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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

REGION 32

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION (PACIFIC CRANE
MAINTENANCE COMPANY, INC.),

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 190, LOCAL
LODGE 1546 and DISTRICT LODGE 160.

Case 32-CB-005932

RESPONSE TO ILWU NOTICE

The ILWU filed a Notice with the Board on November 24, 2020 entitled “Respondent ILWU Notice re: Exceptions Briefing Complete.”

To date, the Board has not decided the Motion to Strike the ILWU’s exceptions which the Charging Parties filed. We understood that the October 6, 2020 Order denied the Motion for Reconsideration. Charging Parties fully anticipate that the Board upon consideration will find that the exceptions and/or the cross-exceptions were untimely. Indeed that issue is also preserved for Court of Appeals if necessary.

The Board has before it nonetheless, all of the relevant arguments. The Decision of the Administrative Law Judge is complete, thorough and correct.

The General Counsel moreover filed an extensive brief to the Administrative Law Judge, a copy of which is attached to this response.

The Charging Parties request that the Board promptly decide this case. It should either strike the exception/cross-exceptions as being late and/or fully affirm the decision of the Administrative Law Judge. In addition, the Board should grant the cross-exceptions filed by the Charging Parties.

This case is now almost 16 years old. Several workers who will benefit have died. The ILWU will undoubtedly appeal further to delay since it is facing bankruptcy in light of the ICTSI litigation in Oregon. This case should be resolved nonetheless.

Dated: December 7, 2020

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

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EXHIBIT A

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

**INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION (PACIFIC CRANE
MAINTENANCE COMPANY, INC.)**

and

Case 32-CB-005932

**INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 190, LOCAL
LODGE 1546, AND LOCAL LODGE 160**

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF
SECOND AMENDED COMPLIANCE SPECIFICATION**

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I. INTRODUCTION

Respondent International Longshore and Warehouse Union's (Respondent ILWU) violated the National Labor Relations Act by accepting recognition of bargaining unit employees at the Ports of Oakland and Tacoma, for which it did not represent an uncoerced and unassisted majority, and by continuing to unlawfully impose its union security clause upon any employee performing bargaining unit work. (GC Exh. 1(a); *Pacific Crane Maintenance Co.*, 359 NLRB 1206, 1220-1221 (2013)(reversed on other grounds); *PCMC/Pacific Crane Maintenance Co., Inc.*, 362 NLRB 988, 991 (2015)). By its unlawful conduct, Respondent ILWU is jointly and severally liable for the disgorgement of dues paid by the employees originally represented by the Charging Party Machinists Union, and by those performing the work originally represented by the Charging Party Machinists Union. (GC. 1(a); *PCMC/Pacific Crane Maintenance Company, Inc.*, 362 NLRB 988 (2015)). In this case, joint and several liability for the reimbursement of unlawfully collected dues, fees and assessments, means that regardless of whether the unlawful conduct was directly attributed to Respondent ILWU or the involved employer, Respondent ILWU's liability attaches to the original workers as individuals wherever they go, and attaches to the individuals performing the original bargaining unit work going forward. While the involved employers in this case settled with the Charging Party Machinists Union to resolve their liability years ago, Respondent ILWU cannot now cloak itself in in those settlements to offset its liability, as the parties explicitly excluded Respondent ILWU and specifically excluded payment for Respondent ILWU's unlawful collection of dues, fees and assessments.

As will be shown, General Counsel has met her burden to set forth a reasonable and dispassionate formula to measure Respondent ILWU's ill-gotten gains, and return those proceeds to the 130 discriminatees in this case. Respondent ILWU has failed to meet its burden by

countering with an unreasonable, and indeed unprecedented, formula to dramatically diminish its liability. Respondent ILWU's failed arguments must be rejected, and General Counsel's reasonable formula must be adopted.

On June 24, 2013, the Board overturned the administrative law judge's decision and ordered Respondent ILWU jointly and severally liable for the reimbursement of dues, fees and assessments resulting from the unlawful acceptance of recognition of the bargaining unit at issue. *PCMC/Pacific Crane Maintenance Co., Inc.*, 359 NLRB 1206 (2013)(reversed on other grounds). The 2013 Board decision was vacated on account of the U.S. Supreme Court's decision in *NLRB v. Noel Canning*, 573 U.S. 513 (2014). Thereafter, on June 17, 2015, the Board adopted the 2013 Board's reasoning and Ordered the same remedy.¹ *PCMC/Pacific Crane Maintenance Co., Inc.*, 362 NLRB 988 (2015).

Respondent ILWU directly engaged in two unfair labor practices: The first is the unlawful acceptance of recognition of bargaining unit members heretofore represented by Charging Party Machinists Union, for which it did not "represent an unassisted and uncoerced majority of" workers²; the second is the unlawful maintenance and enforcement of the PMA-ILWU collective-bargaining agreement, including its union-security provisions, upon workers performing bargaining unit work previously belonging to the Charging Party Machinists Union.³ *Pacific*

¹ "We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order only to the extent consistent with the Decision and Order reported at 359 NLRB 1206 which is incorporated herein by reference." *PCMC/Pacific Crane Maintenance Company, Inc.*, 362 NLRB 988 (2015).

² *PCMC/Pacific Crane Maintenance Co., Inc.*, 362 NLRB at 991.

³ The Board's Order reads, in relevant part:

B. The Respondent Union, International Longshore and Warehouse Union, Oakland, California, and Tacoma, Washington, its officers, agents, and representatives, shall

1. Cease and desist from

Crane Maintenance Company, Inc., 362 NLRB 988, 993 (2015). In this regard, Respondent ILWU’s liability derives in the first instance from its treatment of the original bargaining unit (unlawfully accepting recognition of “All employees performing work described in and covered by “Article 1, Section 2. Work Jurisdiction”⁴ of the Charging Party Machinists Union’s CBA), and

-
- (a) ***Accepting assistance and recognition*** from Respondent Pacific Crane Maintenance Company, Inc. or its successor Pacific Crane Maintenance Company, LP (collectively PCMC) as the exclusive collective bargaining representative ***of the employees in the unit described below (the unit) at a time when the Respondent Union did not represent an uncoerced majority of the employees in the unit***, and when the Machinists District Lodge 190, Local Lodge 1546, and Machinists District Lodge 160, affiliated with International Association of Machinists and Aerospace Workers, AFL–CIO (collectively the Machinists) was the exclusive collective bargaining representative of the employees in that unit:

All employees performing work described in and covered by “Article 1, Section 2. Work Jurisdiction” of the April 1, 2002 through March 31, 2005 collective bargaining agreement between the [Machinists and Pacific Marine Maintenance Company, LLC (PMMC)] . . .; excluding all other employees, guards, and supervisors as defined in the Act.

- (b) ***Maintaining and enforcing the PMA-ILWU Agreement***, or any extension, renewal, or modification thereof, ***including its union-security provisions, so as to cover the unit employees***, unless and until it has been certified by the Board as the collective-bargaining representative of those employees.
- (c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Pacific Crane Maintenance Company, Inc., 362 NLRB 988, 993 (2015)(Emphasis added). Note that the bargaining unit description cited by the Board can be found in the Charging Party Machinists Union 2005-2005 CBA, which is located in this Record as Respondent Exhibit 13.

⁴ Under the Charging Party Machinists Union 2002-2005 CBA with PCMC, Article 1, Section 2, reads in pertinent part: “This Agreement shall cover... terminal maintenance... as presently and hereby after being performed by employees represented by the Union. *This Agreement shall apply to all facilities and operations where the Employer does business and has commercial control.*” (R. Exh. 13)(Emphasis added).

in the second instance, in Respondent ILWU's enforcement of its own CBA on workers performing the original bargaining unit work.⁵

Respondent ILWU is indirectly liable for unfair labor practices committed by the employer. Specifically, the Board found the employer engaged in unlawful conduct when it, *inter alia*, “(assigned) unit employees to nonunit positions and locations,” and “(assigned) nonunit employees to perform unit work,” for which the employer was ordered to, “(j)ointly and severally with the 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, with interest.” *PCMC/Pacific Crane Maintenance Co., Inc.*, 362 NLRB 991, 992 (emphasis added). As such, on June 17, 2005, the Board issued the following remedial Order:

[T]he Respondent Employer and the Respondent Union will be ordered jointly and severally to reimburse all present and former unit employees who joined the Respondent Union on or since March 31, 2005, for any initiation fees, periodic dues, assessments, or any other moneys they may have paid or that may have been withheld from their pay pursuant to the PMA-ILWU Agreement, together with interest...[.]

⁵ Respondent ILWU's successive collective-bargaining agreements with the Pacific Maritime Association contained the following Union Security provision, in pertinent part:

All present fully registered employees who are members of the Union on the date of execution of the Agreement, shall remain members of the Union in good standing as a condition of employment;... All present fully registered employees who are not members of the Union on the date of execution of the Agreement shall become and remain members in good standing of the Union as a condition of employment;... Any employee who becomes fully registered during the life of the Agreement shall, 30 days thereafter, become and remain a member of the Union in good standing as a condition of employment;... A fully registered employee who, 30 days after said registration, has failed to acquire or thereafter maintain membership in the Union as here provided shall be removed from the registration list and deregistered 30 days after notice from the Union that he is not a member in good standing;... A Union member shall be considered in good standing if he makes timely tender of the periodic dues, and initiation fees uniformly required as a condition of becoming and remaining a member in the Union. (R. Exh. 9, 10, 11).

Id. at 989. In so ordering, the Board specifically acknowledged the singular position of bargaining unit members who were transferred away from their work locations at the original bargaining unit terminals, finding that the employer unlawfully “(assigned) unit employees to *nonunit positions and locations*(.)” *Id.* at 991 (emphasis added).

Indeed, the transfer of bargaining unit members would not have occurred in the absence of the unfair labor practice scheme perpetrated by both the employer and Respondent ILWU. In this regard, the Board’s 2013 decision, adopted by the 2015 Board⁶, details the “lean staffing model” utilized by employer PCMC and supported by Respondent ILWU. The Board found:

Under its lean staffing model, PCMC maintained steady employee complement at each of its terminal operations that were just large enough to perform the (maintenance and repair) work at the terminal during slack periods. (Footnote omitted). It temporarily expanded its work force during periods of heightened workload *by transferring mechanics from other terminals* and using the ILWU hiring hall. Commencing on March 31, PCMC *assigned unit employees nonunit work and nonunit employees unit work, in accordance with its lean staffing model.* (Footnote 11).

Pacific Crane Maintenance Co., Inc., 259 NLRB 1206, 1208 (2013)(Emphasis added)(noting at Footnote 11, “In contrast, while working for PPMC, *unit employees performed unit work at a single terminal (Oakland or Tacoma) with a stable work force* composed of other unit employees who were *permanently assigned* to the same terminal.”).

Respondent ILWU continued to collect dues, fees and assessments from the bargaining unit employees who were transferred away from the original bargaining unit terminals to other terminals represented by Respondent ILWU. (R. Exh. 1 “PCMC all shifts all dues by year (10112,

⁶ On June 17, 2015, the Board reviewed Administrative Judge Anderson’s Decision *de novo* and issued the Order *sub judice* in which it reached the same conclusions it had reached in its 2013 decision. *Pacific Crane Maintenance Co., Inc. &/or Pacific Marine Maintenance Co., LLC*, 362 NLRB No. 120, 2015 WL 3791632 (June 17, 2015) (*PCMC/PPMC II*).

10114, 10130),” “PCMC all shifts all dues by year (10131),” “PCMC all shifts all dues by year (30228)”). Thus, regardless of *where* they performed work, Respondent ILWU’s collection of these monies was part and parcel of the panoply and scheme of unfair labor practices committed by the employer and Respondent ILWU for which the Board’s Order requires a make whole remedy.

Respondent ILWU filed a Petition for Review of the Board’s decision with the District of Columbia Circuit Court of Appeals. On May 29, 2018, D.C. Circuit Court denied Respondent ILWU’s petition and granted the Board’s cross-application for enforcement. *International Longshore and Warehouse Union*, 890 F.3d 1100 (D.C. Cir. 2018). On July 24, 2018, the same Court issued a mandate on July 24, 2018, enforcing the full provisions of the Board’s 2015 Decision and Order. (GC Exh. 1(e)). In arriving at its decision, the Court addressed the fundamental statutory basis for Respondent ILWU’s liability:

A union violates section 8(b)(1)(A) by exercising exclusive bargaining authority when it does not, in fact, have the support of an uncoerced majority of the employees in the relevant bargaining unit. *Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731, 733 (1961) (applying 29 U.S.C. § 158(b)(1)(A)). Section 8(b)(2) prohibits a union from causing or attempting to cause “an employer to discriminate against an employee” by requiring the employee to adhere to a union-security clause imposed on behalf of a union that does not represent a majority of the employees in the appropriate bargaining unit. 29 U.S.C. § 158(b)(2); *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 413-14 (1960). The purpose of both provisions is clear: neither an employer nor a union may unilaterally override the employees’ organizational rights, including the right to select bargaining representatives of their choosing. See 29 U.S.C. § 157; see also *Radio Officers’ Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 40 (1954).

International Longshore and Warehouse Union, 890 F.3d 1100, 1108 (D.C. Cir. 2018).

The Court explained succinctly that a single CBA, the Pacific Coast Longshore and Clerks Agreement (PCL&CA), binds both Respondent ILWU and the employer organization Pacific

Maritime Association (PMA), of which PCMC was one of many employer-members. Under the PCL&CA, the Court explained, Respondent ILWU and the PMA have an established dispatch system that relies on a series of union halls that match employees to employers on a flexible basis, allowing labor to transfer between terminals on an as-needed basis. By working under the rules of the PCL&CA, both Respondent ILWU and the PMA member-employers work in sync, allowing PCMC to operate a “lean staffing model.” *Id.* at 1104-05.

In light of the foregoing, the Court’s findings establish that Respondent ILWU was an active participant in the operation of this “lean staffing model” system, which, when applied to the facts of the instant case, demonstrated Respondent ILWU’s unequivocal role in the unfair labor practices giving rise to this litigation. The Court stated:

PCMC’s “lean staffing model” is tied to its membership in the PMA and the PMA’s CBA with [Respondent ILWU] ILWU’s West Coast-wide bargaining unit. *If PCMC had not recognized ILWU as the union representing the former PMMC employees, it would not have had access to the hiring hall or the flexible transfer policies of the PCL&CA.*

Id. at 1110 (emphasis added).

Finally, it must be noted the D.C. Circuit Court specifically declined to address any matters not raised by Respondent ILWU in its Petition for Review, stating:

Under section 10(e), we cannot modify the relief granted absent “extraordinary circumstances.” See *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961) (“[I]n the absence of a showing within the statutory exception of ‘extraordinary circumstances’ the failure or neglect of the respondent to urge an objection in the Board’s proceedings forecloses judicial consideration of the objection in enforcement proceedings.”). Finding nothing “extraordinary” about ILWU’s unexcused failure to raise its arguments before the Board, we conclude that ILWU’s remedial challenge is not properly before us and we decline to address it.

Id. at 1113.

Cognizant of such constraints, here too, the Administrative Law Judge must eschew any arguments raised by Respondent ILWU in its Answers, Brief, and record evidence that seek to modify the terms of relief ordered by the Board that were not raised in its Petition for Review with the Court. Specifically, in that filing, Respondent raised three issues: first, Respondent ILWU argued that the Board erred in concluding that the employer was obligated to bargain with the Charging Party Machinists Union over its decision to shutter PPMC and terminate its workforce; second, Respondent ILWU argued that the Board improperly excluded certain evidence that the maintenance and repair employees merged by accretion into the Respondent ILWU West Coast-wide employee bargaining unit; and third, Respondent ILWU disputed the propriety of the Board remedy. Regarding this third argument, Respondent ILWU specifically and solely argued that because the employer's intervening settlement agreement with the Charging Party Machinists Union granted a payout to each discriminatee of the original bargaining unit, any further payment required by the Board's remedy provided an impermissible windfall to the employees should Respondent ILWU also be held to account. In this regard, Respondent ILWU's *only* challenge to the propriety of the Board's remedy was based on its claim to an offset by the intervening settlement agreements. Thus, any claim now by Respondent ILWU that its liability is tethered to only one unfair labor practice, as it asserts in its Answer,⁷ or that it has no liability despite a finding of joint and several liability,⁸ or that the Board order does not include certain obviously included

⁷ See Respondent's Answer to Second Amended Compliance Specification, at GC Exh. 1(z)(para 1(B), page 2)("...the only unfair labor practice to be remedies is ILWU's acceptance of recognition of PCMC's employees... at APMT terminals.")

⁸ See Respondent's Answer to Second Amended Compliance Specification, at GC Exh. 1(z)(para 1(B), page 2)("...the Board did not determine that ILWU had any role in transferring employees to different terminals or employers, and rather the Board determined that the Respondent Employer PCMC *alone* committed an unfair labor practice by assigning unit employees to nonunit positions and locations and by assigning nonunit employees to perform unit work.") (emphasis in original).

employees⁹, are not attacks on the accuracy or reasonableness of General Counsel's formula suitable for a compliance hearing, but instead are attacks on the very Board Decision and Order affirmed by the D.C. Circuit Court, that are now precluded by Respondent ILWU's failure to raise them before the D.C. Circuit Court. As such, Respondent ILWU's arguments must be treated as the impermissible arguments that they are and must be rejected wholesale.

Respondent ILWU may wish to challenge General Counsel's formula, but it cannot wish away the explicit findings of liability and Board-ordered remedies that Respondent ILWU must answer for. But that is what Respondent ILWU appears to do here. In this regard, Respondent ILWU raises many arguments in its Answer, but it fails to meet its burden by advancing unreasonable measures that run contrary to the Board's findings and Order. Respondent ILWU seeks to slash its liability by arguing that any remedy be limited to only those historical unit employees who continued performing bargaining unit work at the original bargaining unit terminals, thereby excluding any historical unit employees who were transferred away as a function of the "lean staffing model" enabled through Respondent ILWU's halls and as a direct result of Respondent ILWU's unlawful acceptance of recognition. Respondent ILWU further seeks to reduce its liability by arguing that employees must have worked a minimum number of consecutive shifts to qualify for reimbursement as "steady mechanics" at the original bargaining unit terminals. Respondent ILWU further seeks to trim its liability by arguing that the period between the ALJ Decision and the Board's Order reversing that decision, must be tolled for

⁹ See Respondent's Answer to Second Amended Compliance Specification, at GC Exh. 1(z)(para 1(A)(ii), page 9)("... Individuals who were not steadily employed as... 'steady mechanics' ... by PCMC at the APMT terminals in Oakland, California, and Tacoma, Washington, are not part of the unit employees entitled to reimbursement... Individuals who occasionally worked as mechanics, worked for short periods of time as mechanics, or periodically took mechanic shifts... were not part of the unit at issue.")

reimbursement and interest, somehow *sui generis*, and that this period bookends the Oakland reimbursement period, and cuts a swath of years out from the reimbursement period for Tacoma. Respondent ILWU attempts to narrow its liability for fees paid during the reimbursement period, as required by the Board Order, by limiting reimbursement to only those fees paid by employees who worked as “steady mechanics” at the original bargaining unit terminals. Respondent ILWU further seeks to reduce its liability by asserting an offset for unpaid dues, fees, and assessments, without providing a scintilla of evidence showing any one of the 130 discriminatees are in arrears. Finally, Respondent ILWU seeks an opt-in procedure for discriminatees to receive their reimbursements, a mechanism that would have the obvious and surely anticipated effect of disenfranchising scores of discriminatees of their rightful reimbursements. Respondent ILWU has failed to show General Counsel’s formula is unreasonable, and instead advances a wholly unreasonable, arbitrary, and nonsensical formula that has the unsurprising effect of eliminating hundreds of thousands of dollars in liability. Respondent ILWU’s unreasonable and unprecedented measures are not designed to provide a reasonably tailored remedy, and stand in stark contrast to the reasonable, precise, and accurate calculations reached through General Counsel’s formula.

II. REIMBURSEMENT FORMULA

General Counsel issued a Compliance Specification and Notice of Hearing on August 5, 2019, an Amended Compliance Specification and Notice of Hearing on October 22, 2019, an Amendment to the Amended Compliance Specification on January 27, 2020, and a Second Amended Compliance Specification on February 12, 2020. (GC Exh. 1(h), (n), (t), and (x)). In her Specification, General Counsel has established an eligibility formula that is imminently reasonable.

A. Legal Principles.

A finding by the Board that an unfair labor practice was committed is presumptive proof that some backpay is owed. *Minette Mills, Inc.*, 316 NLRB 1009, 1010-1011 (1995); *Arlington Hotel Co.*, 287 NLRB 851, 855 (1987), *enfd. in part.* 876 F.2d 678 (8th Cir. 1989); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2nd Cir. 1965), *cert. denied*, 384 U.S. 972 (1966). As a general matter, the General Counsel ultimately bears the burden of proof in a compliance case. See e.g. *Triple A Fire Protection*, 353 NLRB No. 88 (2009). To meet her initial burden, “the General Counsel need show only that the gross backpay amounts contained in the compliance specification were reasonable and not an arbitrary approximation.” *Chem Fab Corp.*, 20 275 NLRB 21, 21 (1985), *enfd. mem.* 774 F.2d 1169 (8th Cir. 1985), citing *Performance Friction Corp.*, 335 NLRB 1117 (2001) and *Mastell Trailer Corp.*, 273 NLRB 1190, 1190 (1984). Both the Board and the Court have applied a broad standard of reasonableness in approving numerous methods of calculating gross backpay. Any formula which approximates what the discriminatees would have earned had they not been discriminated against is acceptable if not unreasonable or arbitrary in the circumstances. *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), *enfd. mem.* 48 F.3d 1232 (10th Cir. 1995). The Board is required only to adopt a formula which will give a close approximation of the amount due; it need not find the exact amount due. *NLRB v. Overseas Motors*, 818 F.2d 517, 521 (6th Cir. 1987), citing *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 452 (8th Cir. 1963). Nonetheless, the objective is to reconstruct as accurately as possible what employment and earnings the discriminatee would have had during the backpay period had there been no unlawful action. *American Mfg. Co. of Texas*, 167 NLRB 520 (1967); CHM Section 10532.1. In this regard, the General Counsel bears the initial burden of establishing a monetary remedy, while the respondent may establish affirmative defenses to reduce its liability. *International Brotherhood of*

Teamsters Local 25, 366 NLRB No. 99 (2018) citing *Millennium Maintenance & Electrical Contracting*, 344 NLRB 516, 517 (2005) and *Chem Fab Corp.*, 20 275 NLRB 21, 21 (1985), enfd. mem. 774 F.2d 1169 (8th Cir. 1985).

B. The Compliance Officer's Reimbursement Formula.

Compliance Officer Paloma Loya testified that her role as a Compliance Officer includes analyzing Board Orders, administrative law judge decisions, and settlement agreements, to determine the corresponding remedy and develop an eligibility formula for the remedy. (Tr. 29, lines 2-13). Loya contacts the relevant parties to obtain documents that will provide employment dates, pay and benefits documents, expenses or earnings information, and applies the formula to those figures to calculate a backpay or reimbursement total. (Tr. 29, lines 10-16).

In the instant case, Loya testified that she read the Board's Order, which, set forth:

[T]he Respondent Employer and the Respondent Union will be ordered jointly and severally to reimburse all present and former unit employees who joined the Respondent Union on or since March 31, 2005, for any initiation fees, periodic dues, assessments, or any other moneys they may have paid or that may have been withheld from their pay pursuant to the PMA-ILWU Agreement, together with interest...[.]

Pacific Crane Maintenance Company, Inc., 362 NLRB at 989. Loya testified that she sought documents from Respondent ILWU and the respondent employer, but received no documents initially. (Tr. 31, lines 5-25; Tr. 32, lines 1-5). As such, at least initially, she relied on the documents provided by PMA, the employer-organization that was not party to the litigation. (Tr.

32, lines 8-11).¹⁰ These documents only provided when employees registered with Respondent ILWU, when they became casuals, when they became B status members, when they became A status members, and when they retired or otherwise became inactive members. (R. Exh. 1). Months later, Loya received additional PMA documents, provided by Respondent ILWU, that showed detailed work records and dues payments. (Tr. 67, lines 12-18; Tr. 112, lines 1-12).

In all, Loya testified that for Oakland she relied on the following documents provided by PMA: PCMC Mech. Reg. History (10112, 10114, 10130) (general registration and work records); PCMC Mech. Reg. History (10131) (general registration and work records); PCMC all shifts all dues by year (10112, 10114, 10130) (detailed daily work and dues records); PCMC all shifts all dues by year (10131) (detailed daily work and dues records); TAmidon Oakland (provided daily work record and location); Respondent's Answer for dues information. (Tr. 112; lines 1-12; GC Exh. 2; GC Exh. 1(z)(Exh. B)). For Tacoma, Loya relied on: PCMC Mech. Reg. History (30228); PCMC all shifts all dues by year (30228); TAmidon Tacoma (provided daily work record and location); and Respondent's Answer Exhibit's F and B for dues information. (Tr. 113, lines 9-19; GC Exh. 2; GC Exh. 1(z)(Exh. F)).

1. "All Present and Former Unit Employees"

Loya testified that in order to determine who is eligible for reimbursement under the Board's Order and the D.C. Circuit Court Mandate, she analyzed the phrase used in the Board's Order "all present and former unit employees." (Tr. 32, line 14-24). In doing so, she reasoned

¹⁰ These documents are found in Respondent's Exhibit 1 and titled: "PCMC Mech Reg History (10112, 10114, 10130)," "PCMC Mech Reg History (10131)," and "PCMC Mech Reg History (30228)."

that this language amounts to two categories of employees: “former unit employees” is “anybody who had been employed there by the previous employer, the PMMC... those are the historical unit employees”; and the “non-historical” category is “anyone who had performed unit work after that.” (Tr. 32, line 14-24). Consistent with the Board Decision and Order, Loya conceived of two categories of employees to which liability runs: (1) The historical unit members: the individuals of the unlawfully-dissolved historic bargaining unit, irrespective of what work they now performed or where, for as long as they paid dues to Respondent ILWU; and (2) The nonhistorical unit members: the newly hired or transferred-in individuals performing the historic bargaining unit work in the historic bargaining unit work location, under Respondent ILWU’s union security clause.¹¹ In doing so, Loya calculated that there are 130 employees eligible for reimbursement as set forth in General Counsel’s Appendix A. (GC Exh. 1(x)(App. A); Tr. 40, line 10-17).

a. Historical Unit Employees.

Loya testified that she understood “former unit employees” to be “anybody who had been employed there by the previous employer, the PMMC... those are the historical unit employees.” (Tr. 32, line 14-24). She testified that the NLRB Region 32 Oakland Regional Office began compiling a list of potential discriminatees through various seniority lists that were provided by the Charging Party Machinists Union. (Tr. 149, lines 4-13). Those records were cross-checked with the PMA registration records obtained early in her investigation. (Tr. 149, lines 4-13). Loya further testified that she cross-checked that list with the Social Security Administration records

¹¹ As noted *supra*, Respondent ILWU’s collective-bargaining agreements with the Pacific Maritime Association contained a Union Security provision requiring as a condition of employment, membership in “good standing,” defined as follows: “A Union member shall be considered in good standing if he makes timely tender of the periodic dues, and initiation fees uniformly required as a condition of becoming and remaining a member in the Union.” R. Exh. 9, 10, 11.

she was able to obtain for some, but not all, employees. (Tr. 149, lines 4-13; Tr. 191, lines 18-21). As set forth in General Counsel's Appendices C (Oakland) and D (Tacoma), historical unit members are reimbursed for all shifts worked at the bargaining unit terminals *and* for shifts worked at nonbargaining unit terminals. (GC Exh. 1(x)(App. C, D). This is reflected in the columns labeled "PCMC shifts at APMT terminals," *i.e.*, bargaining unit shifts, and "Total number of shifts worked at all employers, including PCMC," *i.e.*, bargaining unit and nonbargaining unit shifts. (GC Exh. 1(x)(App. C, D). For historical unit employees transferred to those nonbargaining unit shifts, the tally of shifts in that latter column are included in the calculation of dues reimbursement for that given year. The column labeled "Months" provides the number of months that the employee is owed for dues reimbursement. This "Months" figure is merely a division of the number of *all shifts* (unit and nonunit alike) divided by 20 workdays in a given month, to translate the number of shifts into the number of months eligible for reimbursement.

i. Loya Testifies There Is No Basis to Exclude Historical Unit Employees Who Were Transferred Away from the Original Terminal.

Compliance Officer Loya testified that historical unit employees transferred to other terminals are eligible for reimbursement. (Tr. 36, line 14-17). As Loya testified,

[T]he Board order found that one of the ULPs was that members of the historical bargaining unit had been transferred to perform nonunit work and vice versa, that nonunit employees were transferred in to perform unit work because they were lumped into... a pool that the ILWU could use their hiring hall to dispatch. And that was different from their experience under PMMC, which they were permanent to these terminals. They were not transferred out. (Tr. 36, line 22-25; Tr. 37, line 1-5).

Loya further testified,

It's my view that the Board [O]rder states that since ... it's not of their own choosing that they went to these other terminals and they should be reimbursed for all that time, that work they performed regardless of which terminals they were

working on in order to be fully reimbursed, fully compensated. (Tr. 37, line 12-18).¹²

Moreover, as discussed above, the first of Respondent ILWU's unlawful conduct was accepting recognition of the bargaining unit for which it did not represent an unassisted and uncoerced majority. Therefore, Respondent ILWU's remedial liability attaches to the very people who were coerced into that membership – the historical unit. In this regard, the transfer of historical bargaining unit members to different terminals does not extinguish the harm inflicted upon them by Respondent ILWU's unlawful conduct. Nor does it extinguish Respondent ILWU's make whole liability to those workers. Thus, regardless of where those workers were transferred to, so long as Respondent ILWU continued to coercively collect dues from them, they are entitled to reimbursement.¹³

b. Non-Historical Unit Employees.

Compliance Officer Loya testified that the “non-historical” category is “anyone who had performed unit work after” PCMC took over operations from PMMC on March 31, 2005. (Tr. 32, line 14-24). The Board's Decision and Order requires a remedy for those who paid dues as a condition to performing the original bargaining unit work: First, the Board found that Respondent

¹² On cross-examination, Loya further testified that “upon rereading of the Board order, it became clear that... the historical unit employees were in a different position because the Board order found that them being transferred to perform non unit work was a ULP and reimbursement of dues would only fairly reimburse them if they're also included for the times that they had been transferred out to other facilities.” (Tr. 122, 4-12).

¹³ On cross-examination, Respondent ILWU questioned Compliance Officer Loya about whether the Board found that transfers were a violation committed by the Employer or Respondent ILWU. Loya testified that the Board's decision found the transfers to be a Section 8(a)(2) violation committed by the employer, but that “the ILWU's acceptance of that recognition and enforcing the PMA-ILWU contract on this group of employees was unlawful... that was part and parcel of the ULP... and if they weren't reimbursed for those portions, then the remedy wouldn't be fully achieved.” (Tr. 157, lines 1-9).

ILWU unlawfully exercised jurisdiction over the bargaining unit work at the original terminals by enforcing its contract over that work;¹⁴ Second, part of the overall unlawful scheme between Respondent ILWU and the employer was unlawfully “(a)ssigning unit employees to nonunit positions and locations, or *assigning nonunit employees to perform unit work*,” for which the employer was ordered to, “(j)ointly and severally with the 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, with interest.” *PCMC/Pacific Crane Maintenance Co., Inc.*, 362 NLRB 991, 992 (emphasis added). As Compliance Officer Loya testified, when nonhistorical bargaining unit employees performed bargaining unit work, Respondent ILWU’s collection of dues from those employees as a condition of performing that work is reimbursable. (Tr. 38, lines 2-4).

In contrast to historical unit employees, non-historical employees who were transferred away from the original terminals are not entitled to dues reimbursement for that time away from the original bargaining unit terminals. (Tr. 38, line 1-10). Instead, nonhistorical unit employees are only eligible for reimbursement for the time they worked at the original terminals performing bargaining unit work. As Loya testified, nonhistorical unit members were less harmed by the ULP than “the historical unit who... after... decades of employment at these terminals had no say as to where they were going to go.” (Tr. 38, line 5-10). As Loya further explained in her testimony, the Board found that “nonunit employees were transferred in to perform unit work

¹⁴ The Board ordered Respondent ILWU to cease and desist from “(m)aintaining and enforcing the PMA-ILWU Agreement, or any extension, renewal, or modification thereof, including its union-security provisions, so as to cover the unit employees...” *PCMC/Pacific Crane Maintenance Co., Inc.*, 362 NLRB 993 (emphasis added). In its Order, the Board defined “unit employees” based on the unit description in effect at the time under the Machinists’ CBA, which included employees performing “terminal maintenance” at “all facilities and operations where the Employer does business and has commercial control.” *Id.*, R. Exh. 13.

because they were lumped into... a pool that the ILWU could use their hiring hall to dispatch.” (Tr. 37, line 1-3). Thus, under Loya’s formulation of the Order, when these non-historical unit employees were transferred away, it was by virtue of the fact that they were otherwise voluntary members of Respondent ILWU, and transfers were part and parcel of their understood condition of employment. This is reflected in General Counsel’s Appendices C (Oakland) and D (Tacoma), which provides for a tally of the “PCMC shifts at APMT terminals,” or, in other words, the bargaining unit terminals. For nonhistorical unit employees, only those shifts appearing in this column factor into the reimbursement of dues for that given year. The column labeled “Months” provides the number of months that the employee is owed for dues reimbursement. This “Months” figure is merely a division of the number appearing in the column labeled “PCMC shifts at APMT terminals” (that is, *only* bargaining unit shifts) divided by 20 workdays in a given month, to translate the number of shifts into the number of months eligible for reimbursement.

i. 30-Shift Per Year Minimum Threshold for Non-Historical Employees.

As noted above, the Board Order required reimbursement for employees who performed bargaining unit work. Yet, as noted elsewhere in this Brief, employees were freely transferred from one terminal to another as part of the flexible labor pool maintained by the PMA-ILWU agreement. Thus, the most precise reimbursement measurement for dues attributed to performing bargaining unit work would require prorating the dues paid in a given month for each day that an employee worked at a bargaining unit terminal. However, such an accounting is hardly the only equitable or reasonable calculation. In this regard, taking the aggregate number of shifts worked in a given year, divided by the 20 workdays in a given month to determine what that tally equates to in terms of months, is the equivalent of adding together all the prorated daily dues owed for shifts spent performing bargaining unit work. As there is no evidence that employees were ever

allowed to pay dues in a prorated fashion, if the resulting figure was a fractional number of months, the number of months was rounded up to a whole number. As Compliance Officer Loya testified, she aggregated the number of shifts in a given year, and when that number reached 30 or more shifts, she divided that number by 20, representing the number of work days in a given month, and rounding up to give her the number of whole months, that gave her the number of months the employee was owed dues reimbursement. (Tr. 39, line 17-19; Tr. 54, line 25; Tr. 55, line 1-5). Thus, this method provides for reimbursement of dues paid that are attributable to the months spent performing bargaining unit work.

Loya further testified that she cross-referenced the resulting number of months, with the actual number of months in which employees worked. (Tr. 74, lines 16-20; Tr. 114, lines 9-13). Thus, if an employee worked about 3 months in the aggregate, she referred back to the PMA records¹⁵ that showed the daily work records to ensure that the employee did in fact work the bulk of his or her shifts in three specific months. (Tr. 114, lines 9-24). Loya further compared those figures with Respondent ILWU's dues records¹⁶ to verify whether an employee was paying disability dues for any given month of limited work, as those reduced dues payments would also be included in the reimbursement. (Tr. 115, lines 16-20).

Loya testified that she considered an eligibility formula in which one shift in a given month triggered a dues reimbursement obligation for that month regardless of how few shifts were worked during that month. (Tr. 38, lines 21-25). She testified that the Charging Party Machinists Union informed her that under the Machinists CBA with PPMC, after 30 days of employment at PPMC, an employee would be required to pay dues. (Tr. 38, line 21-25; Tr. 184, lines 17-20).

¹⁵ R. Exh. 1 (TAmidon Oakland; TAmidon Tacoma).

¹⁶ GC Exh. 1(z)(Exh. D and H).

However, having only the initial PMA records provided early in the investigation, Loya could not determine when those shifts occurred; there was no way to determine whether, for example, 12 shifts were performed a day a month for the whole year, or if these were all performed in a single month. (Tr. 184, lines 17-23). As such, Loya concluded that this metric was too expansive and the number of reimbursements “ballooned up to almost 700 employees,” which she deemed “wasn’t fully reasonable(.)” (Tr. 38, line 16-20). In this regard, as Loya testified throughout the hearing, nonhistorical unit employees were less harmed by Respondent ILWU’s unfair labor practice – its coercive collection of dues -- and in order to compensate for what harm they did suffer, mitigating factors must be accounted for. (Tr. 38, lines 5-10). And in particular, a mitigating factor for nonhistorical unit employees is that “as ILWU members, they could still go perform at other (terminals) - so they were less harmed by the ULP than the historical unit who... after... decades of employment at these terminals, they had no say as to where they were going to go.” (Tr. 38, lines 5-10). For those nonhistoric employees who worked less than 30 shifts, but more than zero shifts, at the original bargaining unit terminals in a given year, it was assumed that they, as members of Respondent ILWU, suffered less harm through their membership in Respondent ILWU. Specifically, they were part of the larger labor pool that was dispatched regularly to various terminals; their time spent performing bargaining unit work was fleeting and outweighed by their time spent performing work elsewhere. Thus, dues reimbursement to those employees starts to look more like a windfall than a make whole remedy, as the bulk of their time in any given month was performed at a nonbargaining unit terminal, work that was made available by virtue of their dues and for which no reimbursement is ordered. Compliance Officer Loya purposefully mitigated this possibility by requiring a minimum of 30 days per year to demonstrate a minimum level of regular and steady employment at the bargaining unit terminals.

Loya further testified that she gave consideration to whether those 30 days must be worked consecutively in order to qualify for reimbursement or whether some figure greater than 30 shifts were required to qualify. (Tr. 39, line 7-19). She testified that a consecutive-day requirement would disqualify too many nonhistorical unit members who otherwise showed, through their number of shifts, consistent employment. (Tr. 39, line 13-16; Tr. 184, lines 23-25; Tr. 185, lines 1-5). In this regard, Loya provided the example of an employee who may have missed a day or two due to illness, and would find him or herself suddenly disqualified from reimbursement. (Tr. 39, line 13-16). Loya concluded that a 30-day or 30-shift minimum was a “reasonable medium threshold that proves some regularity at the terminal” and constituted a compromise between a strict requirement of reimbursement for a single shift, on one extreme, and thirty consecutive shifts, on the other extreme. (Tr. 185, lines 1-5; Tr. 39, line 2-6). As such, no more and no less than 30 days is required to trigger a reimbursement requirement.

2. “Who Joined the Respondent Union on or Since March 31, 2005”

Compliance Officer Loya testified that she defined “joined” as having “applied, and become casuals, and on their way to becoming a B status” and then A status. (Tr. 196, lines 2-6; Tr. 192, lines 10-13). In determining the reimbursement start date, Loya testified that the operative date for the beginning of the period is March 31, 2005, which is the date when PPMC transitioned to PCMC. (Tr. 33, line 3-7). Through her communication with employees directly and when looking at records provided by PMA, Loya determined that members did not actually start paying dues to Respondent ILWU until they became a B class or B status member. (Tr. 31, line 24-25; Tr. 33, line 8-10). As a result, Loya’s calculations included a precise reimbursement date for each individual employee – that is, reimbursement for each eligible employee begins on the date when dues were first paid, rather than the date of the succession of operations on March 31, 2005. Loya

testified that in Oakland, employees became B status in September 2005, and in Tacoma that occurred in July 2005. (Tr. 33, 11-14). These dates are reflected in General Counsel's Appendices C (Oakland) and D (Tacoma), columns "B Status" and "A Status."

a. General Counsel Relied on PMA Records To Establish Dates of Employment.

Compliance Officer Loya testified that she relied on employment records provided by the Pacific Maritime Association (PMA), the employer-organization representing PCMC. (Tr. 42, line 11-20, 22-25; Tr. 47, lines 18-25; Tr. 48, lines 1-4). Loya testified that she used the PMA documents to obtain the number of days per month, per year, that each employee worked from March 2005 through the end of 2013 in the case of Oakland, and through 2016 in the case of Tacoma. (Tr. 49, 14-24; GC Exh. 2; R. Exh. 1). PMA is a multi-employer organization, and thus, as Loya testified, she used these records to identify which employer a given employee worked for. (Tr. 49, lines 22-25; GC Exh. 2, 3, 4; R. Exh. 1). Loya further testified that she used the PMA records to determine the job classification the employee worked in for any given shift. (Tr. 50, 50, lines 5-7).

As an example of the foregoing, Loya testified that using PMA's records, specifically the document titled "T.Amidon Oakand," she could identify that Oakland historical unit employee Nelson Ayala worked 19 shifts in December 2005, that he worked those 19 shifts for "Pacific Crane Maintenance Company, PCMC," that he worked at terminal 10114,¹⁷ and that he worked those shifts as an "ILWU mechanic." (Tr. 49, lines 14-25; Tr. 50, lines 1-12; GC Exh. 2, 4; R. Exh. 1). She testified that because Ayala is a historical unit member, she used the PMA records to

¹⁷ As previously noted, Terminal 10114 is one of the four original terminals where bargaining unit work was performed under representation of Charging Party Machinists Union; these terminals were referred to as the Maersk terminals until 2005, and the APMT terminals thereafter.

determine all shifts and all employers to determine what dates of employment are eligible for reimbursement. (Tr. 54, lines 5-7).

In contrast, Loya testified that for Oakland nonhistorical unit members, she used the PMA records to determine the number of shifts worked specifically at any of the four original terminals where bargaining unit was performed.¹⁸ As an example, Loya testified that she used the “T.Amidon Oakland” records to determine that Oakland employee Jose Amador worked 30 shifts in December 2012 at one of the original bargaining unit work terminals. (Tr. 54, lines 6-9; GC Exh 5; GC Exh. 2; R. Exh. 1). Loya testified that using these records she could see that Amador worked June through December 2012, yet cross-referenced with Respondent ILWU’s dues payment records, Loya knew that Amador “didn’t start paying dues until December 2012.” (Tr. 55, lines 5-10; GC Exh. 5). As such, Loya testified that reimbursement was only warranted for December 2012.¹⁹ (Tr. 55, lines 5-10).

As for Tacoma, Loya testified that she relied on the PMA documents titled “T.Amidon Tacoma.” (Tr. 47, lines 15-25). For nonhistorical unit employee William Ashmore, for example, Loya testified that she relied on PMA records to determine that he was eligible for dues reimbursement for the years that he worked at least 30 shifts at the original bargaining unit terminal. For nonhistorical unit employees, Loya testified that the formula is designed to “only (request) reimbursement on those years that... they meet the 30 days/shifts per year.” (Tr. 56, lines 5-13). As a result, for Ashmore, since he did not work the minimum required 30 shifts at the

¹⁸ In Tacoma, there is only one original terminal where bargaining unit was performed; again, this terminal was referred to as the Maersk terminal until 2005, and the APMT terminal thereafter.

¹⁹ On cross-examination, Compliance Officer Loya acknowledged an error in calculating Jose Amador’s 2012 reimbursement. (Tr. 171, lines 15-24). The correction was made in General Counsel’s Second Amended Compliance Specification and appendices.

original bargaining unit terminal in the year 2012, no reimbursement is required for that year. (Tr. 56, lines 5-13; GC Exh. 6; R. Exh. 1).

For Tacoma historical bargaining unit members, Loya testified that, just as in Oakland, she looked at all shifts worked while paying Respondent ILWU dues, regardless of which terminal, to determine dues reimbursement. (Tr. 57, lines 6-12). For Tacoma historical unit employee Herbert Ahlgren, for example, Loya testified that she included “every month that he had been paying dues as an ILWU mechanic journeyman, or whatever position he was working at any terminal regardless of which terminal as long as he was working and paying dues he was included on our reimbursement formula.” (Tr. 57, lines 2-11; GC Exh. 7; R. Exh. 1).

b. The Reimbursement Period Ends in June 2013 for Oakland and November 2016 for Tacoma.

Loya testified that the reimbursement end date for the Oakland and Tacoma employees corresponded with the date that the employer ceased operations at those locations. (Tr. 33, 14-17). For Oakland, that end date is June 2013, and for Tacoma that end date is November 2016. (Tr. 33, 17-19). Notably, Loya testified that while Respondent ILWU asserts that operations in Tacoma ended on November 4, 2016, she reviewed employment records provided by PMA that showed several employees continuing to perform work through the end of November 2016. (Tr. 34, line 2-7; Tr. 109, lines 9-14). Loya testified that she obtained this information from the PMA records labeled “T.Amidon Tacoma,” which were provided by Respondent ILWU. (Tr. 34, 10-12; Tr. 109, lines 9-14; R.Exh. 1 (“TAmidon Tacoma)). Specifically, and as an example, these documents shows that Tacoma historical employee Herbert Ahlgren worked 19 shifts in the month of November 2016 as an “ILWU Mech Journeyman.” (Exh. 1 (TAmidon Tacoma); GC Exh. 7. As such, Loya concluded that the reimbursement period for Tacoma must end at the end of November 2016.

c. Employees Who Joined Respondent ILWU prior to March 31, 2005 Are Not Eligible.

By the clear terms of the Board Order, employees who joined Respondent ILWU before March 31, 2005, are ineligible for reimbursement. As such, any employee who was already member of Respondent ILWU, whether Class A, Class B, or registered casuals, is ineligible for reimbursement. (GC Exh. 1(x)).

d. Compliance Officer Loya Testifies There Is No Basis For Tolling Period Between February 12, 2009 to June 17, 2015.

Loya testified that she gave due consideration to Respondent ILWU's assertion that the reimbursement period must be tolled between February 12, 2009, when Administrative Law Judge Anderson issued a decision favorable to Respondent, and June 17, 2015, when the Board decisively overturned that decision. Loya further testified, however, that after discussing this argument, it was rejected because there was simply no basis to toll the reimbursement period where "the Board Order did not exclude a time period." (Tr. 36, line 14-17). As such, Loya testified, she saw no basis of "why I would do that." (Tr. 36, line 16).

3. "For Any Initiation Fees, Periodic Dues, Assessments, or Any Other Moneys."

Compliance Officer Loya testified that she relied upon the documents and tables provide by Respondent ILWU to identify the fees, dues, and assessments imposed on the members generally, and paid by each employee individually, during the relevant time periods for the Oakland and Tacoma locals. (Tr. 40, lines 20-25; Tr. 44, lines 1-3; Tr. 46, lines 7-17; Tr. 187, lines 24-25; Tr. 188, lines 1-3). Loya testified that she set forth this undisputed fee structure for Oakland and Tacoma in Appendix B of General Counsel's Second Amended Compliance Specification. (Tr. 40, lines 20-25; Tr. 41, line 1-25). Specifically, Local 10 (Oakland) fee structure consisted of the following: B status processing fees, A status initiation fee, missed meeting fines, missed vote fines, B pro-rata fee, B disability pro rata fee, A status dues, and A status disability dues. (GC Exh.

1(x)(App. B); Tr. 41, lines 7-15). Because the reimbursement period runs over several years, from 2005 to 2013, General Counsel accepted Respondent ILWU's explanation of the increases in fees from year to year. (Tr. 40, 20-21). Certain fees remained the same, such as the missed meeting fee, the A initiation fee, among others, but still others changed nominally, such as the A status dues. Local 23 (Tacoma) fee structure consisted of the following: B status processing fee, A status initiation fee, B status dues, and A status dues. (GC Exh. 1(w), App. B, page 2 of 30; Tr. 41, lines 16-24). Again, General Counsel used Respondent ILWU's timeframe to determine the fees charged for the years 2005 to 2016. (GC Exh. 1(w), App. B, page 2 of 30; Tr. 40, 20-21).

As noted above, Compliance Officer Loya testified that she used registration records provided by the Pacific Maritime Association (PMA) to determine the date upon which each eligible employee registered as a B status or A status member of Respondent ILWU. (Tr. 42, line 11-20, 22-25; Tr. 47, lines 18-25; Tr. 48, lines 1-4; GC Exh. 1(w)(App. C.1-C.9, D.1-D.12)). The PMA records also provided Loya with the amount of payroll dues deductions made for each employee in a given year. (Tr. 43, line 8-20). Regarding the registration dates, as noted above, this is reflected in General Counsel's Appendices C (Oakland) and D (Tacoma). General Counsel's Appendices C and D also show the associated initiation fee paid during the year in which a given status was achieved under the column labeled "Initiation fee."

For nonhistorical unit employees, Loya testified that she used the PMA records to tally the number of shifts worked in a given year at the original terminals (called the Maersk terminals until 2005, and known as the APMT terminals thereafter). (Tr. 43, 21-24; Tr. 47, lines 18-25; Tr. 48, lines 1-4; GC Exh. 1(x)(App. C.1-C.9, D.1-D.12)). For employees working 30 or more shifts in a given year, Loya multiplied the number of months for which dues were owed by the established monthly dues quota for that year. (Tr. 44, 5-7; Tr. 47, lines 18-25; Tr. 48, lines 1-4). For historical

unit employees, Loya testified that she used the PMA records to tally the total number of shifts worked at all employers, including PCMC in a given year. (Tr. 43, lines 8-14, 22-24; Tr. 47, lines 18-25; Tr. 48, lines 1-4). The total number of months worked was multiplied by that year's given dues rate to determine dues reimbursement for that year. (Tr. 44, 5-7; Tr. 47, lines 18-25; Tr. 48, lines 1-4).

To the extent that any historical or nonhistorical unit employees paid processing fees in a given year, but did not work any eligible shifts in that year, or in the adjacent months, those fees are nevertheless reimbursable if they were paid on or after March 31, 2005. (Tr. 191, lines 17-24). To exclude those fees from reimbursement fails to account for the fact that by paying these fees "they are becoming B status members of (Respondent ILWU) and they needed to pay these dues in order to become B status members." (Tr. 191, lines 12-14). Indeed, by the very terms of Respondent ILWU's union security provision, paying a processing fee was in fact a condition of their employment to be employed at the original bargaining unit terminals.²⁰ (Tr. 191, lines 21-24;).

After determining for each employee, the number of months worked in a given year, multiplied by the corresponding monthly dues for that year, plus any fees and assessments paid in a given year, Compliance Officer Loya testified that she totaled for each employee his or her grand total reimbursement owed by Respondent ILWU. (Tr. 48, lines 18-23; GC Exh. 1(w)(App. E, F)). When the total liability for Respondent ILWU's Oakland and Tacoma locations are added together, total liability amounts to \$1,697,541.81. (GC Exh. 1(w)(App. G)).

C. General Counsel Has Met Her Burden By Establishing A Reasonable And Accurate Reimbursement Formula.

²⁰ Respondent ILWU's CBA requires as a condition of work that members remain in "good standing," which is defined as "(making) timely tender of... initiation fees(.)" (R. Exh. 9, 10, 11).

General Counsel has set forth an imminently reasonable formula that captures the plain meaning of the Board's Order and one that is informed by a clear reading of the Board's Decision finding Respondent ILWU jointly and severally liable with the employer for the commission of multiple unfair labor practices. Specifically, as for Respondent ILWU's direct conduct, the Board found it unlawfully accepted recognition of a bargaining unit for which it did not represent an uncoerced and unassisted majority, and that Respondent ILWU unlawfully imposed the terms of its CBA, including its union security provision, as a condition of performing the unlawfully obtained bargaining unit work. *PCMC/Pacific Crane Maintenance Co., Inc.*, 362 NLRB at 991; *enf'd International Longshore and Warehouse Union*, 890 F.3d 1100 (D.C. Cir. 2018). The Board also found Respondent ILWU jointly and severally liable for the commission of unfair labor practices committed by the employer, and ordered reimbursement for dues, fees and assessments accordingly. *Id.* at 991-992. Thus, in finding the employer unlawfully "(assigned) unit employees to nonunit positions and locations," and "(assigned) nonunit employees to perform unit work," Respondent ILWU's liability runs to both the unit employees required to join and pay dues to Respondent ILWU in order to keep their jobs even if they were assigned to "nonunit positions and locations," and its liability runs to those nonunit employees required to pay dues to Respondent ILWU in order to "perform unit work." *Id.* at 991. As such, the Board's Order renders Respondent ILWU jointly and severally liable for multiple unfair labor practices, regardless of whether the Board attributed certain unlawful conduct to the employer rather than directly to Respondent ILWU.

It is the job of the Compliance Officer to determine the appropriate remedy flowing from the Board's Decision and Order. (Tr. 29, line 2-13). In a case as complex as the instant case, access to records and information is crucial to determining what factors shape the appropriate

calculations. For example, to begin to understand how to calculate the remedy, the Compliance Officer needs membership registration records, dues and fee schedules, records of dues and fees paid, job classifications, dates of work, and places of work. However, these records were not initially forthcoming from Respondent ILWU. (Tr. 30, lines 10-16). As such, the formula Compliance Officer Loya developed in near darkness, is imminently reasonable and remarkably accurate. Specifically, by dividing the universe of eligible employees into the historical bargaining unit employees, those employees on the job at the time of the ULP, General Counsel's formula provides a remedy for the first category of employees harmed by Respondent ILWU's takeover of the Charging Party Machinists Union's bargaining unit. By designating a nonhistorical bargaining unit group of employees, General Counsel's formula provides a remedy for the second category of employees harmed by Respondent ILWU's takeover of the Charging Party Machinists Union's bargaining unit work. Both conceptions take account of Respondent ILWU's joint and several liability for the transfer of historical bargaining unit members into nonunit positions and locations, and for the transfer of nonunit members into unit positions, as well as provide a remedy for Respondent ILWU's unlawful acceptance of recognition, and unlawful enforcement of its contract.

With regard to the nonhistorical bargaining unit members, General Counsel has taken into consideration whether the individual worked at the bargaining unit terminal on a steady basis, which General Counsel defines as a minimum of 30 shifts a year at the bargaining unit terminals. This formula takes into account the circumstances and context of the nonhistorical unit members, who were subject to transfer from terminal to terminal as a result of their membership in Respondent ILWU, just as the nonhistorical unit members were. However, unlike the historical unit members, the nonhistorical unit members' harm was mitigated by the fact that they had only ever known such working conditions, whereas the historical unit members had never before been

transferred from terminal to terminal as a condition of their employment. As such, in General Counsel's formulation, the nonhistorical members suffered less harm than the historical unit members, and this is particularly obvious where they worked fewer than 30 days at the bargaining unit terminals demonstrating a *de minimus* level of bargaining unit work. Put another way, a nonhistorical unit member spending less than 30 shifts at the bargaining unit terminals, is being dispatched to nonunit terminals for the vast majority of the year, and therefore his or her dues can readily be said to attach to nonunit work.

General Counsel's reimbursement time period is reasonable and accurate. The Board Order set forth the critical date of March 31, 2005, to determine if an employee joined Respondent ILWU on or after the date of Respondent ILWU's unlawful conduct. Thus, General Counsel's formula uses this date to determine who is potentially eligible for reimbursement, but grounds the reimbursement start date on the date that employees actually began paying dues to Respondent ILWU. Under this formulation, and without dispute from any of the parties, the start date for Oakland is September 17, 2005, and for Tacoma that date is July 23, 2005. General Counsel's formula ends the reimbursement period based on the last date of PCMC's operations at each port, including the last date on which there are work records showing bargaining unit work performed at the terminals. As such, for Oakland, the last date of PCMC operations, and the last date for which there are bargaining unit work records is June 30, 2013. For Tacoma that date is the end of November 2016.

Based on the foregoing, General Counsel's formula provides a reasonable measure of reimbursement by identifying the months and years within the reimbursement period during which each unit employee performed unit work at the Oakland and Tacoma bargaining unit terminals, and in the case of historical unit employees, nonbargaining unit work at any terminal represented

by Respondent ILWU, to calculate the monthly dues, fees, fines and assessments each unit employee paid during these periods.

III. RESPONDENT ILWU'S AFFIRMATIVE DEFENSES ARE MERITLESS AND ITS ALTERNATIVE FORMULA SLASHES REMEDIES FOR SCORES OF EMPLOYEES.

A. Legal Principles.

Once the gross liability is established, the burden shifts to respondent to establish facts that would negate or mitigate its liability. *United States Can Co.*, 328 NLRB 334, 337 (1999), *enfd.* 254 F.3d 626 (7th Cir. 2001); *Mastro Plastics*, 354 F.2d. 170, 178 (2nd Cir. 1965), *cert. denied*, 384 U.S. 972 (1966); *St. George Warehouse (St. George Warehouse I)*, 351 NLRB 961, 963 (2007); *Grosvenor Resort*, 350 NLRB 1197, 1198 (2007). This burden includes establishing affirmative defenses which would mitigate its liabilities. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 324 NLRB 630 (1997). Thus, in challenging the General Counsel's calculations, the burden is on the wrongdoer who committed the unfair labor practice to establish facts that reduce the amount due for gross backpay. *Atlantic Limousine*, 328 NLRB 257, 258 (1999), *enfd.* 243 F.3d 711 (3d Cir. 2001); *Florida Tile Co.*, 310 NLRB 609 (1993), *enfd.* 19 F.3d 36 (11th Cir. 1994).

Where a compliance specification sets forth the beginning date of the backpay period, if the respondent disputes the accuracy of that date, then the respondent has the burden to set forth in its answer an alternative date for beginning the backpay period. See *Emsing's Supermarket*, 299 NLRB 569, 570 (1990). Even where the respondent's answer sufficiently disputes the backpay period set forth in the compliance specification, the respondent has the burden in the compliance hearing to "establish facts that would warrant altering" that alleged period. *Id.* at 571 fn. 7.

Where there has been a substantial delay in reaching the compliance stage of litigation, the United States Supreme Court has rejected the argument that such a delay unduly harms the

respondent. As stated by the Supreme Court in *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264-265 (1969), “Wronged employees are at least as much injured by the Board’s delay in collecting their back pay as is the wrong doing employer ... [T]he Board is not required to place the consequences of [such] delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers.” See also *NLRB v. Emsing’s Supermarket*, 872 F.2d 1279, 1291 (7th Cir. 1989) (court rejected respondent’s request to calculate remedy from date of court decision rather than Board order). Thus, the Court rejected respondent’s reliance on laches to argue that the Board’s delay prejudiced the wrongdoer and that liability should therefore be reduced. *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 369 U.S. at 265.

The Board has similarly rejected the argument that a delay in prosecution shields a respondent from any portion of liability. See *NLRB v. Michigan Rubber Products*, 738 F.2d 111 (6th Cir. 1984); *NLRB v. Hub Plastics Inc.*, 52 F.3d 608 (6th Cir. 1996); see also *Harding Glass Co.*, 337 NLRB 1116, 1118 (2002); *Hubert Distributors*, 344 NLRB 339, 341-342 (2005); *Unitog Rental Services*, 318 NLRB 880, 885 (1995), *affd.* 105 F.3d 651 (5th Cir. 1995); and see *Rochester Gas & Electric*, 364 NLRB No. 6, at 8, 9 (May 24, 2016)(rejecting respondent’s argument that the backpay period be tolled during appeal to D.C. Circuit Court of Appeals and writ of certiorari to the Supreme Court).

Under Section 10(e) of the Act, the Board has no jurisdiction to modify an Order that has been enforced by a court of appeals because, upon the filing of the record with the court of appeals, the jurisdiction of that court is exclusive and its judgment and decree final, subject to review only by the Supreme Court. *Grinnell Fire Protection Systems Co.*, 337 NLRB 141, 142 (2001)(Board has no jurisdiction to modify a court-enforced Order); *Regional Import & Export Trucking*, 323 NLRB 1206, 1207 (1997)(denying employer’s request for offset for lack of jurisdiction under

Section 10(e) because offset would “effectively require modification of the Board’s [previously enforced] Order”); *Haddon House Food Products*, 260 NLRB 1060 (1982); *Scepter Ingot Castings, Inc.*, 341 NLRB 997, 997-998 (2004)(rejecting respondent’s argument that its liability for increased healthcare costs should be offset by wage increases, based on the jurisdictional limitations imposed by Section 10(e).

B. Respondent ILWU’s Unreasonable Reimbursement Period.

1. Respondent ILWU Carves Out a Six-Year “ALJD Period” When It Relied On an ALJ Decision During Pendency of Appeal.

Respondent ILWU carves out a more than six year-period from the reimbursement period: February 12, 2009 to June 17, 2015. This is Respondent ILWU’s so-called “ALJD period” -- the period between the Administrative Law Judge Decision dismissing the consolidated complaint against Respondent ILWU, and the date of the Board’s decision and Order reversing that decision.²¹ (GC Exh. 1(z)(page 11, para. 1(C)).

For Oakland, it is undisputed that the reimbursement period begins on September 17, 2005. (GC Exh. 1(z)(page 11, para. 1(C)). There can be no dispute that PCMC ceased operations at the Oakland bargaining unit terminals on June 30, 2013.²² As such, Respondent ILWU’s carve out of over six years cuts off the reimbursement period prematurely for Oakland at February 12, 2009.

²¹ Notably, in 2013, the Board reversed ALJ Anderson’s decision, but as a case harpooned under *Noel Canning, supra*, this case too was delayed another two years.

²² Respondent “denies that a successor employer took control of the operations in Oakland after June 30, 2013, as the Board’s Decision in Cases 32-CA-110280 and 32-CB-118735 has been appealed and currently is before the D.C. Circuit Court of Appeals.” (GC Exh. 1(z)(page 11, para. 1(C)). However, as discussed, *infra*, the litigation in Case 32-CA-110280 was resolved through a settlement agreement dated July 21, 2016, between the alleged successor employer Ports America Outer Harbor (PAOH) and the Charging Party Machinists Union. As such, there can be no dispute that regardless of the legal status of the subsequent employer-operator of the bargaining unit terminals, PCMC ceased operations on June 30, 2013. (R. Exh. 16).

The consequences of this formula are demonstrated with clarity by Respondent ILWU's own calculations showing numerous Oakland employees working well beyond February 12, 2009, and up to June 30, 2013, but being denied dues reimbursement for those months, and indeed, years of payments to Respondent ILWU. (GC Exh. 1(z)(Exh. C, D).

In this regard, Respondent ILWU admits that 57 Oakland employees are owed reimbursement of some measure.²³ Of those 57 employees, Respondent ILWU shortchanges 53 of them by truncating the reimbursement period to February 2009, and ignoring any dues reimbursement that accrued after that date. (GC Exh. 1(z)(Exh. C, D)). Those 53 employees, Respondent ILWU even acknowledges, continued to work, pay dues, fees, and assessments to Respondent ILWU, well after February 2009. (GC Exh. 1(z)(Exh. C, D). But under Respondent ILWU's formula, they will never see a reimbursement for those payments leaving them with a failed remedy.

For Tacoma, there is no dispute that the reimbursement period begins on July 23, 2005. (GC Exh. 1(z)(page 3, para 1(D)). PMA records provided by Respondent ILWU show that employees continued to perform shifts at the Tacoma bargaining unit terminal throughout November 2016. However, as Respondent ILWU proposes, the ALJ Decision period constitutes a blackout period, during which time reimbursement is tolled. As such, Respondent ILWU's reimbursement period for Tacoma comes with a blackout period from February 2, 2009 to June 17, 2015, resuming at that point to November 4, 2016. The consequences of this are to deny eligible employees reimbursement for a period of over six years in which they in fact worked and paid dues to Respondent ILWU. Respondent ILWU's own calculations admit that these

²³ General Counsel maintains that its calculations showing 62 Oakland employees are eligible for reimbursement is correct, accurate and reasonable. (GC Exh. 1(x)(App. A).

employees continued to work and pay dues, fees and assessments during this time. (GC Exh. 1(z)(Exh. G, H). Again, the result is to deny eligible employees a full remedy.

2. The Board Must Reject Respondent ILWU’s Preposterous “ALJD Period” Carve Out, As It Relied On That Decision At Its Own Peril.

Respondent ILWU has failed to meet its burden to show that General Counsel’s reimbursement period dates are wrong, inaccurate, or otherwise unreasonable. See *Emsing’s Supermarket*, 299 NLRB 569, 570 (1990). In this regard, Respondent ILWU argues wrongly that the period from February 12, 2009 to June 17, 2015 must be excluded from the backpay period and that the interest during that period should not accrue because the operative decision at the time was the ALJD by Judge Anderson dismissing the Consolidated Complaint in favor of Respondent ILWU. (GC Exh. 1(z)(page 11 para. 1(C), (D)). At hearing, Respondent ILWU did not put forth testimony, documentary evidence, or other facts to support its contention that a large swath of years should be cut from the reimbursement period. With no evidence in the record to support such a position, Respondent ILWU’s argument must be rejected. *Id.* at 571 fn. 7 (respondent has the burden in the compliance hearing to “establish facts that would warrant altering” that alleged period).

C. Respondent ILWU’s Unreasonable Treatment of Historical Unit Employees.

1. Respondent ILWU Eliminates All Remedies for Transferred Historical Unit Employees.

Respondent seeks to outright exclude six historical unit employees who were transferred from the original bargaining unit terminals to perform work at other terminals represented by Respondent ILWU. (GC Exh. 1(z)). Asserting that the Board’s Decision and Order do not require reimbursement for these original bargaining unit members performing nonunit work, Respondent ILWU excludes them entirely from any reimbursement, resulting in no available remedy for their losses resulting from Respondent ILWU’s unlawful conduct. Respondent ILWU would deny

reimbursement without exception, to the employees discussed below even though Respondent ILWU continued to collect dues, fees, and assessments from them. (GC Exh. 1(z)(Exh. A, E); R. Exh. 9, 10, 11 (union security provisions therein)).

Randall Castillo is an Oakland historical bargaining unit employee. (Tr. 58, lines 14-21; GC Exh. 8; R. Exh. 1 (PCMC All Shifts All Dues by Year (10112, 10114, 10130), PCMC All Shifts All Dues by Year (10131)). Upon hire by PCMC, from 2006 through 2012 Castillo performed nonbargaining unit work at terminals represented by Respondent ILWU under various job classifications: “ILWU Mech Journeyman,” “ILWU Mech Leadman,” “ILWU Mech Day.” (GC Exh. 8; GC Exh. 1(x)(App. C.2-C.8). As Compliance Officer Loya testified, “(Castillo) was sent to work at other terminals upon being... hired by PCMC, so regardless of which terminal he was sent to work in, he was still paying dues to (Respondent) ILWU in order to continue working, and that’s why he was included” in the reimbursement.²⁴ (Tr. 58, lines 14-21; GC Exh. 8; R. Exh. 1 (“PCMC All Shifts All Dues by Year (10112, 10114, 10130)” and “PCMC All Shifts All Dues by Year (10131)”). As such, whether or not Castillo performed work at the original bargaining unit terminal or at nonbargaining unit terminals represented by Respondent ILWU, Castillo is entitled to reimbursement for the years 2006 to 2012, when he worked at terminals Represented by Respondent ILWU and continued to pay dues and fees in order to do so. (GC Exh. 1(x) (App. C.1-C.8, E); GC Exh. 1(z)(Exh. A)).

Castillo paid dues to Respondent ILWU while working nonbargaining unit shifts at terminals represented by Respondent ILWU: 37 shifts in 2005; 181 shifts in 2006; 151 shifts in

²⁴ On cross-examination, Compliance Officer Loya acknowledged a computation error for the year 2006; the error was corrected in General Counsel’s Second Amended Compliance Specification and appendices. (Tr. 169, lines 14-24; GC Exh. 1(x)).

2007; 255 shifts in 2008; 237 shifts in 2009; 242 shifts in 2010; 224 shifts in 2011; 34 shifts in 2012; 94 shifts in 2013; 192 shifts in 2014; 217 shifts 2015; and 210 shifts in 2016. (GC Exh. 8).

Harry Coudreit is a Tacoma historical unit employee. (GC Exh. 14; GC Exh. 1(x)(App. A, D.1-D.12); R. Exh. 1 (PCMC All Shifts All Dues by Year (30228)). Compliance Officer Loya testified that because Coudreit was a Tacoma historical unit member, she “considered... all shifts he worked at any terminal, regardless of whether it was the bargaining unit (terminal)... as long as he was a dues paying member to the (Respondent) ILWU.” (Tr. 75, lines 11-24; Tr. 76, line 1). Specifically, Coudreit worked at nonbargaining unit terminals under Respondent ILWU representation from 2005 to 2016, in various job classifications: “ILWU Mech Journeyman,” “ILWU Mech Leadman,” “ILWU Mech Day.” (GC Exh. 14; GC Exh. 1(x)(App. D.1-D.12).

Coudreit continued to pay dues to Respondent ILWU as he worked the following nonunit shifts: 204 shifts in 2005; 282 shifts in 2006; 230 shifts in 2007; 240 shifts in 2008; 232 shifts in 2009; 216 shifts in 2010; 205 shifts in 2011; 259 shifts in 2012; 228 shifts in 2013; 367 shifts in 2014; 216 shifts 2015; and 220 shifts in 2016. (GC Exh. 14).

George Horton is an Oakland historical bargaining unit member. (GC Exh. 9; GC Exh. 1(x)(App. A, C.1 to C.5); R. Exh. 1 (PCMC All Shifts All Dues by Year (10112, 10114, 10130); PCMC All Shifts All Dues by Year (10131)). Compliance Officer Loya testified that she “included whichever terminal (Horton) worked in regardless of whether it was the bargaining unit work terminals or not, as long as he was paying dues to the ILWU.” (Tr. 63, lines 22-25). Thus, Horton is owed dues reimbursement for years 2005 through 2008, when he was performed nonbargaining unit work at terminals represented by Respondent ILWU under various job classifications: “ILWU Mech Journeyman,” “ILWU Mech Leadman,” “ILWU Mech Day.” (GC Exh. 9; GC Exh. 1(x)(App. C.1 to C.4)). For example, as Loya testified, in “April 2005, (Horton) was working for

PCMC, but he was working for another terminal with terminal code 10120 as a day mechanic... then in September he worked in terminal code 10116, which is... another terminal that's also run by PCMC at that time." (Tr. 63, lines 22-25; Tr. 64, lines 2-7; GC Exh. 1(x) App. C.1 to C. 4; GC Exh. 9; R. Exh. 1 ("PCMC All Shifts All Dues by Year (10112, 10114, 10130)," "PCMC All Shifts All Dues by Year (10131)").

Horton continued to pay dues to Respondent ILWU for the following nonunit shifts: 186 shifts in 2005; 219 shifts in 2006; 231 shifts in 2007; and 27 shifts in 2008. (GC Exh. 9).

Glen McIntosh is an Oakland historical unit employee. (GC Exh. 1(x)(App.A); R. Exh. 20, 21, 22). McIntosh paid dues to Respondent ILWU for the following nonunit shifts: 69 shifts in 2005 (after becoming a B status member on September 17, 2005); 235 shifts in 2006; 240 shifts in 2007; 254 shifts in 2008; 245 shifts in 2009; 247 shifts in 2010; 247 shifts in 2011; 250 shifts in 2012; and 132 shifts in 2013. (GC Exh. 1(x)(App.C.2-C.9); R. Exh. 20, 21, 22).

Michael Wilper is a Tacoma historical unit employee. (Tr. 91, lines 23-25; Tr. 92, lines 3-5; GC Exh. 26; GC Exh. 1(x)(App. A, D.1-D.7; GC Exh. 1(z)(Exh. F)). Records provided by both PMA and Respondent ILWU show Wilper's dates and locations of employment, and payment of dues to Respondent ILWU over the course of several years. (R. Exh. 4; R. Exh. 1 (TAmidon Tacoma, PCMC Mech. Reg. History (30228); PCMC all shifts all dues by year (30228)). Wilper worked at various terminals represented by Respondent ILWU under the job classification "ILWU Mech Journeyman." (GC Exh. 25).

Wilper continued to pay dues to Respondent ILWU for nonbargaining unit shifts: 181 shifts in 2005; 242 shifts in 2006; 233 shifts in 2007; 221 shifts in 2008; 202 shifts in 2009; 196 shifts in 2010; 89 shifts in 2011; and one shift in 2013. (GC Exh. 25).

Darwin Worrell is a Tacoma historical unit employee. (GC Exh. 26; GC Exh. 1(x)(App. A, D.1-D.7). As Compliance Officer Loya testified, “because (Worrell’s) a historical employee even if he was transferred to another terminal...(h)e’s entitled to this reimbursement.” (Tr. 92, lines 3-5). Worrell worked at various terminals represented by Respondent ILWU under the job classification “ILWU Mech Journeyman.” (GC Exh. 26).

Worrell continued to pay dues to Respondent ILWU for the following nonbargaining unit shifts: 189 shifts in 2005; 262 shifts in 2006; 246 shifts in 2007; 242 shifts in 2008; 227 shifts in 2009; 247 shifts in 2010; 170 shifts in 2011; 233 shifts in 2012; 239 shifts in 2013; 232 shifts in 2014; 226 shifts 2015; and 236 shifts in 2016. (GC Exh. 26).

Respondent ILWU would entirely eliminate the foregoing employees under the misguided principle that they did not perform their hundreds of shifts at the original bargaining unit terminals. (GC Exh. 1(z)(Exh. A, E). Respondent ILWU would have no remedy for these employees, demonstrating an unreasonableness that directly contravenes the Board’s Order requiring reimbursement for monies paid by the original bargaining unit members.

2. Respondent ILWU Slashes Remedy for Certain Transferred Historical Unit Employees.

Respondent ILWU eliminates large periods of time - entire years - from many historical unit employees. Respondent ILWU argues that these employees cannot be reimbursed for dues if they did not perform their work at the original bargaining unit terminals. Such an argument raises an artificial barrier to reimbursement, when the only relevant operative facts are that Respondent ILWU continued to unlawfully collect dues from these historical unit employees. Thus, regardless of where these employees worked, they continued to work as ILWU mechanics and continued to pay dues to Respondent ILWU. (GC Exh. 1(z)(Exh. C, E); GC Exh. 1(x)(App. E, F); R. Exh. 9, 10, 11 (union security provisions therein)). Respondent ILWU undercuts the remedy for these

historical unit employees if they did not perform the entirety of their work at the original bargaining unit terminals; this formulation does not take into account that these historical unit members would never have been transferred in the absence of Respondent ILWU's unlawful conduct, and ignores the undisputed record evidence that Respondent ILWU continued to collect their dues. As such, Respondent ILWU fails to provide adequate relief to these particular historical unit members who transferred between unit and nonunit terminals. Comparing Respondent's Second Amended Answer Exhibits C (Oakland) and E (Tacoma) with General Counsel's Second Amended Compliance Specification Appendices E (Oakland) and F (Tacoma), the comparison illustrates the consequences of Respondent ILWU's formulation. Specifically, under this formula, Respondent ILWU would eliminate huge segments of the reimbursements due to the historical unit employees described below.

Manuel Alvarez is an Oakland historical unit employee who worked for PCMC from 2010 through mid-2013, at various terminals, but mostly at the bargaining unit terminal, and always as an ILWU mechanic journeyman. (R. Exh. 1(TAmidon Oakland). The same records show that after mid-2013, he worked for another employer through 2016 as an ILWU mechanic journeyman. Respondent ILWU denies Alvarez reimbursement for the years 2010-2013. (GC Exh. 1(z)(Exh. C, D).

John Baldwin is an Oakland historical unit employee with a similar pattern of work as Alvarez, yet Respondent ILWU denies Baldwin reimbursement for the years 2010 to 2013, despite the evidence showing he paid dues during that time. (GC Exh. 1(z)(Exh. C, D); R. Exh. 1(TAmidon Oakland)).

Joseph Barczak is a Tacoma historical unit employee who worked at the bargaining unit terminal from 2005 to 2010. (R. Exh. 1(TAmidon Tacoma). He worked for PCMC at a

nonbargaining unit terminal from 2011 to mid-2012. (R. Exh. 1(TAmidon Tacoma). For the last half of 2012, he worked for Washington United Terminals at a nonbargaining unit terminal. For 2013 through 2015, he worked for PCMC at the same nonbargaining unit terminal. In 2016, he worked for Washington United Terminals at the same nonbargaining unit terminal. In each of these years, he worked as an ILWU mechanic journeyman. Respondent ILWU denies any reimbursement for Barczak for the years 2011 to 2016. (GC Exh. 1(z)(Exh. G, H); R. Exh. 1(TAmidon Tacoma)).

Oscar Conde is a Tacoma historical unit employee who worked at the bargaining unit terminal in 2005. In 2006, he worked for PCMC at a nonbargaining unit terminal. From 2007 to 2009 he worked most of his time at PCMC nonbargaining unit terminals; and from 2013 to 2015 he primarily worked for PCMC at a nonbargaining unit terminal. In 2016 he worked at the same terminal under the employer Washington United Terminals. For all of these shifts, Conde worked as an ILWU mechanic journeyman or ILWU mechanic leadman. (R. Exh. 1(TAmidon Tacoma). Respondent ILWU denies Conde any reimbursement for the years 2006 to 2009, and 2013 to 2016. (GC Exh. 1(z)(Exh. G); R. Exh. 1(TAmidon Tacoma)).

John Costa is an Oakland historical unit employee who, in 2005, worked for PCMC in non-unit terminals as an ILWU mechanic journeyman. (R. Exh. 1(TAmidon Oakland). Respondent ILWU denies reimbursement to Costa for the year 2005. (GC Exh. 1(z)(Exh. C); R. Exh. 1(TAmidon Oakland)).

Wayne Coudriet is a Tacoma historical unit employee who from 2005 to 2009 worked at the bargaining unit terminal. From 2010 to 2016 he worked for PCMC at a nonbargaining unit terminal as an ILWU mechanic journeyman, and on occasion as an ILWU mechanic journeyman.

(R. Exh. 1(TAmidon Tacoma). Respondent ILWU denies reimbursement to Coudriet for the years 2010 to 2016. (GC Exh. 1(z)(Exh. G, H); R. Exh. 1(TAmidon Tacoma)).

Isabelo Dela Cruz is an Oakland historical unit employee who, in 2010, worked for PCMC at a nonbargaining unit as an ILWU mechanic journeyman. (R. Exh. 1(TAmidon Oakland). Respondent ILWU denies reimbursement to Dela Cruz for the year 2010. (GC Exh. 1(z)(Exh. C); R. Exh. 1(TAmidon Oakland)).

Floyd DeSerisy is a Tacoma historical unit employee who began working at the bargaining unit terminal 2005, but by the time he began paying dues he had already been transferred to work for PCMC at a nonbargaining unit terminal and stayed there from the remainder of 2005 to 2007. (R. Exh. 1(TAmidon Tacoma). During this entire time, he worked as an ILWU mechanic journeyman. (R. Exh. 1(TAmidon Tacoma). He returned to the bargaining unit terminal for the last half of 2008. Respondent ILWU denies reimbursement to DeSerisy for the years 2005 to 2007. (GC Exh. 1(z)(Exh. G); R. Exh. 1(TAmidon Tacoma)).

William Douglas is a Tacoma historical unit employee who worked at the bargaining unit terminal from 2005 to 2012. From 2013 to 2015, he worked for PCMC at a nonbargaining unit terminal as an ILWU mechanic journeyman. (R. Exh. 1(TAmidon Tacoma). From 2015 to 2016, he continued to work at that terminal under Washington United Terminals as an ILWU mechanic journeyman. (R. Exh. 1(TAmidon Tacoma). Respondent ILWU denies reimbursement to Douglas for the years 2013 to 2016. (GC Exh. 1(z)(Exh. G); R. Exh. 1(TAmidon Tacoma)).

Steven Gagne is a Tacoma historical unit employee who from 2010 to 2016 worked at nonbargaining unit terminals as an ILWU mechanic journeyman. (R. Exh. 1(TAmidon Tacoma). For most of that time, he worked for PCMC at a nonbargaining unit terminal, but spent a few months at the bargaining unit terminal. (R. Exh. 1(TAmidon Tacoma). In October 2010, through

the end of 2016, he worked at PCMC at a nonunit terminal with the occasional shift at the original unit as an ILWU mechanic journeyman and sometimes as an ILWU mechanic leadman. Respondent ILWU denies reimbursement to Gagne for the years 2010 to 2016. (GC Exh. 1(z)(Exh. G); R. Exh. 1(TAmidon Tacoma)).

Charles Grimsley is an Oakland historical unit employee who, from 2010 to 2013, worked for PCMC in a nonbargaining unit work terminal as an ILWU mechanic journeyman. (R. Exh. 1(TAmidon Oakland)). Respondent ILWU denies reimbursement to Grimsley for the years 2010-2013. (GC Exh. 1(z)(Exh. C); R. Exh. 1(TAmidon Oakland)).

Juan M. Guevara is an Oakland historical unit employee who, from 2010 to 2013, worked for PCMC at a nonbargaining unit terminal as an ILWU mechanic journeyman. (R. Exh. 1(TAmidon Oakland)). Respondent ILWU denies reimbursement to Guevara for the years 2010 to 2013. (GC Exh. 1(z)(Exh. C); R. Exh. 1(TAmidon Oakland)).

Danna Jennings is a Tacoma historical unit employee who from 2005 to 2012 worked for PCMC at the bargaining unit terminal, but in 2013 he worked for PCMC at a nonbargaining unit terminal. In 2015, Jennings worked for PCMC at a nonbargaining unit terminal; in late 2015 through 2016, Jennings worked for the same nonbargaining unit terminal under Washington United Terminals. All of this time, Jennings worked as an ILWU mechanic journeyman. (R. Exh. 1(TAmidon Tacoma)). Respondent ILWU denies reimbursement to Jennings for the years 2013, 2015, and 2016. (GC Exh. 1(z)(Exh. G); R. Exh. 1(TAmidon Tacoma)).

Ruben Juarez is an Oakland historical unit member who, from his date of hire, worked in non-unit work terminals as an ILWU mechanic journeyman. (R. Exh. 1(TAmidon Oakland)). From 2007 to mid-2009, he worked for PCMC at a bargaining unit terminal. (R. Exh. 1(TAmidon Oakland)). From mid-2009 to 2013, he worked for Ocean Terminal Services as an ILWU mechanic

in terminal 10116. (R. Exh. 1(TAmidon Oakland). Respondent ILWU denies reimbursement to Juarez for the years 2010 to 2013. (GC Exh. 1(z)(Exh. C); R. Exh. 1(TAmidon Oakland).

Jeffrey King is a Tacoma historical unit employee who, in 2006 and 2007 worked for PCMC at a nonbargaining unit terminal, and from 2011 to 2016 he worked for PCMC at a nonbargaining unit terminal. All the while, he worked as an ILWU mechanic journeyman. (R. Exh. 1(TAmidon Tacoma). Respondent ILWU denies reimbursement to King for the years 2006, 2007, and 2011 to 2016. (GC Exh. 1(z)(Exh. G.); R. Exh. 1(TAmidon Tacoma)).

Ralph Lacher is a Tacoma historical unit employee who worked from 2005 to 2014 at the bargaining unit terminal. In about mid-2014 through the end of 2016, he worked for PCMC at a nonbargaining unit terminal. He worked these shifts as an ILWU mechanic journeyman. (R. Exh. 1(TAmidon Tacoma). Respondent ILWU denies reimbursement to Lacher for the years 2015 to 2016. (GC Exh. 1(z)(Exh. G); R. Exh. 1(TAmidon Tacoma)).

John McClean is an Oakland historical unit employee who, in 2010, worked for PCMC in bargaining unit and nonbargaining unit terminals as an ILWU mechanic journeyman. (R. Exh. 1(TAmidon Tacoma). However, he spent most of 2010 in 10131, which is a bargaining unit terminal. Respondent ILWU denies reimbursement to McClean for the year 2010. (GC Exh. 1(z)(Exh. C); R. Exh. 1(TAmidon Oakland).

Eugene Oades is a Tacoma historical unit employee who worked briefly at the bargaining unit terminal in 2005, but for the remainder of 2005 to mid-2008, he mostly worked for PCMC at a nonbargaining unit terminal as an ILWU mechanic journeyman; from 2008 to 2016 he again worked for PCMC at a nonbargaining unit terminal. For each of these years, he worked as an ILWU mechanic journeyman, and after 2008, as an ILWU mechanic leadman. (R. Exh.

1(TAmidon Tacoma). Respondent ILWU denies reimbursement to Oades for the years 2006 to 2016. (GC Exh. 1(z)(Exh. G, H); R. Exh. 1(TAmidon Tacoma)).

Richard Pachal is a Tacoma historical unit employee who from 2010 to 2012 worked most of his shifts at the bargaining unit terminal but also at the Washington United Terminals nonbargaining unit terminals, as a ILWU mechanic journeyman; from 2013 to 2015 he continued working at this same terminal as an employee of PCMC and as an ILWU mechanic journeyman; in 2016, he continued working at that same terminal under Washington United Terminals. In all of these years, he worked as an ILWU mechanic leadman. (R. Exh. 1(TAmidon Tacoma). Respondent ILWU denies reimbursement to Pachal for the years 2010 to 2016. (GC Exh. 1(z)(Exh. G, H); R. Exh. 1(TAmidon Tacoma)).

Francisco Paredes is an Oakland historical unit member who, from 2010 to 2013, worked for PCMC at a nonbargaining unit terminal as an ILWU mechanic journeyman. (R. Exh. 1(TAmidon Oakland). Respondent ILWU denies reimbursement to Paredes for the years 2010 to 2013. (GC Exh. 1(z)(Exh. C, D); R. Exh. 1(TAmidon Oakland)).

Kenneth Punla is an Oakland historical unit employee who from 2010 to 2013 worked for PCMC at a nonbargaining unit terminal as an ILWU mechanic journeyman. Respondent ILWU denies reimbursement to Punla for the years 2010 to 2013. (GC Exh. 1(z)(Exh. C, D); R. Exh. 1(TAmidon Oakland)).

Luis Quijano is an Oakland historical unit member who, from 2010 to 2013, worked for PCMC at a nonbargaining unit terminal as an ILWU mechanic journeyman. Respondent ILWU denies reimbursement to Quijano for the years 2010 to 2013. (GC Exh. 1(z)(Exh. C); R. Exh. 1(TAmidon Oakland)).

Gordon Rohse is an Oakland historical unit employee who, from 2010 to 2013, worked for Ocean Terminal Services at a nonbargaining unit terminal as an ILWU mechanic journeyman in terminal. (R. Exh. 1(TAmidon Oakland)). Respondent ILWU denies reimbursement to Rohse for the years 2010 to 2013. (GC Exh. 1(z)(Exh. C, D); R. Exh. 1(TAmidon Oakland)).

Rex Thompson is a Tacoma historical unit employee who, from 2006 to 2007 worked at a PCMC at a nonbargaining unit terminal as an ILWU mechanic journeyman. (R. Exh. 1(TAmidon Tacoma)). Respondent ILWU denies reimbursement to Thompson for the years 2006 to 2007. (GC Exh. 1(z)(Exh. G); R. Exh. 1(TAmidon Tacoma)).

Respondent ILWU seeks to deny reimbursement for these historical employees, leaving them with no remedy for the years described here. This would leave this large cohort of discriminatees with an incomplete remedy, despite the uncontested evidence showing that they continued to perform work at terminals represented by Respondent ILWU, which continued to collect dues, fees and assessments from them during these years.

3. Any Argument By Respondent ILWU That Impermissibly Excludes Historical Unit Members Who Were Transferred Must Be Rejected, As It Runs Contrary to The Explicit Board Order.

The Board's holding that bargaining unit members were unlawfully transferred to nonbargaining unit terminals, and holding the employer and Respondent ILWU jointly and severally liable for reimbursement of dues, fees, and assessments, presumes that a make-whole remedy is owed. *Minette Mills, Inc.*, 316 NLRB at 1010-1011. Yet Respondent ILWU seeks to eliminate six historical unit employees on the basis that they were transferred from the bargaining unit terminals to perform nonunit work, and seeks to drastically reduce reimbursement to numerous other historical unit employees because they were transferred some portion of time to nonbargaining unit terminals. Contrary to Respondent ILWU's argument, these historical unit

employees are precisely the group of employees the Board ordered a remedy for. The employees were all hired by PCMC, joined Respondent ILWU, and continued to work at terminals represented by Respondent ILWU, for months and years after Respondent ILWU's unlawful conduct. Between them, they worked thousands of nonbargaining unit shifts, while Respondent ILWU continued to collect dues, fees and assessments from each and every one of them. These are the core group of employees whose harm was most readily identified and defined by the very fact that they were transferred to nonbargaining unit terminals; they are the group of employees who were assigned "to nonunit positions and locations," as the Board held. Respondent ILWU attempts to shove liability onto the employer for these employees, arguing that members who were transferred from the APMT terminal are not included in the Board's Order or D.C. Circuit Court's Mandate because it was the employer's decision to transfer any such employees away from the bargaining unit terminals and therefore Respondent ILWU has no liability for dues reimbursement to those members. Such an argument fails to account for the finding that the Board held Respondent ILWU jointly and severally liable for the reimbursement of dues of the "the unit" harmed by the panoply of unfair labor practices committed by Respondent ILWU and the employer, hand in hand. Viewed in this light, Respondent ILWU's formula is both unreasonable, and an impermissible attempt to re-write the Board's decision and order, and as such, must be rejected.

D. Respondent ILWU's Unreasonable "Steady Mechanic" Requirement.

1. Respondent ILWU Denies Full Remedy To Nonhistorical Employees By Imposing Unreasonable "Steady Mechanic" Requirement.

Respondent ILWU imposes a drastic requirement that employees must somehow qualify as "steady mechanics" in order to be reimbursed for dues attributed to performing bargaining unit work. (GC Exh. 1(z)(page 8-9; Exh. E). Respondent ILWU's requirement appears to be made up

out of whole cloth, as the Board set forth no such requirement in its Order. In fact, Respondent ILWU's formulation not surprisingly leaves 14 nonhistorical employees with no remedy for the violations that the Board found to be a direct result of Respondent ILWU's unlawful conduct. As discussed *supra*, General Counsel's formula provides an imminently reasonably accounting of Respondent ILWU's liability toward nonhistorical unit employees performing bargaining unit work. In this regard, the 30-shift per year minimum required by General Counsel provides a basic measure of whether an employee worked on a steady or consistent basis at the bargaining unit terminal. In contrast, Respondent ILWU would impose a nearly impossible requirement – indeed, one that it never clearly defines -- of nearly fulltime year-round employment to qualify for reimbursement. Respondent ILWU's requirement is utterly baseless. Respondent denies, without exception, the employees described below:

William Ashmore is a Tacoma nonhistorical unit employee. (Tr. 56, lines 5-13; GC Exh. 6). In 2008, Ashmore worked 31 bargaining unit shifts over the course of 5 months. (GC Exh. 1(x)(App. D.4); R. Exh. 1 (PCMC All Shifts All Dues by Year (30228)). Thus, Ashmore is owed 2 months of dues reimbursement.²⁵ Moreover, Ashmore became a B status member of Respondent ILWU in 2006 and paid B status initiation fees totaling \$250. (GC Exh. 1(x)(App. D.2). Therefore, Ashmore is owed reimbursement for those fees. (GC Exh. 1(x)(App. F). As Compliance Officer Loya testified, the Board Order requires reimbursement for dues, fees and assessments paid during the reimbursement period, which begins on March 31, 2005. (Tr. 191, lines 12-24; Tr. 192, lines 5-18). Ashmore paid his B status fee in 2006, and as such, the fee falls within the reimbursement period. (GC Exh. 1(x)(App. D.2); R. Exh.1 (PCMC Mech Reg History (3228)). Whether or not

²⁵ 31 bargaining unit shifts, divided by 20 workdays in a month (1.55), rounded up, equals 2 months.

Ashmore performed 30 or more shifts at the bargaining unit terminal in a given year determines whether there will be a dues reimbursement obligation, not whether a fee reimbursement obligation is triggered. (Tr. 132, lines 5-25; Tr. 133, lines 1-20). To be sure, for the years that Ashmore worked shifts at the original bargaining unit terminal, whether or not he met the 30-shift threshold, he was required to be a member of Respondent ILWU. Fees are an inextricable part of Respondent ILWU's membership structure: For Ashmore to have paid dues, he must also have been a registered member of Respondent ILWU. In fact, for those members who were not yet dues-paying members, as in the case of registered "casuals," General Counsel does not seek reimbursement. (GC Exh. 1(n)(para. 1(c), compare GC Exh. 1(x)(para.1)). As Respondent ILWU would have it, discussed *infra*, reimbursement for fees is not part of the remedy in the circumstance when no shifts are performed at the bargaining unit terminal in the same year, but such a view fails to account for the fact that upon performing the bargaining unit work, the very basis undergirding the basis for dues reimbursement is the initiation fee that enabled the dispatch to the terminal. (Tr. 132, lines 5-25; GC Exh. 1(z)). In short, Respondent ILWU wishes to ignore the very structure of its own membership organization. Such a view results in a remedial failure.

Eric Bock is a Tacoma nonhistorical unit employee who worked the minimum threshold of 30 shifts for the year 2016, the only year for which reimbursement is owed. (Tr. 72, line 16-17; GC Exh. 12; GC Exh. 1(x)(D.12). In 2016, Bock worked 30 bargaining unit shifts over the course of 5 months. (GC Exh. 1(x)(App. D.12); R. Exh. 1 (PCMC All Shifts All Dues by Year (30228)). Thus, Bock is owed 2 months of dues reimbursement.²⁶

²⁶ 30 bargaining unit shifts, divided by a 20 workdays per month (1.5), rounded up, equals 2 months.

Ralph Cable is a Tacoma nonhistorical employee who worked a minimum of 30 shifts at the original bargaining unit terminal after he began paying dues to Respondent ILWU in 2015. (GC Exh. 1(x)(App. D.12); GC Exh. 13; Tr. 74, lines 6-8). Compliance Officer Loya testified that she calculated that Cable was owed initiation fee and dues and reimbursement for a portion of 2015.²⁷ (Tr. 74, lines 10-25; Tr. 75, line 1; Tr. 176, lines 1-3; GC Exh. 13; GC Exh. 1(x)(F)). After Cable began paying dues in July 2015, Cable worked 66 shifts performing bargaining unit work over the course of the next 5 months.²⁸ (GC Exh. 13; R. Exh. 1(TAmidon Tacoma)). Thus, Cable is owed 4 months of dues reimbursement.²⁹

Juan B. Gonzalez is an Oakland nonhistorical unit employee who worked more than 30 shifts at the original bargaining unit terminal in 2008. As such, Compliance Officer Loya testified that “because he met the 30-shift threshold in 2008... for that year we’re asking for... a couple of months’ worth of dues in addition to his initiation fee that he paid.” (Tr. 96, lines 8-10; GC Exh.

²⁷ On cross-examination, Compliance Officer Loya acknowledged an error in Ralph Cable’s calculation. (Tr. 175, lines 10-15). The appropriate correction was made in General Counsel’s Second Amended Compliance Specification and appendices. However, an additional error was discovered in General Counsel’s calculation. Specifically, General Counsel erred in requesting 5 months of dues reimbursement, and hereby amends GC 1(x)(App. D.11, F, and G) to reflect that for 2015 Cable is owed dues reimbursement for 4 months. This is a difference of \$140.

²⁸ There is a discrepancy between GC Exhibit 13 showing the number of bargaining unit shifts Cable worked from July through November 2015, as 66, versus, GC Exhibit 1(x)(Appendix D.11) showing Cable worked 132 bargaining unit shifts in all of 2015. The pivot table in GC Exhibit 13 is based off of PMA records titled TAmidon Tacoma. (R. Exh. 1 (TAmidon Tacoma)). General Counsel Exhibit 1(x)(Appendix D.11) is based on the PMA records titled All Shifts All Dues by Year (30228), which does not show a month by month break down of when shifts were worked. (R. Exh. 1 (All Shifts All Dues by Year (30228))). While General Counsel typically errs on the side of the discriminatee and uses the higher reported number of shifts, in Cable’s case, because he is only owed dues reimbursement for shifts performed after July 2015, when he began paying dues, General Counsel had to rely on TAmidon records because only these records showed a month by month break down of shifts worked. As such, the correct number of bargaining unit shifts Cable worked in 2015, is 66, which may be an underreporting of shifts.

²⁹ 66 bargaining unit shifts, divided by 20 to get the equivalent number of months (3.3 months), rounded up, equals 4 months.

29; GC Exh. 1(x)(App. C.4, E). In 2008, Gonzalez worked 36 bargaining unit shifts over the course of 9 months. (GC Exh. 1(x)(App. C.4); GC Exh. 29). As such, Gonzales is owed two months of dues reimbursement.³⁰ (GC Exh. 1(x)(App. E).

Kirchie Harding is a Tacoma nonhistorical unit employee. (Tr. 76, lines 16-18; GC Exh. 1(x), Appendices D.4 to D. 7; GC Exh. 15; R. Exh. 1 (PCMC All Shifts All Dues by Year (30228)). Compliance Officer Loya testified that “for the years that (Harding) met the ... 30 shift figure threshold, he’s included, as long as he was a dues paying member” of Respondent ILWU. (Tr. 76, lines 14-18). Further, given that PMA’s records for Tacoma do not show payroll dues deductions, Loya testified that she surmised he was a dues-paying member because “he’s listed... as being an ILWU mechanic.” (Tr. 76, 19-21). In 2008, Harding worked 49 bargaining unit shifts over the course of six months. (GC Exh. 1(x) (App. D.4); R. Exh. 1 (PCMC All Shifts All Dues by Year (30228)). Thus, Harding is owed 3 months of dues for 2008.³¹ In 2009, Harding worked 75 bargaining unit shifts over the course of 10 months.³² (GC Exh. 1(x)(App. D.5); GC Exh. 15; R. Exh. 1 (All Shifts All Dues by year (30228)). Thus, he is owed 4 months of dues reimbursement.³³ In 2010, Harding worked 34 bargaining unit shifts over the course of 9 months.

³⁰ 36 bargaining unit shifts, divided by 20 to get the equivalent number of months (1.8), rounded up, equals 2 months

³¹ 49 bargaining unit shifts, divided by 20 to get the equivalent number of months (2.45), rounded up, equals 3.

³² GC Exhibit 15 shows the number of bargaining unit shifts Harding worked is 64 in 2009, 33 in 2010, 61 in 2011, versus, GC Exhibit 1(x)(Appendix D.5, D.6, D.7) showing he worked 75 in 2009, 34 in 2010, and 62 in 2011. The pivot tables are based off of PMA records titled TAMidon Tacoma. (R. Exh. 1 (TAMidon Tacoma). General Counsel Exhibit 1(x)(Appendix D) is based on the PMA records titled All Shifts All Dues by Year (30228). (R. Exh. 1 (All Shifts All Dues by Year (30228)). General Counsel errs on the side of the discriminatee and uses the higher reported number of shifts.

³³ 75 bargaining unit shifts, divided by 20 to get the equivalent in months (3.75), rounded up, equals 4 months.

(GC Exh. 15; GC Exh. 1(x)(App. D.6); R. Exh. 1 (All Shifts All Dues by year (30228)). As such, he is owed 2 months of dues reimbursement for 2010.³⁴ In 2011, Harding worked 62 shifts over the course of 8 months. (GC Exh. 15; GC Exh. 1(x)(App. D.7)). As such, he is owed 4 months of dues for 2011.³⁵

Marty Lenzen is a Tacoma nonhistorical unit employee who performed bargaining unit work at the original terminal for a minimum of 30 days in 2008. (GC Exh. 1(x)(App. D.4; GC Exh. 17). Compliance Officer Loya testified that “in the years that (Lenzen) met the threshold of 30 days” at the bargaining unit terminal, he is entitled to reimbursement for dues and his initiation fee. (Tr. 80, lines 12-22). In 2008, Lenzen worked 51 bargaining unit shifts over the course of 8 months. (GC Exh. 17). Thus, Lenzen is owed 3 months of dues reimbursement.³⁶

Jared Manson is a Tacoma nonhistoric unit member. (GC Exh. 1(x) (Appendix D. 11); GC Exh. 18). Compliance Officer Loya testified that the PMA registration records, obtained at the inception of her compliance investigation when neither the employer nor Respondent ILWU provided requested documents, showed 23 shifts worked in 2015. (Tr. 81, lines 13-18; R. Exh. 1 (PCMC Mech Reg History (30228)). However, when reconciled with the PMA records titled T.Amidon Tacoma, provided by Respondent ILWU only after the initial Compliance Specification issued (in August 2019), Loya identified a discrepancy. (Tr. 81, line 13-25; Tr. 82, lines 1-18). The T.Amidon Tacoma PMA records showed Manson worked 40 shifts in 2015. Thus, as Loya testified, “to err... on the safe side, we included (Manson) and are asking for the two months that

³⁴ 34 bargaining unit shifts, divided by 20 to get the equivalent in months (1.7), rounded up, equals 2 months.

³⁵ 62 bargaining unit shifts, divided by 20 to get the equivalent number of months (3.1), rounded up, equals 4 months.

³⁶ 51 bargaining unit shifts, divided by 20 to get the equivalent number of months (2.55), rounded up, equals 3 months.

the 40 shifts rounds up to for that year... \$279.90.” (Tr. 81, lines 13-25; Tr. 82, lines 1-18). In 2015, Manson worked 40 bargaining unit shifts over the course of five months. (GC Exh. 1(x)(App. D. 11); GC Exh. 18; R. Exh. 1(TAmidon Tacoma). As such, he is owed 2 months of dues reimbursement.³⁷

Merl May is a Tacoma nonhistorical unit employee, who met the 30-shift threshold for 2016. (Tr. 85, line 17-20; GC Exh. 1(x)(App. D.12); GC Exh. 19; R. Exh. 1 (TAmidon Tacoma)). In 2016, May worked 53 bargaining unit shifts over the course of 6 months. As such, May is owed 3 months of dues reimbursement.³⁸ (GC Exh. 1(x)(Appendix D.12); GC Exh. 19).

Michael Moore is a Tacoma nonhistorical unit employee who worked a minimum of 30 shifts at the original bargaining unit terminal in Tacoma in 2011. (Tr. 95, lines 4-9; GC Exh. 28; GC Exh. 1(x)(Appendix D.7); R. Exh. 1 (PCMC all shifts all dues by year (30228)). Compliance Officer Loya testified that “2011 is the only year (Moore) met the threshold and we’re asking for reimbursement for that year in addition to the initiation fees he paid.” (Tr. 95, lines 12-15; GC Exh. 1(x) (App. F)). In 2011, Moore worked 46 bargaining unit shifts over the course of 8 months. Thus, he is owed 3 months of dues reimbursement.³⁹

Tom Paulson is a Tacoma nonhistorical unit employee who met the 30-shift threshold for 2015 and 2016. (Tr. 86, lines 5-13; GC Exh. 1(x), Appendices D.11, D. 12; GC Exh. 20; R. Exh. 1(TAmidon Tacoma)). In 2015, Paulson worked exactly 30 bargaining unit shifts over the course

³⁷ 40 bargaining unit shifts, divided by 20 to get the equivalent in months (2), rounded up, equals 2 months.

³⁸ 53 bargaining unit shifts, divided by 20 to get the equivalent in months (2.65), rounded up, equals 3 months.

³⁹ 46 bargaining unit shifts, divided by 20 to get the equivalent in months (2.3), rounded up, equals 3 months.

of three months. (GC Exh. 20; GC Exh. 1 (App. D.11)). Thus, he is owed 2 months of dues reimbursement.⁴⁰ (GC Exh. 1(x)(App.F)). In 2016, Paulson worked 91 bargaining unit shifts over the course of 11 months.⁴¹ (GC Exh. 20; GC Exh. 1(x)(App. D.12)). As such, he is owed 5 months of dues reimbursement.⁴² (GC Exh. 1(x)(App. D.12)).

Brandon Stevenson is a Tacoma nonhistoric unit member who met the 30-day threshold at the bargaining unit terminal for 2015. (Tr. 87, lines 19-23; GC Exh. 1(x) App. D.11; GC Exh. 21; R.Exh. 1 (PCMC All Shifts All Dues by year (30228); PCMC Mech. Reg. History (30228)). Compliance Officer Loya noted that in the PMA registration records showed Stevenson worked exactly 30 shifts in 2015 she therefore determined reimbursement was appropriate for 2015. (Tr. 87, lines 19-25; Tr. 88, lines 1-3). In 2015, Stevenson worked 30 bargaining unit shifts over the course of two months. GC Exh. 1(x)(App. D.11); GC Exh. 21). As such, he is owed 2 months of due reimbursement.⁴³

Jacob Theoharis is a Tacoma nonhistorical unit employee who worked a minimum of 30 shifts in 2012 at the original bargaining unit terminal.⁴⁴ (Tr. 88, line 19-25; GC Exh. 22; GC Exh.

⁴⁰ 30 bargaining unit shifts, divided by 20 to get the equivalent number of months (1.5), rounded up, equals 2 months.

⁴¹ There is a discrepancy between GC Exhibit 20 showing the number of bargaining unit shifts Paulson worked in 2016 as 90, versus, GC Exhibit 1(x)(Appendix D.12) showing Paulson worked 91 bargaining unit shifts in 2016. The pivot table in GC Exhibit 20 is based off of PMA records titled TAmidon Tacoma. (R. Exh. 1 (TAmidon Tacoma)). General Counsel Exhibit 1(x)(Appendix D.12) is based on the PMA records titled All Shifts All Dues by Year (30228). (R. Exh. 1 (All Shifts All Dues by Year (30228))). General Counsel errs on the side of the discriminatee and uses the higher reported number of shifts.

⁴² 91 bargaining unit shifts, divided by 20 to get the equivalent number of months (4.55), rounded up, equals 5 months.

⁴³ 30 bargaining unit shifts, divided by 20 to get the equivalent in months (1.5), rounded up, equals 2 months.

⁴⁴ On cross-examination, Compliance Officer Loya acknowledged an error in Jacob Theoharis' calculation. (Tr. 176, lines 19-25; Tr. 177, lines 1-4). The appropriate correction was made in General Counsel's Second Amended Compliance Specification and appendices.

1(x)(App. D.8)). In 2012, Theoharis worked 46 bargaining unit shifts over the course of at least three months.⁴⁵ Thus, he is owed 3 months of dues reimbursement.⁴⁶

Andrew Upshaw is a Tacoma nonhistorical unit employee who worked a minimum of 30 shifts in 2008 and 2011. (Tr. 89, lines 19-22; GC Exh. 23; GC Exh. 1(x)(Appendices D.4 and D.7; R. Exh. 4). In 2008, Upshaw worked 68 bargaining unit shifts over the course of seven months. (GC Exh. 1(x)(App. D.8); GC Exh. 23). Thus, he is owed 4 months of dues reimbursement.⁴⁷ In 2011, Upshaw worked 32 bargaining unit shifts over the course of six months.⁴⁸ (GC Exh. 1(x)(App. D.7); GC Exh. 23). Thus, he is owed 2 months of dues reimbursement.⁴⁹

John Westhead is a Tacoma nonhistorical unit employee who worked a minimum of 30 shifts in 2008, 2009, 2010, 2011, 2012. (Tr. 90, lines 9-21; GC Exh. 1(x), App. D.4-D.8). Westhead also paid initiation fees in 2007. (Tr. 90, lines 20-21; GC Exh. 1(x), App. D.3). In 2008, Westhead

⁴⁵ There is a discrepancy between GC Exhibit 22 showing the number of bargaining unit shifts Theoharis worked in 2012 was 35, versus, GC Exhibit 1(x)(Appendix D.8) showing Theoharis worked 46 bargaining unit shifts in 2012. The pivot table in GC Exhibit 22 is based off of PMA records titled TAmidon Tacoma. (R. Exh. 1 (TAmidon Tacoma)). General Counsel Exhibit 1(x)(Appendix D.8) is based on the PMA records titled All Shifts All Dues by Year (30228). (R. Exh. 1 (All Shifts All Dues by Year (30228))). General Counsel errs on the side of the discriminatee and uses the higher reported number of shifts.

⁴⁶ 46 bargaining unit shifts, divided by 20 to get the equivalent in months (2.3), rounded up, equals 3 months.

⁴⁷ 68 bargaining unit shifts, divided by 20 to get the equivalent in months (3.4), rounded up, equals 4 months.

⁴⁸ There is a discrepancy between GC Exhibit 23 showing the number of bargaining unit shifts Upshaw worked in 2011 was 20, versus, GC Exhibit 1(x)(Appendix D.7) showing Upshaw worked 32 bargaining unit shifts in 2011. The pivot table in GC Exhibit 23 is based off of PMA records titled TAmidon Tacoma. (R. Exh. 1 (TAmidon Tacoma)). General Counsel Exhibit 1(x)(Appendix D.4) is based on the PMA records titled All Shifts All Dues by Year (30228). (R. Exh. 1 (All Shifts All Dues by Year (30228))). General Counsel errs on the side of the discriminatee and uses the higher reported number of shifts.

⁴⁹ 32 bargaining unit shifts, divided by 20 to get the equivalent in months (1.6), rounded up, equals 2 months.

worked 63 bargaining unit shifts over the course of 9 months.⁵⁰ (GC Exh. 1(x), App. D.4; GC Exh. 24). Thus, he is owed 4 months of due reimbursement.⁵¹ In 2009, Westhead worked 57 bargaining unit shifts over the course of 7 months. (GC Exh. 1(x)(App. D.5); GC Exh. 24). Thus, he is owed 3 months of dues reimbursement.⁵² In 2010, Westhead worked 72 bargaining unit shifts over the course of 9 months. (GC Exh. 1(x), App. D.6; GC Exh. 24). As such, he is owed 4 months of dues reimbursement.⁵³ In 2011, Westhead worked 106 bargaining unit shifts over the course of 11 months. (GC Exh. 1(x), App. D.7; GC Exh. 24). Thus, he is owed 6 months of dues reimbursement.⁵⁴ In 2012, Westhead worked 34 bargaining unit shifts over the course of 4 months. (GC Exh. 1(x), App. D.8; GC Exh. 24). Thus, he is owed 2 months of dues reimbursement.⁵⁵

2. Respondent ILWU’s Unreasonable “Steady Mechanic” Requirement Is A Red Herring, Eliminating Virtually All Liability, And Must Be Rejected.

Contrary to Respondent ILWU’s argument, the Board ordered remedy is not limited to only those employees who worked as “steady mechanics” at the bargaining unit terminals. (GC Exh. 1(z)(page 9, para. 1(A)(ii), page 10, para. 1(A)(iii)). Indeed, the Board’s Order addressing

⁵⁰ GC Exhibit 24 shows the number of bargaining unit shifts Westhead worked was 62 in 2008, 48 in 2009, 68 in 2010, 106 in 2011, and 30 in 2012, versus, GC Exhibit 1(x)(Appendix D.4, D.5, D.6, D.7, D.8) showing Westhead worked 63 bargaining unit shifts in 2008, 57 in 2009, 72 in 2010, 104 in 2011, and 34 in 2012. The pivot table in GC Exhibit 24 is based off of PMA records titled TAmidon Tacoma. (R. Exh. 1 (TAmidon Tacoma)). General Counsel Exhibit 1(x)(Appendix D.4, D.5, D.6, D.7, D.8) is based on the PMA records titled All Shifts All Dues by Year (30228). (R. Exh. 1 (All Shifts All Dues by Year (30228))). General Counsel errs on the side of the discriminatee and uses the higher reported number of shifts.

⁵¹ 63 bargaining unit shifts, divided by 20 to get the equivalent in months (3.15), rounded up, equals 4 months.

⁵² 57 bargaining unit shifts, divided by 20 to get the equivalent in months (2.85), rounded up, equals 3 months.

⁵³ 72 bargaining unit shifts, divided by 20 to get the equivalent in months (3.6), rounded up, equals 4 months.

⁵⁴ 106 bargaining unit shifts, divided by 20 to get the equivalent in months (5.3), rounded up, equals 6 months.

⁵⁵ 34 bargaining unit shifts, divided by 20 to get the equivalent in months (1.7), rounded up, equals 2 months.

“all present and former unit members” is far more expansive than Respondent ILWU asserts. The Order does not read: ‘all present and former steady mechanics’ as Respondent ILWU prefers. Thus, Respondent ILWU’s assertion that only “steady mechanics” at the bargaining unit terminals are eligible for reimbursement finds no basis in the Board’s Order or the D.C. Circuit Court’s Mandate.

Respondent ILWU wrongly argues for the exclusion of any employee not meeting this “steady mechanic” designation based on its assertion that these employees were members of the “ILWU coastwise bargaining unit of longshore workers and marine clerks,” and as such, they “were not part of the unit at issue.” (GC Exh. 1(z)(page 9, para 1(A)(ii)). Such an argument strains credulity as the “unit at issue” are the members of the Charging Party Machinists Union as defined by that party’s CBA:

This Agreement shall cover... terminal maintenance... as presently and hereby after being performed by employees represented by the Union. *This Agreement shall apply to all facilities and operations where the Employer does business and has commercial control.* (R. Exh. 13)(Emphasis added).

This unit description does not include a requirement of “steady basis” or “steady mechanic” designation. In fact, this description firmly roots that bargaining unit in the location – “all facilities and operations” -- of the bargaining unit work, *i.e.*, the original bargaining unit terminals. Thus, any employee performing work at these terminals, is a member of “the unit at issue.” Moreover, the Board’s Order requires a remedy for “all former and current members who joined the ILWU since March 31, 2005,” and therefore the Order did not limit the remedy to those who had previously been represented by the Charging Party Machinists Union, but rather, all employees going forward who performed that work. Thus, the logical conclusion is that employees who continue to perform that bargaining unit work at “all facilities and operations where the Employer

does business” are included – regardless of whether they are termed “steady mechanics” or not. Further, the historical bargaining unit members who were transferred away from the original bargaining unit members are also part of “the unit at issue” by virtue of the historical membership in that unit (“presently... represented by the (Charging Party Machinists) Union.”). Thus, Respondent’s proposed exclusion is an attempt to narrow the scope of eligible employees by imposing an artificial designation that did not exist under the historical bargaining unit description and, further, finds no basis in the Board’s Order.

Moreover, the Board’s finding that Respondent ILWU unlawfully enforced its contract, including its union security clause on the unit of employees tasked with performing this work, presumes that a remedy is owed. *Minette Mills, Inc.*, 316 NLRB 1009, 1010-1011 (1995)(a finding by the Board that an unfair labor practice was committed is presumptive proof that some remedy is owed); *Arlington Hotel Co.*, 287 NLRB 851, 855 (1987), *enfd.* in part 876 F.2d 678 (8th Cir. 1989); *NLRB v. Mastro Plastics Corp.*, 354 F.2d. 170, 178 (2d Cir. 1965), *cert. denied* 384 U.S. 972 (1966). However, Respondent ILWU’s formula unreasonably eliminates 14 employees from any remedy on the basis that they were not steadily employed or deemed “steady mechanics,” even though they performed a minimum level of bargaining unit work. (GC Exh. 1(z)(Exh. A, E). These 14 employees -- Randall Castillo, Juan B. Gonzalez, George Horton, Glen McInstosh, William Ashmore, Eric Bock, Ralph Cable, Harry Coudreit, Kirchie Harding, Marty Lenzen, Jared Manson, Merl May, Michael Moore, Tom Paulson, Brandon Stevenson, Jacob Theoharis, Andrew Upshaw, John Westhead, Michael Wilper, and Darwin Worrell – literally worked thousands and thousands of bargaining unit shifts at the original bargaining unit terminals. Respondent ILWU’s attempt to redefine the contours of the Board’s findings – arguing that steady mechanics, and only steady mechanics -- were harmed by Respondent ILWU’s unlawful conduct, belies the voluminous

records demonstrating these 14 employees performed bargaining unit work time and time again at the bargaining unit terminals. (R. Exh. 1). Such a recasting of the Board's actual findings and Order is an improper attempt to modify the Board's Order. *Grinnell Fire Protection Systems Co.*, 337 NLRB 141, 142 (2001)(Board has no jurisdiction to modify a court-enforced Order).

General Counsel rejects Respondent ILWU's unreasonably restrictive formula. Yet cognizant that nonhistorical unit members occupy a different space than historical unit members in terms of measurable harm, General Counsel's formula captures this difference. General Counsel's formula reconciles the fact that nonhistorical unit members who performed fewer than 30 shifts at the original bargaining unit terminals, spent the majority of their time at nonbargaining unit terminals. Thus, in that instance, General Counsel credits their dues payments to those nonbargaining unit shifts and does not seek dues reimbursement for those *de minimus* shifts. In contrast, Respondent ILWU seeks a wholesale elimination of 14 nonhistorical employees without providing a reasoned accounting of the time they spent performing the unlawfully acquired bargaining unit work.

E. Respondent ILWU Meritless Defense of Prior Membership.

1. Respondent ILWU's Elimination Based On Previous ILWU Membership Has No Basis in Fact.

Respondent ILWU asserts that General Counsel has included individuals who were members of Respondent ILWU prior to March 31, 2005. However, Respondent ILWU's exclusion of employee Brent Leinum runs contrary to the record evidence.

Brent Leinum is a Tacoma nonhistorical unit employee who re-applied and re-joined Respondent ILWU after March 31, 2005. (Tr. 93, lines 20-25; Tr. 94, lines 1-6; GC Exh. 1(w) App. D.2-D.4, D.8, F; GC Exh. 27). Although Leinum was previously a member of Respondent ILWU in the 1990's, the PMA registration records for Tacoma show that by 2004, Leinum was

classified as an “inactive casual.” (Tr. 93, lines 20-25; Tr. 94, lines 1-6; R. Exh. 1 (PCMC Mech Reg history (30228)). Further, the same records show that after March 31, 2005, Leinum was listed as a an “applicant” for Respondent ILWU. (Tr. 93, lines 20-25; Tr. 94, lines 1-6; R. Exh. 1 (PCMC Mech Reg history (30228)). Based on these records, Compliance Officer Loya testified that “to me that means that... he stopped his ILWU membership at some point, and then he didn’t become... a new member again until sometime during the reimbursement period... and that’s why... he was included... among the discriminatees.” (Tr. 94, lines 2-6).

2. Contrary to Respondent’s Assertion, General Counsel Has Not Included Employees Who Joined Respondent ILWU Prior to March 31, 2005.

There is no dispute that employees who joined Respondent ILWU prior to March 31, 2005, are excluded from eligibility for reimbursement. Respondent nevertheless argues that General Counsel has included individuals who should be excluded on this basis. (GC Exh. 1(z)(page 8 para. 1(A)(i), Exh. A, E). However, Respondent only identifies one individual that it contends falls within this exclusion: Brent Leinum. (GC Exh. 1(z)(Exh. E). General Counsel has shown that although Leinum was previously a member of Respondent ILWU in the 1990’s, the PMA registration records for Tacoma show that by 2004, Leinum was classified as an “inactive casual.” (Tr. 93, lines 20-25; Tr. 94, lines 1-6; R. Exh. 1 (PCMC Mech Reg history (30228)). The record evidence shows that Leinum re-applied and re-joined Respondent ILWU after March 31, 2005. (Tr. 93, lines 20-25; Tr. 94, lines 1-6; GC Exh. 1(w) App. D.2-D.4, D.8, F; GC Exh. 27). The same records show that after March 31, 2005, Leinum was listed as a an “applicant” for Respondent ILWU. (Tr. 93, lines 20-25; Tr. 94, lines 1-6; R. Exh. 1 (PCMC Mech Reg history (30228)). Based on these records, Compliance Officer Loya testified that “(Leinum) stopped his ILWU membership at some point, and then he didn’t become... a new member again until sometime during the reimbursement period... and that’s why... he was included... among the

discriminatees.” (Tr. 94, lines 2-6). As such, Respondent ILWU’s exclusion of Leinum on the assertion of prior membership runs contrary to the record evidence.

To the extent Respondent ILWU argues any other individuals must be excluded on the basis of prior membership, it has failed to identify them with any specificity.

F. Respondent ILWU’s Meritless Defense of No Dues Payment Records.

1. Respondent ILWU Eliminates Remedy For Employees Because of Its Own Lack Of Recordkeeping.

Respondent ILWU seeks to eliminate employees for whom it asserts there are no records of dues payments. However, substantial evidence shows that regardless of whatever faulty recordkeeping by Respondent ILWU, these employees worked in classifications and worksites that Respondent ILWU represented, and thus, dues payments were exacted. To be sure, by the very terms of Respondent ILWU’s collective-bargaining agreements with the Pacific Maritime Association, payment of dues and fees required for membership in good standing is a condition of employment. (R. Exh. 9, 10, 11 (union security provisions therein)).

Harvey Anderson is a Tacoma historical unit employee who performed work as an “ILWU Mech Journeyman” during the relevant time periods. (GC Exh. 11; R. Exh. 1 (TAmidon Tacoma)). Compliance Officer Loya testified that based on PMA records⁵⁶ she determined that “by virtue that he was an ILWU mechanic working quite consistently from 2005 to 2016... (i)n order to keep working, I’m under the assumption that he paid dues in order to continue working(.)” (Tr. 71, lines 2-6; GC Exh. 11). Further, Loya noted that in PMA’s records for Tacoma specifically, there was a lack of information about payroll dues deductions. (Tr. 71, lines 15-18). Specifically, she testified, “for a lot of the Tacoma employees, or mainly for the historical unit Tacoma employees,

⁵⁶ R. Exh. 1 (TAmidon Tacoma); GC Exh. 11 (pivot table of TAmidon Tacoma).

... it doesn't seem like they ... paid dues through payroll deductions... and my assumption is that they paid it directly (to Respondent ILWU.).” (Tr. 71, lines 15-20). This assumption is based on the PMA records showing that Anderson “continued to work and be dispatched through ILWU as an ILWU mechanic journeyman.” (Tr. 71, 22-25; GC Exh. 11). Respondent ILWU’s collective-bargaining agreement contains a union security clause and it is therefore reasonable to assume that employees who continually worked under the contract is paying dues. (R. 9). If Anderson had failed to pay dues, Respondent ILWU would have enforced the union security clause to cause his termination. Thus, Respondent ILWU’s proposed exclusion of Anderson on the assertion that he did not pay dues to Respondent ILWU contravenes the record evidence.

Charles Lincoln is an Oakland nonhistorical unit employee who performed work as an “ILWU Mech Journeyman” and “ILWU Mech Day” during the relevant time periods. (GC Exh. 10; R. Exh. 1 (TAmidon Oakland)). As Compliance Officer Loya testified, based on PMA’s records,⁵⁷ Lincoln was “obviously working as an ILWU mechanic. It is by that assumption that... in order to work, he has to pay dues...if you look what PMA’s reported, ... (i)t is by that assumption that... in order to work, he has to pay dues...(If you look what PMA’s reported ... that he had payroll dues deductions for the year... so it is my assumption that he was a dues paying member of ILWU and so for the time period that he worked at the terminals where the bargaining unit work was being performed, he’s owed reimbursement for those time periods.” (Tr. 64, line 17-20, 25; Tr. 65, lines 1-12).

In addition, Charles Lincoln paid an \$825 A status initiation fee in 2008, but Respondent ILWU contends that he is ineligible for reimbursement as it has no records of such fees. (GC Exh. 1(x)(App. C.4); GC Exh. 1(z)(Exh. A)). However, PMA registration records show that Lincoln

⁵⁷ R. Exh 1 (TAmidon Oakland); GC Exh. 10 (pivot table of TAmidon Oakland).

became an A status member in 2008, and as such it is assumed that Respondent ILWU would not have allowed Lincoln to work at its jobsites without having paid a registration fee. (R. Exh. 9, 10, 11 (union security provisions therein); R. Exh. 1(PCMC Mech Reg History (10112, 10114, 10130); PCMC Mech Reg History (10131)). As such, Respondent ILWU fails to reconcile with the records showing Lincoln paid this fee within the reimbursement period. As such, Respondent ILWU's proposed exclusion of Lincoln on the assertion that he did not pay dues or fees to Respondent ILWU is not borne out by the record evidence.

Michael Guyton is a Tacoma historical unit employee because he previously worked for PMMC under Charging Party representation and was then hired by PCMC under Respondent ILWU representation. (GC Exh. 16; GC Exh. 1(x)(App. A, D.1-D.12); R. Exh. 1 (PCMC All Shifts All Dues by Year (30228)). As Compliance Officer Loya testified, Guyton was a registered B status member as of July 23, 2005, and therefore he is eligible for dues reimbursement for the months July through December 2005, he is entitled to the processing fee incurred by becoming a B status member. (Tr. 79, lines 12-18). Loya noted that even though the PMA records⁵⁸ show no payroll dues deductions for Guyton, this means only that no dues were deducted throughout payroll, but it "does not tell (us) that he didn't pay dues." (Tr. 79, lines 18-22). Guyton worked at multiple terminals represented by Respondent ILWU under various job classifications: "ILWU Mech Journeyman" and "ILWU Mech Journeyman Lead." (GC Exh. 16). As such, Loya testified that "we know that he was working as an ILWU mechanic, and in order to work, I assume that he as to pay dues." (Tr. 79, lines 9-11; R. Exh. 9, 10, 11). Respondent ILWU would unreasonably have no remedy for Guyton on the basis that it does not have records of dues payment.

⁵⁸ R. Exh. 1 (PCMC Mech Reg History (30228); TAmidon Tacoma).

2. Uncertainty As To Dues Payments Must Be Resolved In Favor Of Discriminatees, And Respondent ILWU's Attempt to Hide From Liability Based On Its Lack of Recordkeeping Must Be Rejected.

Any argument by Respondent ILWU that a lack of dues records for certain employees extinguishes its reimbursement obligation must be soundly rejected. A well-established principle is that “when uncertainty arises concerning the appropriate amount of make-whole relief, the uncertainty is normally, and appropriately, resolved in favor of the injured party and against the respondent, as the wrongdoer.” *Lou’s Transport, Inc.*, 366 NLRB No. 140 slip op. at p. 7 (July 24, 2018); *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980) (enf’d. sub nom. *Angle v. NLRB*, 683 F.2d 1296 (10th Cir. 1982)(where there are uncertainties or ambiguities, doubts should be resolved in favor of the wronged party rather than the wrongdoer); *Webco Industries, Inc.*, 340 NLRB 10, 11 (2003); *F. M. Broadcasting Corporation d/b/a WHLI Radio*, 233 NLRB 326, 329 (1977); see also *Paper Moon Milano*, 318 NLRB 962, 963 (1995), *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), *United Aircraft Corp.*, 204 NLRB 1068 (1973). In *United Aircraft Corporation*, 204 NLRB 1068 (1973), the Board stated that “the backpay claimant should receive the benefit of any doubt rather than the [r]espondent, the wrongdoer is responsible for the existence of any uncertainty and against whom any uncertainty must be resolved.”

In this case, to the extent there is any uncertainty in the records as to whether dues were paid by certain employees, the uncertainty must be construed against Respondent ILWU. General Counsel has only included employees for whom there are work records indicating ILWU job-classifications for which dues are required. (GC Exh. 1(z)(page 10, para 1(A)(iv)-(v)). Based on Respondent ILWU’s own collective-bargaining agreement, and by the terms of the union security clause contained therein, payment of dues was a condition of work, and failure to do so, meant Respondent ILWU could cause job termination. (R. Exh. 9, 10, 11). Further, Compliance Officer Paloma Loya testified throughout the hearing that with respect to Tacoma-based employees, PMA

records show that no dues were deducted through payroll. Those same records showed that these employees performed work in ILWU-classifications such as “ILWU Mech Journeyman,” and as such, they were presumed to have paid dues in order to work those shifts. Again, working as an ILWU mechanic, by virtue of Respondent ILWU’s union security clause, all but guarantees that dues were paid. (R. Exh. 9, 10, 11). In light of the foregoing, General Counsel’s evidence shows that there is no basis to exclude, as Respondent urges, employees Harvey Anderson, Charles Lincoln, or Michael Guyton.

G. Respondent ILWU’s Unreasonable Treatment of Fees.

1. Respondent ILWU Denies Fees By Imposing Unreasonable “Steady Mechanic” Requirement.

Respondent ILWU makes the remarkable assertion that fees are not reimbursable unless these are paid during a year in which the employee worked bargaining unit shifts as a “steady mechanic.” (GC Exh. 1(z)(page 11, para. 1(E)). Notably, Respondent ILWU failed to set forth a definition of what qualifies as a “steady mechanic” that would apply to these workers harmed by Respondent ILWU’s unfair labor practices. Nevertheless, this formulation leaves numerous employees without a remedy for the fees paid to Respondent ILWU within the reimbursement period.

Specifically, contrary to all record evidence, Respondent ILWU denies reimbursement to the following employees who paid fees within the reimbursement period: Joseph Barczak, who paid a \$400 A status initiation fee in 2011;⁵⁹ Nathan Been, who paid a \$250 B status initiation fee in 2007 and a \$400 A status initiation fee in 2012;⁶⁰ David Bell, who paid an \$825 A status

⁵⁹ GC Exh. 1(x)(App. D.7); GC Exh. 1(z)(Exh. H).

⁶⁰ GC Exh. 1(x)(App. D.3, D.8); GC Exh. 1(z)(Exh. G, H).

initiation fee in 2007;⁶¹ Randall Castillo, who paid an \$825 A status initiation fee in 2007;⁶² Arch Chaney, who paid a \$400 A status initiation fee in 2012;⁶³ Gregory Coles, who paid a \$250 B status initiation fee in 2006 and a \$400 A status initiation fee in 2012;⁶⁴ Floyd DeSerisy, who paid a \$250 B status initiation fee in 2005;⁶⁵ Steven Gagne, who paid a \$400 A status initiation fee in 2011;⁶⁶ Juan B. Gonzalez, who paid an \$825 A status initiation fee in 2013;⁶⁷ Juan M. Guevara, who paid an \$825 A status initiation fee in 2007;⁶⁸ William Hooper, who paid a \$250 B status initiation fee in 2005;⁶⁹ George Horton, who paid an \$825 A status initiation fee in 2007;⁷⁰ Rueben Juarez, who paid an \$825 A status initiation fee in 2007;⁷¹ Jeffrey King, who paid a \$250 B status initiation fee in 2005;⁷² Ella Locke, who paid a \$400 A status initiation fee in 2012;⁷³ Scott MacKenzie, who paid an \$825 A status initiation fee in 2008;⁷⁴ Sean Massier, who paid a \$250 B status initiation fee in 2013;⁷⁵ Dale McCarty, who paid a \$250 B status initiation fee in 2005;⁷⁶ Glen McIntosh, who paid an \$825 A status initiation fee in 2007;⁷⁷ Eugene Oades, who paid a

⁶¹ GC Exh. 1(x)(App. C.3); GC Exh. 1(z)(Exh. G, H); R. Exh. 1 (PCMC All Shifts All Dues by Year – (10112, 10114, 10130) and (10131)).

⁶² GC Exh. 1(x)(App. C.3); R. Exh. 1 (PCMC All Shifts All Dues by Year – (10112, 10114, 10130) and (10131)).

⁶³ GC Exh. 1(x)(App. D.8); GC Exh. 1(z)(Exh. H).

⁶⁴ GC Exh. 1(x)(App. D.2, D.8); GC Exh. 1(z)(Exh. G, H).

⁶⁵ GC Exh. 1(x)(App. D.1); GC Exh. 1(z)(Exh. G, H).

⁶⁶ GC Exh. 1(x)(App. D.1); GC Exh. 1(z)(Exh. G, H).

⁶⁷ GC Exh. 1(x)(App. C.9); R. Exh. 1 (PCMC All Shifts All Dues by Year – (10112, 10114, 10130) and (10131)).

⁶⁸ GC Exh. 1(x)(App. C.3); GC Exh. 1(z)(Exh. C, D).

⁶⁹ GC Exh. 1(x)(App. D.1); GC Exh. 1(z)(Exh. G, H).

⁷⁰ GC Exh. 1(x)(App. C.3); R. Exh. 1 (PCMC All Shifts All Dues by Year – (10112, 10114, 10130) and (10131)).

⁷¹ GC Exh. 1(x)(App. C.3); GC Exh. 1(z)(Exh. C, D).

⁷² GC Exh. 1(x)(App. D.2); GC Exh. 1(z)(Exh. G, H).

⁷³ GC Exh. 1(x)(App. D.8); GC Exh. 1(z)(Exh. H).

⁷⁴ GC Exh. 1(x)(App. C.4); GC Exh. 1(z)(Exh. C, D).

⁷⁵ GC Exh. 1(x)(App. D.9); GC Exh. 1(z)(Exh. G, H).

⁷⁶ GC Exh. 1(x)(App. D.1); GC Exh. 1(z)(Exh. G, H).

⁷⁷ GC Exh. 1(x)(App. C.3); GC Exh. 1(z)(Exh. A).

\$400 A status initiation fee in 2011;⁷⁸ Kenneth Obrien, who paid a \$400 A status initiation fee in 2012;⁷⁹ Richard Pachal, who paid a \$400 A status initiation fee in 2012;⁸⁰ Matthew Perrine, who paid a \$400 A status initiation fee in 2012;⁸¹ and Mario Tucker, who paid a \$400 A status initiation fee in 2012.⁸²

2. Respondent ILWU Denies Fee Reimbursement By Imposing Unreasonable Blackout During So-Called “ALJD Period.”

Respondent further asserts that fees paid during the so-called “ALJD period” are not eligible for reimbursement. (GC Exh. 1(z)(page 11, para. 1(F)). This would eliminate reimbursement for any fees paid between February 12, 2009 and June 15, 2015. (GC Exh. 1(z)(Exh. H)). There is no confusion that the start of the reimbursement period begins on March 31, 2005, as set forth by the Board. Thus, General Counsel alleges that the fees paid on or after March 31, 2005, and before the end of the reimbursement period in 2013 for Oakland, and 2016 for Tacoma, are reimbursable.

Through its unreasonable restrictions, Respondent ILWU would deny reimbursement to the following employees for the \$400 A status initiation fee each of them paid to Respondent ILWU in 2011, on the sole basis that this falls within the so-called “ALJD period”: Herbert Ahlgren, Randall Butchart, Oscar Conde, Wayne Coudreit, Dan Davidson, William Douglas, Terence Finn, Jim Fulton, Dana Gorham, Terry Hoffman, William Hooper, Calvin Hughley, Danna Jennings, Jonathan Karlin, Jeffrey King, Ralph Lacher, Ernesto Lucero, Douglas Nelson, Richard Newman, Chris Otto, Norkhoun Phonesaithip, David Suchan, Kent Taylor, Rex

⁷⁸ GC Exh. 1(x)(App. D.7); GC Exh. 1(z)(Exh. H).

⁷⁹ GC Exh. 1(x)(App. D.8); GC Exh. 1(z)(Exh. H).

⁸⁰ GC Exh. 1(x)(App. D.8); GC Exh. 1(z)(Exh. H).

⁸¹ GC Exh. 1(x)(App. D.9); GC Exh. 1(z)(Exh. H).

⁸² GC Exh. 1(x)(App. D.8); GC Exh. 1(z)(Exh. H).

Thompson, Bryan Thongvanh, Claude Thornbrugh, Clarence Walters, and William Wilcher. (GC Exh. 1(z)(Exh. H); GC Exh. 1(x)(App. D.7)). Respondent ILWU would also deny the \$400 A status initiation fee paid by Dale Gallian in 2012. It is patently clear that Respondent ILWU's "ALJD period" blackout dates undermine the remedy for the unlawfully obtained fees paid by these employees to Respondent ILWU. In short, Respondent ILWU fails to deliver an adequate remedy, and instead proposes a wholly unreasonable remedy.

3. The Board Must Reject Respondent ILWU's Unreasonable Attempts to Exclude Fees That Were Paid During Reimbursement Period.

Respondent ILWU argues that fees paid during the reimbursement period are not reimbursable unless the employee has also worked at the bargaining unit terminal as a "steady mechanic" during that same year. (GC Exh. 1(z)(page 11, para 1(E)). Once again, Respondent ILWU impermissibly seeks to modify the Board's Order by means of imposing a restriction that the Board itself did not order, nor articulate in its finding of liability. That is, the Board did not limit the reimbursement of dues to only those years in which bargaining unit work was performed. (Tr. 192, lines 5-18). Respondent identifies no part of the Board's Decision and Order to situate its argument, as no such language exists in the law of the decision. Moreover, such a proposal belies the very nature of Respondent ILWU's membership structure, which fundamentally rests on membership fees as a precondition to performing work at terminals represented by Respondent ILWU. (Tr. 191, lines 12-24)(R. Exh. 9, 10, 11). Dues reimbursement is determined by whether shifts have been worked at the bargaining unit terminal, or in the case of historical employees, at any terminal represented by Respondent ILWU. Membership fees are different, as these are a prerequisite to dispatch, seniority, and priority, and therefore fee reimbursement is not contingent on work performed in any given month or year. (R. Exh. 9, 10, 11). Under the clear terms of the Board's Decision and Order, fee reimbursement is determined by whether these fees were paid

during the reimbursement period. Respondent ILWU cannot now seek to modify the terms of the Board's Order. This argument must be rejected.

Respondent further argues that the ALJD period acts as a blackout period in which no fees can be reimbursed. This is again a nonsensical proposition that is not rooted in the Board decision or in any legal precedence. See *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 369 U.S. 258, 265 (1969); *Harding Glass Co.*, 337 NLRB 1116, 1118 (2002); *Hubert Distributors*, 344 NLRB 339, 341-342 (2005); *Unitog Rental Services*, 318 NLRB 880, 885 (1995), *affd.* 105 F.3d 651 (5th Cir. 1995). Indeed, the fees paid during the reimbursement period are reimbursable regardless of whether Respondent ILWU believed it would prevail in the preceding litigation. Respondent wishes any harm caused by the delay in litigation to be borne by the discriminatee employees, rather than own the harm and repay the debt it owes. Such a position is contrary to the Board authority and must be rejected.

H. Respondent ILWU Seeks To Ride Coattails of Settlement Agreements That Explicitly Excluded Payment of Respondent ILWU's Liability.

1. Legal Principles.

In *Urban Laboratories, Inc.*, the Board applied Supreme Court precedent to Board proceedings by holding that “a release of one joint tortfeasor does not release the other joint tortfeasor unless that is the intention of the parties.” 305 NLRB 987, 987-988 (1991), citing *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 342-348 (1970). The *Urban Laboratories* Board rejected respondent's claim that its liability should be offset by the settlement reached between General Counsel and co-respondent, emphasizing that the settlement “expressly provides that the potential liability of the other Respondents was unaffected.” 205 NLRB at 988. In so doing, the Board held that the settlement did not extinguish the claims against the remaining respondents. *Id.* Likewise, in *Regional Import And Export Trucking Co., Inc.*, the Board rejected respondent

union's arguments that it should be allowed to offset its own portion of 'joint' liability by subtracting all or part of respondent employers' arbitration award payments from the half of the total amount which respondent union was obligated to pay, regardless of the union's assistance in obtaining that award. 323 NLRB 1206, 1207 (1997).

2. The Record Evidence Shows No Employees Received Reimbursement for Dues, Fees, or Assessments Collected By Respondent ILWU.

In 2016, the Charging Party Machinists Union and PCMC/PMMC reached a settlement agreement for \$10,500,000 resolving the claims the Machinists raised against PCMC/PMMC. According to the express terms of the settlement agreement reached between Charging Party Machinists Union and the employers (PCMC and PMMC), the money each worker received under the settlement "specifically does not include any claim for union dues which were paid to the International Longshore and Warehouse Union, but the Released Parties (PCMC and PMMC) are relieved of any responsibility to reimburse such dues." (R. Exh. 14) The settlement further set forth that "nothing herein releases the [Respondent ILWU] International Longshore & Warehouse Union or any of its local unions." (R. Exh. 14). Finally, the terms stated, "Nothing in this Agreement shall affect the Petition for Review and Cross-Application for Enforcement with respect to the International Longshore & Warehouse Union, Case Nos. 15-1336 and 16-1123." (R. Exh. 14). Indeed, the settlement was intended to compensate employee claims of losses based on layoffs and losses to the to the employees' benefits and pension funds administered by the Charging Party Machinists Union: "the settlement payment will be allocated to such payees as... have a good faith claim of loss... examples of such potential payees include... Machinists' benefit funds and laid off employees." (R. Exh. 14).

Charging Party Machinists' Union Assistant Director Don Crosatto testified that the settlement did not encompass any part of the dues owed to employees. (Tr. 284, lines 1-7). He

further testified that his understanding was that Respondent ILWU held the unlawfully collected dues, and not the employer PCMC or PMMC. (Tr. 284, lines 13-15, 23-24). Consistent with Crosatto's testimony, Charging Party Machinists' Union Directing Business Representative Daniel Morgan testified that there was no amount in the settlement allocated to pay the dues reimbursement obligation. (Tr. 295, lines 24-25; Tr. 296, line 1).

Crosatto testified that he helped "to calculate the actual amounts due to the people in the (settlement). First ... devising a fair division between the Tacoma bargaining unit and the Oakland bargaining unit... (t)hen with the monies that were allocated... deciding how to allocate it between the benefit plans and the employees... (t)hen between the various employees that were concerned in this matter." (Tr. 243, lines 11-19; R. Exh. 14). As for the initial division, Crosatto testified that Oakland received approximately 35% of the gross settlement amount, and the remainder to Tacoma; approximately \$1.7 went to the Charging Party Union Trust Pension Fund. (Tr. 243, lines 24-25; Tr. 252, lines 14-15; R. Exh. 15, under seal).

Assistant Director Crosatto testified that he based all hourly economic losses based on the wage rate that existed in 2004 under the Machinists CBA for the full reimbursement time period from 2005 to 2013. (Tr. 264, lines 24-25; Tr. 265, lines 1-3). In this regard, the wage rate applied to determine hourly losses was artificially held low, as raises were certain to have occurred over the course of those years. (Tr. 264, lines 24-25; Tr. 265, lines 1-3). Specifically, Crosatto testified that he based this assumption on his firsthand experience, as,

(E)very subsequent agreement I've negotiated on the waterfront has contained... at least respectable levels of wage and benefits increases. The worst contracts negotiated in the off-dock industry has contained wage and benefit increases. So I find it hard to conceive that we would go two or three contract cycles without any increase in wages or benefits. Particularly in this industry.

(Tr. 269, lines 11-25; Tr. 270, line 1). As such, applying the 2004 wage rate as a static wage rate over the backpay period shows under-compensation for the lost hourly wages for the employees. (Tr. 265, lines 1-2, "... the number would actually be quite a bit higher").

Further, Crosatto testified that he was not able to account for daily "time-and-a-half" overtime after 8 hours, double time after 10 hours, day-six overtime, day-seven overtime, or other premium pay earned by employees under the Machinists CBA for reasons of resources, practicality, and limited available records. (Tr. 236, lines 6-25; Tr. 237, lines 1-15; Tr. 267, lines 5-11; Tr. 235, lines 3-25; Tr. 236, lines 1-13; Tr. 238, lines 10-17; Tr. 267, lines 12-18; Tr. 268, lines 1-6). In this regard, Crosatto testified that he sought a way to calculate wage losses of the employees without wading into the arduous task of parsing out which employees regularly or semi-regularly earned over time, double time, or other premium pay, as he did not have full records from PMA nor did he have a "squadron of accountants." (Tr. 252, lines 21-2; Tr. 253, lines 1-5; Tr. 267, lines 5-11).

Finally, Crosatto testified that he did not take into consideration the significant wage differences between the tiered wage structure of Respondent ILWU's CBA and the Machinists CBA. (Tr. 283, 16-25). Specifically, Crosatto testified that when compared with the Machinists' CBA wage rates, Respondent ILWU's B status members "get less money," and in the first 90 days as probationary casuals, the "rate... was a fair bit lower." In fact, as Crosatto testified, "that was one of the complaints was that at least the first couple months (the employees) took a fairly healthy pay cut." (Tr. 283, lines 18-22). However, none of these disparities in pay were taken into account, another measure by which the backpay settlement figure undercounted real losses. (Tr. 283, lines 23-25). Only after employees reached A status in Respondent ILWU, did the wage rates even out

with those under the Machinists CBA. (Tr. 283, lines 6-13). As Crosatto testified, at that point, “the wage rates were pretty comparable.” (Tr. 283, lines 6-13).

Based on the foregoing, Crosatto testified that he determined that the “fairest mechanism... would be to compensate people based on the amount of time they had ... in (the) PCMC bargaining unit... because the people that were there the longest suffered the greater loss of pay and benefits.” (Tr. 253, lines 6-12; Tr. 269, lines 7-10(employees compensated “based on time, rather than actual economic losses.”). As such, Crosatto testified that based on the remaining available settlement proceeds, the number of eligible employees (40), and the number of months (100) that the employees performed work in the PCMC bargaining unit, each employee would receive \$460 for every month he or she worked in the PCMC unit. (Tr. 250, lines 1-10; Tr. 253, lines 10-12; Tr. 253, lines 13-19). Crosatto testified that there were some outlier employees who went from disability status into retirement, or simply went to work for PCMC, and those employees were among the recipients of the smallest payout of around \$2,767. (Tr. 253, lines 20-25; Tr. 254, lines 1-4; R. Exh. 15, under seal).

Crosatto testified that the “(Charging Party Machinists Union) pension fund wasn’t” fully compensated for the loss of investment resulting from the ULPs. (Tr. 254, lines 11-14). As Directing Business Representative Daniel Morgan testified, “the pension formula for a benefit under that pension is solely dependent on the amount of contributions (an employee makes) times a multiplier,” and as a result, money given to the pension “did not directly benefit the employees as an increase to their pensions.” (Tr. 295, lines 1-2). Instead, the \$840,000 paid in a lump sum to the Machinists pension trust was a lump sum to the trust to “offset for unfunded liability that would have been due” under the CBA, and was “not for individual credit to the members.” (Tr. 294, lines 2-5, 18-21). Further, Morgan testified that there was no compensation or credit to

employees in any other part of the settlement to make up for the fact that they were not getting pension credits. (Tr. 295, lines 20-23).

Moreover, as Crosatto testified, each the employees also lost out of their annuity as a result of the ULPs, and this, too, was not compensated for. (Tr. 254, lines 13-25; Tr. 255, lines 1-11). Specifically, under the then-existing Machinists' CBA, employees were entitled to a supplemental \$2,146.17, from which \$700 was allocated to the pension fund, and another portion allocated to cover health and welfare costs, and the remainder, at that time in 2004, about \$600 went to the "trustee directed 401k plan" for the employees' direct benefit. (Tr. 254, lines 13-25; Tr. 255, lines 1-11; R. Exh. 13). Even accounting for both increases in health and welfare expenses year to year, and accounting for negotiated increases to benefits year to year, Crosatto estimated, employees continued to lag behind where they would have been up to the year 2013. (Tr. 256, lines 21-25; Tr. 257, lines 1-4, 17-25; Tr. 258, lines 1-7). As Crosatto testified,

(S)tarting in 2005, these people lost because they were no longer working under a collective-bargaining agreement that called for (the annuity). They lost the ability to add any money to that, and so the amount of lost money, particularly for people that worked all the way through to 2013, was considerable.

(Tr. 255, lines 16-20). Specifically, Crosatto testified that for employees who worked the entirety of 2005 to 2013, he calculated a loss of about \$560 a month less in pension benefits for the rest of their lives. (Tr. 281, lines 8-21). Other losses were less tangible, such as the example of an employee who passed away in his forties just two years into the instant litigation, which, under the Machinists' CBA would have entitled his widow to draw upon his pension immediately, but because of the litigation he was considered an inactive Machinists member with no contributions made during those two years prior to his untimely death. (Tr. 282, line 2-15). As a result, his

widow had to wait until her late husband would have been 65 to draw benefits. (Tr. 282, line 2-15).

Crosatto testified that he calculated lost vacation benefits for employees based on their seniority, which corresponded to either one week per year for the newest hires, to three, four, and five-week vacations for employees with increasing seniority. (Tr. 260, lines 4-13; R. Exh. 15). Crosatto took into account the vacation rights each employee earned under Respondent ILWU's collective-bargaining agreement with PCMC. (Tr. 260, lines 20-25, Tr. 261, lines 1-10). For example, for an employee with nearly 30 years of seniority, he went "immediately from five weeks (of vacation) to zero, then to one week, then back to two, then eventually, back up to three, where during all of these years if he'd been under (the Machinists') agreement he would have been at five weeks." (Tr. 264, lines 1-8). Thus, in calculating this employee's loss in vacation, Crosatto looked at the difference between what he would have had, and what he actually received under Respondent ILWU's CBA. (Tr. 264, lines 13-21; R. Exh. 15).

Perhaps most striking, Crosatto testified that in calculating the backpay figures for the settlement distribution, he based reimbursement on the 2004 payrate even though "obviously... there would have been wage increases" had the Charging Party Machinists Union been able to continue representing the unit. (Tr. 264, lines 22-25; Tr. 265, lines 1-3). Thus, the hours of lost vacation year after year were multiplied by the static 2004 wage rate. (Tr. 265, lines 1-3).

The settlement agreement provided no compensation for losses incurred by the Machinists Union's health and welfare fund. (Tr. 282, 16-24; R. Exh. 14).

Charging Party Machinists Union Assistant Director Don Crosatto testified that he relied on the 2004 Machinists' CBA, which gave employees 16 paid holidays per year, and compared

this with Respondent ILWU's CBA, providing for only 13 per year.⁸³ (Tr. 265, lines 12-25). Again, year after year, employees lost 24 hours of paid holidays, yet as Crosatto testified, he used the static 2004 wage rate to calculate the backpay owed for these losses. (Tr. 266, lines 4-6).

The express terms of the settlement agreement excluded tax payments for any adverse tax consequences resulting from the payment of a lump sum to each employee. (R. Exh. 14).

Specifically, the settlement states, "*the payees shall be solely responsible for taxes, if any, due on account of the payments made to them.*" (R. Exh. 14, emphasis added).

Assistant Director Crosatto testified that there was no compensation for several miscellaneous out of pocket expenses incurred by the employees. For example, even though many of the employees were already welders, they were required to take a welding test as a condition of employment. (Tr. 266, lines 21-25). The employees reported to Crosatto that they paid a couple of hundred dollars each for the test, which was never reimbursed. (Tr. 266, lines 21-25; Tr. 267, line 1). Certain other employees reported to Crosatto that they lost work time due to jury duty, which was not compensated. (Tr. 267, lines 1-4).

In another settlement reached in 2016, Union dues were also excluded from the agreement between the Charging Party Machinists Union and the employers operating in the original bargaining unit terminals in Oakland (Ports America Group, Inc., Outer Harbor Terminal LLC, MTC Holdings, Marine Terminals Corp.). (R. Exh. 16). Specifically, the \$3 million settlement agreement sets forth that "no part of the Settlement Amount shall be utilized to satisfy any claim for dues which may ultimately found to have been unlawfully paid to the ILWU and the Settlement

⁸³ Charging Party Machinists Union Assistant Director Crosatto testified that he did not take into consideration the two *unpaid* holidays under Respondent ILWU's CBA when calculating economic losses of the employees. (Tr. 266, lines 7-10). Under the Machinists' CBA, about 6 of the paid holidays were floating personal days. (Tr. 219, lines 12-20).

Amount does not include reimbursement for any dues money paid to the ILWU or which was not paid to the Machinists. The settlement does however relieve OHT, MTC-H and MTC of any responsibility to reimburse such dues.” (R. Exh. 16). Just as in the settlement with PCMC, this settlement did not compensate employees for any adverse tax consequences for receiving a lump sum payment. (R. Exh. 16). The settlement explicitly stated, “the recipients of this money shall be solely responsible for taxes, if any, due because of the receipt of said money.” (R. Exh. 16). Similar to the PCMC settlement, this settlement resolved the liability stemming from the employers’ unlawful conduct, stating explicitly that the settlement resolves “all forms of compensation, benefits or interest” resulting from the Charging Party Union’s charges against the employers. (R. Exh. 16). As such, the settlement further states that payments are for “payees (with) a good faith claim of loss,” excluding any claims for dues paid to Respondent ILWU. (R. Exh. 16).

Charging Party Machinists Union Assistant Director Crosatto testified that the settlement sorely undercounted the real losses incurred by the employees as the employers were threatening bankruptcy. (Tr. 277, lines 2-5). As Crosatto testified, the damages both in terms of lost wages and benefits certainly the damages to the trust funds were a lot greater than the amounts we settled for.” (Tr. 277, lines 12-14); R. Exh. 17, under seal).

3. There Is No Legal Or Factual Basis For Respondent ILWU’s Offset Argument and It Must Be Rejected.

There is categorically no factual or legal basis for Respondent ILWU’s argument that its liability should be offset by the settlement agreements reached between the Charging Party Union and the various employers. (GC Exh. 1(z)(page 13, para. 2(D)). As the Board held in *Urban Laboratories*, the settlement of one party’s liability does not extinguish the liability of the other held jointly and severally liable. 305 NLRB at 987-988. This is especially so where the parties to

the settlement expressly carved out the remaining party's liability, making it clear to all that the remaining party is not relieved of any liability. *Id.* at 988.

Thus, in this case, as a threshold matter, the Board must examine the settlement between the Charging Party Machinists Union and the employers in the 2016 settlement agreements. See *Urban Laboratories*, 305 NLRB at 988. Those agreements expressly excluded Respondent ILWU and excluded payment for dues, fees, and assessments paid to Respondent ILWU, thereby making the intention of the parties absolutely clear that the settlements in no way extinguished Respondent ILWU's liability. (R. 14; R. 16). In the PCMC settlement agreement, the parties stated that the settlement "specifically does not include any claim for union dues which were paid to the International Longshore and Warehouse Union, but the Released Parties (PCMC and PPMC) are relieved of any responsibility to reimburse such dues." (R. Exh. 14) The settlement further set forth that "nothing herein releases the [Respondent ILWU] International Longshore & Warehouse Union or any of its local unions." (R. Exh. 14). Likewise, the agreement with PAOH, et al, explicitly stated that "no part of the Settlement Amount shall be utilized to satisfy any claim for dues which may ultimately found to have been unlawfully paid to the ILWU and the Settlement Amount does not include reimbursement for any dues money paid to the ILWU or which was not paid to the Machinists. The settlement does however relieve OHT, MTC-H and MTC of any responsibility to reimburse such dues." (R. Exh. 16). The plain language of the settlements demonstrates that the intent of the parties was to leave Respondent ILWU's liability untouched. And it is. Respondent ILWU cannot rely on the settlements to offset its own liability.

Further, as the Board held in *Regional Import And Export Trucking Co., Inc.*, where payment by a jointly liable employer goes to remedy the harm caused by the employer, the union cannot offset its own portion of joint liability as that liability stems from the union's own unlawful

conduct for which there is a separate and distinct remedy owed, even were there is joint liability. 323 NLRB 1206, 1207 (1997). In that case, the union sought to offset its liability based on an arbitration award it helped obtain for the employee against the employer. *Id.* at 1206. The Board held that, notwithstanding the joint liability, the union's own unlawful conduct required a remedy, and therefore it could not borrow from the award paid by the Employer to reduce its liability. *Id.* at 1207.

In the instant case, the employers' settlements with the Charging Party Union were targeted at remedying the harm caused by the employers' unlawful conduct; there was no remedy provided for that would address the harm caused by Respondent ILWU's unlawful conduct. (R. Exh. 14; R. Exh. 16). Specifically, the PCMC settlement stated: "The settlement payment will be allocated to such payees as the Machinists may designate, provided the payees have a *good faith claim of loss* as determined by Machinists, examples of such potential payees include... *machinist benefits funds and laid off employees of PMMC.*" (R. Exh. 14, emphasis added). Thus, the settlement payments were intended to compensate employees for losses related to their layoff, including contributions to their benefits fund through the Charging Party Machinists' funds. While this obviously does not include dues paid to Respondent ILWU, the parties nonetheless made this explicit in the next clause: "The loss *specifically does not include any claim for union dues* which were paid to the International Longshore and Warehouse Workers," Respondent ILWU. (R. Exh. 14, emphasis added). Likewise, the settlement with PAOH et al. stated that the settlement satisfied claims by the employee benefit funds, and that the remaining funds will be allocated to employees "who have a good faith claim of loss." (R. Exh. 16). And again, the parties explicitly stated that "no part of the Settlement Amount shall be utilized to satisfy any claim for dues" paid to Respondent ILWU. (R. Exh. 16). As the plain language of the settlements show, the settlement

monies were directed by the parties to remedy the losses incurred by employees that could be directly attributed to the employers' unlawful conduct – that is, remedies for layoffs and failure to pay into the employee benefit and pension funds. There were no remedies for unlawfully collected union dues. As such, Respondent ILWU cannot claim that the remedies that were directed to compensate employees for the employers' unlawful conduct, must hew to its own benefit. Respondent's claim must be rejected.

Finally, ample record evidence demonstrates that the payout to each employee was far below a 100% makewhole remedy, and thus Respondent ILWU's claims that employees will receive an unlawful windfall or double recovery is simply not grounded in the facts. (GC Exh. 1(z)(page 13, para. 2(D)). Specifically, the evidence shows that the pay rate used to compensate employees for loss in pay and hours was kept artificially low, at the 2004 payrate; employees' overtime, double, sixth-day pay, and seventh-day pay, was not accounted for, and all hours were counted in straight time; employees loss in paid holidays was not accounted for; and various miscellaneous expenses, such as out of pocket expense for welding courses required by PCMC, and unpaid jury duty leave, were not accounted for. Finally, the settlements did not provide for tax consequences as a result of receiving the lump sum payment. (R. Exh. 14; R. Exh. 16). Even without the actual 100% make whole numbers as a comparison, these discounts demonstrate that in no way were employees made 100% whole from the employers' settlement payouts. As such, Respondent ILWU's claim to an offset to avoid a windfall to employees simply runs contrary to the evidence and is just another attempt by Respondent ILWU to circumvent its full scope of liability.

I. Respondent ILWU's Assorted Defenses Not Addressed Above Are Also Without Merit.

1. Respondent ILWU Incorrectly Argues that General Counsel Included Employees Who Did not Work at ILWU-Represented Terminals.

Contrary to Respondent ILWU's assertion, General Counsel has only included workers where there are records showing work performed at terminals represented by Respondent ILWU. (GC Exh. 1(z)(page 10, para 1(A)(iv)-(v)). In this regard, Respondent ILWU failed to identify with any specificity the individuals it asserts were never employed at ILWU-represented terminals. As such, General Counsel rejects the blanket assertion that it has incorrectly included ineligible employees on the basis of work performed at non-ILWU-represented terminals. Having put forth no specific allegation, or evidence to support its assertion, Respondent ILWU has not met its burden and this argument must be rejected.

2. Respondent Incorrectly Argues that No Employees Worked Through the End of November 2016 in Tacoma, And Incorrectly Argues The Tacoma Period Ends November 4, 2016.

Respondent ILWU argues that PCMC ceased operations on November 4, 2016, and that as such no reimbursement can be made to employees after that date. Yet Compliance Officer Loya testified that she relied on the TAmidon Tacoma records to support her determination of the Tacoma end date of November 30, 2016, rather than the November 4, 2016 that Respondent urges. (Tr. 34, line 2-12). Specifically, these documents shows that Tacoma historical employee Herbert Ahlgren worked 19 shifts in the month of November 2016 as an "ILWU Mech Journeyman." (Exh. 1 (TAmidon Tacoma); GC Exh. 7). Under Respondent ILWU's formulation, Ahlgren would receive reimbursement for, at the most, four days in November, when in actuality he worked 19 days in November and is entitled to reimbursement accordingly. Yet, Respondent ILWU provided no evidence to show that the TAmidon Tacoma records were inaccurate, or that other conflicting work records exist. Not only should any uncertainty weigh in favor of the discriminatees, but,

moreover, Respondent ILWU has not met its burden to show that changing the Tacoma reimbursement period is warranted. *Lou's Transport, Inc.*, 366 NLRB No. 140 slip op. at p. 7 (July 24, 2018); *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980) (en'f'd. sub nom. *Angle v. NLRB*, 683 F.2d 1296 (10th Cir. 1982)(where there are uncertainties or ambiguities, doubts should be resolved in favor of the wronged party rather than the wrongdoer); *Emsing's Supermarket*, 299 NLRB 569, 570 (1990)(setting forth respondent's burden to put facts in evidence to warrant changing the backpay period). As such, Respondent ILWU's argument must be rejected.

3. Respondent ILWU Incorrectly Argues that Reimbursement and Interest Should Be Tolloed for the So-Called "ALJD Period" From February 12, 2009 and June 17, 2015.

Respondent argues that the Board's timing, taking six years to overturn ALJ Anderson's decision, warrants the tolling of the reimbursement period and the accrual of interest during this period. (GC Exh. 1(z)(page 12, para. 1(F)). To the extent Respondent ILWU argues a "theory of laches" to assert that it was prejudiced by the Board's delay and must therefore be shielded from a portion of liability in the instant proceedings, the Board must reject this argument. See *NLRB v. Michigan Rubber Products*, 738 F.2d 111 (6th Cir. 1984); *NLRB v. Hub Plastics Inc.*, 52 F.3d 608 (6th Cir. 1996). Relying on well-established Board precedent, supported by the Supreme Court, this argument requires the Board to privilege the wrong-doer over the interest of the discriminatees who are the true party prejudiced by delay. *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 369 U.S. 258, 265 (1969); *Harding Glass Co.*, 337 NLRB 1116, 1118 (2002); *Hubert Distributors*, 344 NLRB 339, 341-342 (2005); *Unitog Rental Services*, 318 NLRB 880, 885 (1995), aff'd. 105 F.3d 651 (5th Cir. 1995). Respondent ILWU's argument has no foundation in Board law, and has been explicitly rejected by the U.S. Supreme Court. It must be rejected here.

Under Section 10(e) of the Act, the Board has no jurisdiction to modify an Order that has been enforced by a court of appeals. Thus, even assuming that the Board could modify the dates of the remedy notwithstanding the D.C. Circuit Court's enforcement of the Board's Order, there is no merit in Respondent's argument that it must do so to avoid penalizing Respondent. As stated by the Supreme Court in *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264-265 (1969), "Wronged employees are at least as much injured by the Board's delay in collecting their back pay as is the wrong doing employer ... [T]he Board is not required to place the consequences of [such] delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." See also *Harding Glass Co.*, 337 NLRB 1116, 1118 (2002); *Hubert Distributors*, 344 NLRB 339, 341-342 (2005); *Unitog Rental Services*, 318 NLRB 880, 885 (1995), *affd.* 105 F.3d 651 (5th Cir. 1995); and see *Rochester Gas & Electric*, 364 NLRB No. 6, at 8, 9 (May 24, 2016)(rejecting respondent's argument that the backpay period be tolled during appeal to D.C. Circuit Court of Appeals and writ of certiorari to the Supreme Court). In light of the foregoing, Respondent ILWU has failed to put forth any legal authority for its remarkable request.

4. There Is No Record Evidence Supporting Respondent ILWU's Offset for Unpaid Dues.

Respondent ILWU presented no evidence to show that any of the employees who are owed reimbursement are in arrears in their payment of dues, fees, and/or assessments imposed by Respondent ILWU. Having failed to meet its burden to establish facts that would mitigate its liability in this respect, there is simply no factual or legal basis to offset the reimbursements set forth by General Counsel on this basis. This bare bones argument must be rejected.

5. There Is No Basis to Require Discriminatees to "Opt-in" to Receive Their Duly Owed Reimbursement Remedy.

Under Section 10(e) of the Act, on the filing of the record with the court of appeals, the jurisdiction of the court of appeals is exclusive and its judgment and decree is final, subject to

review by the Supreme Court. *Haddon House Food Products*, 260 NLRB 1060 (1982). Here, the Board's Order has already been enforced and accordingly the Board no longer has jurisdiction to modify that Order. As such, Respondent ILWU's proposed "opt-in" procedure for discriminatees amounts to a re-writing of the Order and Mandate, and one that would have the likely effect of disenfranchising scores of discriminatees who unwittingly fail to "opt-in." Further, there is simply no precedent for requiring discriminatees to "opt-in" to their duly owed remedy. The D.C. District Court's decision enforcing the Board's finding of joint and several liability is the law of the case and the Administrative Law Judge cannot now absolve Respondent ILWU from that liability by requiring discriminatees to "opt-in," which would have the obvious consequence of depriving scores of discriminatees of their remedy. Thus, Respondent ILWU's opt-in requirement must be soundly rejected.

IV. CONCLUSION

General Counsel has met her duty in these proceedings by establishing a reasonable and accurate formula to calculate the makewhole remedy owed to employees harmed by Respondent ILWU's unlawful conduct. Respondent ILWU's formulation leaves numerous employees without a remedy entirely, or an unreasonably diminished remedy, and reflects a misreading of the Board's Order at best, or an impermissible attempt to refashion the remedy entirely, at worst. Respondent ILWU likewise may not avail itself of any offset based on the settlement agreements reached with the various employers in the preceding litigation, as those settlements fell far below a makewhole remedy, and further excluded any portion of Respondent ILWU's liability by providing no compensation for unlawfully obtained union dues, fees and assessments. Thus, the weight of the record evidence shows that the formula set forth in General Counsel's Second Amended

Compliance Specification provides a reasonable and accurate makewhole remedy, as required by the Board and the D.C. District Court.

DATED AT Oakland, California this 18th day of May 2020,

Respectfully submitted,

/s/ Angela Hollowell-Fuentes

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

**INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION (PACIFIC CRANE
MAINTENANCE COMPANY, INC)**

and

Case 32-CB-005932

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 190, LOCAL
LODGE 1546 AND DISTRICT LODGE 160**

Date: May 18, 2020

**AFFIDAVIT OF SERVICE OF GENERAL COUNSEL'S BRIEF
IN SUPPORT OF SECOND AMENDED COMPLIANCE SPECIFICATION**

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

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May 18, 2020

Date

Ida Lam, Designated Agent of NLRB

Name

/s/ Ida Lam

Signature

