NO DATE FOR ORAL ARGUMENT HAS BEEN SET

Nos. 20-1411, 20-1432

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EVERPORT TERMINAL SERVICES INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

INTERNATIONAL ASS'N OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE 1546; INTERNATIONAL ASS'N OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1414, AFL-CIO,
Intervenors for Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

EVERPORT TERMINAL SERVICES INC.;
INTERNATIONAL LONGSHORE & WAREHOUSE UNION,
Respondents.

On petition for review of the National Labor Relations Board, Case Nos. NLRB-1: NLRB-32CA172286; NLRB-1: NLRB-32CV172414

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Initial Brief: Jan. 19, 2021

CORPORATE DISCLOSURE STATEMENT

Petitioner/cross-respondent Everport Terminal Services Inc. is a wholly owned subsidiary of Evergreen Marine Corporation (Taiwan), Ltd., a publicly traded Taiwanese company.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Everport Terminal Services Inc. provides the following information:

A. Parties and Amici

The parties and/or intervenors before the National Labor Relations Board and this Court are:

- Everport Terminal Services Inc.
- General Counsel, National Labor Relations Board
- International Longshore and Warehouse Union
- International Association of Machinists & Aerospace Workers, District Lodge 190, Local Lodge 1546, AFL-CIO
- International Association of Machinists & Aerospace Workers, District Lodge 190, Local Lodge 1414, AFL-CIO

B. Ruling Under Review

The ruling under review is *Everport Terminal Services Inc. and International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 156, AFL-CIO and International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodge 1414, AFL-CIO*, 370 NLRB No. 28 (Sept. 30, 2020).

C. Related Cases

This appeal has been consolidated with the related appeal in *International Longshore & Warehouse Union v. NLRB*, No. 20-1412 (D.C. Cir.). The National Labor Relations Board has filed cross-petitions for enforcement in both consolidated appeals. Everport is not aware of any other related cases.

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GLOSSARY

D&O	The Board's Decision and Order
ETS Ex.	Everport Terminal Services, Inc.'s exhibits
GC Ex.	General Counsel's exhibits.
IAM	International Association of Machinists and Aerospace Workers
ILWU	International Longshore and Warehouse Union
ILWU Ex.	ILWU's exhibits
M&R	Maintenance and Repair
MMTS	Miles Motors Transport System
MTC	Marine Terminals Corporation
NLRA	National Labor Relations Act
PCLCD	Pacific Coast Longshore Contract Document
PMA	Pacific Maritime Association
STS	Seaside Transportation Services, LLC
Tr.	Transcript of the ALJ hearing below

INTRODUCTION

The National Labor Relations Board's decision in this case upsets the stable precedent that has governed collective bargaining in the Pacific Coast longshore industry for almost a century. In 1938, responding to a decade of deadly labor strife on the Pacific Coast, the Board took sweeping action. It found that, in light of the unique history of longshore labor on the Pacific Coast, a coastwide bargaining unit covering all longshore labor was the only appropriate unit to protect workers' interests and guarantee lasting industrial peace, and it certified the International Longshore and Warehouse Union ("ILWU") as the unit's representative. The Board was right. For the last 80 years, courts and the Board have praised the coastwide bargaining arrangement and relied on it in resolving labor disputes. Employers and employees on the Pacific Coast, in turn, have structured their businesses and labor relationships based on this unbroken chain of precedent.

Unbroken, that is, until now. When Everport Terminal Services Inc. decided to operate a marine terminal in the Port of Oakland, it—like every other major terminal operator on the Pacific Coast—joined the Pacific Maritime Association, a multiemployer association that serves as

bargaining agent for Pacific Coast terminal operators. Under longstanding Board precedent, Everport—like every other major terminal operator on the Pacific Coast—thereby became bound to the PMA's collective bargaining agreement with the ILWU, the Pacific Coast Longshore Contract Document ("PCLCD"). That agreement required Everport—like every other major terminal operator on the Pacific Coast—to engage longshore labor from the ILWU-represented coastwide bargaining unit, using the PMA and ILWU's joint dispatch halls. And Everport complied with its contractual obligations.

Courts and the Board have repeatedly approved and enforced these obligations. In this case, though, the Board penalized Everport for honoring them. The Board found that Everport violated the National Labor Relations Act by using mechanics from the coastwide unit to perform maintenance and repair ("M&R") work at its terminal, when the terminal's previous operator had subcontracted M&R work to companies that employed mechanics represented by the International Association of Machinists ("IAM"). But Everport had no relationship with the IAM or any IAM-represented mechanics, and courts and the Board have long recognized that M&R work at PMA members' terminals belongs to the

coastwide longshore unit. Everport thus had no choice but to engage mechanics through the PCLCD's procedures using the ILWU-PMA joint dispatch halls.

The Board's contrary decision departs from more than 80 years of precedent. Such a drastic change, if permitted at all, would demand an especially compelling justification. The Board did not offer one. Instead, it ignored or dismissed 80 years of decisions, relying on arbitrary distinctions, irrelevant precedent, and a plain misreading of the PCLCD's unambiguous terms. As this Court has repeatedly had to remind the Board, such an unreasoned departure from precedent is unacceptable. Indeed, just last year, this Court and the Ninth Circuit rejected two similar decisions in which the Board seemingly sought to weaken the coastwide bargaining unit by misapplying its precedent and ignoring the PCLCD. The Court should put a stop to this troubling pattern.

The Board's failure to justify its rejection of precedent is particularly troubling given its decision's potential to upend the entire Pacific Coast shipping industry. "The ultimate object of the National Labor Relations Act, as the Supreme Court has repeatedly stated, is 'industrial peace.'" *Dana Corp. & Int'l Union*, 356 NLRB 256, 262 (2010).

But by finding that it was an unfair labor practice for Everport to comply with the ILWU-PMA collective bargaining agreement, the Board cast into doubt the lawfulness of the entire coastwide bargaining system. For decades, that system has created parity between employees and employers and preserved industrial peace. Without it, bargaining on the Pacific Coast will be less effective, labor will be harder to find, and terminal operations will face debilitating, costly labor disputes. It is unlikely that the Board could ever justify upending that long-established system, but here it did not even try. Such an unsupported and disruptive decision cannot stand.

JURISDICTIONAL STATEMENT

The Board's decision is a final order over which this Court has jurisdiction under 29 U.S.C. § 160(f). The Board issued its decision on September 30, 2020, and Everport filed its petition for review on October 9, 2020. ECF No. 1.

STATEMENT OF THE ISSUE

Whether the Board acted contrary to law or arbitrarily and capriciously in concluding that Everport violated the NLRA by, before it began operations or hired any employees, joining the PMA—the multiemployer bargaining association recognized by the Board as the

representative of employers utilizing labor from the coastwide longshore unit—and complying with the PMA's existing collective bargaining agreement with the ILWU.

STATUTES AND REGULATIONS

The relevant statutes and regulations are reprinted in the Addendum bound with this brief.

STATEMENT OF THE CASE

A. History of the Pacific Coast Longshore Unit

1. The Big Strike and Bloody Thursday

The summer of 1934 was a turbulent time on the Pacific Coast. Since the turn of the century, numerous labor organizations for Pacific Coast longshoremen had struggled to gain bargaining power with employers. *In re Shipowners' Ass'n*, 7 NLRB 1002, 1007-10 (1938). The unions' efforts culminated in May 1934 with the beginning of the "Big Strike," a complete work stoppage by all longshoremen at major Pacific Coast ports. David L. Gregory, *Why Not a General Strike?*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 621, 627 (2006).

Throughout the strike, picketers clashed violently with strikebreakers and police. One Thursday in June, as thousands of picketers faced off against strikebreakers, the police dispersed the crowd

with nightsticks, tear gas, and gunfire. Fred B. Glass, *From Mission to Microchip: A History of the California Labor Movement* 239-40 (2016). The melee spread across the Embarcadero, spilling onto Market Street and into downtown San Francisco. Mike Quin, *The Big Strike* 110-17 (2006 ed.). By the time it was over, "[s]cores of men littered the sidewalk." *Id.* at 115. Two strikers died from gunshot wounds. Dozens more were injured. Ahmed A. White, *Workers Disarmed: The Campaign Against Mass Picketing and the Dilemma of Liberal Labor Rights*, 49 Harv. C.R.-C.L. L. Rev. 59, 70-71 (2014). Longshore workers to this day honor "Bloody Thursday" as a holiday. Glass, *supra*, at 246.

After Bloody Thursday, the government intervened. President Roosevelt created the National Longshoremen's Board, a precursor to the National Labor Relations Board, to facilitate a settlement. *Shipowners*, 7 NLRB at 1008. The Board engineered an end to the Big Strike in July 1934, with the parties agreeing to arbitrate remaining disputes before the Board. *Id.* at 1008-09. Three months later, the Board issued an arbitration award setting coastwide wage and hour provisions and establishing coastwide hiring and dispatch halls jointly operated by management and labor. *Id.* at 1009. This award laid the foundation for

the first coastwide collective bargaining agreement between longshoremen and their employers, executed in 1937. *Id.* at 1009-10.

2. Certification of the Coastwide Longshore Bargaining Unit

During the first three decades of the 20th century, Pacific Coast longshoremen were organized into numerous independent labor associations. The associations' attempts to bargain on a port-by-port basis were consistent "failures" for employees. *Id.* at 1024. Unifying these associations to improve bargaining power became a focus for longshore labor in the 1930s.

In 1938, three years after the Board began administering the NLRA, the ILWU filed a petition to be certified as the bargaining representative for all longshore labor on the Pacific Coast. The Board granted the petition, certifying the ILWU as the representative for "all the workers employed at longshore labor in the Pacific Coast ports of the United States." *Id.* at 1021-22.

"The Board defined the unit so broadly because of the strength shown by the employers jointly negotiating and administering labor agreements through [multiemployer] associations." *Cal. Cartage Co. v. NLRB*, 822 F.2d 1203, 1206 (D.C. Cir. 1987). At the time, "virtually all

direct or indirect employers of longshoremen on the West Coast belonged to the[se] associations and thus none fell outside the unit." *Id.* And because "employers were acting together on a coast basis," the Board found that longshore workers must also organize on a coastwide basis. *Shipowners*, 7 NLRB at 1022, 1024-25. Based on the history of collective bargaining on the coast, which revealed "failures when [workers] acted on a port basis" and "success when they acted with their fellow longshoremen on the coast," the Board concluded that "action that is not coastwide will result in a harmful set-back to their self-organization." *Id.* at 1023-24.

A rival union challenged the NLRB's certification, arguing that the coastwide unit "denie[d] to a majority of the longshore employees of a single employer the right to select [a union other than the ILWU] as their exclusive bargaining representative." *Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 403-04 (1940). The NLRB countered that "individual employers functioned almost entirely through their associations in dealing with the longshoremen" and that "wages, hours, methods of hiring . . . and other terms and conditions of employment were uniform on the Pacific Coast." NLRB Br. 7, *Am. Fed'n of Labor*, 308 U.S. 401, 1939 WL 48667. As a result, the coastwide unit "would best insure to [longshoremen] the full

benefit of their rights under the [NLRA]." *Id.* The Supreme Court dismissed the appeal on jurisdictional grounds, leaving in place the Board's certification decision. 308 U.S. at 407-12.

The breadth of the Board's decision was immediately apparent. The *New York Times* ran a front-page headline describing it as a "Sweeping Decision Setting Up [the] Nation's First Major Geographical Bargaining Agency," which encompassed "All West Coast Longshoremen." James A. Gross, *The Reshaping of the National Labor Relations Board: National Labor Policy in Transition 1937-1947* 56-57 (1981). Other contemporaneous commentators similarly understood that the Board-certified unit covered "all longshoremen on [the] Pacific Coast." Note, *The "Globe Rule" for Determining Appropriate Bargaining Units Under the Wagner Act*, 6 U. Chi. L. Rev. 673, 685-86 & n.78 (1939); *see also, e.g.,* E. Merrick Dodd, *The Supreme Court and Organized Labor, 1941-1945*, 58 Harv. L. Rev. 1018, 1028 n.43 (1945) (discussing "the view taken [in *Shipowners*] that . . . the appropriate bargaining unit under the Act may be an entire industry"). The Board itself described the decision as certifying "a single unit for the longshoremen employed by companies throughout the Pacific Coast who were members of employer

associations." NLRB, *Third Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1938* 196 (1939).

B. The PMA and Its Collective Bargaining Agreement with the ILWU

1. The PMA Negotiates and Administers Labor Agreements with the ILWU

In 1949, the various Pacific Coast employer associations discussed in *Shipowners* merged to form the PMA. *ILWU*, 208 NLRB 994, 1003 (1974), *overruled on other grounds, ILWU (Cal. Cartage),* 278 NLRB 220 (1986); *Longshoremen & Warehousemen (Waterfront Employers Ass'n)*, 90 NLRB 1021, 1025 (1950). Every PMA member thus belongs to the multi-employer bargaining association that, under *Shipowners*, must bargain with the coastwide unit of ILWU-represented longshoremen. (Tr. 2387:11-18, 2636:8-20.) Today, roughly 70 ocean vessel carrier lines, stevedore companies, marine terminal operators, and longshore maintenance and repair companies operating on the Pacific Coast belong to the PMA. (ILWU Ex. 27.[1])

[1] "Tr. [Page Number:Line Number]" refers to the transcript of the ALJ hearing below, "ILWU Ex." to the ILWU's exhibits, "ETS Ex." to Everport's exhibits, and "GC Ex." to the General Counsel's exhibits. The Board's Decision and Order is cited as "D&O [Page Number]."

For terminal operators in particular, PMA membership is essential. No operator can run an international marine container terminal without first joining the PMA because, absent PMA membership, no operator can access the longshore workers necessary to run a terminal. (Tr. 1683:13-1684:13, 2387:11-18, 2636:8-20, 2815:8-13, 3654:13-3655:2); *see Shipowners*, 7 NLRB at 1014-15 ("Only a very small percentage of those companies which use longshore labor are not members of the [employer associations], and no large company is not a member.").

The PMA "serves as the multi-employer bargaining representative for its employer members, with the primary purpose of negotiating, executing, and administering collective bargaining agreements." *PMA v. NLRB*, 967 F.3d 878, 881 (D.C. Cir. 2020). PMA members do not set their own employment policies, terms, or benefits for longshore workers. (Tr. 2122:9-19.) Instead, PMA members must comply with the collective bargaining agreement negotiated between the ILWU and the PMA, known as the Pacific Coast Longshore & Clerks' Agreement. That agreement establishes the terms and conditions of employment for approximately 14,000 ILWU-represented longshoremen, mechanics, and marine clerks in the 29 commercial ports on the Pacific Coast. (ILWU

Exs. 5, 6; ILWU Ex. 27 at 31, 64; Tr. 2045:11-2046:4.) It comprises two documents: the Pacific Coast Clerks Contract Document, which is irrelevant here, and the Pacific Coast Longshore Contract Document ("PCLCD"), which covers "[v]irtually all longshore work at West Coast ports." *ILWU v. NLRB* (*Kinder Morgan*), 978 F.3d 625, 630 (9th Cir. 2020); D&O 11.

Under the PCLCD, each covered port has a Joint Port Labor Relations Committee made up of members from the local ILWU union, the PMA, and employers. Each port's committee administers the port's lists of registered longshore workers, operates the local longshore and clerk dispatch halls, and adjudicates grievances between workers and employers. PCLCD § 17 (ILWU Ex. 5 § 17). The port-specific committees are under the ultimate control of the Coast Labor Relations Committee, which consists of representatives from the ILWU and the PMA. (Tr. 2035:20-2036:1.)

These committees—not individual PMA members—make all decisions affecting the employment of longshore workers and mechanics, such as initial hiring procedures, promotion, adjustment of grievances,

pay adjustments, training, certification of skills, discipline, and termination. (Tr. 2036:11-22, 2236:3-19, 2407:23-2408:9.)

2. The Coastwide Longshore Unit Includes Mechanics Who Perform M&R Work on Longshore Equipment

Before 1960, cargo ships were loaded and unloaded with breakbulk cargo that had to be loaded piece-by-piece instead of in containers. ILWU longshoremen handled this cargo and did M&R work on their stevedoring equipment. *PMA*, 256 NLRB 769, 771 (1981). Then the "container revolution" of the 1960s replaced the traditional longshore equipment with standardized containers. *Id.* at 771-72; *Cal. Cartage*, 822 F.2d at 1206. Cranes lifted these containers on and off vessels, eliminating a substantial portion of traditional longshore work. *PMA*, 256 NLRB at 771.

To preserve work for longshoremen in the face of this modernization, the ILWU and the PMA negotiated amendments to the PCLCD in 1978. The amendments clarified that ILWU-represented longshoremen would perform M&R work on stevedoring equipment like cranes, containers, and chassis. *Id.* at 769. The PCLCD thus applies "to the maintenance and repair of containers of any kind and of chassis, and the movement incidental to such maintenance and repair," as well as "to

the maintenance and repair of all stevedore cargo handling equipment." PCLCD §§ 1.7, 1.71.

Before the 1978 amendments, the IAM had also performed some M&R work for trucks, tractors, mobile cranes, and other mechanical equipment. *PMA*, 256 NLRB at 772. In *PMA*, the IAM contested the ILWU's claim to M&R work at a Pacific Coast terminal, which the employer had converted from breakbulk to a "modern container terminal." *Id.* at 775. Like Everport in this case, the employer had never before employed anyone to perform M&R services, having always subcontracted the work. After expanding its terminal, it began to use its own employees to perform M&R work and recognized the ILWU as their representative. *Id.* at 774-76. The contractors and IAM claimed that the employer violated Section 8(e) of the NLRA by recognizing the ILWU. *Id.* at 769, 771. The Board dismissed the complaint, upholding ILWU jurisdiction over M&R work. *Id.* at 770. The Board found it "clear" that the PCLCD assigns M&R work to ILWU longshoremen. *Id.*

The Ninth Circuit has also affirmed ILWU jurisdiction over longshore M&R work. In *IAM District Lodge No. 94 v. ILWU, Local 13*, 781 F.2d 685, 688 (9th Cir. 1986), two PMA members with no ties to the

IAM assigned M&R work to ILWU-represented mechanics. The IAM challenged the assignment, claiming jurisdiction over the work under an agreement between the IAM and an ILWU chapter. *Id.* at 686-87. The Ninth Circuit rejected the IAM's claim, holding that *PMA* "clearly illustrates the binding effect of the 1978 PCLC[D] upon PMA member-employers," who could not be kept "from honoring . . . the PCLC[D]." *Id.* at 688 n.2, 689. A few months ago, the Ninth Circuit again held that the PCLCD "unambiguously assigns to the [ILWU] all M&R work, on all present and future stevedore cargo handling equipment . . . for all PMA members, at all West Coast ports." *Kinder Morgan*, 978 F.3d at 642.

The PCLCD was amended again in 2008, this time to add certain grandfathered exceptions to the ILWU's M&R work jurisdiction. The exceptions apply to terminals—known as "red-circled" terminals—where the terminal operator has an existing contract with another unionized workforce, such as the IAM, for M&R work. D&O 12. The red-circle exception allows these operators to continue using non-ILWU mechanics for M&R work that would otherwise belong to the ILWU. *Kinder Morgan*, 978 F.3d at 631 n.5. "Red circle" status, however, is entity-specific and expires when a terminal is taken over by a PMA member with no

preexisting contract with the non-ILWU union. (ILWU Ex. 3; ETS Exs. 2, 15; GC Exs. 74-76; Tr. 976:7-23.) At that point, the PMA member must begin engaging M&R mechanics from the coastwide bargaining unit.

3. The Joint Dispatch Halls

No PMA member has its own longshore bargaining unit or negotiates directly with workers in the coastwide unit. (Tr. 2603:1-7, 2636:8-20, 2785:24-2786:3.) Instead, longshore workers are assigned jobs through joint dispatch halls first created by the Board's 1934 arbitration award. PCLCD § 8.11. No private terminal operator can access the longshore workforce—the only stevedoring workforce available to major terminal operators on the West Coast—other than through the joint dispatch halls. (Tr. 2815:8-13.)

The PCLCD recognizes three classes of workers who can be engaged through the ILWU-PMA dispatch halls. In order of priority, they are "Class A" (full registration), "Class B" (limited registration), and Identified Casual. (Tr. 1980:4-10, 2048:4-13, 2679:18-2680:3; D&O 11 & n.9.) Entry-level workers are assigned to the Identified Casual list and may progress through Class B to Class A. (Tr. 1980:11-24, 2569:8-21.) Only workers on a registered or identified casual list are eligible for

dispatch and to fill a job covered by the PCLCD. PCLCD § 8.33. Registered workers are given work preference over Identified Casual workers. PCLCD §§ 8.14, 8.41; (Tr. 2137:16-17, 2421:16-2422:3).

Workers do not fill out separate employment forms for individual PMA companies. (Tr. 2055:18-2056:2.) They may apply for openings at any port run by a PMA member and, once assigned to a port, are dispatched to work at marine container terminals pursuant to dispatch rules based on the worker's seniority, skills, and work opportunity. (Tr. 2038:3-10, 2128:23-2129:21.) Longshore workers are trained by the PMA and supervised on a multiemployer, coastwide basis. (Tr. 2064:11-2065:4, 2243:12-14; ILWU Exs. 45, 46.) The PMA performs all payroll and employment record functions for all workers, including issuing payroll checks that cover work performed for multiple PMA members in a payroll period. (Tr. 2053:12-21, 2253:2-12, 2379:5-18, 2420:16-19, 2500:4-19.)

4. Engaging Unregistered Mechanics for Full-Time Jobs

The PCLCD generally prohibits anyone who is not on an eligible worker list from performing covered work for a PMA member on the West Coast. There is one exception, however, for mechanics. When a PMA member is unable to fill all its full-time mechanic jobs with registered

longshoremen, it may engage unregistered mechanics under letters of understanding called the "Herman-Flynn" letters. (Tr. 1979:14-24, 3329:21-3330:4.)

Under the Herman-Flynn procedures, a PMA member that cannot fill all its full-time positions through the dispatch hall may seek mechanics from any source. (Tr. 2272:12-23.) The member refers the unregistered mechanic to the local PMA office, which performs safety and fitness training and other onboarding procedures before the mechanic can begin work. D&O 11. A newly engaged Herman-Flynn mechanic receives Class B registration after 90 days of work. *Id.*; (Tr. 2546:6-15). Within five years of Class B registration, the Herman-Flynn mechanic becomes eligible for Class A registration. (Tr. 2307:25-2308:13.) If the Herman-Flynn mechanic gets laid off for any reason by a PMA member, he can check into the dispatch hall and be eligible for available M&R jobs or, if no M&R jobs are available, any other job available to a longshoreman of equivalent registration status. (Tr. 2796:7-21.) After 12 years as a full-time mechanic, the Herman-Flynn worker may choose to leave that job and "check in" to the dispatch hall on a full-time basis to work the full range of longshore jobs for PMA members. (Tr. 2147:14-25.)

C. Everport's Acquisition and Operation of the Nutter Terminal

1. Operation of the Nutter Terminal Before December 2015

Everport is a marine container terminal operator engaged in the business of loading and discharging cargo containers at marine terminals. D&O 9-10. In 2002, the Port of Oakland assigned to Everport's parent corporation, Evergreen Marine Corporation (Taiwan) Ltd., the right to operate the Ben E. Nutter Terminal in the Port of Oakland. *Id.* Evergreen entered into a series of agreements with Seaside Transportation Services, LLC ("STS"), under which STS agreed to operate the Nutter Terminal. *Id.* STS, in turn, subcontracted all M&R work at the Nutter Terminal to two subcontractors, Marine Terminals Corporation ("MTC") and Miles Motors Transport System ("MMTS"). *Id.*

On July 1, 2012, Evergreen assigned its entire interest in the Nutter Terminal to Everport. D&O 10. Everport agreed with STS that STS would continue operating the terminal. As relevant here, STS continued to subcontract all the M&R work at the Nutter Terminal to MTC and MMTS. MTC and MMTS directly employed mechanics in bargaining units represented by the IAM. D&O 9-10. The MTC bargaining unit contained up to 20 mechanics, while the MMTS

bargaining unit contained up to seven. D&O 10. The remainder of the union-represented workers employed at the terminal were represented by the ILWU and obtained from the coastwide bargaining unit through the joint dispatch halls. Those ILWU-represented longshore workers made up a majority of the total workforce at the terminal. D&O 41.

Before December 2015, MTC and MMTS employed all M&R labor at the Nutter Terminal. D&O 10. Everport employed no labor at the terminal, had no bargaining relationship or contracts with the IAM, and exercised no control over the terms and conditions of employment for MTC's or MMTS's employees. (Tr. 1222:21-1223:1, 1328:20-25, 1488:14-22, 3707:15-18.)

2. Everport Joins the PMA and Informs the ILWU and IAM It Will Engage Mechanics Through the Joint Dispatch Halls

By Spring 2015, Everport had decided to operate the Nutter Terminal itself. D&O 10; (Tr. 1682:25-1683:2). In July 2015, Everport terminated its agreement with STS, effective December 5, 2015. (Tr. 1826:22, 3632:5-9.)

Everport knew there was no other source of longshore labor outside of the coastwide longshore unit. (Tr. 1683:13-1684:13, 3654:13-16.) So, to

operate the terminal, Everport had to join the PMA. (Tr. 1685:16-17, 3654:13-16.) The PMA approved Everport's application in June 2015. D&O 11, 16. As required by its membership, Everport authorized the PMA to establish policies for it in all matters relating to labor contracts and controversies, to bargain for Everport in any negotiations with longshore unions, and to enter binding contracts on Everport's behalf. (Tr. 2262:18-2263:17, 2378:19-2379:4, 2386:5-2387:23, 2403:18-2404:18.) Everport also became subject to the PCLCD, including the obligation to follow its dispatch hall procedures. PCLCD § 1.82.

When the "red-circle" exception was added to the PCLCD in 2008, the Nutter Terminal was listed as red-circled. (Tr. 2323:16-19.) As explained, however, red-circle status is entity-specific. (Tr. 976:7-23.) In August 2015, Everport received a letter from the ILWU's international president demanding that Everport engage longshore workers, including mechanics, exclusively "from the ILWU longshore bargaining unit, through the Joint Dispatch Halls." (GC Ex. 74.) Subsequent letters from various ILWU chapters similarly demanded that Everport engage M&R labor through the joint dispatch halls. (GC Exs. 75-76.) The ILWU informed Everport that the Nutter Terminal's red-circle status would

expire when Everport took over because red-circle status is entity-specific and, unlike MTC and MMTS, Everport had no preexisting relationship with the IAM. D&O 15-17. Everport consulted with its bargaining representative, the PMA, which confirmed the ILWU's interpretation of the red-circle exception. D&O 15, 17; (Tr. 1724:20-25). Because the PCLCD is a contract between the PMA and the ILWU, Everport was bound by their interpretation. D&O 20, 43; (Tr. 3927:1-19).

Between May and December 2015, Everport made clear to the PMA, ILWU, and IAM that it planned to engage labor to operate the Nutter Terminal through the ILWU-PMA longshore dispatch halls. D&O 15-16; (Tr. 3293:7-3300:10). Everport never told the IAM or any of its members that it would employ any IAM-represented mechanics or that it would preserve the terms and conditions of employment for mechanics previously employed by MTC or MMTS (the "Former MTC/MMTS Mechanics"). D&O 42-43; (Tr. 1324:10-1325:14). To the contrary, Everport informed the IAM that it would engage its labor through the PCLCD's dispatch hall provisions. D&O 15-16, 20.[2]

[2] The employment of the Former MTC/MMTS Mechanics at the Nutter Terminal, like the employment of all employees of STS's subcontractors,

3. Everport Begins Hiring Mechanics

In November 2015, Everport posted notices in the joint dispatch hall, requesting 27 full-time mechanics for M&R work. D&O 15, 20. Everport received 25 to 30 applications through the joint dispatch hall. D&O 19. It also received around 20 resumes from unregistered applicants, including former Former MTC/MMTS Mechanics. (*Id.*; GC Exs. 13, 65.) At least five of the Former MTC/MMTS Mechanics were unavailable to work because of disability, and at least two did not apply. (Tr. 1164:25-1165:3, 3716:24-3717:3.)

Everport structured its interview process to comply with the PCLCD. D&O 18, 26. Everport began interviewing mechanic applicants in late November 2015. D&O 19. As required by the PCLCD, Everport first interviewed the registered applicants. D&O 19-22, 26. It then interviewed the Former MTC/MMTS Mechanics through the Herman-Flynn procedures. D&O 21, 23, 26. The Board found that Everport's interviewers tracked which applicants were registered ILWU mechanics and which were unregistered, IAM-represented mechanics. D&O 23-24,

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ceased on or before December 4, 2015, the final day of STS's subcontract with MTC and MMTS. D&O 10, 44.

26. The Board further found that Everport planned to hire no more than 49 percent of its mechanics from among the Former MTC/MMTS Mechanics. D&O 27.[3]

Everport interviewed around 26 registered mechanics and offered full-time positions to 15. (GC Ex. 24; ETS Ex. 27; ILWU Ex. 13.) Then, through the Herman-Flynn procedures, Everport offered full-time positions to 15 Former MTC/MMTS Mechanics, 13 of whom accepted. (ILWU Ex. 1; Tr. 411:14-21, 1019:24-1021:2.)

D. Procedural History

The IAM disputed Everport's assignment of M&R work to ILWU-represented mechanics. In March 2016, the IAM filed an unfair labor practices charge with the NLRB, alleging that Everport violated sections 8(a)(1), (2), (3), and (5) of the NLRA, 29 U.S.C. § 158(a). The core of the IAM's allegations was that Everport refused to negotiate as a successor to MTC and MMTS, discriminated against IAM members, and

[3] This finding directly contradicts the undisputed evidence regarding the number of employment offers Everport made to Former MTC/MMTS Mechanics and mechanics registered in the ILWU-PMA joint dispatch halls. It and many other of the Board's and the ALJ's factual and credibility findings are incorrect, but they are beside the point given the fundamental legal errors discussed in this brief.

unlawfully recognized the ILWU as the bargaining agent for its M&R mechanics.

The General Counsel issued a Complaint against Everport. On February 15, 2017, the NLRB's regional director filed a petition for a temporary injunction under NLRA § 10(j). *Hardy-Mahoney v. Everport Terminal Servs., Inc.*, 2017 WL 1092325 (N.D. Cal. Mar. 23, 2017). The district court denied the petition, holding (among other things) that the regional director had not shown a likelihood of success on the merits or a risk of irreparable harm. *Id.* at *3-4. The court found that Everport was not "attempting to avoid having a unionized workforce," and it found "persuasive" Everport's explanation "that it was merely attempting to act consistently with other West Coast terminal operators in abiding by its obligations as a member of the PMA." *Id.* at *3.

The parties then conducted a hearing before an administrative law judge. After the hearing, the ALJ found that Everport violated the NLRA "by discriminatorily refusing to hire a majority of [its] predecessor's [IAM]-represented employees and instead prematurely recognizing [and] hiring a majority of [ILWU-]represented employees." D&O 9. The Board affirmed the ALJ's rulings, findings, and conclusions and adopted the

ALJ's order with insubstantial modifications. D&O 1-2.[4] The Board found that Everport "unlawfully recognized [the] ILWU at a time when it did not represent a majority of . . . Everport's employees and unlawfully applied the terms of the ILWU-PMA collective-bargaining agreement." *Id.* at 1 n.4. By a 2-1 vote, the Board also found that Everport could not "set initial terms and conditions of employment because it used a general discriminatory hiring plan . . . to prevent [its predecessors'] employees from constituting more than 49 percent of the new workforce." *Id.*

The Board also approved the ALJ's recommended remedy, requiring Everport, among other things, to withdraw recognition of the ILWU, stop applying the PCLCD, restore the terms and conditions of the Former MTC/MMTS Mechanics' prior employment with MTC and MMTS, recognize and bargain with the IAM as the Former MTC/MMTS Mechanics' representative, and offer employment to all Former MTC/MMTS Mechanics not now employed by Everport. D&O 2-6.

Everport timely filed a petition for review. ECF No. 1.

[4] Because the Board adopted the ALJ's decision, this brief treats the ALJ's findings and conclusions as those of the Board.

SUMMARY OF THE ARGUMENT

It is undisputed that "Everport was already a member of the PMA at the time of most events" relevant to this case. D&O 26. In fact, Everport's PMA membership required it to take the actions the Board erroneously found unlawful. As a PMA member, Everport had to comply with the PCLCD by engaging labor through the ILWU-PMA joint dispatch halls and prioritizing the applications of ILWU-represented mechanics. The Board's decision that Everport violated the NLRA can survive only if joining the PMA *itself* violated the NLRA. It did not. In finding otherwise, the Board did not merely misapply the law—it disregarded 80 years of contrary precedent and cast doubt on the legality of the entire Pacific Coast longshore industry.

I. The doctrine underlying the Board's decision is the "successorship doctrine" from *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 281 (1972). The Board found that Everport, as a successor to MTC and MMTS, inherited those companies' bargaining obligations to the IAM. That conclusion is inconsistent with the facts and the law.

A. The Former MTC/MMTS Mechanics are not an appropriate bargaining unit for analyzing Everport's successorship obligations. The only appropriate unit is the coastwide bargaining unit represented by the ILWU and certified by the Board.

1. More than 80 years ago, the Board found that the only appropriate bargaining unit for PMA members' longshore labor is the coastwide bargaining unit. *Shipowners' Ass'n of the Pac. Coast*, 7 NLRB 1002, 1021-24 (1938). Therefore, because Everport joined the PMA before taking control of the Nutter Terminal, the only appropriate bargaining unit for its longshore labor is the coastwide bargaining unit. The Board dismissed *Shipowners* by stating that the coastwide bargaining unit does not include M&R mechanics, D&O 41, which is both incorrect and inconsistent with the Board's own precedent. The Ninth Circuit recently rejected the Board's position, concluding that M&R work "unambiguously" belongs to the coastwide unit. *ILWU v. NLRB* (*Kinder Morgan*), 978 F.3d 625, 642 (9th Cir. 2020). As in *Kinder Morgan*, the Board's assignment of M&R work to a bargaining unit other than the coastwide unit must be rejected.

2. The Board also erred by selecting a single-employer unit of Former MTC/MMTS Mechanics when Everport is a member of the PMA, a multiemployer bargaining association. The Board has previously found that a "history of multiemployer bargaining" makes single-employer units inappropriate. *Arbor Constr. Pers., Inc.*, 343 NLRB 257, 257-58 (2004). Because Everport was a member of a multiemployer bargaining association when it took control of the Nutter Terminal, no single-employer bargaining unit could be appropriate.

B. Because Everport's PMA membership rendered the Former MTC/MMTS Mechanics an inappropriate bargaining unit, the Board could require Everport to bargain with those mechanics only by finding that Everport's decision to join the PMA was itself illegal. But *Shipowners* requires coastwide bargaining between the PMA and the ILWU's coastwide bargaining unit. For that coastwide bargaining to occur, Pacific Coast terminal operators must be able to legally join the PMA, subject only to the requirement that they not join the PMA out of hostility to a union. And the Board did not find that Everport joined the PMA out of hostility to the IAM.

Instead, the Board found that Everport, by joining the PMA, prematurely recognized the ILWU as its employees' bargaining agent. But that cannot be right. At the time Everport joined the PMA, it *had* no employees. Accordingly, no existing worker was forced to become represented by the ILWU. And by joining the PMA, Everport accessed the existing coastwide longshore workforce, which had at all material times manifested majority support for ILWU representation. Everport thus did not force ILWU representation on any nonconsenting employee.

C. The Board also found that Everport discriminated against the Former MTC/MMTS Mechanics when it was hiring mechanics. But any preference for longshore registered mechanics in the hiring process occurred after Everport was already bound to the PCLCD and was required by the PCLCD's dispatch and registration procedures. So the relevant question is, again, whether Everport violated the NLRA by *joining the PMA*. But even the Board did not dispute that Everport joined the PMA for the valid, nondiscriminatory purpose of ensuring that it could engage longshore workers—through the coastwide bargaining unit certified by the Board—to operate the Nutter Terminal. That nondiscriminatory decision did not violate the NLRA.

II. For all these reasons, the Board's decision is incorrect as a matter of law. It is also arbitrary and capricious because it disregards decades of precedent without justification.

A. The Board first disregarded precedent by selecting the Former MTC/MMTS Mechanics as an appropriate bargaining unit, when *Shipowners* and subsequent decisions required it to select the ILWU-represented coastwide unit. To justify this departure from precedent, the Board misstated its previous decisions and cited supposed "distinctions" that have nothing to do with the relevant issues. The Board also relied on its decision in *PCMC/Pacific Crane Maintenance Co.*, 359 NLRB 1206 (2013), which this Court has already held is irrelevant to successorship cases like this one, *ILWU v. NLRB* (*Ports Am.*), 971 F.3d 356, 362 (D.C. Cir. 2020).

B. The Board next disregarded precedent when it found that Everport violated the NLRA by joining the PMA and complying with the PCLCD. For decades, the Board and courts have approved terminal operators' decisions to join the PMA. These same decisions have consistently recognized that PMA members must comply with the PCLCD. The Board provided no justification for making Everport the

first PMA member to be punished for joining the PMA and honoring the PCLCD's requirements.

C. This decision marks a pattern of cases in which the Board has disregarded precedent in an apparent effort to undermine the coastwide bargaining unit and the PCLCD. Last year, this Court and the Ninth Circuit rejected Board decisions that had denied the coastwide bargaining unit's right to M&R work under the PCLCD. *Kinder Morgan*, 978 F.3d at 642; *Ports Am.*, 971 F.3d at 362. As in those cases, the Board here misapplied precedent and ignored the PCLCD's plain language to weaken the coastwide bargaining unit's role in the Pacific Coast longshore industry.

III. The Board's unjustified departure from precedent is dangerous as well as lawless. The Pacific Coast longshore industry has been built around the Board's longstanding approval of coastwide bargaining between the PMA and ILWU-represented longshore workers. The Board's decision threatens that arrangement. If Pacific Coast terminal operators cannot legally join the PMA before engaging longshore workers, the coastwide bargaining unit created in *Shipowners* will collapse. That would create unprecedented barriers to entry for new

operators, undermine collective bargaining, and potentially return the Pacific Coast to the ineffective, port-by-port bargaining arrangement that harmed workers and necessitated coastwide bargaining in the first place. Nothing in the Board's decision justifies these consequences.

STANDARD OF REVIEW

The Court "consider[s] whether the Board's findings of fact are supported by substantial evidence, and whether its reasoning is arbitrary and capricious." *Ports Am.*, 971 F.3d at 360 (citation omitted). A Board decision is arbitrary and capricious when it "err[s] in applying established law," *PMA*, 967 F.3d at 884, departs from precedent without a sufficient explanation, or relies on "clearly distinguishable precedent," *Ports Am.*, 971 F.3d at 360 (internal quotation marks omitted).

STANDING

Everport has standing as a "person aggrieved" by the Board's decision. 29 U.S.C. § 160(f). The decision has an "adverse effect" on Everport because it found that Everport violated the NLRA and ordered numerous sanctions. *Retail Clerks Union 1059 v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965); D&O 1-6.

ARGUMENT

The central question in this case is whether the NLRA forbids what the PCLCD requires. The Board found that it does. The Board is wrong. For more than 80 years, employers and employees on the Pacific Coast have relied on the Board's creation and approval of the coastwide longshore bargaining unit. They have similarly relied on Board and judicial approval and enforcement of the PCLCD. The Board's decision threatens this status quo. It throws into question the PCLCD's legality and the viability of the coastwide bargaining unit. And it does so without seriously engaging with the near-century of precedent inconsistent with its conclusions.

I. The Board Erred in Finding That Everport Owed or Violated Any Obligations to the Former MTC/MMTS Mechanics

The Board's decision rests on the "successorship doctrine" created by the Supreme Court in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). Under *Burns*, the NLRA requires a successor employer to bargain with its predecessor's employees when "the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent." *Id.* at 281. But "a successor employer inherits the

collective-bargaining obligations of its predecessor *only if the previously recognized bargaining unit remains appropriate under the successor*." *Ports Am.*, 971 F.3d at 358 (emphasis added). And in no event does a successor have any duty to hire its predecessor's employees, *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 259-62 (1974), or to maintain the predecessor's terms of employment, *IAM v. NLRB*, 595 F.2d 664, 671 (D.C. Cir. 1978). A successor's "only duty [is] to make [its] decisions on a basis other than hostility to a union." *Sierra Realty Corp. v. NLRB*, 82 F.3d 494, 496 (D.C. Cir. 1996).

The Board misapplied these principles when it concluded that Everport owed and violated successorship obligations to the Former MTC/MMTS Mechanics. Due to Everport's PMA membership, the only appropriate bargaining unit was the coastwide longshore unit certified by the Board. Everport joined the PMA for valid, nondiscriminatory business reasons before it began operations or engaged any labor. It then followed the hiring process required by the PCLCD. Everport's compliance with its obligations as a PMA member, which courts and the Board have repeatedly upheld and enforced, did not violate the NLRA.

A. The Only Appropriate Bargaining Unit Is the Coastwide Longshore Unit, Not the Former MTC/MMTS Mechanics

A "successor employer inherits the collective-bargaining obligations of its predecessor only if the previously recognized bargaining unit remains appropriate under the successor." *Ports Am.*, 971 F.3d at 358. A bargaining unit may become inappropriate when, for example, the successor's "operational structure and practices differ[]" from the predecessor's. *Burns*, 406 U.S. at 280. When that happens, the successor employer has no obligation to bargain with the "previously recognized bargaining unit." *Ports Am.*, 971 F.3d at 358.

That is the case here. Before Everport operated the Nutter Terminal, the previous operator subcontracted M&R work to MTC and MMTS, which employed IAM-represented mechanics. But when Everport took over, it had no preexisting relationship with the IAM and had already joined the PMA, a multiemployer association governed by a preexisting collective bargaining agreement with the coastwide unit of ILWU-represented longshore workers. *See* D&O 26 ("Everport was already a member of the PMA at the time of most events affecting this Terminal."). Because of the fundamental difference between MTC's and

MMTS's operations and Everport's operations—that is, the absence of any relationship with the IAM—a single-employer, single-location unit limited to the Former MTC/MMTS Mechanics was not an appropriate bargaining unit, and the only appropriate unit was the coastwide bargaining unit.

1. Courts and the Board Have Recognized That the Coastwide Unit is the Only Appropriate Unit for PMA Members' Longshore Workers

Although "[t]he Board is entitled to deference on its selection of an appropriate unit," that deference is not absolute. *Cleveland Constr., Inc. v. NLRB*, 44 F.3d 1010, 1014 (D.C. Cir. 1995). When selecting the appropriate unit, "the Board 'cannot ignore its own relevant precedent but must explain why it is not controlling.'" *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 60 (D.C. Cir. 2004). A unit selection that "depart[s] from precedent" must be "set aside." *Cleveland Constr.*, 44 F.3d at 1016.

The Board here disregarded its own precedent establishing that the coastwide bargaining unit is the one appropriate unit for longshore workers on the Pacific Coast. The Board in 1938 held that all the longshore workers who work for members of multiemployer associations on the Pacific Coast should belong to a single bargaining unit represented

by the ILWU. *Shipowners*, 7 NLRB at 1021-22. The Board found that the coastwide unit was "the one most appropriate for purposes of collective bargaining," *id.* at 1024, because it was "the one that will insure to employees the full benefit of their right to self-organization and to collective bargaining," *id.* at 1022. Any other unit would "result in a harmful set-back to [employees'] self-organization." *Id.* at 1023. As a result, "[s]ince the 1930s, the ILWU has represented West Coast longshore workers" in "a single multiemployer/multiport coastwise unit." *SSA Pac., Inc.*, 366 NLRB No. 51, 2018 WL 1625736, at *3 (Apr. 3, 2018).

Due to the Board's decision in *Shipowners*, and as the uncontroverted hearing testimony established, no operator can run a Pacific Coast marine container terminal without first joining the PMA. (Tr. 1683:13-1684:13, 2387:11-18, 2636:8-20, 2815:8-13, 3654:13-3655:2.) Without access to the ILWU-PMA joint dispatch halls, no operator can engage longshore labor. (Tr. 1684:16-19, 3654:13-16.) Everport, therefore, could not assume operation of the Nutter Terminal unless it first joined the PMA. (Tr. 1683:13-1684: 19, 3654:13-16.)

Because Everport is a PMA member, it belongs to a multiemployer association whose longshore workers must, under *Shipowners*, be

represented by the coastwide bargaining unit. *Shipowners*, 7 NLRB at 1021-24; (Tr. 2387:11-18, 2636:8-20). But the Board rejected the coastwide, multiemployer unit in favor of a single-employer, port-specific unit limited to the Former MTC/MMTS Mechanics. D&O 32, 41. That cannot be squared with *Shipowners*. *Cf. Cal. Cartage Co. v. NLRB*, 822 F.2d 1203, 1209 n.10 (D.C. Cir. 1987) (rejecting "arguments [that] are at bottom a challenge to the bargaining unit determination made by the Board in [*Shipowners*]"). As *Shipowners* explained, approving single-employer, port-specific units for PMA members' workers would cause "a harmful set-back to [employees'] self-organization." 7 NLRB at 1023.

Here, the Board dismissed *Shipowners* by stating that the coastwide unit does not include mechanics, D&O 41, but that is wrong. The PCLCD unambiguously assigns longshore M&R work to ILWU mechanics. *Kinder Morgan*, 978 F.3d at 642. To conclude otherwise, the Board argued that the PCLCD's red-circle exception "would have been unnecessary if *Shipowners' Ass'n* and [its] progeny applied to mechanics." D&O 41. That is exactly backward. The red-circle exception is an *exception*. It proves the rule that mechanics are included in the coastwide unit: If they weren't, mechanics would *never* be covered by the PCLCD

and the red-circle exception would serve no purpose. That is why the Board previously found it "clear" that ILWU-represented mechanics must perform M&R work at PMA members' ports. *PMA*, 256 NLRB at 769-70. That decision, the Ninth Circuit has held, "clearly illustrates" that PMA members must use ILWU-represented mechanics for M&R work. *IAM Dist. Lodge No. 94*, 781 F.2d at 688-90 & n.2.

The Board tried to distinguish *PMA*, but none of its purported "distinctions" has anything to do with whether the coastwide bargaining unit includes mechanics. D&O 41. First, the Board observed that the terminal in *PMA* "converted from traditional stevedoring services to a modern container system," while the Nutter terminal was already containerized, D&O 41, but nothing in the relevant PCLCD provisions turns on when a given terminal becomes containerized. Second, the Board said *PMA* involved "no successorship issues" because "the employer fired [its] subcontractors." *Id.* But Everport also took over M&R work from STS's subcontractors, so that is no distinction at all. In any event, whether *PMA* was a successorship case has no bearing on the scope of the coastwide bargaining unit. Neither does the fact that *PMA* interpreted the 1981 version of the PCLCD, which the Board said was

"superseded in 2008 with red circle language." *Id.* The terms assigning M&R work to the coastwide unit were the same in 1981 as they are today. And the "red circle language," *id.*, as explained, provides *exceptions* to the general rule that the coastwide unit includes mechanics. It did not "supersede[]," *id.*, any of the relevant terms.

Indeed, the Ninth Circuit recently rejected the Board's interpretation of the PCLCD as not assigning M&R work to the ILWU's coastwide unit. *Kinder Morgan*, 978 F.3d at 642. The employer in *Kinder Morgan*, like Everport, was a PMA member bound by the PCLCD. *Id.* at 630. The ILWU and another union each claimed their members should perform certain M&R work at the employer's port. *Id.* at 631. The Board found, as it did here, that the PCLCD did not assign the work to the coastwide bargaining unit. *Id.* at 632. The Ninth Circuit disagreed, holding that the "PCLCD *unambiguously* assigns to the [coastwide longshore unit] *all* M&R work, on *all* present and future stevedore cargo handling equipment . . . for *all* PMA members, at *all* West Coast ports." *Id.* at 642 (emphasis added).

As in *Kinder Morgan*, Everport's PMA membership required it to assign M&R work to members of the coastwide bargaining unit that the

Board created in *Shipowners*. That fact fundamentally distinguishes Everport's operations from the operations of MTC and MMTS. Those companies had a historical relationship with the IAM's mechanics. Everport, in contrast, had no relationship with the IAM or the Former MTC/MMTS Mechanics. So, when it took over the Nutter Terminal, the terminal's red-circle status expired, severing any connection between MTC and MMTS's historical use of IAM mechanics and Everport's future M&R work, which under the PCLCD had to be done by workers from the coastwide unit. *Supra* at 21-22. That sharp break between MTC and MMTS's operations and Everport's operations rendered the Former MTC/MMTS Mechanics unit inappropriate as a matter of law.

The Board did not contest the PMA's and ILWU's interpretation of the red-circle exception as expiring when Everport took over the Nutter Terminal. Instead, the Board dismissed the red-circle issue as an irrelevant "red herring." D&O 43. That shows how badly the Board went off the rails. Under the PCLCD, Everport could assign M&R work to IAM-represented mechanics only if the Nutter Terminal remained red-circled. So, whether the red-circle status survived Everport's taking over operation of the terminal is *central*, not irrelevant, to whether the Former

MTC/MMTS Mechanics could have remained an appropriate bargaining unit. And because the PCLCD is an agreement between the PMA and ILWU, the Board may not "refus[e] to accept the parties' own interpretation of their contract." *NLRB v. ILWU, Local No. 50*, 504 F.2d 1209, 1215 (9th Cir. 1974). The Board's dismissal of that point illustrates its failure to engage with the reality of the PCLCD and the coastwide unit the Board itself created 80 years ago. *See id.* at 1214-17 (rejecting Board's assignment of longshore work because it "misconstrued" the PCLCD).

2. Everport's Membership in the PMA Multiemployer Bargaining Association Makes a Single-Employer Unit of Former MTC/MMTS Mechanics Inappropriate

Everport's membership in a multiemployer bargaining association equally requires rejecting the Board's selection of the Former MTC/MMTS Mechanics as an appropriate bargaining unit.

Multiemployer bargaining "is a well-established, important, pervasive method of collective bargaining." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 240 (1996). The Pacific Coast longshore industry has long been subject to multiemployer bargaining. *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 94 (1957); *Shipowners*, 7 NLRB at 1023-25. The Board recognized in *Shipowners* that, due to the prevalence of

multiemployer associations on the Pacific Coast, "the individual company can be said to exercise very few of the functions which are the essential attributes of the employer-employee relationship." 7 NLRB at 1025. Accordingly, the Board recognized "[t]he regional [multiemployer] associations" as the employers' bargaining representatives and affirmed certification of all longshore workers on the Pacific Coast as the appropriate employee bargaining unit. *Id.* at 1024-25. The Board has since confirmed that the PMA, the current incarnation of the multiemployer associations approved in *Shipowners*, is a lawful "multiemployer bargaining association." *ILWU Local 19*, 266 NLRB 193, 194 (1983).

The Board's certification of the coastwide, multiemployer bargaining unit limits its ability to approve single-employer units for PMA members' longshore labor. In a successorship case, the Board's power to select a bargaining unit arises from section 9 of the NLRA. *ILWU v. NLRB* (*Pac. Crane*), 890 F.3d 1100, 1111 (D.C. Cir. 2018); 29 U.S.C. § 159(a)-(b). And under section 9, a "controlling history of multiemployer bargaining" makes single-employer units inappropriate. *Arbor Constr. Pers., Inc.*, 343 NLRB 257, 257-58 (2004); *accord, e.g., J.D. Consulting, LLC*, 345 NLRB 1298, 1300 (2005). As a result, the PMA's long history of

multiemployer bargaining with the coastwide longshore unit prevents the Board from certifying employer-specific bargaining units for PMA members, at least when the member has no historical relationship with a single-employer unit.

Everport never had a relationship with the Former MTC/MMTS Mechanics or any other single-employer bargaining unit. When it began operating the Nutter Terminal, its only relationship was with the PMA. So while a single-employer, port-specific unit of IAM mechanics may have been appropriate for MTC and MMTS, the only appropriate unit for Everport was the multiemployer, coastwide longshore unit.

B. Everport Lawfully Joined the PMA and Did Not Prematurely Recognize the ILWU as Any Incumbent Employee's Bargaining Representative

1. Because the only appropriate bargaining unit for PMA members' longshore workers is the ILWU's coastwide bargaining unit, the Board could require Everport to bargain with the Former MTC/MMTS Mechanics only by concluding that Everport's decision to join the PMA was itself unlawful. But courts and the Board have consistently approved Pacific Coast terminal operators' decisions to join the PMA and follow the PCLCD. *Supra* Part I.A. Indeed, *Shipowners*

requires operators and longshore workers to bargain on a coastwide basis. Such coastwide bargaining cannot occur if the Board can, on an ad hoc basis, reject an operator's obligations to the coastwide unit in favor of port-specific units; coastwide means coastwide. For bargaining to occur coastwide, as *Shipowners* requires, Pacific Coast terminal operators like Everport must be able to legally join the PMA and comply with the PCLCD.

To be sure, an operator cannot join the PMA out of "hostility to a union." *Sierra Realty Corp.*, 82 F.3d at 496. But the Board did not find that Everport joined the PMA due to anti-union animus. In fact, it is undisputed that Everport joined the PMA because it could not engage longshore workers without access to the coastwide joint dispatch halls. (Tr. 1684:16-19, 3654:13-16.) Everport was free to make that business decision without first negotiating with the Former MTC/MMTS Mechanics, with whom it had no relationship. *S&F Mkt. St. Healthcare LLC v. NLRB*, 570 F.3d 354, 362-63 (D.C. Cir. 2009); *Sierra Realty Corp.*, 82 F.3d at 496-98; *IAM*, 595 F.2d at 671-76.

2. Although the Board did not find or even suggest that Everport joined the PMA out of hostility to a union, it nonetheless concluded that joining the PMA was unlawful. It found that Everport, by joining the

PMA and complying with the PCLCD, "unlawfully recognized [the] ILWU at a time when it did not represent a majority of . . . Everport's employees and unlawfully applied the terms of the [PCLCD]." D&O 1 n.4. That finding misunderstands the facts, the law, and the nature of multiemployer associations like the PMA; it encapsulates the Board's inexplicable and erroneous approach to this case.

As the Board recognized in *Shipowners*, individual PMA members "exercise very few of the functions which are the essential attributes of the employer-employee relationship." 7 NLRB at 1025. As the employer representative, the PMA assumes the primary role in bargaining and administering labor contracts governing the coastwide longshore workers whom PMA members engage through the joint dispatch halls. *Id.* at 1024-25. When a new terminal operator like Everport joins the PMA, it is not hiring a new workforce that must then elect a bargaining representative. Instead, the terminal operator steps into a preexisting bargaining relationship between the PMA and the ILWU, under which the relevant workforce ("workers employed at longshore labor in the Pacific Coast") has *already* been defined and its representative (the ILWU) has *already* been chosen. *Id.* at 1022-25. "Through its

membership in the [PMA], the company *indirectly* employs longshoremen represented by local unions affiliated with the [ILWU]." *Int'l Transp. Serv., Inc. v. NLRB*, 449 F.3d 160, 162 (D.C. Cir. 2006) (emphasis added).

For these reasons, it is wrong for the Board to characterize joining the PMA as a "premature recognition" event. Instead, by engaging labor through the joint dispatch halls, a PMA member draws from an existing bargaining unit that recognized its representative long ago, when the *Shipowners* Board certified the ILWU. 7 NLRB at 1022-25. Everport's use of the dispatch halls thus did not force the ILWU or the PCLCD on any existing employee. It guaranteed that Everport's new longshore workers would have all *already* consented to ILWU recognition by joining the coastwide bargaining unit through the joint dispatch halls.

3. The Board missed this point, creating a Catch-22 for terminal operators. *See Adv. Life Sys. Inc. v. NLRB*, 898 F.3d 38, 49 (D.C. Cir. 2018) (vacating in part Board order that "left [the employer] in a Catch-22"). Multiemployer associations like the PMA provide their members a body of union-represented workers whose terms of employment have already been negotiated by the association and the union. As explained, Everport had no real choice but to join the PMA—and thus bind itself to

the PCLCD—before operating the terminal, because doing so was its only way to access the necessary workers. *Supra* at 21. But under the Board's reasoning, a PMA member may not bind itself to the PCLCD before it engages its workers—despite the fact that the very reason a would-be terminal operator must join the PMA is to gain access to the coastwide longshore workforce, which has already bound itself to the PCLCD. The Board did not acknowledge or explain this Catch-22, which renders the coastwide bargaining required by *Shipowners* effectively impossible, if not per se illegal.

Until recently, the Board had taken a different approach, setting out a clear and administrable rule for when a company can lawfully join a multiemployer association. A company cannot unilaterally impose the association's collective bargaining agreement on the company's incumbent workforce. *Comtel Sys. Tech. Inc.*, 305 NLRB 287, 289-90 (1991); *Mohawk Bus. Machines Corp.*, 116 NLRB 248, 249 (1956). But if a company has no incumbent workforce (like Everport when it joined the PMA), it is free to join a multiemployer association and engage labor under the association's collective bargaining agreement. *See Bldg. Contractors Ass'n*, 364 NLRB No. 74, 2016 WL 4376616, at *1 (Aug. 16,

2016) (finding "appropriate" a multiemployer association that "require[d] member-employers to be bound by the terms of any collective-bargaining agreement" between association and unions); *Sands Point Nursing Home*, 319 NLRB 390, 390-91 (1995) (approving employer's compliance with multiemployer association's agreement).

That rule resolves this case. Because Everport joined the PMA before it engaged any workers, its compliance with the PCLCD did not subject any nonconsenting employee to ILWU representation. All of its longshore workers, including the Former MTC/MMTS Mechanics, were engaged through the dispatch halls as members of a preexisting bargaining unit represented by the ILWU. That is not premature recognition. *See St. Louis Post Dispatch*, 1981 WL 25940 (NLRB GC Div. of Advice May 29, 1981) (employer lawfully extended recognition to union before commencement of operations where employees had already ratified proposed contract).

C. Everport Properly Followed the Hiring Process Required by the PCLCD

In addition to rejecting Everport's PMA membership, the Board also found that Everport could not lawfully comply with the PCLCD because it discriminated against Former MTC/MMTS Mechanics during

its hiring process. D&O 1 n.4. But that finding of discrimination is legally irrelevant. Everport joined the PMA for valid, nondiscriminatory business reasons. Any "discrimination" occurred *after* Everport joined the PMA. D&O 26. The PCLCD, after all, requires hiring from the ILWU halls; whether or not that can be described as "discrimination" against non-ILWU workers, it cannot be an unfair labor practice to follow the terms of a collective bargaining agreement with the Board-certified representative of a Board-certified bargaining unit.

1. There is no dispute that the PCLCD required Everport to engage its longshore workers through the ILWU-PMA joint dispatch halls. The Board and other courts have held that PMA membership automatically binds members to the PCLCD. *PMA*, 256 NLRB at 770; *IAM, Dist. Lodge No. 94*, 781 F.2d at 688; *infra* Part II.B. And because Everport had no preexisting relationship with any union other than the ILWU, the Nutter Terminal's red-circle status expired when Everport took control. *Supra* at 20-21. At that point, the PCLCD required Everport to use the joint dispatch halls. *IAM, Dist. Lodge No. 94*, 781 F.2d at 688 n.2. And as explained above, Everport's obligation to engage longshore

workers through the joint dispatch halls extended to its M&R mechanics. *Supra* at 40-42.

2. Everport's process for hiring mechanics, which the Board called discriminatory, was the process required by the PCLCD. Everport first interviewed registered applicants. D&O 19-23, 26. Then it interviewed unregistered applicants, including Former MTC/MMTS Mechanics, through the Herman-Flynn procedures. *Id.* Although the Board found that Everport discriminated against the Former MTS/MMTS Mechanics by favoring registered ILWU mechanics, the PCLCD *required* Everport to prioritize the registered mechanics' applications. Only after exhausting qualified registered mechanics could Everport consider the unregistered Former MTC/MMTS Mechanics. *Supra* at 24. If Everport had followed any other process, it would have breached the PCLCD, and the ILWU could have stopped work at the terminal. *See ILWU (Vance, J. Duane)*, 137 NLRB 119, 127 (1962) (approving strike to compel compliance with PCLCD).

For that reason, Everport's hiring process—even if it prioritized registered mechanics from the joint dispatch hall—could not violate the NLRA, unless joining the PMA and agreeing to the PCLCD was itself

somehow unlawful. As explained, it was not. *Supra* Part I.B. Everport could, therefore, lawfully follow the PCLCD's hiring procedures, even if that meant hiring more mechanics registered in the ILWU-PMA joint dispatch halls than unregistered Former MTC/MMTS Mechanics.

3. In addition, because Everport lawfully decided to follow the PCLCD's procedures, any "discrimination" involved in those procedures is irrelevant to whether Everport could ever have inherited MTC's and MMTS's bargaining obligations to the Former MTC/MMTS Mechanics. A new employer inherits the prior employer's bargaining obligations only when "a majority of the employees hired by the new employer are represented by a recently certified bargaining agent." *Burns*, 406 U.S. at 281. The Board here found it impossible to determine whether, in the absence of "discrimination," IAM-represented mechanics would have made up a majority of Everport's workforce. D&O 1 n.4. But that ignores that Everport's actions occurred in the context of a coastwide, multiemployer agreement. Because Everport engaged its workers through the joint dispatch halls, it engaged Former MTC/MMTS Mechanics through the joint longshore dispatch and registration procedures under the PCLCD, *not* as part of MTC and MMTS's IAM-

represented workforce. *Supra* at 16-17. Even if Everport had engaged every Former MTC/MMTS Mechanic, there is no circumstance in which they could have constituted a majority of the 14,000-strong coastwide unit. (Tr. 2045:11-2046:4.)

II. The Board Ignored or Unreasonably Distinguished Precedent Inconsistent with Its Decision

For the reasons explained above, the Board's decision is erroneous as a matter of law. Even if it were not, however, it must still be vacated as arbitrary and capricious because of its many "unexplained departure[s] from precedent." *ABM Onsite Servs.—W., Inc. v. NLRB*, 849 F.3d 1137, 1142 (D.C. Cir. 2017). "[T]he NLRB—like any other agency—cannot turn its back on its own precedent and policy without reasoned explanation." *Id.* at 1146 (cleaned up). "[W]hen the Board fails to explain—or even acknowledge—its deviation from established precedent, 'its decision will be vacated as arbitrary and capricious.'" *Id.*

The Board here ignored or arbitrarily distinguished precedent inconsistent with its conclusions that Everport violated the NLRA by joining the PMA and following the PCLCD's hiring process. This is "'an inexcusable departure from the essential requirement of reasoned decision making.'" *NLRB v. CNN Am., Inc.*, 865 F.3d 740, 751 (D.C. Cir.

2017). Instead of providing "a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored," the Board "glosse[d] over . . . prior precedents." *Id.* "Such '[s]ilence in the face of inconvenient precedent is not acceptable.'" *Id.* This Court has frequently had to vacate Board decisions for this error. *E.g.*, *id.*; *ABM Onsite Servs.*, 849 F.3d at 1142-47; *Stewart v. NLRB*, 851 F.3d 21, 30 (D.C. Cir. 2017); *Dupuy v. NLRB*, 806 F.3d 556, 563 (D.C. Cir. 2015); *E.I. Du Pont De Nemours & Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012); *LeMoyne-Owen Coll.*, 357 F.3d at 60-61; *Speedrack Prods Grp., Ltd. v. NLRB*, 114 F.3d 1276, 1282 (D.C. Cir. 1997); *Cleveland Constr.*, 44 F.3d at 1016. It should do the same here.

A. The Board first disregarded precedent when finding that the Former MTC/MMTS Mechanics were an appropriate bargaining unit for Everport. As explained above, the Board shrugged off *Shipowners*' certification of the coastwide bargaining unit by claiming that the unit does not include mechanics. *Supra* at 40. That is both wrong on its own terms and contradicted by the Board's own previous conclusion that the coastwide bargaining unit "clear[ly]" includes mechanics. *PMA*, 256 NLRB at 769-70. To avoid this inconsistency, the Board dismissed *PMA*

based on irrelevant distinctions. *Supra* at 41. The Board's reliance on these "insignificant" distinctions falls far short of its obligation to "provide a reasoned analysis for changing its course." *Speedrack Prods. Grp.*, 114 F.3d at 1280-81 (cleaned up).

Moreover, the Board made no attempt at all to distinguish the Ninth Circuit's holding in *IAM, District Lodge No. 94* that the PCLCD "clearly" requires PMA members to use ILWU-represented mechanics for M&R work. 781 F.2d at 688-90 & n.2. The Board merely described the case's facts and quoted its recognition that "employees 'have the freedom to choose their exclusive bargaining agent' and the employer has a duty to bargain with only that selected representative." D&O 41. But the Ninth Circuit made that statement to explain why local agreements "are secondary to bona fide, industry-wide collective bargaining agreements" like the PCLCD. 781 F.2d at 690. Far from supporting the Board's decision, the quoted language from *IAM District Lodge No. 94* repudiates it.[5]

[5] The Ninth Circuit's decision in *Kinder Morgan* even more firmly rejects the Board's conclusion that the coastwide longshore unit does not include mechanics. 978 F.3d at 641-42. That recent decision provides an independent basis to reject the Board's decision.

The Board similarly dismissed the multiple decisions in which it has "praised" and "shown deference" to the PCLCD. *See ILWU, Local No. 50*, 504 F.2d at 1216-17 (citing cases). The Board has "acclaimed" the PCLCD as "a history-making precedent, a peaceful settlement of a problem which has troubled the west coast waterfront for a number of years." *ILWU (Ind.) Local 19 (Am. Mail Line, Ltd.)*, 144 NLRB 1432, 1442 (1963). It has "recognized the soundness of [the PCLCD's] objective" to "promote industrial peace." *United Indust. Workers (Albin Stevedore Co.)*, 182 NLRB 633, 636 (1970). And it has relied on the PCLCD "as a factor favoring longshoremen" in work disputes, even when the disputed work is only "in the broadest sense longshore work." *United Indust. Workers, Pac. Dist. (Sea-Land Serv., Inc.)*, 188 NLRB 241, 243 (1971); *Am. Mail Line,* 144 NLRB at 1442.

Ignoring this body of cases, the Board cited just one case it said "rejected" Everport's argument: *PCMC/Pacific Crane Maintenance Co.*, 359 NLRB 1206 (2013), *aff'd*, 362 NLRB 988 (2015), *enf'd sub nom. Pac. Crane*, 890 F.3d 1100. D&O 42. *PCMC* did no such thing. That case involved two companies, PMMC and PCMC, that stipulated they "were at all times material a single employer." 359 NLRB at 1207. PMMC laid

off its IAM-represented mechanics and transferred its operations at a Pacific Coast terminal to PCMC. *Id*. PCMC hired those same mechanics the next day, simultaneously withdrawing recognition from the IAM and recognizing the ILWU. *Id.* "Based on the parties' stipulation" that they comprised a single employer, the Board found that PCMC's withdrawal of recognition violated the NLRA. *Id.* This Court affirmed, relying "heavily on PMMC and PCMC's single-employer stipulation." 890 F.3d at 1110; *see Ports Am.*, 971 F.3d at 359 ("[W]e relied 'heavily' on a stipulation that [PMMC] and [PCMC] . . . should be treated as a single employer.").

That stipulation makes *PCMC* irrelevant to this case. Because of the stipulation, the question in *PCMC* was whether a single employer can "escape its bargaining obligation by the simple device of laying off [its] employees . . . and then rehiring them as 'new' employees." *PCMC*, 359 NLRB at 1210. Not surprisingly, the Board answered "no," holding that PCMC had to bargain with the IAM because "PMMC and PCMC together constituted a single employing enterprise" that had preexisting obligations to the IAM. *Id.* at 1209-10. Everport, in contrast, is not the same entity as MTC or MMTS and has never had any relationship with the IAM. Unlike in *PCMC*, the question here is whether a new employer

with no relationship with the previous employer or the union that represented the previous employer's employees may follow the PCLCD's requirement that it engage M&R workers through the ILWU-PMA dispatch halls. *PCMC* has nothing to say about that question.

Indeed, this Court recently vacated a Board decision because it erroneously relied on *PCMC* in a successorship case like this one. *Ports Am.*, 971 F.3d at 362. There, the Board relied on *PCMC* to hold that PCMC's successor violated the NLRA by continuing to recognize the ILWU as its workers' representative. *Id.* This Court reversed, holding that *PCMC* was irrelevant; it "involved no successorship issue because the parties there had stipulated that the[y] . . . should be treated as a single employer." *Id.* *PCMC* is just as irrelevant here, yet the Board repeatedly relied on it. D&O 30-32, 40-42. As in *Ports America*, the Board's reliance on this "inapposite precedent" was arbitrary and requires vacatur. 971 F.3d at 362.

B. The Board also disregarded precedent when it concluded that Everport violated the NLRA by joining the PMA and complying with the PCLCD. Since *Shipowners*, courts and the Board have always treated PMA membership as binding the member to the PCLCD. In *PMA*, for example,

the Board held that "employers who join the PMA after the execution of the bargaining agreement are subject to its terms." *PMA*, 256 NLRB at 770. And in *IAM District Lodge No. 94*, the Ninth Circuit held that "member-employers of PMA with no previous ties to the IAM" were "bound by the . . . PCLC[D] to employ [ILWU mechanics] to perform the specified work." 781 F.2d at 688; *accord Kinder Morgan*, 978 F.3d at 642.

Scores of other decisions agree that PMA members are bound by the PMA's contracts with the ILWU. *E.g., PMA v. NLRB*, 827 F.3d 1203, 1205 (9th Cir. 2016) (PMA membership makes employer bound to … the [PCLCD]"); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1462-63 (9th Cir. 1997) (employer "was bound to [ILWU] contracts through its membership in the PMA"); *ILWU, Local 8*, 363 NLRB No. 12, 2015 WL 5638153 (Sept. 24, 2015) (employer "bec[a]me bound directly to the existing PMA/ILWU agreement when it applied for and became a member of the PMA"); *IBEW, Local 48*, 357 NLRB 2217, 2219 (2011) (PMA member becomes "bound to a collective-bargaining agreement with ILWU"); *ILWU, Local 13 (Princess Cruises Co.)*, 161 NLRB 451, 454 (1966) (PMA members "were obligated by a contract between PMA and the Respondent to assign [work to] longshoremen exclusively"); *ILWU,*

Local 10 (Matson Navigation Co.), 140 NLRB 449, 454 (1963) (PMA membership triggers "contractual relations with the ILWU, covering longshoremen"); *see also ILWU, Local 14, AFL-CIO v. NLRB*, 85 F.3d 646, 654 (D.C. Cir. 1996) (observing that PMA members' longshore work "'belong[s]' to the [ILWU]")

These cases address many different PMA members that had no existing stevedoring employees before they joined the PMA in order to access the only longshore workforce on the West Coast, but none so much as hints that joining the PMA in such a manner or complying with the PCLCD could be unlawful. To the contrary, they uniformly hold that membership in the PMA binds an employer to the PCLCD. The Board gave no adequate reason to treat Everport differently from how it has treated this industry for more than 80 years.

C. The Board's decision in this case is part of a troubling recent trend in which it has improperly sought to limit the coastwide bargaining unit's role in Pacific Coast longshore work. In the last year, the Board has, by misapplying its precedent and misinterpreting or ignoring the PCLCD, twice denied the ILWU M&R work that the PCLCD assigns to the coastwide unit—only to lose on appeal. *Ports Am.*, 971 F.3d at 360-

63; *Kinder Morgan*, 978 F.3d at 640-42. In *Ports America*, the Board punished the ILWU for accepting M&R work under the PCLCD, "arbitrarily" applying its "inapposite" decision in *PCMC* to find that the coastwide bargaining unit was not the appropriate unit. 971 F.3d at 360-63. And in *Kinder Morgan*, the Board "ignored" the PCLCD's "plain language" to find that the coastwide unit was not entitled to perform M&R work at Pacific Coast ports. 978 F.3d at 642. In both cases, this Court and the Ninth Circuit had to order the Board to comply with its precedent and respect the PCLCD's plain terms. *Ports Am.*, 971 F.3d at 362; *Kinder Morgan*, 978 F.3d at 642.

The Board committed the same errors here. As in *Kinder Morgan*, the Board ignored or misinterpreted the PCLCD's terms that require Everport, as a PMA member, to assign its M&R work to the coastwide bargaining unit. And, as in *Ports America*, it did so by misapplying its own precedent, including by relying on the irrelevant *PCMC* decision. So, as in *Kinder Morgan* and *Ports America*, the Court should likewise reject the Board's decision here.

III. The Board's Decision Threatens the Longshore Industry and Industrial Peace on the Pacific Coast

Because the Board did not adequately explain its decision, we cannot know for sure why the Board departed from precedent so drastically. *Ports America* and *Kinder Morgan* suggest, however, that the Board has, as of late, sought to use ad hoc enforcement actions to undermine the PMA-ILWU collective bargaining agreement and chip away at the coastwide bargaining unit it certified in *Shipowners*. Changing course on so fundamental a question in a retrospective enforcement action—without even acknowledging, let alone justifying, the reversal—violates basic administrative law principles. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (holding an agency must "provide a more detailed justification" to reject a "prior policy [that] has engendered serious reliance interests"). But the Board's apparent effort to undo its own 80-year coastwide approach and remake the Pacific Coast longshore industry is not just lawless—it is also dangerous.

The Board certified the coastwide longshore bargaining unit "to resolve longstanding—and sometimes violent—disputes in that industry." *ILWU*, 2017 WL 2305438, at *2 n.3 (NLRB Div. of Judges May 25, 2017), *aff'd*, 365 NLRB No. 149 (Dec. 13, 2017). It sought to "effectuate the

policies of the Act" by remedying past "failures" in collective bargaining and "insur[ing] to the longshoremen the full benefit of their right to self-organization and to collective bargaining." *Shipowners*, 7 NLRB at 1024-25. The Board succeeded. In the 80 years since, coastwide collective bargaining has created parity between employees and employers and preserved industrial peace. *ILWU, Local No. 50*, 504 F.2d at 1216.

The Board's decision threatens that achievement. By rejecting longstanding precedent that companies may lawfully join the PMA and comply with the PCLCD, the Board cast doubt on the legality of many PMA members' business operations. That doubt will discourage terminal operators from joining the PMA and upset negotiations between the PMA and ILWU. It will sow uncertainty in ports across the coast, weaken the bargaining positions of employers and employees alike, and possibly return the Pacific Coast longshore industry to the ineffective port-by-port bargaining system that precipitated Bloody Thursday. It will, in short, undermine the NLRA's "ultimate object" of "industrial peace." *Dana Corp.*, 356 NLRB at 262 (internal quotation marks omitted).

Consider first the position in which the Board's decision puts Everport. On one side, Everport's membership in the PMA binds it to the

PCLCD, which requires it to engage mechanics from the joint dispatch halls. On the other side, the Board ordered Everport not to comply with the PCLCD, to hire IAM-represented mechanics outside of the joint dispatch halls, and to negotiate with the IAM rather than the ILWU. What is Everport supposed to do? Bargaining with the IAM as its mechanics' representative would breach the PCLCD, which is an unfair labor practice. *Sheet Metal Workers Int'l Ass'n v. Simpson Sheet Metal, Inc.*, 954 F.2d 554, 555 (9th Cir. 1992). Negotiating a separate agreement with the IAM would let Everport "escape the binding effect of an agreement resulting from group bargaining"—another unfair labor practice. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 415 (1982). But according to the Board, *not* bargaining with the IAM and *not* negotiating a separate agreement are also unfair labor practices. Everport is trapped by these competing demands, "caught 'between the devil and the deep blue.'" *ILWU v. NLRB*, 884 F.2d 1407, 1411 (D.C. Cir. 1989); *see Adv. Life Sys.*, 898 F.3d at 40 ("Unfair if you do; unfair if you don't. As a practical matter, that is the position in which the [Board's] decision in this case left the employer.").

Now extend the uncertainty Everport faces to every port on the Pacific Coast. In *IAM District Lodge No. 94*, the Ninth Circuit reversed a Board decision that would "forbid PMA member-employers . . . from honoring their own contract." 781 F.2d at 689-90. The Board's decision here has the same effect. If Everport is punished for complying with the PCLCD, no Pacific Coast employer will know whether it can join the PMA or honor the PMA's bargaining obligations to the ILWU. That would create unprecedented barriers to entry in the industry, undermine "future bargaining between PMA and ILWU," and "result in serious consequences to the labor relations framework." *Id.*

The Board should not want to upend the coastwide system that has worked well for the past 80 years. But if the Board does want to revisit its decision that only a coastwide bargaining unit is appropriate and shift to a different approach going forward, it must—at the very least—say so openly, explain why its view has changed, and defend its new view with reasons strong enough to justify disrupting the entire Pacific Coast longshore industry. *Fox*, 556 U.S. at 515-16. What the Board may not do is dismantle the coastwide bargaining unit silently, through one-off retrospective enforcement actions that punish PMA members for

operating within the coastwide system that the Board itself formalized 80 years ago. Because that is the effect of the Board's decision here, this Court should reject it.

CONCLUSION

The Court should grant Everport's petition, deny the Board's cross-petition for enforcement, and dismiss all charges against Everport.

Respectfully submitted,

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January 19, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,818 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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Date: January 19, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2021, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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ADDENDUM

29 U.S.C. § 158(a) 1
29 U.S.C. § 159(a)-(b) 3
29 U.S.C. § 160(f) 5

29 U.S.C. § 158(a)

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for

believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 159(a)-(b)

§ 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards

if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

29 U.S.C. § 160(f)

§ 160. Prevention of unfair labor practices

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.