everport, was also supposed to provide notice to the Machinist-represented mechanics that the terms and conditions of the PMA-ILWU Agreement would apply to them, if hired. Here Everport relies upon *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 11 (2007). Everport interprets *Cadillac* as "applying 'perfectly clear' doctrine where successor employer, 'by offering job applications . . . to [the predecessor's] employees . . . invited the employees to accept employment.'" Everport additionally contends that it "never communication any intent to apply different employment terms and conditions for its longshore labor, whether with respect to stevedoring or [maintenance and repair] workers. (Everport Br. at 52.)

Everport's involvement with PMA and ILWU does nothing to advise the predecessors' mechanics that they would be retained as a group. Everport admits it did no such thing and Choi's supposed notification was minimal at best, only telling one employee to apply. Someone at ILWU telling a Machinist-represented mechanic that Everport posted positions with ILWU does not demonstrate that Everport told the existing mechanic workforce that it would be retained, much less under what conditions.

During interviews, Everport did not tell predecessors' mechanics that it intended to hire a majority of employees. Reliance upon *Cadillac*, supra, is not helpful to Everport or the ILWU. The employer in *Cadillac* was found to be a perfectly clear successor when the employer failed to notify any of the same employees it hired, who were in the same bargaining unit of drivers, that any terms and conditions would be changed and in fact, affirmatively represented everything would be the same. The job applications were offered to the predecessor's drivers.

In contrast to *Cadillac*, Everport posted the jobs with an entirely different pool of potential mechanics at the Joint Dispatch Hall; it never gave notice or applications to the Machinist-represented mechanics. If Everport was a perfectly clear successor to the predecessors who employed mechanics, it would have been required to continue the terms and conditions maintained by the Machinists, not the PMA-ILWU Agreement.

Everport also cites *McGuire v. Humble Oil & Refining Co.*, 355 F.2d 352 (2d Cir. 1966). Everport notes that, in *McGuire*, the Second Circuit affirmed the NLRB's determination that Humble, as the purchaser, was entitled to supplant the predecessor employees' union and accrete those employees into Humble's existing units. Some distinctions must be made. First, the Second Circuit decision involved the previous union attempting to enforce its collective bargaining rights against the successor to arbitrate cases. Second, as Everport notes, Humble was indeed a purchaser, but, as Everport does not note, Humble's purchase agreement contained provisions that it was purchasing assets and had no obligations with the seller's employees. Everport was not in the same position as Humble.

By failing to make clear it intended to retain a majority of the predecessors' Machinist-represented mechanics, in their appropriate units, Everport could not meet the first requirement to become a perfectly clear successor. The conditions communicated to the predecessors' mechanics were unlawful.

4. The "red circle" provisions of the PMA-ILWU Agreement are a red herring

Everport and ILWU both contend that the red circle provisions require the employer to recognize and bargain with ILWU because the Terminal was vacated. Everport maintained that its June 2015 membership in PMA ensured that the PMA-ILWU Agreement's red circle language no longer applied to the Terminal. (Tr. 674.) ILWU Local 10 President MacKay testified that nothing changed in the port supplement in 2014. (Tr. 3023.) MacKay testified that the Terminal lost its red circle status because MTC and STS vacated the premises in December 2015. (Tr. 3021, 3026.)

ILWU's brief contends that the PMA-ILWU Agreement interpretation by Everport, PMA and ILWU is not to be questioned because the agreement itself is not the product of unfair labor practices and the Board is not permitted to make an interpretation. (Everport Br. at 41.) ILWU misses mark: Neither the agreement itself nor its creation are questioned, but its application to a group of mechanics who are already represented is the issue. The Machinists are not party to the PMA-ILWU Agreement, so it did not agree to these provisions. Respondents' application of this provision does not take into account the rights of already represented workers. I therefore cannot countenance application of this provision to this case when Board law dictates otherwise, particularly on Everport's discriminatory hiring, with ILWU's help. See generally *A to Z Maintenance Corp.*, 309 NLRB 672, 675 (1992).

5. Cases requiring Everport to recognize ILWU because Everport is a member of PMA's multi-employer unit are not persuasive

ILWU also contends that the multi-employer unit is the only appropriate unit because Everport has joined and is bound by the PMA-ILWU Agreement. It cites *Mo's West*, 283 NLRB 130, 133 (1987). This case occurred during decertification petitions filed in two units and the Board affirmed the Regional Director's dismissal of the petitions. The employers claimed that they were not in the multi-employer unit. Although the Board found that the employers remained members of the multi-employer group, the reason for dismissal was that the decertification petitions

were not coextensive with the certified or recognized unit. *Id.* at 130. In *Custom Colors Contractors*, 226 NLRB 851 (1976), *enfd.* 564 F.2d 190 (5th Cir. 1977), an employer in a multi-employer group did not make a timely and unambiguous withdrawal before the multi-employer group negotiated a collective-bargaining agreement. The individual employer refused to abide by the multi-employer contract, and in doing so, violated Section 8(a)(5) and (1). This case is not on point as it provides no guidance in the situation when a successor is faced with a pre-existing unit despite the terms of the contract.

#### 6. Section 10(b)

ILWU contends that the charges are outside of the 6-month statute of limitations, as defined in Section 10(b) of the Act, because Everport joined PMA in early 2015. Because the charge was filed more than 6 months after Everport joined PMA, ILWU contends the charge is untimely.

Section 10(b)<sup>61</sup> requires that the charging party file its initial charge in a matter within a 6-month statute of limitations; the charging party's failure to do so bars any subsequent complaint. *Masonic Temple Assn. of Detroit*, 364 NLRB No. 150, slip op. at 1 fn. 1 (2016); *Positive Electrical Enterprises, Inc.*, 345 NLRB 915, 918 (2005). The 6-month statute of limitations begins to run when a party has "clear and unequivocal notice of the violation," not when "a party sends conflicting signals or otherwise engages in ambiguous conduct." *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), citing *CAB Associates*, 340 NLRB 1391, 1392 (2003). Also see *Minteq Int'l, Inc.*, 364 NLRB No. 63 (2016), *rev. denied* 855 F.3d 329 (D.C. Cir. 2017). The 10(b) allegation is not jurisdictional, but instead is considered an affirmative defense. *Federal Management Co., Inc.*, 264 NLRB 107 (1982). The party alleging this affirmative defense, here ILWU, has the burden of proof, which is met when the party demonstrates that the filing party had actual or constructive knowledge of the unfair labor practice. *ISS Facility Services, Inc.*, 363 NLRB 261 (2015); *Broadway Volkswagen*, 342 NLRB at 1246.

ILWU's argument hinges upon its belief that Respondent Everport, by entering into the PMA Agreement in June 2015, notified all parties that Everport was required to recognize and use only ILWU labor, including mechanics. As discussed above, Everport was not permitted to grant recognition to ILWU, nor was ILWU permitted to accept such recognition when employees had an existing collective-bargaining representative.<sup>62</sup> This position also contradicts Everport's timeline, that it possibly would have been able to subcontract mechanics' work to Gregorio, potentially leaving the units intact, until Gregorio gave notice in late October 2015. It also contradicts Everport's internal communications regarding convincing ILWU it was not in interest to pursue the mechanic units. Two months after PMA's approval of Everport's membership, ILWU's August 2015 letters to Everport demanded discussions on the mechanics and threatening with all available remedies: These communications do not show that Everport already accepted the ILWU's interpretation of PMA-ILWU Agreement regarding the mechanics. Thus, the

late October-early November 2015 date is the earliest concrete evidence of Everport agreeing to recognize ILWU as the bargaining agent for the mechanics and determining to apply the terms of the PMA-ILWU Agreement to those employees.

Respondent Everport did not notify the Machinists that it intended to utilize ILWU bargaining unit labor instead of Machinists-represented employees, well after the mechanics were presented with their layoff slips. Everport's notification to the Machinists came in November, with less than 6 weeks to the December 4 closing of the port for renovation and change-over to Everport operations. Lang knew by September 2 that he intended to utilize the Joint Dispatch hall for employees but did not know what was going to happen to the mechanics because he was waiting for an answer from Gregorio. Gregorio's answer came in late October and Everport did not advise Machinists' Business Representative Crosatto until November 2015, after Everport posted positions with the Joint Dispatch Hall. As the initial charges against Respondents Everport and ILWU were filed respectively on March 22 and March 23, 2016, Charging Parties filed the charges within the 6-month statute of limitations. *Armco, Inc. v. NLRB*, 832 F.2d at 362.

#### IX. THE MACHINISTS' ADDITIONAL ALLEGATIONS, BEYOND GENERAL COUNSEL'S ALLEGATIONS

The Machinists raise additional allegations of unlawful conduct beyond the scope of General Counsel's complaint. These allegations include: Costs of the Joint Dispatch Hall, a hiring hall, are primarily borne by PMA, rather than solely by ILWU, and non-member payments funneled to the Joint Port Labor Relations Committee; the agreement between PMA and ILWU for Herman/Flynn discriminates against employees; PMA is not a *bona fide* multi-employer association; and the agreement violates Section 8(e) ("hot cargo") of the Act. General Counsel put forth none of them and I sustained objections to Charging Party's lines of questioning related to Charging Party's theories. As General Counsel controls the theories of the case, I decline to make any findings regarding Charging Parties' theories. Its request for an additional remedy is discussed below.

#### X. ADMONITION OF ATTORNEY

During the hearing, most counsel were verbally combative with each other, making a number of ad hominem attacks. I asked that they stop. At least on two occasions, one attorney called another a liar or said he lied. Like kindergarteners, they were given off the record breaks for "time outs" and other assorted warnings and threats. Ultimately, I warned them that continued conduct of this sort would warrant an admonition on the record.

Attorney David Rosenfeld continued to do so and was warned to stop. (See, e.g., Tr. 2296.) Rosenfeld disregarded my warnings and on this particular occurrence, Attorney Akrotirianakis for Everport took the bait. I admonished Rosenfeld, then again warned Akrotirianakis to stop taking the bait. General Counsel may investigate and decide whether to obtain further sanctions from the Board. See Board's Rule 102.177. As part of its

<sup>61</sup> Also see: Board Rule §102.14, Service of charge.

<sup>62</sup> If this argument was accepted, then it would be ILWU's admission that Everport prematurely recognized it in June 2015. The premature

recognition, although still unlawful, could fall outside the 10(b) period, but not the unlawful discriminatory hiring per *Love's Barbeque*.

## EVERPORT TERMINAL SERVICES, INC.

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determination, the Board may consider what, if any, prior sanctions the Board gave to Rosenfeld. In re *Joel I. Keiler*, 316 NLRB 763, 766 (1995).

## CONCLUSIONS OF LAW

1. Respondent Everport Transportation Services is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Predecessor employers STS, MTC and MMTS were employers within the meaning of Section 2(2), (6), and (7) of the Act.

3. Respondent International Longshore and Warehouse Union and its local, Local 10, are labor organizations within the meaning of Section 2(5) of the Act.

4. Charging Parties International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1546, AFL-CIO and International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1414, AFL-CIO are labor organizations within the meaning of Section 2(5) of the Act.

5. The following persons employed by Everport are supervisors within the meaning of Section 2(11) and/or agents within the meaning of Section 2(13) of the Act:

- a. CEO George Lang
- b. Vice President Randy Leonard
- c. Manager Ron Neal
- d. Supervisor/superintendent David Choi
- e. Manager Mark Simpson
- f. Robin Hsiegh
- g. Elaine Logan

6. The following persons are agents of ILWU and/or ILWU Local 10 within the meaning of Section 2(13) of the Act:

- a. ILWU President Robert McEllrath
- b. ILWU Vice President Ray Familiathe
- c. ILWU Officer Willie Adams
- d. ILWU Benefits Specialist John Castanho
- e. ILWU Coast Committeeman Leal Sundet
- f. Local 10 President Melvin MacKay
- g. Local 10 Vice President Ferris

7. The following bargaining units were and are appropriate units for collective bargaining:

- a. Maintenance and repair unit previously employed by MTC

All employees performing work described and covered by Section 1 of the collective-bargaining agreement between MTC and the IAM effective by its terms for the period July 1, 2011 to June 30, 2016; excluding all other employees, guards, and supervisors as defined in the Act.

- b. Crane maintenance and repair unit previously employed by MMTS:

All employees performing work described in and covered by Section 1.4 of the collective-bargaining agreement between MMTS and the IAM effective by its terms for the period June 2, 2015 to May 31, 2016; excluding all other employees, guards and supervisors as defined in the Act.

8. Respondent Everport, by David Choi and Mark Simpson, engaged in unfair labor practices within the meaning of Section 8(a)(1) by informing employees that it intended to hire 51

percent ILWU-represented employees and 49% Machinist-represented employees for maintenance and repair work at the Nutter Terminal, Oakland, California.

9. Respondent Everport, by Elaine Logan, engaged in unfair labor practices within the meaning of Section 8(a)(1) by telling employees that they could not be interviewed yet because they were not ILWU.

10. Respondent Everport engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by repeatedly informing prospective employees that they had to follow the Herman/Flynn procedures pursuant to the PMA-ILWU Agreement (PCLCD) to be qualified for hire.

11. Respondent Everport engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by repeatedly telling prospective employees that hiring was contingent upon their acceptance of ILWU as their exclusive bargaining representative.

12. Respondent Everport engaged in unfair labor practices within the meaning of Section 8(a)(1) and (2) of the Act by telling employees that they could not be considered because they were not registered longshoremen and/or sent for referral through the PMA-ILWU Joint Dispatch hiring hall.

13. Respondent Everport engaged in unfair labor practices within the meaning of Section 8(a)(2) and (1) of the Act by assisting ILWU when it repeatedly informed prospective employees that they had to follow the Herman/Flynn procedures pursuant to the PMA-ILWU Agreement (PCLCD) to be qualified for hire.

14. Respondent Everport engaged in unfair labor practices within the meaning of Section 8(a)(2) and (1) of the Act by telling prospective employees that hiring was contingent upon their acceptance of ILWU as their exclusive bargaining representative.

15. Respondent Everport engaged in unfair labor practices within the meaning of Section 8(a)(2) and (1) of the Act by assisting, recognizing and bargaining with Respondent ILWU as the collective-bargaining representative of the mechanics employed at the Nutter Terminal in Oakland, California, when the ILWU did not represent an uncoerced majority of the unit employees or at a time before the commencement of Everport's normal port operations when it did not employ a representative segment of its ultimate mechanic employee complement.

16. Respondent Everport engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act by implementing a plan to avoid hiring former employees of predecessor STS and its subcontractors MTC and MMTS, or members of the Charging Parties Machinists, and discriminating against or refusing to hire those individuals because of their concerted activities or Machinists affiliation, in order to avoid a successorship obligation to recognize and bargain with the Charging Parties.

17. Respondent Everport is a successor employer to STS, MTC and MMTS.

18. Respondent Everport engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by refusing, as successor to STS, MTC and MMTS to recognize and bargain with the Charging Parties Machinists as the representative of the employees at the Ben E. Nutter Terminal performing

maintenance and repair work, concerning their terms and conditions of employment; unilaterally setting initial terms and conditions of employment for unit employees without first giving notice to and bargaining with Charging Parties Machinists about those changes; and unilaterally determining to hire individuals other than former STS and its subcontractors MTC and MMTS' employees to perform bargaining unit work without notifying and bargaining with Charging Parties Machinists.

19. Respondent Everport engaged in unfair labor practices within the meaning of Section 8(a)(2), (3), and (5) by applying terms and conditions of the PMA–ILWU agreement, including union-security clause and hiring hall provisions, before Everport hired any employees for maintenance and repair work.

20. By the foregoing conduct, Respondent Everport has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7).

21. Respondent ILWU engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act when it demanded recognition from Respondent Everport for the mechanics units.

22. Respondent ILWU engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act when it unlawfully accepted recognition from Respondent Everport before Everport began operations and when it did not represent an uncoerced majority of the units, and at a time Respondent Everport had not started normal business operations nor employed in the units a representative segment of its ultimate employee complement.

23. By demanding recognition as the exclusive bargaining representative of the employees employed by Everport, and by seeking to enforce the collective bargaining agreement by attempting to require Everport to hire only employees dispatched through the Joint Dispatch hiring hall, enforcing union-security and Herman/Flynn provisions of the PMA–ILWU Agreement, or to otherwise discriminate, Respondent ILWU has violated Section 8(b)(1)(A) and (2) of the Act.

24. By the foregoing conduct, Respondent ILWU has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

The ideal remedial order restores “the situation, as nearly as possible, to that which would have been obtained but for [the unfair labor practices].” *Pace Industries, Inc. v. NLRB*, 118 F.3d 585, 593 (8th Cir. 1997), citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). “Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.” *Phelps Dodge Corp.*, 313 U.S. at 197. Restoration of the status quo ante, including reinstatement and backpay, is necessary when a new employer unlawfully discriminates in hiring to avoid a bargaining obligation. *Galloway School Lines, Inc.*, 321 NLRB 1422, 1425 (1996); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1467 (9th Cir. 1997), enfg. 317 NLRB 1011 (1995), cert. denied. 522 U.S. 948 (1997).<sup>63</sup>

Respondent Everport and Respondent ILWU shall cease and desist in discriminating against the employees previously represented by the Machinists or any other employees not represented by the ILWU. *International Union of Operating Engineers, Stationary Engineers Local 39 (Mark Hospital Intercontinental Hotel)*, 357 NLRB 1683, 1683 fn. 1 (2011).

Respondent Everport shall be ordered to withdraw recognition from Respondent ILWU as the collective-bargaining representative of the unit employees unless and until Respondent ILWU has been certified by the Board as their collective-bargaining representative. In addition, Respondent Union shall be ordered to cease accepting Respondent Employer's recognition unless and until it is so certified. *PCMC*, 362 NLRB 988, 988. ILWU argues that this remedy is unwarranted and instead suggests an election of the current steady mechanics. This suggestion does not erase the unfair labor practices of unlawfully recognizing the ILWU and instead gives it a leg up as the current bargaining representative among the current mechanics, most of whom were hired through the PMA–ILWU Joint Dispatch hall.

Both Respondents are ordered to cease and desist from applying the PMA–ILWU Agreement (PCLCD), including its union-security provisions, and any extension, renewal, or modification thereof, to the unit employees. *St. Helens Shop 'N Kart*, 311 NLRB 1281, 1281 fn. 2 (1993). Respondents Everport and ILWU are jointly and severally liable for damages caused by their violations of Section 8(a)(2) and (3) and 8(b)(1)(A) and (2); the date of which begins January 4, 2016 to the date of reinstatement. *Textile Workers, TWUA Local 169 (Acme Mattress Co., Inc.)*, 91 NLRB 1010, 1015–1017 (1950), enfd. 192 F.2d 524 (7th Cir. 1951).

Respondent Everport must also retroactively restore the preexisting terms and condition of employment set forth in predecessors' collective bargaining agreements with the two Machinist units for the period from Everport's violation, effective December 5, 2015, until Everport and the Machinists reach a new agreement or come to impasse. *Adams & Associates, Inc.*, 871 F.3d 358, 373 (5th Cir. 2017), enfg. 363 NLRB 1923 (2016). A successor employer that unlawfully discriminates to avoid a bargaining obligation is not free to set unilaterally initial terms and conditions of employment. See generally *Smith & Johnson Construction*, 324 NLRB at 970. Had Everport acted lawfully in hiring the predecessors' maintenance employees, it would have been free to set terms and conditions of employment for the bargaining units. *Burns*, 406 U.S. at 281–283. By discriminatorily hiring its employees and ensuring that it would recognize the ILWU, Everport waived that right. Everport is ordered to reinstate the status quo ante, to make employees whole by remitting all wages and benefits absent Everport's unlawful conduct, until it negotiates in good faith to agreement or to impasse. This remedy is necessary to prevent Everport from benefitting from its unlawful conduct, including unlawfully applying the PMA–ILWU agreement to the employees, and give the bargaining process a chance to work. *U.S. Marine Corp.*, 944 F.2d at 1322–1323; *NLRB v. Advanced Stretchforming Int'l, Inc.*, 233 F.3d 1176 (9th Cir. 2000), cert. denied 534 U.S. 948 (2001).

<sup>63</sup> This case also discusses the validity of this remedy and cites the Seventh Circuit and Second Circuit. *U.S. Marine Corp. v. NLRB*, 944

F.2d 1305, 1320 (7th Cir 1991) (en banc), cert. denied, 503 U.S. 936 (1992); *NLRB v. Staten Island Hotel*, 101 F.3d 858 (2d Cir. 1996).

Therefore, Everport is ordered to recognize and, on request, bargain with Machinists' District Lodge 190, Local Lodge 1414, and District Lodge 190, affiliated with the International Association of Machinists and Aerospace Workers, AFL-CIO (the Machinists) as the bargaining representatives of the unit employees with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document. Also see *Carib Inn of San Juan*, 312 NLRB 1212, 1212 fn. 4 (1993), enfd. sub nom. *NLRB v. Horizons Hotel Corp.*, 49 F.3d 795 (1st Cir. 1995).

I recommend the affirmative bargaining order as a remedy for Everport's premature recognition of ILWU, discriminatory hiring to avoid a bargaining obligation with the Machinists, and failure to recognize and bargain with the Machinists. *Caterair International*, 322 NLRB 64 (1996). This remedy is the traditional Board requirement for a 8(a)(5) "refusal to bargain with the lawful collective-bargaining representative in an appropriate unit of employees." *Id.* at 68. I recommend that the parties be required to bargain in good faith for 12 months due as a temporary decertification bar.

At times, the U.S. Court of Appeals for the District of Columbia has required the Board to justify the affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 738-739 (D.C. Cir. 2000). This analysis balances three areas: "(1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." *Ports America*, 366 NLRB No. 76, slip op. at 4, citing *Vincent*, 209 F.3d at 738. In balancing these three factors, I find, for reasons similar to *Ports America*, the affirmative bargaining order in this case is warranted.

First, the affirmative bargaining order will vindicate the Section 7 rights of the unit employees. Everport denied these employees of the benefits of collective bargaining with their designated representatives by prematurely recognizing ILWU when it had not hired anyone in those units yet, by its discriminatory hiring to avoid recognizing the Machinists, thereby refusing to recognize and bargain with the Machinists. ILWU unlawfully accepted recognition and, with Everport, applied the terms and conditions of the PMA-ILWU Agreement. As a result, the mechanics were denied their Section 7 rights when Everport and ILWU denied them of the right to their chosen collective bargaining representative; it also assisted the non-majority representative ILWU and subjected the mechanics to the terms and conditions of PMA-ILWU Agreement, including its union security requirement. The Section 7 rights of the employees who may not wish for continued representation by the Machinists are not unduly burdened by the affirmative bargaining order or the bar to raising a question of representation of the Machinists' majority status for a reasonable period of time. "The duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation." *Ports America*, 366 NLRB No. 76, slip op. at 5. Only after restoration of the status quo ante can employees have a reasonable opportunity to assess whether they wish to continue the Machinists' representation during a period free of Everport's unlawful conduct. *Id.*

Regarding the second factor, the affirmative bargaining order

promotes meaningful collective bargaining and industrial peace, which are at the heart of the Act's policies. The rationale is explained clearly in *Ports America*, 366 NLRB No. 76, slip op. at 5:

It removes the Respondent Employer's incentive to delay bargaining the hope of further discouraging support for the Machinists. It also ensures that the Machinists will not be pressured to achieve immediate results at the bargaining table following the Board's issuance of a cease-and-desist order to forestall an effort by the ILWU to resume its representative status, perhaps with the Respondent Employer's support—or worse, its unlawful assistance.

Regarding the third factor, alternative remedies are not effective in removing the taint of Everport's unlawful refusal to recognize and bargain with the Machinists, its unlawful hiring, and premature recognition of ILWU. A cease-and-desist order, without a temporary decertification bar or a bargaining requirement, means little because it would allow a challenge to the Machinists' majority status before the taint of Everport's unlawful refusal to bargain with the Machinists and its unlawful recognition of ILWU have dissipated. *Id.* The result would be horribly unjust in the circumstances of this case because Everport's unlawful conduct likely has caused lasting negative impressions of the Machinists in the bargaining units and because Everport made clear it preferred representation by ILWU. In addition, ILWU has benefited from the unlawful recognition from Everport and its assistance to Everport for some time. *Id.* These circumstances, created by the Respondents' unlawful actions, "outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued representation by the Machinists or any other union." *Id.* Employees should instead have the right to assess the effectiveness of the Machinists as their bargaining representative, which requires Everport to bargain in good faith with the Machinists for a reasonable period of time. *Ports America*, 366 NLRB No. 76, slip op. at 5. Therefore, the affirmative bargaining order, with a temporary decertification bar, is required to fully remedy the extensive violations in this case.

Respondent Everport also is required to make all contractually required contributions to the Machinists benefit funds that it failed to make, including any additional amounts due the funds on behalf of the unit employees in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and to make the employees whole for any expenses they may have incurred as a result of Respondent Employer's failure to make such payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons*, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

The Board imposes a *status quo ante* remedy to restore the employees to the rightful position they would have been in, but for the successor's unlawful discriminatory hiring. *Adams & Associates, Inc. v. NLRB*, 871 F.3d 358 (5th Cir. 2017), and cases cited therein. Respondent Employer shall also be required to rescind, on the Machinists' request, any or all of the unilateral

changes to the unit employees' terms and conditions of employment made on or after December 4, 2015, and to make unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. The order shall not be construed as requiring or authorizing Respondent Employer to rescind any improvements in the terms and conditions of employment unless requested to do so by the Machinists. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).<sup>64</sup>

Respondent Everport is required to offer employment to all employees laid off from MTC and MMTS on December 4, 2015, and not reemployed by Respondent Employer in their previous positions, and to make them whole for any loss of earnings and other benefits suffered as a result of Everport's unlawful failure to hire. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Respondent Everport also will be required to remove from its files and records any and all references to the unlawful layoffs and notify the affected employees in writing that this has been done and that the discharge will not be used against them in any way. *PCMC*, 362 NLRB 988.

Regarding union dues, the Board customarily directs that dues owed to a union be deducted from employees' backpay. *Ogle Protection Services*, 183 NLRB at 682. However, when an employer has unlawfully repudiated a collective-bargaining agreement, the Board will require the employer to reimburse the union for dues payments that it failed to make where employees signed valid dues-deduction authorizations. *A.W. Farrell & Son, Inc.*, 361 NLRB 1487, 1487 (2014), and cases cited therein. Therefore, Everport shall reimburse the Machinist units for any dues not deducted and remitted from the time of its unlawful failure to hire, beginning December 14, 2015 (when the ILWU-represented employees were allowed to work) until the Machinists-MTC collective-bargaining agreement expired on June 30, 2016 and the Machinists-MMTS collective-bargaining agreement expired on May 31, 2016, on behalf of its employees who executed dues authorizations prior to or during the period of Respondent Employer's unlawful conduct, at no cost to the employees. *PCMC*, 362 NLRB 988.

Respondent Employer and Respondent Union will be ordered jointly and severally to reimburse all present and former unit employees who joined Respondent Union on or since December 4, 2015, for any initiation fees, periodic dues, assessments, or any other moneys they may have paid or that may have withheld from their pay pursuant to the PMA-ILWU Agreement, together with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Where employees have been compelled to pay union dues, initiation fees, and other moneys to ILWU, the employees should

be reimbursed for what was required for them to pay to ILWU for membership fees, dues and other expenses imposed upon the employees by ILWU. *Cascade General v. NLRB*, 9 F.3d 731, 737 (9th Cir. 1993), cert. denied 511 U.S. 1052 (1994), enfg. 303 NLRB 656 (1991) (employer required to reimburse employees); *NLRB v. Forest City/Dillon-Tecon Pac.*, 522 F.2d 1107 (9th Cir. 1975), enfd. in part and remanding in part 209 NLRB 867 (1974) (remand regarding remedy). Also see *NLRB v. Jan Power, Inc.*, 421 F.2d 1058, 1064 (9th Cir. 1970), enfg. *Service Employees Local 399 (Columbia Building Maintenance Co.)*, 173 NLRB 798 (1968) (“[W]e hold it reasonable for the Board to infer that those employees who joined the union after the execution of the agreement could well have been motivated by the overriding compulsion of that agreement and its union-security clause. [cites omitted]”).

General Counsel also requests that the discriminatees be paid consequential economic damages for any losses incurred due to the Respondents' unlawful actions. At present, the Board has not agreed that this remedy is appropriate, and I therefore decline to apply it. *Dish Network Corp.*, 366 NLRB No. 119, slip op. at 1 fn. 3 (2018).

Respondent Everport shall be ordered to compensate affected employees for any adverse tax consequences of receiving a lump-sum backpay award. Respondent Employer shall file a report with the Regional Director of Region 32, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

Respondents Everport and ILWU each shall be ordered to post the Board's standard notice to employees and notice to employees and members, respectively. In addition, in light of the close factual connection between the unfair labor practices committed by Respondent Employer and Respondent Union, they are further ordered to post a signed copy of the other Respondent's notice, which will be provided by the Region, in the same places and under the same conditions as each posts its own notice. *Voith Industrial Services, Inc.*, 363 NLRB 1038, 1038, fn. 5 (2016).

Additionally, Respondent Everport shall mail the notices to any unit employees not employed by Respondent Employer after December 4, 2015. This mailing is required because of the passage of time and because some of the employees who were unlawfully laid off from MTC and/or MMTS on December 4, 2015, were not rehired and therefore would not see the notices physically posted at the facilities of Respondent Employer or Respondent Union.

I also order that a responsible management official read the notice with a representative of the Board and a representative of the Machinists to be present during a notice reading. *Voith Industrial Services*, 363 NLRB 1038, 1038, fn. 5 and slip op at 37. I also find that the ILWU president must read the notice at both Everport and at the Local 10 union hall during a membership meeting. The purpose of reading the decision is to dispel continued effects of the Respondents' unlawful acts and to impress

<sup>64</sup> See *Pressroom Cleaners*, 361 NLRB 1166 (2014) (when employer discriminatorily refuses to hire, employer must continue predecessor's rate until parties reach agreement or impasse).

upon employees that the violating employer and its management team are bound by the Act. *Emerald Green Building Services*, 364 NLRB No. 109, slip op. at 1 fn. 3 (2016). The same is true for ILWU.

The Machinists request a broad order for ILWU<sup>65</sup> but General Counsel did not. I agree with the Machinists and recommend the broad order. I am guided by *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). The Board has a duty to demand increasingly stringent remedy when a respondent is a repeat offender. *NLRB v. Local 3, IBEW*, 861 F.2d 44 (2d Cir. 1988) (repeated violations of §8(b)(7) warranted broad order); *NLRB v. Local 3, IBEW*, 730 F.2d 870, 881 (2d Cir. 1984), enfg. 265 NLRB 213 (1982) (continued secondary activities warranted broad order). The order is warranted when a respondent has “a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights.” *Hickmott*, 242 NLRB at 1357. Also see *Systems Management*, 292 NLRB at 1102. Since the hearing concluded, the Board issued its decision in *Ports America*, supra, which affirmed the administrative law judge’s decision that ILWU continued the unlawful conduct it began in PCMC. The Board’s 2015 finding in *PCMC*, supra, were upheld at the District of Columbia Circuit Court. In such a situation, ILWU’s history of repeat offenses would warrant a broad remedy. *International Union of Operating Engineers, Local 12*, 2709 NLRB 1172, 1172–1173 (1984). Given the continued conduct of ILWU with PCMC and its successor Ports America, and now with Everport, I find that ILWU has a proclivity to violate the Act as noted here and a limited order would not be effective. The violations in *PCMC*, supra, and *Ports America*, supra, occurred in the same unit, but shows similar conduct here. The evidence in this matter makes clear that ILWU and Local 10 intended to nab this jurisdiction, regardless of the rights of the predecessors’ mechanics. High-ranking officials at both ILWU and its local, Local 10, were involved in making these violations possible. Timing also indicates that ILWU kept no secret about its intent to take jurisdiction at the Ben E. Nutter Terminal in Oakland. It is likely that ILWU will continue its path of unlawful conduct involving other employers, employees, and job applicants. *Motion Picture Studio Mechanics, Local 52, IATSE v. NLRB*, 593 F.2d 197 (2d Cir. 1979), enfg. 238 NLRB 19 (1978).

#### ORDER

Having found that Respondent Employer and Respondent Union have engaged in certain unfair labor practices, I will order that they cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

A. Respondent Everport Terminal Services, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees and/or prospective employees that it has a hiring plan to limit the number of employees hired from one union, in favor of another union.

(b) Telling employees and/or prospective employees that it cannot hire them because of obligations to ILWU or any other unlawfully recognized union.

(c) Dominating, interfering with, or contributing support to ILWU or any other labor organization.

(d) Refusing to hire bargaining unit employees of MTC and MMTS, the predecessor employers, because of their union-representation status in the predecessors’ operation, or otherwise discriminating against employees to avoid having to recognize Charging Parties International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1546 and Lodge 1414, AFL–CIO.

(e) Refusing to bargain in good faith with the Charging Parties as the exclusive collective-bargaining representative of its employees in the following appropriate units:

i. Maintenance and repair unit previously employed by MTC

All employees performing work described and covered by Section 1 of the collective-bargaining agreement between MTC and the IAM effective by its terms for the period July 1, 2011 to June 30, 2016; excluding all other employees, guards, and supervisors as defined in the Act.

ii. Crane maintenance and repair unit previously employed by MMTS:

All employees performing work described in and covered by Section 1.4 of the collective-bargaining agreement between MMTS and the IAM effective by its terms for the period June 2, 2015 to May 31, 2016; excluding all other employees, guards and supervisors as defined in the Act.

(f) Withdrawing recognition from the Machinists as the exclusive collective-bargaining representative of the unit employees.

(g) Granting assistance to International Longshore and Warehouse Union (Respondent ILWU) and recognizing it as the exclusive collective-bargaining representative of the unit employees at a time when Respondent ILWU did not represent an unassisted and uncoerced majority of the employees in the unit, and when the Machinists was the exclusive collective-bargaining representative of unit employees.

(h) Unilaterally changing wages, hours, and other conditions of employment without bargaining about these changes with the Charging Parties.

(i) Applying the terms and conditions of employment of the PMA–ILWU collective-bargaining agreement (PCLCD) to the unit employees, including its union-security and hiring hall provisions, and any extension, renewal, or modification thereof, to the unit employees.

(j) Unilaterally discharging unit employees without first notifying the Machinists and giving it a meaningful opportunity to bargain regarding the decision to discharge unit employees.

(k) Bypassing the Machinists and directly offering unit employees continued employment in the unit on the basis of terms and conditions of employment different from those enjoyed under predecessor employers MTC and MMTS on the condition that they be represented by Respondent ILWU.

(l) Changing the terms and conditions of employment of the unit employees without first notifying the Machinists and giving it an opportunity to bargain.

<sup>65</sup> Everport is not a recidivist and a broad order is not warranted.

(m) Discriminating against unit employees in regard to their hire and tenure of employment in order to encourage membership in ILWU.

(n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Withdraw and withhold recognition from ILWU and ILWU Local 10 as the collective-bargaining representatives of unit employees unless and until ILWU has been certified by the Board as the collective-bargaining representative.

(b) Refrain from applying the terms and conditions of employment of the PMA–ILWU Agreement (PCLCD) with ILWU and ILWU Local 10, including its union-security and hiring hall provisions, to the unit employees, unless and until that labor organization has been certified by the National Labor Relations Board as the exclusive representative of those employees.

(c) The unit employees affected are: Kevin Bono; James Bouslog; Timothy Burns; Patrick Fenisey; Tye Gladwell; Preston Humphrey; Wade Humphrey; Steven Likos; George Lingenfelter; John McDaniel; Michael Meister; Matthew Polce; Juan Salas; Steven Sanders; Jack Sutton Jr.; Jack Sutton Sr.; Brandon Tavares; Matthew Tavares; James Anthon; Dean E. Compton; Guilherme “Gil” Freitas; Raymond MacDonald; Nenad Milokjovic; and, Brian Tilley.

(d) Jointly and severally with ILWU, reimburse all unit employees for all initiation fees, dues and other moneys paid by them or withheld from their wages pursuant to the PMA–ILWU Agreement (PCLCD), with interest.

(e) Notify the Machinists in writing of all changes made to the unit employees’ terms and conditions of employment on or after December 4, 2015, and, on request of the Machinists, rescind any or all unlawfully imposed changes and restore terms and conditions of employment retroactively to December 4, 2015.

(f) Make the unit employees whole for any losses sustained due to the unlawfully imposed changes in wages, hours, benefits and other terms and conditions of employment set forth in the Remedy section of this decision.

(g) Make whole all unit employees discharged since December 4, 2015, for any loss of earnings and other benefits suffered as a result of Everport’s unlawful failure to hire, in the manner set forth in the Remedy section of this decision, plus reasonable search-for-work and interim employment expenses.

(h) Make whole the mechanics for any loss of earnings and other benefits suffered as a result of Everport’s unlawful failure to hire, in the manner set forth in the Remedy section of this decision, plus reasonable search-for-work and interim employment expenses.

(i) Compensate the unit employees for any adverse income tax consequences of receiving their backpay in one lump sum, and file with the Regional Director for Region 32, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the back pay award to the appropriate calendar year(s).

(j) Within 14 days from the date of this Order, remove from its files any references to the unlawful failure to hire, and within

3 days thereafter, notify the affected employees in writing that this has been done and that the unlawful discharges will not be used against them in any way.

(k) Within 14 days of the date of this Order, offer employment to the following named former unit employees of the predecessors, and any other similarly situated employees who would have been employed by Respondent Everport but for the unlawful discrimination against them, in their former positions, or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their place. The employees are: Kevin Bono; James Bouslog; Timothy Burns; Patrick Fenisey; Tye Gladwell; Preston Humphrey; Wade Humphrey; Steven Likos; George Lingenfelter; John McDaniel; Michael Meister; Matthew Polce; Juan Salas; Steven Sanders; Jack Sutton Jr.; Jack Sutton Sr.; Brandon Tavares; Matthew Tavares; James Anthon; Dean E. Compton; Guilherme “Gil” Freitas; Raymond MacDonald; Nenad Milokjovic; and, Brian Tilley.

(l) Recognize and, on request, bargain with Machinists District Lodge 190, Local Lodge 1414, and District Lodge 190, affiliated with the International Association of Machinists and Aerospace Workers, AFL–CIO (the Machinists) as the joint bargaining representative of the unit employees with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed agreement:

i. Maintenance and repair unit previously employed by MTC

All employees performing work described and covered by Section 1 of the collective-bargaining agreement between MTC and the IAM effective by its terms for the period July 1, 2011 to June 30, 2016; excluding all other employees, guards, and supervisors as defined in the Act.

ii. Crane maintenance and repair unit previously employed by MMTS:

All employees performing work described in and covered by Section 1.4 of the collective-bargaining agreement between MMTS and the IAM effective by its terms for the period June 2, 2015 to May 31, 2016; excluding all other employees, guards and supervisors as defined in the Act.

(m) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stores in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(n) Within 14 days after service by the Region, post at its Nutter Terminal facilities in Oakland, California, copies of the

attached notice marked “Appendix A” and “Appendix B.”<sup>66</sup> Copies of the notice of Appendix A, on forms provided by the Regional Director for Region 32, after being signed by the authorized representative for Everport, shall be posted by Everport and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an internet or an internet site, or other electronic means, if Everport customarily communicates with its employees by such means. Reasonable steps shall be taken by Everport to ensure that the notices are not altered, defaced, or covered by any other material. If Everport has gone out of business or closed the facility involved in this proceeding, Everport shall duplicate and mail, at its own expense, a copy of the notice to all current and former unit employees employed by Everport at its Oakland, California terminal at any time since December 4, 2015.

(o) Within 14 days after service by the Region, hold a meeting or meetings during working hours at the Terminal, which will be scheduled to ensure the widest possible attendance of unit employees, at which time the attached notice marked “Appendix A” is to be read to its employees by Vice President Randy Leonard in the presence of a Board agent.

(p) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certificate of responsible officials on a form provided by the Region attesting to the steps that Respondent Everport has taken to comply.

B. Respondent International Longshoremen Workers Union, its officers, agents, and representatives, shall

1. Cease and desist from:

(a) Accepting assistance and recognition from Respondent Everport Transport Services, Inc., as the exclusive collective bargaining representative of unit employees at a time when ILWU did not represent an uncoerced majority of the employees in the units and when the Machinists were the exclusive collective-bargaining representative of the employees in the units.

(b) Maintaining and enforcing the PMA–ILWU Agreement (PCLCD), or any extension, renewal, or modification thereof, including its union-security and hiring hall provisions, so as to cover the unit employees, unless and until ILWU has been certified by the National Labor Relations Board as the collective-bargaining representative of those employees.

(c) Attempting to cause Everport, or any other employer, to deny employment to or otherwise discriminate against employees who have not been dispatched through the Joint Dispatch Hall.

(d) In any manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the purposes and policies of the Act:

(a) Decline recognition as the exclusive collective bargaining

representative of employees in the following units, unless and until ILWU has been certified by the National Labor Relations Board as the exclusive representative of those employees.

i. Maintenance and repair unit previously employed by MTC

All employees performing work described and covered by Section 1 of the collective-bargaining agreement between MTC and the Machinists effective by its terms for the period July 1, 2011 to June 30, 2016; excluding all other employees, guards, and supervisors as defined in the Act.

ii. Crane maintenance and repair unit previously employed by MMTS:

All employees performing work described in and covered by Section 1.4 of the collective-bargaining agreement between MMTS and the Machinists effective by its terms for the period June 2, 2015 to May 31, 2016; excluding all other employees, guards and supervisors as defined in the Act.

(b) Jointly and severally with Everport, reimburse all present and former unit employees for all initiation fees, dues and other moneys paid by them or withheld from their wages pursuant to the PMA–ILWU Agreement, with interest.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director for Region 32 may allow for good cause shown, provide at a reasonable place designed by the Board or its agent all records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount due under the terms of this Order.

(d) Within 14 days after service by the Region, post at all of its offices and meeting halls copies of the attached notice marked “Appendix B.”<sup>67</sup> Copies of the notice for Appendix B, on forms provided by the Regional Director for Region 32, after being signed by Respondent ILWU’s authorized representative, shall be posted by Respondent ILWU and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, or other electronic means, if Respondent ILWU customarily communicates with its members by such means. Reasonable steps shall be taken by Respondent ILWU to ensure that the notices are not altered, defaced, or covered by other material. In addition, ILWU will post and maintain its notice for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted, at Everport.

(e) Within 14 days after service by the Region, post at the same places and under the same condition as in the preceding subparagraph signed copies of Respondent Everport’s notice to employees marked “Appendix A.”

(f) Within 14 days after service by the Region, hold a meeting or meetings during working hours at the Ben E. Nutter Terminal,

<sup>66</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

<sup>67</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

which will be scheduled to ensure the widest possible attendance of unit employees, at which time the attached notice marked "Appendix B" is to be read to Everport mechanics by the ILWU President in the presence of a Board agent and a representative of the Machinists. In addition, within 14 days after service by the Region, hold a meeting or meetings at the Local 10 union hall, which will be scheduled to ensure the widest possible attendance of members, at which time the attached notice marked "Appendix B" is to be read to its member by the ILWU President in the presence of a Board agent.

(g) Furnish the Regional Director with signed copies of Respondent ILWU's notice to members and employees marked "Appendix B" for posting by Respondent Everport at its facility where notices to employees are customarily posted. Copies of the notice, to be furnished by the Regional Director, shall be signed and returned to the Regional Director promptly.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that Respondent ILWU has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found herein.

Dated Washington, D.C. July 27, 2018

#### APPENDIX A

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us 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 tell you that we require you to be represented by the International Longshoremens and Warehousemen Union (ILWU) in order to be employed by us.

WE WILL NOT tell you that we are hiring only a specific percentage of non-ILWU-represented employees in order to hire a majority of ILWU-represented employees.

WE WILL NOT tell you that we require you to accept the wages, hours and terms and conditions of the collective-bargaining agreement pursuant to the PMA-ILWU Agreement (PCLCD) in order to be employed by us.

WE WILL NOT fail and refuse to bargain with International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1546, AFL-CIO and International Association of Machinists and Aerospace Workers, District Lodge 190, Lodge Local 1414, AFL-CIO (the Machinists) as your exclusive

collective-bargaining representative.

WE WILL NOT grant assistance to ILWU or recognize it as your exclusive collective-bargaining representative at a time when ILWU does not represent an unassisted and uncoerced majority of the employees in the Unit.

WE WILL NOT discriminate against you regarding your hire or tenure of employment in order to encourage membership in ILWU or discriminate against the Machinists or any other union.

WE WILL NOT engage in discriminatory hiring to avoid recognizing the Machinists or any other union in order to recognize ILWU.

WE WILL NOT apply the terms and condition of employment pursuant to the PMA-ILWU Agreement (PCLCD), or any extensions, renewals, or modifications of that agreement, including its union-security, to you at a time when ILWU does not represent an unassisted an uncoerced majority of employees in the unit.

WE WILL NOT change your terms and conditions of employment without first notifying the Machinists and giving it a meaningful opportunity to bargain.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL withdraw and withhold all recognition from ILWU as your exclusive collective-bargaining representative, unless and until ILWU has been certified by the National Labor Relations Board as your exclusive collective-bargaining representative.

WE WILL refrain from applying to you the terms and conditions of employment of the PMA-ILWU Agreement (PCLCD) collective-bargaining agreement, including its union-security and Herman/Flynn provisions, unless and until ILWU has been certified by the National Labor Relations Board as your exclusive representative.

WE WILL restore your terms and conditions of employment that existed prior to our unlawful recognition of ILWU.

WE WILL, jointly and severally with ILWU, reimburse you for all initiation fees, dues and other moneys paid by you or withheld from your wages pursuant to the PMA-ILWU Agreement (PCLCD), with interest.

WE WILL recognize and, on request bargain at reasonable times and places and in good faith with the Machinists as the exclusive bargaining representative of our employees in the following appropriate units concerned wages, hours and other terms and conditions of employment, and if an understanding is reached, embody the understanding in signed agreements:

Maintenance and repair unit previously employed by MTC

All employees performing work described and covered by Section 1 of the collective-bargaining agreement between MTC and the IAM effective by its terms for the period July 1, 2011 to June 30, 2016; excluding all other employees, guards, and supervisors as defined in the Act.

Crane maintenance and repair unit previously employed by MMTS

All employees performing work described in and covered by Section 1.4 of the collective-bargaining agreement between MMTS and the IAM effective by its terms for the period June

EVERPORT TERMINAL SERVICES, INC.

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2, 2015 to May 31, 2016; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL notify the Machinists in writing of any changes made to your terms and conditions of employment on or after December 4, 2015, and, on request of the Machinists, WE WILL rescind any or all changes and restore your terms and conditions of employment retroactively to December 4, 2015.

WE WILL make you whole, with interest for any losses sustained due to our unlawfully imposed changes in wages, hours, benefits and other terms and conditions of employment. The employees to be made whole are: Kevin Bono; James Bouslog; Timothy Burns; Patrick Fenisey; Tye Gladwell; Preston Humphrey; Wade Humphrey; Steven Likos; George Lingenfelter; John McDaniel; Michael Meister; Matthew Polce; Juan Salas; Steven Sanders; Jack Sutton Jr.; Jack Sutton Sr.; Brandon Tavares; Matthew Tavares; James Anthon; Dean E. Compton; Guilherme "Gil" Freitas; Raymond MacDonald; Nenad Milokjkovic; and, Brian Tilley.

WE WILL, within 14 days from the date of the Board's Order, offer the following employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. The employees are: Kevin Bono; James Bouslog; Timothy Burns; Patrick Fenisey; Tye Gladwell; Preston Humphrey; Wade Humphrey; Steven Likos; George Lingenfelter; John McDaniel; Michael Meister; Matthew Polce; Juan Salas; Steven Sanders; Jack Sutton Jr.; Jack Sutton Sr.; Brandon Tavares; Matthew Tavares; James Anthon; Dean E. Compton; Guilherme "Gil" Freitas; Raymond MacDonald; Nenad Milokjkovic; and, Brian Tilley.

WE WILL compensate unit employees, as stated above, for any adverse income tax consequences of receiving their backpay in one lump sum, and WE WILL file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful failure to hire predecessors' unit employees and WE WILL, within 3 days thereafter, notify the affected employees in writing that this has been done and that we will not use the unlawful discharges against them in any way.

EVERPORT TERMINAL SERVICES, INC.

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/32-CA-172286> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



#### APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us 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 accept assistance or recognition from Everport Terminal Services, Inc. as your exclusive collective-bargaining representative at a time when we do not represent an uncoerced majority of employees in your unit.

WE WILL NOT maintain or enforce our collective-bargaining agreement pursuant to the PMA-ILWU Agreement (PCLCD) or any extensions, renewals, or modifications of that agreement, including its union-security and hiring hall provisions, so as to cover you, unless and until we have been certified by the National Labor Relations Board as your collective-bargaining representative.

WE WILL NOT in any other manner restrain or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL decline recognition as the exclusive collective-bargaining representative of Everport employees in the following units, unless and until we have been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees:

Maintenance and repair unit previously employed by MTC

All employees performing work described and covered by Section 1 of the collective-bargaining agreement between MTC and the IAM effective by its terms for the period July 1, 2011 to June 30, 2016; excluding all other employees, guards, and supervisors as defined in the Act.

Crane maintenance and repair unit previously employed by MMTS

All employees performing work described in and covered by

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Section 1.4 of the collective-bargaining agreement between MMTS and the IAM effective by its terms for the period June 2, 2015 to May 31, 2016; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL, jointly and severally with Respondent Everport, reimburse all present and former employees in the units described above for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA-ILWU Agreement, with interest.

## INTERNATIONAL LONGSHORE AND WAREHOUSE UNION

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/32-CA-172286> or by using the QR code below. Alternatively, you can obtain a copy of the decision

from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

