

Nos. 20-1411, 20-1412 & 20-1432

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

EVERPORT TERMINAL SERVICES, INC.,

and

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION,

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE
WORKERS, DISTRICT LODGE 190, LOCAL LODGES 1546 & 1414, AFL-CIO,**

Intervenors for Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-
APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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)	
and)	
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INTERNATIONAL LONGSHORE AND)	
WAREHOUSE UNION,)	
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Petitioners/Cross-Respondents)	Nos. 20-1411
)	20-1412
v.)	20-1432
)	
NATIONAL LABOR RELATIONS BOARD,)	Board Case Nos.
)	32-CA-172286
Respondent/Cross-Petitioner)	32-CB-172414
)	
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)	
INTERNATIONAL ASSOCIATION OF)	
MACHINISTS & AEROSPACE WORKERS,)	
DISTRICT LODGE 190,)	
LOCAL LODGES 1546 & 1414, AFL-CIO,)	
)	
Intervenors for Respondent/Cross-Petitioner)	
)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

A. Parties and Amici

Everport Terminal Services, Inc. (“Everport”) is the Petitioner in case No. 20-1411 and the Cross-Respondent in case No. 20-1432. International Longshore and

Warehouse Union (“ILWU”) is the Petitioner in case No. 20-1412 and the Cross-Respondent in case No. 20-1432. The Board is the Respondent in case Nos. 20-1411 and 20-1412, and the Cross-Petitioner in case No. 20-1432. International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodges 1546 & 1414, AFL-CIO are the Intervenors for the Board in case Nos. 20-1411 and 20-1412, and were the charging parties before the Board.

B. Ruling under Review

The case under review is a Decision and Order issued by the Board against Everport and the ILWU in Board Case Nos. 32-CA-172286 and 32-CB-172414, entitled *Everport Terminal Services, Inc.*, and reported at 370 NLRB No. 28, 2020 WL 6050506 (Sept. 30, 2020).

C. Related Cases

The ruling under review was not previously before this or any other court, and Board counsel is not aware of any related cases currently pending or about to be presented in this or any other court.

s/ Ruth E. Burdick
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Dated at Washington, DC
this 25th day of March 2021

TABLE OF CONTENTS

Headings	Page(s)
Jurisdictional statement.....	2
Statement of issues.....	2
Relevant statutory provisions.....	3
Statement of the case.....	4
I. The Board’s findings of fact	6
A. Since the 1960s, IAM has represented the mechanics who performed M&R work at the Terminal	6
B. Under pressure from ILWU, Everport hires ILWU-represented mechanics, and refuses to hire the predecessors’ IAM-represented mechanics, to avoid recognizing and bargaining with IAM	8
C. Everport and ILWU conspire to rig the interview process to ensure that a majority of the new workforce consists of ILWU-represented mechanics	10
D. Everport tells the predecessors’ IAM-represented mechanics that it cannot hire them because of their union affiliation, discriminatorily refuses to hire them, and instead hires a new workforce consisting mainly of ILWU-represented mechanics	11
E. Everport continues the predecessors’ operations while unilaterally applying the terms of the Longshore Contract to the historical units	13
II. The Board’s conclusions and order.....	16
Summary of argument.....	21
Standard of review	25

TABLE OF CONTENTS

Headings	Page(s)
Argument.....	26
I. The Board properly exercised its broad discretion in rejecting Everport and ILWU’s only challenge to its successorship finding, namely that the historical units were no longer appropriate for bargaining after Everport took over the terminal.....	26
A. A successor employer cannot refuse to recognize and bargain with an incumbent union, and cannot recognize and bargain with a union that does not represent an uncoerced majority of unit employees	27
B. Everport was a successor employer that inherited the predecessors’ obligation to recognize and bargain with IAM	28
1. Everport and ILWU waived challenges to the Board’s amply supported findings that Everport continued the predecessors’ business and discriminated against their IAM-represented mechanics.....	29
a. Everport substantially continued the predecessors’ business ...	30
b. Everport and ILWU conspired to discriminate against the predecessors’ IAM-represented mechanics by rigging the selection process to ensure that ILWU-represented mechanics would constitute a majority of Everport’s new M&R workforce	31
2. The historical units remained appropriate after Everport’s takeover of M&R operations	35
a. Everport failed to refute the historical units’ presumption of appropriateness, and the units maintained a community of interest separate from other nonunit employees	36
b. The historical units were not accreted into ILWU’s coastwide bargaining unit	38

TABLE OF CONTENTS

Headings	Page(s)
c. Everport’s challenge to the Board’s unit-appropriateness finding is entirely without merit	40
C. Everport and ILWU’s remaining unit-appropriateness arguments have no merit	44
1. The Board’s ruling is consistent with precedent and cases cited by Everport have no bearing on the historical units’ appropriateness	44
2. Everport’s fear-mongering has no basis in law or fact.....	48
II. The Court should summarily enforce the Board’s findings, which Everport does not contest, that it committed multiple unfair labor practices as the historical units’ successor employer	49
A. Everport violated Section 8(a)(1) of the Act by telling the predecessors’ IAM-represented mechanics that it would not interview them due to their union affiliation, that it intended to hire a new workforce with no more than 49 percent IAM-represented mechanics, and that their hiring was contingent on agreeing to work under the Longshore Contract’s Herman-Flynn procedures and accepting ILWU as their representative	50
B. Everport violated Section 8(a)(2) and (1) of the Act by telling the predecessors’ IAM-represented mechanics that it would not consider hiring them based on their union affiliation and that their hiring was contingent on agreeing to work under the Longshore Contract’s Herman-Flynn procedures and accepting ILWU as their representative, and by prematurely recognizing ILWU as the historical units’ collective-bargaining representative	51
C. Everport discriminated against the predecessors’ IAM-represented mechanics by refusing to hire them based on their union affiliation, in violation of Section 8(a)(3) and (1) of the Act.....	52

TABLE OF CONTENTS

Headings	Page(s)
D. Everport violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with IAM as the historical units' collective-bargaining representative, and by unilaterally applying the Longshore Contract to the historical units and unilaterally deciding not to hire the predecessors' mechanics without giving IAM notice and an opportunity to bargain	53
E. Everport unlawfully assisted ILWU and discriminated against the predecessors' IAM-represented mechanics by applying the terms of the Longshore Contract to its M&R workforce before hiring a single mechanic, in violation of Section 8(a)(2), (3), and (5) of the Act	55
III. The Court should summarily enforce the Board's findings, which ILWU does not contest, that it committed several unfair labor practices based on Everport's status as a successor employer	55
A. A union cannot lawfully accept recognition and assistance from an employer or apply a collective-bargaining agreement to a unit when it does not represent an uncoerced majority of employees.....	56
B. ILWU violated the Act by demanding and accepting Everport's recognition as the historical units' exclusive bargaining representative.....	57
C. ILWU unlawfully sought to enforce the Longshore Contract in order to force Everport to discriminate against IAM-represented mechanics	58
Conclusion	59

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Bally’s Park Place, Inc. v. NLRB</i> , 646 F.3d 929 (D.C. Cir. 2011).....	25
<i>Brockton Hospital v. NLRB</i> , 294 F.3d 100 (D.C. Cir. 2002).....	25
* <i>Cadillac Asphalt Paving Co.</i> , 349 NLRB 6 (2007).....	36, 37
<i>Capital Cleaning Contractors, Inc. v. NLRB</i> , 147 F.3d 999 (D.C. Cir. 1998).....	34
<i>CCI Ltd. Partnership v. NLRB</i> , 898 F.3d 26 (D.C. Cir. 2018).....	49
<i>Community Hospitals of Central California v. NLRB</i> , 335 F.3d 1079 (D.C. Cir. 2003).....	28, 30, 36
<i>Consolidated Communications, Inc. v. NLRB</i> , 837 F.3d 1 (D.C. Cir. 2016).....	54
* <i>Dean Transportation, Inc. v. NLRB</i> , 551 F.3d 1055 (D.C. Cir. 2009).....	28, 30, 35, 38
* <i>Dodge of Naperville, Inc.</i> , 357 NLRB 2252 (2012), <i>enforced</i> , 796 F.3d 31 (D.C. Cir. 2015).....	38, 39
* <i>EEOC v. Waffle House, Inc.</i> , 534 U.S. 279 (2002).....	43
<i>Elmhurst Care Center</i> , 345 NLRB 1176 (2005), <i>enforced</i> , 303 F. App’x 895 (D.C. Cir. 2008)	52
<i>Everport Terminal Services, Inc.</i> , 370 NLRB No. 28 (Sept. 30, 2020)	2

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Fall River Dyeing Corp. v. NLRB</i> , 482 U.S. 27 (1987)	28, 30
<i>Fort Dearborn Co. v. NLRB</i> , 827 F.3d 1067 (D.C. Cir. 2016).....	53
<i>Fox v. Government of D.C.</i> , 794 F.3d 25 (D.C. Cir. 2015).....	29, 48
<i>IAM District Lodge No. 94 v. ILWU, Local 13</i> , 781 F.2d 685 (9th Cir. 1986).....	46
<i>IAM Lodge 35 v. NLRB</i> , 311 U.S. 72 (1940)	28
<i>ILWU, Local 14 v. NLRB</i> , 85 F.3d 646 (D.C. Cir. 1996).....	47
<i>ILWU Local 19</i> , 144 NLRB 1432 (1963).....	46
<i>ILWU v. NLRB (Kinder Morgan)</i> , 978 F.3d 625 (9th Cir. 2020).....	44, 46
* <i>ILWU v. NLRB (Pacific Crane)</i> , 890 F.3d 1100 (D.C. Cir. 2018).....	39, 56, 57
<i>International Ladies’ Garment Workers Union v. NLRB</i> , 366 U.S. 731 (1961)	28, 52, 56
* <i>Karl Kallman (Love’s Barbeque)</i> , 245 NLRB 78 (1979), <i>enforced</i> <i>in relevant part</i> , 640 F.2d 1094 (9th Cir. 1981).....	29, 31, 32, 34, 35, 40, 43, 54
<i>KLB Industries, Inc. v. NLRB</i> , 700 F.3d 551 (D.C. Cir. 2012).....	42
<i>Litton Financial Printing Division v. NLRB</i> , 501 U.S. 190 (1991)	53-54

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Local Lodge No. 1424 v. NLRB</i> , 362 U.S. 411 (1960)	57
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983)	53
<i>Microimage Display Division of Xidex Corp. v. NLRB</i> , 924 F.2d 245 (D.C. Cir. 1991).....	51
<i>MV Public Transportation, Inc.</i> , 356 NLRB 867 (2011).....	52
* <i>NLRB v. Burns Security Services</i> , 406 U.S. 272 (1972).....	28, 30, 31, 34, 41
<i>NLRB v. General Fabrications Corp.</i> , 222 F.3d 218 (6th Cir. 2000).....	49-50
<i>NLRB v. ILWU, Local No. 50</i> , 504 F.2d 1209 (9th Cir. 1974).....	43, 47
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962)	54
<i>NLRB v. Transportation Management Corp.</i> , 462 U.S. 393 (1983)	32
<i>NV Energy, Inc.</i> , 362 NLRB 14 (2015).....	38, 39
<i>Ozburn-Hessey Logistics, LLC v. NLRB</i> , 833 F.3d 210 (D.C. Cir. 2016).....	32
<i>Pacific Coast Supply, LLC v. NLRB</i> , 801 F.3d 321 (D.C. Cir. 2015).....	54

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Pacific Maritime Association</i> , 256 NLRB 769 (1981).....	45, 46
* <i>Pacific Maritime Association v. NLRB</i> , 967 F.3d 878 (D.C. Cir. 2020).....	43
<i>PCC Structural, Inc.</i> , 365 NLRB No. 160, 2017 WL 6507219 (2017)	37
<i>Planned Building Services</i> , 347 NLRB 670 (2006).....	32
<i>Ports America Outer Harbor, LLC</i> , 366 NLRB No. 76, 2018 WL 2086090 (2018), <i>remanded sub nom. ILWU v. NLRB</i> , 971 F.3d 356 (D.C. Cir. 2020)	46
* <i>Pressroom Cleaners</i> , 361 NLRB 643 (2014).....	34, 35, 38
<i>Serramonte Oldsmobile, Inc. v. NLRB</i> , 86 F.3d 227 (D.C. Cir. 1996).....	35
<i>Shipowners’ Association of the Pacific Coast</i> , 7 NLRB 1002 (1938).....	40, 42, 44, 45
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984)	25
* <i>Trident Seafoods, Inc. v. NLRB</i> , 101 F.3d 111 (D.C. Cir. 1996).....	36
<i>United Food & Commercial Workers v. NLRB</i> , 519 F.3d 490 (D.C. Cir. 2008).....	35
<i>United Food & Commercial Workers v. NLRB</i> , 768 F.2d 1463 (D.C. Cir. 1985).....	30

TABLE OF AUTHORITIES

Cases	Page(s)
<i>United Industrial Workers of North America, Pacific District,</i> 188 NLRB 241 (1971).....	47
<i>United Services Automobile Association v. NLRB,</i> 387 F.3d 908 (D.C. Cir. 2004).....	34
<i>Universal Camera Corp. v. NLRB,</i> 340 U.S. 474 (1951)	25
<i>W&M Properties of Connecticut, Inc.,</i> 348 NLRB 162 (2006), <i>enforced,</i> 514 F.3d 1341 (D.C. Cir. 2008)	31, 32
<i>Wayneview Care Center v. NLRB,</i> 664 F.3d 341 (D.C. Cir. 2011).....	25
<i>Woelke & Romero Framing, Inc. v. NLRB,</i> 456 U.S. 645 (1982)	42
<i>Wright Line, a Division of Wright Line, Inc.,</i> 251 NLRB 1083 (1980), <i>enforced on other grounds,</i> 662 F.2d 899 (1st Cir. 1981).....	32

TABLE OF AUTHORITIES

Statutes	Page(s)
National Labor Relations Act, as amended (29 U.S.C. §§ 151, et seq.)	
29 U.S.C. § 157.....	18, 20, 27, 36, 43, 50, 56
29 U.S.C. § 158(a)(1).....	16, 17, 49, 50, 51, 52, 53, 54
29 U.S.C. § 158(a)(2).....	16, 17, 28, 49, 51, 52, 55
29 U.S.C. § 158(a)(3).....	17, 49, 52, 53, 55
29 U.S.C. § 158(a)(5).....	17, 28, 49, 53, 54, 55
29 U.S.C. § 158(b)(1)(A).....	17, 55, 56
29 U.S.C. § 158(b)(2).....	17, 55, 56, 57
29 U.S.C. § 158(b)(4)(ii)(D).....	47
29 U.S.C. § 158(d).....	53-54
29 U.S.C. § 159(a).....	27, 42
29 U.S.C. § 159(b).....	35
29 U.S.C. § 160(a).....	2
29 U.S.C. § 160(e).....	2, 25, 42
29 U.S.C. § 160(f).....	2
29 U.S.C. § 160(k).....	47
Regulations	
Fed. R. App. P. 28(a)(8)(A).....	29

GLOSSARY

Documents Referred to in the Board's Brief*

D&O or Order	<i>Everport Terminal Services, Inc.</i> , 370 NLRB No. 28, 2020 WL 6050506 (Sept. 30, 2020).
ERBr.	Everport's corrected opening brief
ERX	Hearing exhibit introduced by Everport
ER & ILWU Exs & Supp. Brs	Everport and ILWU's exceptions to the decision of the administrative law judge and supporting briefs
GCX	Hearing exhibit introduced by the General Counsel
ILWUBr.	ILWU's corrected opening brief
ILWUX	Hearing exhibit introduced by ILWU
Tr.	Hearing transcript

Entities Referred to in the Board's Brief

The Board	National Labor Relations Board
Evergreen	Evergreen Marine Corp.
Everport	Everport Terminal Services, Inc.
The General Counsel	Counsel for the Board's General Counsel
IAM	International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodges 1546 & 1414, AFL-CIO
ILWU	International Longshore and Warehouse Union

* In its final brief, the Board will substitute joint appendix (JA) citations for the designations shown here and will update the glossary accordingly.

Marine	Marine Terminals Corporation
Miles	Miles Motor Transport System
PMA	Pacific Maritime Association
The Port	Port of Oakland, California
The Predecessors	Seaside Transportation Services, Marine Terminals Corporation, and Miles Motor Transport System
Seaside	Seaside Transportation Services
The Terminal	Ben E. Nutter Terminal

Miscellaneous

The Act	National Labor Relations Act, 29 U.S.C. § 151 et seq.
The Longshore Contract	Pacific Coast Longshore Contract Document
M&R	Maintenance and repair

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on petitions for review by Everport Terminal Services, Inc. (“Everport”) and International Longshore and Warehouse Union (“ILWU”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Board Order against Everport and ILWU. International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodges 1546 & 1414, AFL-CIO (“IAM”) have intervened on behalf of the Board. The Board’s Decision and Order, reported at 370 NLRB No. 28 (Sept. 30, 2020), is final. The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”), as amended, 29 U.S.C. § 151 et seq., § 160(a). All filings with the Court are timely. This Court has jurisdiction under Section 10(e) and (f) of the Act. *Id.* § 160(e), (f).

STATEMENT OF ISSUES

1. The Board found that Everport was the successor employer of two bargaining units of mechanics historically represented by IAM, and that it was not free to set initial terms because it conspired with ILWU to impose a discriminatory hiring plan that kept the predecessors’ mechanics from constituting a majority of the new workforce. Everport and ILWU dispute the Board’s finding that the historical units remained appropriate for bargaining, but do not challenge the Board’s successorship findings on any other basis. Accordingly, the issue before

the Court is whether the Board properly exercised its broad discretion in finding that Everport and ILWU failed to offer compelling evidence that the decades-old units remained appropriate for bargaining.

2. Based on Everport's status as a successor employer, the Board found that it committed a multitude of unfair labor practices. Because Everport does not dispute any of those findings, the question before the Court is whether to summarily affirm them and enforce the corresponding portions of its Order against Everport.

3. Based on Everport's status as a successor employer, the Board found that ILWU committed several unfair labor practices, which ILWU also does not challenge. Accordingly, the question before the Court is whether to summarily affirm the Board's findings and enforce the corresponding portions of its Order against ILWU.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

This case arises from a dispute between two unions vying to represent two bargaining units of maintenance and repair (“M&R”) employees, also referred to as “mechanics.” Since the 1960s, these two units (“the historical units”) have been represented by IAM and provided M&R services at the Ben E. Nutter Terminal (“the Terminal”) in the Port of Oakland, California (“the Port”).

In 2015, the Terminal’s operator, Everport, severed its contracts with the historical units’ then-employers and took all M&R work in-house. Everport also joined the Pacific Maritime Association (“PMA”) and its collective-bargaining agreement with ILWU, the Pacific Coast Longshore Contract Document (“the Longshore Contract”). With ILWU’s complicity, Everport hired a new M&R workforce with a majority of ILWU-represented mechanics and peremptorily applied the Longshore Contract to those employees. IAM responded by filing unfair-labor-practice charges with the Board. (GCX 1(a), (c), (e), (g), (i).)¹

After an investigation, the Board’s General Counsel issued a consolidated complaint alleging that Everport was the historical units’ successor employer and had inherited the previous employers’ obligation to bargain with IAM. The General Counsel alleged that, as a successor employer, Everport violated the Act

¹ The record abbreviations in this proof brief are explained in the Glossary. Where applicable, references preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

by purposefully preventing the predecessors' IAM-represented mechanics from constituting a majority of its new M&R workforce, refusing to recognize IAM as the historical units' collective-bargaining representative, recognizing ILWU instead, assisting ILWU in securing a majority of its M&R workforce, unilaterally applying the terms of ILWU's collective-bargaining agreement, and generally interfering with the historical units' statutory rights. The complaint also alleged that ILWU violated the Act by demanding and accepting recognition as the historical units' exclusive representative, and by seeking to enforce its collective-bargaining agreement by requiring Everport to discriminate against the historical units' IAM-represented mechanics. (GCX 1(k).)

Following a hearing, an administrative law judge found that Everport and ILWU violated the Act as alleged. (D&O 9-49.) Everport and ILWU then filed exceptions with the Board to most of the judge's findings. On review, the Board affirmed the judge's rulings, findings, and conclusions, and adopted her recommended Order with modifications. (D&O 1-8.) The Board's findings are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. Since the 1960s, IAM Has Represented the Mechanics Who Performed M&R Work at the Terminal

The Port leases shipping berths to marine-terminal operators. In approximately 1968, the Port leased the Terminal to Marine Terminals Corporation (“Marine”), which provided stevedoring services to shipping lines, such as berthing vessels and loading/offloading cargo containers. (D&O 9-11; Tr. 716-17, 938-39, 2241.) Marine also performed M&R work, which consists of servicing and fixing cargo containers, as well as the cranes, vehicles, and other equipment used to move them around the Terminal.² (D&O 10; Tr. 3350-53.)

Marine’s mechanics were historically represented by IAM Local 1414 in a single bargaining unit divided into four shops.³ Sometime in the 1970s, Marine reassigned the crane shop to its subsidiary, Miles Motor Transport System (“Miles”), where it formed a separate bargaining unit represented by IAM Local 1546. (D&O 10 & n.5; Tr. 119-20, 363, 938-39.) Marine’s stevedores have

² Stevedoring and M&R services are often grouped together under the umbrella term “longshore” work.

³ The power shop maintains all equipment with combustion engines, including the machines used to move containers around the Terminal. The reefer shop handles refrigerated cargo containers and the electric generators (“gensets”) used to cool them. The chassis shop services the trailers onto which cargo containers are mounted for road transportation. Finally, the crane shop repairs the various types of cranes used on the terminal. (D&O 10; Tr. 110, 112-15, 257-58, 295, 333-35.)

historically been represented by ILWU under the Longshore Contract. (D&O 13; Tr. 3170.)

In 2002, Evergreen Marine Corporation (“Evergreen”) took over the Terminal lease and, together with Marine, created an entity called Seaside Transportation Services (“Seaside”) to operate the Terminal. (D&O 9 & n.3; ERX 17, Tr. 948-49, 1261-62, 1509-10, 1588-89.) In turn, Seaside hired Marine and Miles to continue providing stevedoring and M&R services. (D&O 9-10 & n.3; Tr. 1263, 1589-90.)

In 2010, Evergreen created Everport as a subsidiary terminal operator. (D&O 10; Tr. 949-50, 1484.) Two years later, Evergreen terminated its contract with Seaside, Marine, and Miles (collectively, “the predecessors”), and assigned the Terminal lease to Everport, which immediately rehired them. (D&O 10; ERX 18, Tr. 1261-62, 1510-12, 1588.)

By early 2015, Everport had grown dissatisfied with the predecessors’ performance and resolved to operate the Terminal itself. (D&O 10; Tr. 1592-93.) Everport notified the predecessors that their contract would end on December 5, 2015, and joined PMA for access to stevedore labor. (D&O 10-11; GCX 73, ERX 5, ILWUX 37, Tr. 1683-84, 3632-33, 3654.)

B. Under Pressure From ILWU, Everport Hires ILWU-Represented Mechanics, and Refuses To Hire the Predecessors' IAM-Represented Mechanics, To Avoid Recognizing and Bargaining with IAM

Everport's initial plan in spring 2015 was to hire an M&R contractor and let it figure out whether to employ IAM- or ILWU-represented mechanics. (D&O 15; Tr. 3914-15.) However, over the summer ILWU grew increasingly frustrated as Everport remained noncommittal about which union would get its M&R work. In mid-August, ILWU and its Locals 10 and 52 sent Everport separate letters asserting that under the Longshore Contract, Everport was obligated to employ only ILWU-represented mechanics, and warning that they would "pursu[e] all available remedies" if Everport did not comply.⁴ (D&O 16-17; GCX 74-76.) In September, PMA informed Everport of its view that the Terminal's contractual red-circle exception had lapsed, meaning PMA was asserting that Everport had to hire ILWU-represented mechanics. (D&O 15; Tr. 3688, 3926-27.)

In late October, Everport's intended M&R contractor declined to take the job and Everport decided to move the work in-house. (D&O 15, 16; GCX 64, Tr. 1601-02, 1680-81, 3303-04.) Everport President George Lang instructed

⁴ The Longshore Contract contains a union-security clause that requires PMA employers to hire only ILWU-represented employees, except in so-called "red-circle" facilities where M&R work was historically performed by non-ILWU mechanics. (D&O 12; ILWUX 5 at 104, 218-19, Tr. 2154-55.) The Terminal is a designated red-circle facility where IAM-represented mechanics historically performed such work. (D&O 12; ILWUX 5 at 219, 10 at 922.)

Senior Vice President Randy Leonard to “set the [M&R] shops up as ILWU,” and to “hire sufficient ILWU mechanics for the Terminal.”⁵ (D&O 18; Tr. 3285, 3301-02, 3517-18.) Everport determined to hire 27 mechanics, the same amount employed by the predecessors. (D&O 15; Tr. 1491-92.) Everport also decided that both units would have a majority of ILWU-represented mechanics, so that it would not have to recognize or bargain with IAM. (D&O 33-37.)

On November 11, Everport posted for 27 mechanic positions in the PMA-ILWU Joint Dispatch Hall. (D&O 11, 18; GCX 37.) On the same day, Everport had a meeting with ILWU and PMA where ILWU asserted, as PMA had earlier, that the Terminal’s red-circle exception had expired, and PMA opined that ILWU would likely prevail if the matter went to arbitration. Everport then acceded to ILWU’s demands, agreeing to give first consideration to ILWU-represented mechanics, and to only consider IAM-represented mechanics if vacancies remained. Everport also promised that any IAM-represented mechanics would be hired under the Longshore Contract’s Herman-Flynn procedures, which would require them to accept representation by ILWU.⁶ (D&O 17; GCX 72.)

⁵ Although the judge refers to Lang as Everport’s chief operating officer (D&O 12), Lang identified himself as president (Tr. 1483).

⁶ Herman-Flynn procedures allow employers who cannot find suitable ILWU candidates in the Joint Dispatch Hall to hire employees “off the street.” (D&O 11; ILWUX 10 at 901-09, Tr. 2272-73, 2330, 2430.)

During this months-long process, Everport received multiple inquiries from IAM about the future of the historical units. Each time, Everport responded that no decision had been made. (D&O 15-16; Tr. 956-57, 961-63, 1197, 1199-1209, 1324.) At no point did Everport tell IAM that it had already decided to hire ILWU-represented mechanics, or that it felt constrained to do so by the Longshore Contract. (D&O 39.) Finally, on November 18, IAM requested by letter that Everport recognize and bargain with it as the historical units' collective-bargaining representative. (D&O 20; GCX 63.) The next day, Everport officially informed IAM for the first time that it would employ ILWU-represented mechanics. (D&O 18; GCX 64 at 2.)

C. Everport and ILWU Conspire To Rig the Interview Process To Ensure That a Majority of the New Workforce Consists of ILWU-Represented Mechanics

Everport proceeded on Lang's instructions to "exhaust the [Joint Dispatch] hall" by interviewing all available ILWU applicants before considering the predecessors' IAM-represented mechanics. (D&O 18, 26; Tr. 3338, 3719, 3845-48.) To that end, Everport only advertised its M&R openings in the Joint Dispatch Hall, and not anywhere IAM-represented mechanics might see them, such as at the Terminal or online. (D&O 18; Tr. 543, 1566, 3341.) Nor did Everport's

supervisors tell the predecessors' mechanics to apply.⁷ (D&O 20; GCX 83, Tr. 269, 306, 365, 1224, 1441.) Everport also verified that applicants scheduled for interviews were ILWU members in good standing. Notably, an Everport representative called to schedule an interview with Preston Humphrey, one of the predecessors' IAM-represented mechanics, then called back to ask if he was a member of ILWU; when Humphrey said no, the representative said Everport was only interviewing ILWU mechanics at the time and cancelled the interview. (D&O 21; Tr. 366.)

By contrast, Everport actively reached out to ILWU for candidates, and ILWU worked to recruit applicants for Everport. (D&O 18-19; GCX 19-23, Tr. 561-62, 3110.) Everport and ILWU were also in regular contact during the interview process, and Everport sent ILWU a list of applicants to review. (D&O 19, 23; GCX 71, Tr. 578, 583-84, 1569-70, 3110-11, 3372-73.)

D. Everport Tells the Predecessors' IAM-Represented Mechanics That It Cannot Hire Them Because of Their Union Affiliation, Discriminatorily Refuses To Hire Them, and Instead Hires a New Workforce Consisting Mainly of ILWU-Represented Mechanics

Everport began interviewing the predecessors' IAM-represented mechanics on December 3, two days before it was slated to take over the Terminal. (D&O 20;

⁷ Upon learning of the posting, IAM scrambled to collect resumes from the predecessors' mechanics and overnighted them to Leonard. (D&O 20; GCX 65, Tr. 1223-28.) Leonard denied receiving the package, but IAM produced a shipping receipt proving that he did. (D&O 20; GCX 93, Tr. 3333-34.)

Tr. 810, 821, 1539, 1566.) Superintendent David Choi spearheaded the interview process. (D&O 18, 22; Tr. 473, 3392, 3481, 3560). Everport's interviewers asked each applicant if they agreed to be hired into ILWU's coastwide unit under the Longshore Contract's Herman-Flynn procedures. (D&O 21; Tr. 775-76, 3556-57.) Three applicants testified that Choi told them Everport had to hire 51 percent ILWU mechanics and 49 percent IAM mechanics. (D&O 21-22; Tr. 153, 272, 1445.) Two of those applicants also testified that they were given the same ratio by Everport managers who were not part of the selection process. (D&O 21-22; Tr. 155, 1446.)

After completing the interviews, Choi wrote on each interview form whether the candidate was represented by ILWU or IAM. (D&O 22, 23; GCX 24-25, Tr. 1004-05.) Choi also created separate lists for ILWU and IAM applicants, which he sent to ILWU for review. (D&O 23-24; GCX 26, Tr. 583.)

On December 5, the day Everport assumed Terminal operations, Choi e-mailed Lang and Leonard a list of 15 ILWU and 12 IAM candidates he had selected. However, Choi cautioned that there were not enough ILWU applicants for crane and power-shop positions, adding that he had told ILWU their crane candidates were "poor," and asked "if there was anything [they] could do to assist" Everport. (D&O 24; GCX 27.) Although Choi knew the predecessors employed several qualified crane mechanics represented by IAM, instead of choosing from

that pool, he re-interviewed and hired three ILWU-represented candidates he had previously dismissed as “poor.” (D&O 22; Tr. 815-16, 823-28.)

On December 14, a complement of 14 ILWU-represented mechanics started working at the Terminal. On January 4, 2016, the day the Terminal resumed normal operations, they were joined by 12 of the predecessors’ mechanics, now represented by ILWU according to the Longshore Contract’s Herman-Flynn procedures. (D&O 10, 25; GCX 14, ILWUX 47, Tr. 411.)

Sometime in January, Choi told Patrick Fenisey, an IAM-represented mechanic who used to work for the predecessors, about a potential M&R job at Everport. A month later, Choi offered Fenisey the job, and then abruptly rescinded the offer on the same day. Choi explained that ILWU’s president, who had obtained Fenisey’s resume, had said Everport could only hire through the PMA-ILWU Joint Dispatch Hall. (D&O 24-25; Tr. 310-13.)

E. Everport Continues the Predecessors’ Operations While Unilaterally Applying the Terms of the Longshore Contract to the Historical Units

Everport continued the predecessors’ operations with minimal differences. The process of loading and unloading ships did not change, and Everport used the same ship-to-shore cranes. (D&O 29; Tr. 754, 3813-14.) Everport also used the same rubber-tired gantry cranes and transtainer cranes to move containers and load them onto chassis. (D&O 14; Tr. 335, 341, 392, 755.) And Everport continued using the same heavy equipment and vehicles to move containers across the

Terminal, often in the same numbers. (D&O 14; Tr. 346, 390-93, 532-33, 1517-22.) Some equipment was literally the same, as it was bought or leased from the predecessors, although Everport did install a more sophisticated terminal-operating system. (D&O 13-14, 29; GCX 69, Tr. 388-90, 393-99, 3374-75, 3964-66.)

Everport also continued the predecessors' M&R operations with only minor changes. (D&O 29; Tr. 755-56.) The mechanics remained divided among the same four shops, operating out of the same locations. (Tr. 333, 335-37, 341.) They maintained the same duties as under the predecessors, and continued working on the same or similar equipment, using the same knowledge and skills. (D&O 14, 29; Tr. 333-35, 341-43, 535-36, 1521-22.) They also kept attending the same regularly scheduled meetings. (Tr. 337-38, 344-45.) With some exceptions, they did not keep the same direct supervisors, even though many of the predecessors' managers also transitioned to Everport.⁸ (D&O 30.)

⁸ Everport made only three changes to the mechanics' duties. (D&O 29.) First, the 2015 Longshore Contract imposed mandatory roadability tests to ensure that every chassis is safe for the road. Mechanics already performed those tests under the predecessors, but only when truck drivers specifically requested them. (D&O 14; Tr. 2684-86, 2696-97.) Second, whereas the predecessors outsourced work replacing tires on chassis, Everport kept it in-house; however, mechanics already changed tires on non-chassis equipment. (D&O 14; Tr. 756-59, 3967-68.) Finally, reefer mechanics became responsible for plugging and unplugging gensets and recording the containers' temperatures and vent settings. Under the predecessors, those tasks were performed by security guards, but mechanics have always plugged and unplugged gensets in the course of their M&R duties. (D&O 14; Tr. 744-46, 748-50, 3973-74.)

Everport applied the Longshore Contract's terms and conditions of employment, including its union-security and hiring-hall provisions, to the historical units. (D&O 25-26.) Everport hired the predecessors' mechanics under the Longshore Contract's Herman-Flynn procedures, which required them to undergo a 90-day probationary period during which they did not receive health-and-welfare benefits and could be terminated at will. (D&O 11, 25; Tr. 373-75, 1254, 2137-38, 2546, 2772, 2991.) Afterward, they could register as Class B mechanics, who are also subject to the Longshore Contract and required to pay dues to ILWU.⁹ (D&O 26; GCX 14, Tr. 375-76, 1980-82, 2308.) Everport's application of the Longshore Contract also caused the predecessors' mechanics to lose their seniority and seniority-related benefits, and incur substantial losses of income. (D&O 25; Tr. 368, 383.) They also received different health-and-welfare coverage, lower overtime and holiday pay, less vacation time, and no sick days compared to IAM's contract with the predecessors. (D&O 25; Tr. 260-61, 384-85,

⁹ Class B mechanics are "limited registered," meaning that they are not full members of ILWU. (Tr. 2616, 2680.) Class B mechanics get health-and-welfare benefits, but they are subject to separate discipline and termination procedures, they get second selection of work, they cannot work as leadmen, and they must pay to use the Joint Dispatch Hall. (D&O 11-12; ILWUX 5 at § 8.12, Tr. 1247-48, 1979-82, 2066-68, 2552-53, 2626, 3547-48.) Class B mechanics must work at least 12 years for the same employer before they can formally join ILWU as Class A or "fully registered" mechanics. (D&O 11; GCX 45, Tr. 373, 442-43, 657-59, 2057-58, 2147, 2566-67, 2772.)

1247-48.) Everport made these changes without notifying or bargaining with IAM.
(D&O 40.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Kaplan, Emanuel, and McFerran) found, in agreement with the administrative law judge, that Everport:

- Told the predecessors' IAM-represented mechanics that it planned to hire a 51 percent ILWU-represented mechanics for M&R work, that they could not be interviewed because they were not represented by ILWU, that their hiring was contingent on accepting ILWU as their exclusive collective-bargaining representative, and that they had to follow the Longshore Contract's Herman-Flynn procedures to qualify for hiring, in violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1);
- Assisted, recognized, and bargained with ILWU as the historical units' representative at a time when ILWU did not represent an uncoerced majority of the unit, and told the predecessors' IAM-represented mechanics that they could not be considered for employment because of their union affiliation and that in order to be hired they had to follow the Longshore Contract's Herman-Flynn procedures and accept ILWU as their collective-bargaining representative, in violation of Section 8(a)(2) and (1) of the Act, 29 U.S.C. § 158(a)(2) and (1);

- Implemented a plan to avoid hiring IAM-represented mechanics, and discriminated against or refused to hire them because of their union affiliation, in order to avoid a successorship obligation to recognize and bargain with IAM, in violation of Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1);
- Refused to recognize and bargain with IAM as the historical units' exclusive representative, and failed to give IAM notice and an opportunity to bargain before unilaterally implementing the Longshore Contract and hiring a majority of ILWU-represented mechanics, in violation of Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1); and
- Applied the terms of the Longshore Contract to its M&R workforce before hiring a single mechanic, in violation of Section 8(a)(2), (3), and (5) of the Act, 29 U.S.C. § 158(a)(2), (3), and (5).

(D&O 1-2 & n.4, 45-46.)

The Board also found, in further agreement with the judge, that ILWU violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. § 158(b)(1)(A) and (2), by demanding and accepting Everport's recognition as the historical units' collective-bargaining representative, and by seeking to enforce the Longshore Contract by requiring Everport to discriminate against the predecessors' IAM-represented mechanics. (D&O 1-2 & n.4, 46.)

The Board's Order requires Everport to cease and desist from the unfair labor practices found and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (D&O 2-3.) The Order affirmatively requires Everport to withdraw and withhold recognition from ILWU, refrain from applying the terms of the Longshore Contract, recognize and, on request, bargain with IAM for a reasonable period of time, and if an understanding is reached, embody that understanding in signed agreements covering the two historical units. (D&O 2 n.5, 3.) The Order further requires Everport to:

- Reimburse all historical-unit employees, jointly and severally with ILWU, for all initiation fees, dues, and other monies paid or withheld pursuant to the Longshore Contract, with interest;
- Notify IAM in writing of all changes made to the historical units' terms and conditions of employment on or after December 4, 2015, rescind any such changes if requested by IAM, and make employees whole, with interest, for any losses sustained due to those unlawful changes;
- Make all historical-unit employees laid off since December 4, 2015, whole for any loss of earnings and other benefits suffered as a result, plus reasonable search-for-work and interim-employment expenses;

- Make historical-unit employees whole for any loss of earnings and other benefits suffered as a result of Everport's unlawful failure to hire, plus reasonable search-for-work and interim-employment expenses;
- Compensate affected historical-unit employees for any adverse tax consequences of receiving lump-sum backpay awards;
- Remove from its files any reference to the unlawful failures to hire and layoffs, and notify the affected employees in writing that this has been done and that the unlawful failures to hire and layoffs will not be used against them in any way; and
- Offer employment to certain named historical-unit employees, and any other similarly situated employees who would have been employed by Everport but for the unlawful discrimination against them, in their former positions, or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their place.

(D&O 3-4.) Finally, the Order requires Everport to post paper copies of a signed remedial notice, distribute that notice electronically to its employees (if Everport customarily communicates with them by such means), schedule a meeting for the notice to be read aloud to historical-unit employees, either by an Everport official

or by a Board agent in the presence of an Everport official, and post paper copies of a similar notice signed by ILWU. (D&O 4.)

Separately, the Board's Order requires ILWU to cease and desist from the unfair labor practices found, and in any other manner restraining or coercing employees in the exercise of their Section 7 rights. (D&O 4-5.) The Order affirmatively requires ILWU to decline recognition as the historical units' exclusive collective-bargaining representative and, jointly and severally with Everport, reimburse all present and former historical-unit employees for all initiation fees, dues, and other monies paid or withheld pursuant to the Longshore Contract, with interest. (D&O 5.) Lastly, the Order requires ILWU to post paper copies of a signed remedial notice, distribute that notice electronically to its members (if ILWU customarily communicates with them by such means), schedule a meeting for the notice to be read aloud to Everport's mechanics, either by an ILWU official or by a Board agent in the presence of an ILWU official, and post paper copies of Everport's notice. (D&O 5.)

SUMMARY OF ARGUMENT

Despite Everport and ILWU's attempts to distort the issues before the Court, the Board's key findings in this case are clear and essentially undisputed. The Board found that Everport was the historical units' successor employer, and that it was not free to set initial employment terms because it conspired with ILWU to use a discriminatory hiring plan, which prevented the predecessors' IAM-represented mechanics from constituting a majority of its new M&R workforce. Aside from contesting the units' appropriateness (a factor in the successorship analysis), Everport does not directly challenge the Board's successorship finding. Instead, Everport, seconded by ILWU, makes the mistake of assuming that the Longshore Contract trumps everything, even the successorship finding. If the Court rejects that misguided argument and finds that substantial evidence supports the Board's successorship finding, then it should summarily affirm the Board's further findings that Everport and ILWU committed a host of unfair labor practices, and enforce the Board's Order in full.

When a successor employer takes over a business, it is obligated to bargain with the incumbent union representing its employees so long as it maintains substantial continuity with the predecessor's operation, its workforce consists of a majority of the predecessor's employees, and the bargaining unit remains appropriate for that purpose. Everport and ILWU do not dispute the Board's

findings that Everport maintained essentially the same operations as the predecessors, and that they engineered the hiring process to ensure that the predecessors' IAM-represented mechanics would not comprise a majority of the new workforce.

Instead, the pair challenge only the Board's finding that the historical units remained appropriate once Everport took over the Terminal. The record, however, brims with evidence that the historical units continued to perform the same M&R work, using the same tools and skills, under the same working conditions and generally the same supervisory structure, and did so without interchange with ILWU-represented stevedores, who worked in a different, coastwide unit. Moreover, the only loss to the historical units' distinct identity came from Everport's unilateral application of the Longshore Contract, and since that was itself an unlawful unilateral change, Everport and ILWU cannot rely on it to impugn the historical units' continued appropriateness. Accordingly, the Board reasonably concluded that the historical units maintained their separate community of interest, and that Everport and ILWU failed to offer compelling circumstances for setting aside the units' decades-long history of representation by IAM. For the same reason, the Board reasonably found that the historical units did not accrete into ILWU's coastwide bargaining unit.

Everport and ILWU's attempt to refute the historical units' continued appropriateness is a lost cause. They contend that because Everport was already a PMA member when it took over the Terminal, and because it had no prior connection to IAM or the historical units, the Terminal's red-circle status (i.e., its exemption from the Longshore Contract) somehow expired, which in turn rendered the historical units inappropriate. But the Longshore Contract is not binding on IAM, nor does it preempt the Board's successorship rules outside of ILWU's coastwide unit. Therefore, the purported expiration of the Terminal's red-circle status has no bearing on Everport's status under the Act as a successor employer. Everport and ILWU's related claims—that the Board's decision renders the coastwide unit “per se illegal” and makes it unlawful for employers to join the PMA or apply the Longshore Contract—fail for the same reason.

Everport and ILWU's remaining unit-appropriateness arguments are equally unavailing. They insist that the Board arbitrarily ignored binding precedent on the issue, but of the dozens of decisions they cite, not one has any bearing on the outcome of this case. As for their groundless claim that the Board's decision threatens to destroy labor peace on the West Coast by denying ILWU ownership of the historical units' work, it smacks of desperation and fear-mongering. The Board's Order does nothing of the sort; it simply recognizes the historical units' continued existence under Everport, based on the uncontroversial notion that the

Longshore Contract does not preempt the Board's judicially-approved successorship rules.

The Board's well-supported findings that Everport is the historical units' successor employer, and that it discriminatorily refused to hire the predecessors' mechanics because of their IAM affiliation, provide the foundation for the Board's unfair-labor-practice findings. However, Everport and ILWU have waived all objections to those findings by failing to challenge them in their opening briefs. Accordingly, if the Court affirms the Board's finding that the historical units remained appropriate after Everport began operating the Terminal, and therefore that Everport is the units' successor employer, then it should summarily affirm the Board's unfair-labor-practice findings and enforce its Order in full.

STANDARD OF REVIEW

This Court’s “role in reviewing an NLRB decision is limited.” *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). The Court must treat the Board’s factual findings as conclusive if they are “supported by substantial evidence on the record considered as a whole.” *Id.* (quoting 29 U.S.C. § 160(e)). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). Under that standard, therefore, “the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary.” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011); *see also Universal Camera*, 340 U.S. at 488 (reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it *de novo*”). Finally, the Court defers to the Board’s interpretation of the Act so long as it is reasonably defensible. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984); *accord Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002).

ARGUMENT

I. THE BOARD PROPERLY EXERCISED ITS BROAD DISCRETION IN REJECTING EVERPORT AND ILWU'S ONLY CHALLENGE TO ITS SUCCESSORSHIP FINDING, NAMELY THAT THE HISTORICAL UNITS WERE NO LONGER APPROPRIATE FOR BARGAINING AFTER EVERPORT TOOK OVER THE TERMINAL

Under settled Board law, a successor employer inherits the predecessors' duty to recognize and bargain with the union representing their employees.

Furthermore, a successor that uses a discriminatory hiring plan to prevent the predecessors' employees from constituting a majority of its workforce loses the right to set their initial terms and conditions of employment.

This case turns on the Board's findings that Everport succeeded Seaside, Marine, and Miles as the historical units' employer, and that it intentionally avoided hiring their IAM-represented mechanics. (D&O 28-37.) Those conclusions undergird the Board's further findings that, as a successor employer, Everport unlawfully discriminated against the predecessors' mechanics, altered their terms and conditions of employment, deprived them of their right to choose their collective-bargaining representative, and recognized ILWU instead. (D&O 37-39.) The same conclusions also serve as a predicate for the Board's findings that ILWU violated the Act by seeking to enforce the Longshore Contract to compel Everport to discriminate against the predecessors' IAM-represented

mechanics, and by demanding and accepting Everport’s recognition when it did not represent an uncoerced majority of Everport’s M&R workforce. (D&O 39-40.)

Everport and ILWU do not dispute that all the Board’s unfair-labor-practice findings against them are based on its initial determination that Everport was a successor employer that implemented a discriminatory hiring plan. Nor do they contest the bulk of the Board’s successorship findings. Instead, they assert only that the historical units were no longer appropriate for bargaining after Everport took over Terminal operations. In rejecting their claim, however, the Board properly exercised its broad discretion to make bargaining-unit determinations, and thus the Court should enforce the totality of its Order.

A. A Successor Employer Cannot Refuse To Recognize and Bargain With an Incumbent Union, and Cannot Recognize and Bargain With a Union That Does Not Represent an Uncoerced Majority of Unit Employees

Section 7 of the Act guarantees employees “the right . . . to form, join or assist labor organizations [and] to bargain collectively through representatives of their own choosing” 29 U.S.C. § 157. Section 9(a) of the Act provides that a union “designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes” becomes that unit’s exclusive collective-bargaining representative. *Id.* § 159(a). Together, Sections 7 and 9(a) guarantee employees freedom of choice and majority rule in

their selection of a bargaining-unit representative. *Int'l Ladies Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961).

To preserve employees' right to freely choose their representative, the collective-bargaining process must remain "free . . . from all taint of an employer's compulsion, domination or influence." *IAM Lodge 35 v. NLRB*, 311 U.S. 72, 80 (1940). Accordingly, the Act makes it an unfair labor practice for an employer to refuse to recognize and bargain with the duly certified union of its employees. 29 U.S.C. § 158(a)(5). Likewise, it is unlawful for an employer to support a union financially or otherwise, *id.* § 158(a)(2), including by recognizing a union that does not represent the majority of its employees, *Garment Workers*, 366 U.S. at 737-38.

B. Everport Was a Successor Employer That Inherited the Predecessors' Obligation To Recognize and Bargain With IAM

Within certain limits, the duty to recognize and bargain with an incumbent union also applies to a successor employer taking over a unionized business. *NLRB v. Burns Sec. Servs.*, 406 U.S. 272, 278-79 (1972); *accord Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1082 (D.C. Cir. 2003). An employer qualifies as a successor if: (1) there is substantial continuity between its business and that of its predecessor; (2) it hires the majority of its workforce from the predecessor's union-represented employees; and (3) the bargaining unit remains appropriate. *Burns*, 406 U.S. at 280-81; *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41, 43-47 (1987); *accord Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1060 (D.C.

Cir. 2009). The Board will also find successorship in cases where the successor does not hire the majority of its workforce from the predecessor's employees, if this results from unlawful discrimination. *Karl Kallman (Love's Barbeque)*, 245 NLRB 78, 82 (1979), *enforced in relevant part*, 640 F.2d 1094, 1100-01 (9th Cir. 1981).

1. Everport and ILWU waived challenges to the Board's amply supported findings that Everport continued the predecessors' business and discriminated against their IAM-represented mechanics

In their opening briefs, Everport and ILWU do not contest the Board's findings that Everport substantially continued the predecessors' business and discriminatorily failed to hire the majority of its workforce from their IAM-represented mechanics. Any challenge to those findings is therefore waived. *See Fox v. Gov't of D.C.*, 794 F.3d 25, 29-30 (D.C. Cir. 2015) (appellant waived challenge to dispositive issue by failing to argue it in opening brief); Fed. R. App. P. 28(a)(8)(A) (opening brief's argument must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"). In any event, as shown below, ample evidence supports the Board's findings.

a. Everport substantially continued the predecessors' business

The first prong of the *Burns* successorship test considers whether substantial continuity exists between two businesses. *Fall River*, 482 U.S. at 43. For purposes of this analysis, the Board examines:

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

Dean Transp., 551 F.3d at 1060 (quoting *Fall River*, 482 U.S. at 43). This inquiry is highly fact-specific, based on the totality of the circumstances, and no single factor is dispositive. *United Food & Commercial Workers v. NLRB*, 768 F.2d 1463, 1470 (D.C. Cir. 1985). Moreover, the Board conducts its review “from the perspective of the employees involved.” *Cnty. Hosps.*, 335 F.3d at 1083 (citing *Fall River*, 482 U.S. at 43).

The record in this case overwhelmingly supports the Board’s finding that as the Terminal’s reopening on January 4, 2016, Everport was substantially continuing the predecessors’ operations. (D&O 29-30.) First, Everport’s business of maintaining and repairing containers, cranes, chassis, and other container-related equipment remained the same as that of the predecessors. (Tr. 755-56.) Second, Everport’s mechanics continued to perform the same work, on the same kind of equipment, using the same skill set and the same type of tools, and in the

same conditions as they did under the predecessors. (Tr. 333-38, 341-45, 535-36, 1521-22.) Finally, the evidence emphatically supports the Board's finding that Everport's business and production processes related to M&R work were essentially identical to that of the predecessors, and that unit employees would view their job situations as unaltered. (D&O 29-30.) Thus, the first *Burns* factor is met.

b. Everport and ILWU conspired to discriminate against the predecessors' IAM-represented mechanics by rigging the selection process to ensure that ILWU-represented mechanics would constitute a majority of Everport's new M&R workforce

The second prong of the *Burns* test asks whether the successor employer has hired a majority of its workforce from the predecessor's union-represented employees. *Burns*, 406 U.S. at 280-81. Although a successor has no obligation to hire the predecessor's employees, it cannot intentionally discriminate against them. *Id.* at 280 n.5; *W&M Props. of Conn., Inc.*, 348 NLRB 162, 163 (2006), *enforced*, 514 F.3d 1341 (D.C. Cir. 2008). If the employer is shown to have done so, the Board will still find successorship if the two other *Burns* factors are met. *Love's Barbeque*, 245 NLRB at 82 (1979).

To analyze a *Love's Barbeque* scenario, the Board applies the motivation test set forth in *Wright Line*.¹⁰ Under that framework, a successor violates the Act if antiunion animus is a motivating factor in its decision not to hire a new workforce in which the predecessor's employees would constitute a majority of the unit, unless the record compels the conclusion that the successor met its burden of proving that it would have taken the same action regardless of their union membership. In assessing the employer's motive, the Board examines whether employees engaged in union or other protected activity, the successor knew about the activity, and the successor acted on the basis of antiunion animus. Where it is shown that the successor's reasons for refusing to hire the predecessor's employees are pretextual—that is, they were either false or not in fact relied upon—the successor has necessarily failed to meet its burden, and the violation is deemed proven. *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 218-20 (D.C. Cir. 2016); *Wright Line*, 251 NLRB at 1084 n.5.

The record here is chock full of uncontroverted evidence that Everport conspired with ILWU to ensure that it would hire fewer IAM- than ILWU- represented mechanics, thereby thwarting IAM from retaining majority status.

¹⁰ *Wright Line, Div. Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), *approved by NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401-04 (1983). *See also W&M*, 514 F.3d at 1347-48 (citing *Planned Bldg. Servs., Inc.*, 347 NLRB 670, 673-74 (2006)).

(D&O 33-37.) Everport plainly knew that the predecessors' mechanics were represented by IAM. As for Everport's animus, it was on full display during the hiring process, which was transparently designed to favor ILWU applicants. Indeed, not only did Everport post openings exclusively at the PMA-ILWU Joint Dispatch Hall, which IAM-represented mechanics cannot access, but it also relied on ILWU to propose and vet potential candidates. (GCX 19-23, 71, Tr. 543, 561-62, 578, 583-84, 1566, 1569-70, 3110-11, 3341, 3372-73.) In addition, Everport made a point of "exhausting" the Joint Dispatch Hall before considering any of the predecessors' IAM-represented mechanics. (Tr. 1566, 3338, 3719, 3845-48.) Superintendent Choi even went so far as to reinterview and hire three poor-quality ILWU candidates rather than pick IAM applicants he knew were highly qualified. (D&O 22; GCX 27, Tr. 815-16, 823-28.) Further, when Everport did interview the predecessors' mechanics, it made sure they understood that they would be hired as Herman-Flynn employees represented by ILWU. (D&O 21; Tr. 775-76, 3556-57.) And most damning for Everport, their interviewer-in-chief explicitly told three IAM-represented applicants that Everport had a hiring quota of 51 percent ILWU to 49 percent IAM, a fact that other Everport managers confirmed.¹¹ (D&O 21-22; Tr. 153, 155, 272, 1445-46.) Although employers rarely admit unlawful

¹¹ Everport and ILWU both expressly declined to challenge that finding here. (ERBr. 25 n.3, ILWUBr. 7 n.2.)

discrimination, in this case Everport did just that—and got caught red-handed. *See United Servs. Auto. Ass’n v. NLRB*, 387 F.3d 908, 916 (D.C. Cir. 2004) (confession of unlawful discrimination belies employer’s claim that it acted on lawful motive).

Substantial evidence also supports the Board’s finding that Everport’s purported reasons for not hiring more of the predecessors’ IAM-represented mechanics were mere pretexts to conceal its unlawful motive. (D&O 36-37.) The only one Everport reprises here is its assertion that it was bound by the Longshore Contract to hire ILWU-represented mechanics. (ERBr. 52-56.) But while a successor employer is ordinarily free to set the initial terms and conditions of employment of its employees, *Burns*, 406 U.S. at 284, Everport forfeited that right by unlawfully refusing to hire the predecessors’ mechanics. *Love’s Barbeque*, 245 NLRB at 82; *accord Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1007-09 (D.C. Cir. 1998). Therefore, Everport could not unilaterally apply the terms of the Longshore Contract to the historical units. *Id.*; *accord Pressroom Cleaners*, 361 NLRB 643, 643 & n.5 (2014).

ILWU’s only argument before this Court is predicated on the same incorrect assumption and fails for the same reason. It brazenly claims that Everport actually discriminated against its mechanics, not IAM’s, because absent the 51% ILWU – 49% IAM quota (which, as ILWU acknowledges, the parties unlawfully conspired to impose), Everport would have hired even more ILWU mechanics pursuant to the

Longshore Contract. (ILWUBr. 4-5, 7-11.) In so claiming, ILWU effectively acknowledges that Everport discriminated against the predecessors' IAM-represented mechanics, which actually supports the *Love's Barbeque* finding. Moreover, as a *Love's Barbeque* successor Everport was obligated to maintain the status quo of its predecessors' terms and conditions of employment, and could not unilaterally apply the Longshore Contract to the historical units. *Pressroom Cleaners*, 361 NLRB at 643 & n.5. Therefore, Everport's quotas did not unlawfully discriminate against ILWU applicants—but they did violate the statutory rights of the predecessors' IAM-represented mechanics.

2. The historical units remained appropriate after Everport's takeover of M&R operations

The Act vests in the Board the authority to determine “the unit appropriate for the purposes of collective bargaining.” 29 U.S.C. § 159(b); *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996). The Board “need only select *an* appropriate unit, not *the most* appropriate unit.” *Dean Transp.*, 551 F.3d at 1063 (quotation marks and citation omitted). Given the fact-intensive nature of this inquiry, the Board has “broad discretion” in making bargaining-unit determinations and its findings are “entitled to wide deference.” *United Food & Commercial Workers v. NLRB*, 519 F.3d 490, 494 (D.C. Cir. 2008).

a. Everport failed to refute the historical units’ presumption of appropriateness, and the units maintained a community of interest separate from other nonunit employees

In assessing whether a bargaining unit remains appropriate under a new employer, the Board applies a presumption, approved by the Court, that the historical unit constitutes an appropriate bargaining unit. *Cnty. Hosps.*, 335 F.3d at 1085. Under this longstanding policy, “a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness.” *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 9 (2007) (internal quotation marks and footnote omitted); *accord Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996).

Given the historical units’ extended collective-bargaining history, Everport faces a heavy burden in refuting their continued appropriateness. *Trident*, 101 F.3d at 118. Indeed, Everport must show either that the historical units are “repugnant to Board policy,” that they are “so constituted as to hamper employees in fully exercising” their Section 7 rights, that “compelling circumstances” support “overcom[ing] the significance of bargaining history,” or that they no longer “conform reasonably well to other standards of appropriateness.” *Id.* (citations omitted). On review, Everport’s sole argument is that it had no prior relationship with the historical units or IAM before taking over the Terminal. As discussed

below (pp. 40-43), however, that claim does not even come close to fulfilling its burden.

Moreover, there is ample evidence supporting the Board's finding that the historical units still conformed "reasonably well to other standards of appropriateness" after the transition to Everport. *Cadillac Asphalt*, 349 NLRB at 9. Broadly, those "other standards" relate to whether unit employees share a community of interest sufficiently distinct from their nonunit counterparts.

Specifically, the Board examines:

whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

PCC Structural, Inc., 365 NLRB No. 160, 2017 WL 6507219, at *6 (2017).

The record shows categorically that under Everport, the predecessors' IAM-represented mechanics continued to use the same skills to perform the same jobs, in the same locations, using the same type of equipment, in the same working conditions, and that they did so under separate supervision from, and without significant interchange with, ILWU-represented employees. (D&O 32.) Everport also kept the crane shop separate, as did the predecessors. (D&O 31.) Given that Terminal operations remained virtually unaltered after Everport's arrival, the

Board was well within its discretion to find that the historical units remained appropriate.¹² (D&O 31-32.)

b. The historical units were not accreted into ILWU's coastwide bargaining unit

Ample evidence and settled law also support the Board's finding that the historical units were not accreted into ILWU's coastwide unit. (D&O 31-32.)

Accretion involves "the addition of a group of employees to an existing union-represented bargaining unit without a Board election," *Dean Transp.*, 551 F.3d at 1067, and occurs when employees added to a historical unit "have little or no separate group identity and . . . share an overwhelming community of interest with the preexisting unit," *NV Energy, Inc.* 362 NLRB 14, 16 (2015) (quotation marks and citations omitted).

The Board applies the accretion doctrine restrictively, as it effectively strips employees of their right to decide whether to be represented by a union. *Dean Transp.*, 551 F.3d at 1067. For that reason, when considering whether a bargaining

¹² Although the historical units lost some of their distinct identity when Everport placed them under the Longshore Contract (D&O 32), as explained above (p. 34), Everport forfeited the right to unilaterally set initial terms and conditions of employment when it deliberately avoided hiring the predecessors' mechanics to avoid bargaining with IAM. *Pressroom Cleaners*, 361 NLRB at 643. Therefore, Everport's application of the Longshore Contract to the historical units constituted an unlawful unilateral change, and consequently its effects are accorded no weight in determining whether the units remained appropriate. *Dodge of Naperville, Inc.*, 357 NLRB 2252, 2253 (2012), *enforced*, 796 F.3d 31, 39 (D.C. Cir. 2015).

unit retains its distinct identity, the Board’s established practice is to ignore the effects of any unlawful changes to the unit’s terms and conditions of employment. *See Dodge of Naperville, Inc.*, 357 NLRB 2252, 2253 (2012), *enforced*, 796 F.3d 31, 39 (D.C. Cir. 2015). Indeed, “[t]o hold otherwise would allow [the employer] to benefit from its own unlawful conduct.” *ILWU v. NLRB (Pac. Crane)*, 890 F.3d 1100, 1111 (D.C. Cir. 2018) (second alteration in original) (quotation marks and citation omitted). Therefore, in verifying whether an established bargaining unit retains its distinct identity after being joined to another, the Board’s benchmark is the situation that existed before the unfair labor practices occurred. *See id.* at 1112.

To determine whether accretion has occurred, the Board considers the traditional community-of-interest factors. *See NV Energy*, 362 NLRB at 16-17. In this case, and as discussed above (pp. 37-38), ample evidence supports the Board’s finding that after Everport replaced the predecessors, the historical units maintained their distinct identity and continued to share a community of interest separate from other Terminal workers. And the minimal reduction in their separate identity that came from having their terms and conditions of employment regulated by the Longshore Contract does not factor into the analysis because it resulted from an unlawful unilateral change. Accordingly, the Board properly exercised its discretion in finding that the historical units did not accrete into the coastwide ILWU bargaining unit after Everport took over the Terminal. (D&O 31-32.)

c. Everport's challenge to the Board's unit-appropriateness finding is entirely without merit

Everport, echoed by ILWU, contends that it is not a *Burns/Love's Barbeque* successor solely because the historical units were no longer appropriate for bargaining when it took over the Terminal. We have shown above (pp. 35-39) that Everport's argument is factually incorrect. It is also legally baseless.

We begin with Everport's unfounded claim that this case is controlled by *Shipowners' Association of the Pacific Coast*, 7 NLRB 1002 (1938), where the Board recognized a single coastwide bargaining unit for all longshore workers. Today, the Longshore Contract between ILWU and PMA governs the terms and conditions of employment of that coastwide unit. Everport asserts that, as a new terminal operator, it had no choice but to join PMA, become bound by the Longshore Contract, and hire ILWU-represented employees from the Joint Dispatch Hall. (ERBr. 2-3, 31-32, 36, 49-50, 52-53.)

The obvious flaw with this argument is that it does not account for the Terminal's mechanics, who despite *Shipowners* have been represented by IAM for decades. To get around that problem, Everport invents a rule out of whole cloth: it baldly asserts that on the West Coast, single-employer units (like the historical units here) lose their appropriateness for bargaining if they are taken over by a PMA member, "at least when the member has no historical relationship" with them. (ERBr. 46-47, 61.) Thus, according to Everport, the fact that it became a

PMA member before taking over the Terminal, and that it had no prior relationship with IAM or the historical units, somehow caused the Terminal's red-circle status (and its exemption from the Longshore Contract) to expire, which in turn created a "sharp break" in Everport's operations compared to the predecessors', thus rendering the historical units "inappropriate as a matter of law." (ERBr. 43; *see also* 16, 37-38, 53.)

Needless to say, there is absolutely no precedent for Everport's new "rule" that its PMA membership trumps everything. Nor does the record support Everport's claim that the historical units lost their appropriateness because its "operational structure and practices differ[]" from the predecessors'. (ERBr. 37 (quoting *Burns*, 406 U.S. at 280)). As shown above (pp. 30-31, 37-38), the evidence that the Terminal's operations were virtually unchanged under Everport is overwhelming. Moreover, the fact that the historical units had a new collective-bargaining representative and a new contract cannot be relied upon to show a change in "operational structure and practices" where, as here, the new representative and new contract were imposed in violation of the Act. To the contrary, the record emphatically supports the Board's finding that the historical units remained appropriate. (D&O 31-32.)

Everport's remaining arguments unravel from there.¹³ Thus, the Board's decision does not render the *Shipowners* coastwide bargaining unit "per se illegal" (ERBr. 51), nor does it compel a finding that "Everport violated the [Act] by joining the PMA" (ERBr. 4, 28, 31, 32, 48, 54, 56, 62, 63, 66). Instead, the Board simply recognized that M&R work at the Terminal remains under IAM's jurisdiction by virtue of Everport's successorship status. Everport's claim that *Shipowners* precludes the Board from certifying single-employer units for PMA members (ERBr. 30, 45-46) is similarly off-base. The Board's decision does not certify new units; it merely acknowledges the historical units' continued existence under a successor employer. For the same reason, Everport misses the mark with its newly-minted assertion that Section 9(a) of the Act, 29 U.S.C. § 159(a), precludes the Board from approving single-employer units on the West Coast because of its "controlling history of multiemployer bargaining." (ERBr. 46

¹³ Those arguments are also jurisdictionally barred under Section 10(e) of the Act, which provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court [of appeals], unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). Everport and ILWU did not assert the arguments discussed in this paragraph before the Board, either in their exceptions and supporting briefs or in a motion for reconsideration. (ER & ILWU Exs & Supp. Brs.) Nor have they offered any explanation for their failure to do so. Accordingly, their claims are not properly before the Court. See *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (reviewing courts lack jurisdiction over objections not raised to Board during initial proceeding or on motion for reconsideration); *KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 560 (D.C. Cir. 2012) (same).

(citation omitted)).¹⁴ All of those arguments fail because they depend on the same fiction, i.e., that Everport is not a *Burns/Love's Barbeque* successor.

Finally, Everport strikes out in asserting that “the Board may not ‘refus[e] to accept the parties’ own interpretation of their contract,’” and must therefore respect PMA and ILWU’s view that the Terminal’s red-circle exception has lapsed.

(ERBr. 44 (quoting *NLRB v. ILWU, Local No. 50*, 504 F.2d 1209, 1215 (9th Cir.

1974)).) Simply put, how PMA and ILWU construe the red-circle provision is

irrelevant because “a contract cannot bind a nonparty.” *EEOC v. Waffle House,*

Inc., 534 U.S. 279, 294 (2002); *PMA v. NLRB*, 967 F.3d 878, 888 (D.C. Cir. 2020).

That is particularly true in the labor context because “[t]he Act establishes a system of *exclusive* collective-bargaining representation in which employers are statutorily

obligated to bargain with their employees’ chosen representative.” *PMA*, 967 F.3d

at 888 (emphasis added). Because IAM is not a party to the Longshore Contract,

its status as the historical units’ exclusive collective-bargaining representative is

not, and has never been, tied to the survival of the Terminal’s red-circle exception.

For the same reason, PMA and ILWU cannot nullify Board successorship rules and

deprive the historical units of their Section 7 rights simply by interpreting the

Longshore Contract to their liking.

¹⁴ Moreover, the two cases cited by Everport on this point (ERBr. 46) are inapposite because they involved union attempts to carve out new single-employer units from established Section 9(a) multiemployer units.

C. Everport and ILWU's Remaining Unit-Appropriateness Arguments Have No Merit

Everport, seconded by ILWU, also asserts that the Board's Decision is arbitrary because it ignores precedent (which it mistakenly characterizes as binding on the issue of unit appropriateness), and that the Board's Order threatens industrial peace on the West Coast by rejecting ILWU's claims to the historical units' work. Both contentions are baseless.

1. The Board's ruling is consistent with precedent and cases cited by Everport have no bearing on the historical units' appropriateness

There is no merit to Everport and ILWU's claims that the Board's Decision ignores or departs from precedent without proper explanation. (ERBr. 56-65.) Everport's entire argument rests on a deliberate misunderstanding of the Board's discussion of *Shipowners*, a case that has no application here, as the Board explained. (D&O 41.) *Shipowners* was the catalyst for the creation of the Longshore Contract, of which the Ninth Circuit has said that it covers "[v]irtually all longshore work at West Coast ports." *ILWU v. NLRB (Kinder Morgan)*, 978 F.3d 625, 630 (9th Cir. 2020). But not *literally* all of it. Over time, PMA and ILWU recognized the existence of some longstanding M&R units not represented by ILWU, and decided to grandfather them into the Longshore Contract in the form of "red-circle" terminals exempt from that contract. (D&O 12; ILWUX 5 at 11 §§ 1.8-1.81.) In and of itself, the existence of red-circle terminals disproves

Everport's claim that *Shipowners* gave ILWU exclusive jurisdiction over all M&R work on the West Coast. (ERBr. 40, 57.)

As the Board aptly noted here, the red-circle clause "would have been unnecessary if *Shipowners' Ass'n* and progeny *applied to mechanics*." (D&O 41 (emphasis added).) Everport seizes on the italicized language to argue, falsely, that the Board "dismissed *Shipowners* by stating that the coastwide unit does not include mechanics." (ERBr. 29, 39.) But the Board said nothing of the sort; to the contrary, in the sentence immediately preceding the one cited by Everport, the Board expressly noted: "The red-circle language . . . recognizes that a number of maintenance and repair bargaining units were not historically represented by ILWU." (D&O 41.) Thus, while the Board acknowledged that the Longshore Contract covers most M&R work on the West Coast, it squarely rejected Everport's claim that *Shipowners* created "a monolithic coastwide unit" in which all M&R work belongs to ILWU. (D&O 41.)

Other cases cited by Everport in mischaracterizing the coastwide unit as "monolithic" likewise undermine its position. For instance, in *PMA*, 256 NLRB 769 (1981), the Board found that the 1978 version of the Longshore Contract contained a "grandfather clause" allowing PMA members to use non-ILWU employees for bargaining-unit work (including M&R work) if they had a past practice of doing so. *Id.* at 770. This "disavowal of work jurisdiction," as the

Board described it, lives on in the current Longshore Contract’s red-circle clause.¹⁵ Compare *id.* at 769, with ILWUX 5 at 11 §§ 1.8-1.81. Thus, *PMA* cannot be squared with Everport’s claim that ILWU owns all M&R work on the West Coast. Moreover, *PMA* is inapposite because the employer in that case was not a *Burns* successor and had a legitimate business reason for refusing to hire contractors who employed non-ILWU employees. 256 NLRB at 770, 777-78.

Everport’s tactic of spotlighting inapposite cases simply because courts declined to enforce the Board’s orders (ERBr. 33, 43, 59-62, 64-65) does nothing to advance its position. For instance, the issue in *Ports America Outer Harbor, LLC*, 366 NLRB No. 76, 2018 WL 2086090 (2018), remanded *sub nom. ILWU v. NLRB*, 971 F.3d 356, 361-62 (D.C. Cir. 2020), was whether a successor employer could argue that a bargaining unit had become inappropriate due to the unfair labor practices of its predecessor. Everport makes no such claim here, and thus it is immaterial that the Court remanded *Ports America* for the Board to clarify its rationale. *Id.* at 363. As for *Kinder Morgan*, 978 F.3d at 641-42, it was a

¹⁵ See also, e.g., *Kinder Morgan*, 978 F.3d at 630, 642 (recognizing that the Longshore Contract’s attribution of all M&R work to ILWU is “subject . . . to exceptions not at issue here”); *IAM District Lodge No. 94 v. ILWU, Local 13*, 781 F.2d 685, 689 & n.3 (9th Cir. 1986) (noting that the 1978 Longshore Contract required PMA employers to assign bargaining-unit work to ILWU employees only if they used ILWU employees for such work before 1978, or if they joined PMA after the contract’s ratification); *ILWU Local 19*, 144 NLRB 1432, 1442 n.19 (1963) (stating that the Longshore Contract “continues in effect certain existing exceptions” to ILWU’s coastwide jurisdiction over M&R work).

jurisdictional-dispute case under Section 10(k) of the Act, 29 U.S.C. § 160(k), not a successorship case like this one.¹⁶

Everport’s general reliance on Section 10(k) cases to show that the Board has “‘praised’ and ‘shown deference’” to the Longshore Contract is equally futile. (ERBr. 59 (quoting *ILWU, Local No. 50*, 504 F.2d at 1216).) Those cases dealt primarily with the technological shift toward container shipping, notably the use of increasingly large cranes, and its impact on traditional longshore labor. In that context, the Board cited the Longshore Contract’s “primary aim” of lightening “the impact of unemployment upon longshoremen due to mechanization” as a factor that favored assigning crane operations to ILWU. *United Indus. Workers of N. Am., Pac. Dist.*, 188 NLRB 241, 243 (1971). No such concerns are at play in this case.

Finally, Everport gains no ground by citing “[s]cores of other decisions” holding that PMA employers are bound by the Longshore Contract. (ERBr. 62-63.) As shown above (p. 43), the Longshore Contract does not preempt the

¹⁶ A jurisdictional-dispute case occurs when a union is charged with violating Section 8(b)(4)(ii)(D) of the Act by using threats, coercion, or restraint to make an employer assign certain work to its members rather than to other employees. 29 U.S.C. § 158(b)(4)(ii)(D). In those cases, Section 10(k) empowers the Board to determine which group of employees is entitled to perform the disputed work. *See, e.g., ILWU, Local 14 v. NLRB*, 85 F.3d 646, 651 (D.C. Cir. 1996). This case plainly does not involve Section 10(k) or 8(b)(4)(ii)(D), and there is no dispute that IAM had jurisdiction over the historical units’ M&R work under the predecessors. Instead, the only question is whether Everport became the historical units’ successor employer, and therefore inherited the predecessors’ duty to recognize and bargain with IAM.

statutory rights of the predecessors' mechanics, nor does it disprove Everport's status as a successor employer under Board law.

2. Everport's fear-mongering has no basis in law or fact

In a last-ditch attempt to convince the Court, Everport, supported by ILWU, resorts to baseless conspiracy theories and scare tactics by suggesting that the Board is actively trying to “undermine the [Longshore Contract] and chip away at the coastwide bargaining unit,” which will inevitably disrupt industrial peace on the West Coast and pave the way to another Bloody Thursday. (ERBr. 65-67.) Not only are those claims ludicrous, but they are premised on the same debunked argument that the Board's Order makes it unlawful for employers like Everport to join the PMA and apply the Longshore Contract.¹⁷ At the risk of beating a dead horse, we repeat that the Board merely applied established labor-law principles to find that Everport succeeded Seaside, Marine, and Miles as the historical units' employer, that the historical units maintained their appropriateness in that transition, and that Everport must remedy its unfair labor practices.

Indeed, the terms of the Board's remedial Order—to which Everport and ILWU waived all challenges by failing to raise them in their opening briefs, *Fox*, 794 F.3d at 29-30—demonstrate that their doomsday scenarios are unfounded. As relevant here, the Board ordered Everport to recognize IAM as the historical units'

¹⁷ See *supra* p. 42.

representative, bargain on IAM's request as to the historical units only, cease applying the Longshore Contract to the historical units, and rescind all unilateral changes if IAM so requests. (D&O 3.) The Board similarly ordered ILWU to decline recognition as the historical units' collective-bargaining representative. (D&O 5.) These are the Board's standard remedies in this type of case, and the Board tailored them narrowly to the facts at hand. Thus, the Board's Order does not prevent Everport, ILWU, PMA, and other parties to the Longshore Contract from doing business, nor does it impose any of the uncertainty or chaos that Everport prophesies. (ERBr. 66, 68.)

II. THE COURT SHOULD SUMMARILY ENFORCE THE BOARD'S FINDINGS, WHICH EVERPORT DOES NOT CONTEST, THAT IT COMMITTED MULTIPLE UNFAIR LABOR PRACTICES AS THE HISTORICAL UNITS' SUCCESSOR EMPLOYER

As noted above (p. 27), Everport has waived nearly all challenges to the Board's successorship finding, except for claiming that the historical units were no longer appropriate after it took over the Terminal. Accordingly, if the Board properly exercised its discretion in rejecting that claim, and therefore found that Everport was a successor employer, then the Court should summarily affirm the Board's findings that Everport violated Section 8(a)(1), 8(a)(2), 8(a)(3), and 8(a)(5) of the Act, and enforce the corresponding portions of its Order. *CCI Ltd. P'ship v. NLRB*, 898 F.3d 26, 35 (D.C. Cir. 2018) (Board is entitled to summary enforcement of uncontested portions of its orders); *NLRB v. Gen. Fabrications*

Corp., 222 F.3d 218, 231-32 (6th Cir. 2000) (Board is entitled to summary affirmance of uncontested findings).

A. Everport Violated Section 8(a)(1) of the Act by Telling the Predecessors' IAM-Represented Mechanics That It Would Not Interview Them Due to Their Union Affiliation, That It Intended To Hire a New Workforce with No More Than 49 Percent IAM-Represented Mechanics, and That Their Hiring Was Contingent on Agreeing to Work Under the Longshore Contract's Herman-Flynn Procedures and Accepting ILWU as Their Representative

Section 8(a)(1) of the Act makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7 [of the Act],” 29 U.S.C. § 158(a)(1), which includes “the right . . . to bargain collectively through representatives of their own choosing,” *id.* § 157. The Board found, and substantial evidence supports, that Everport violated Section 8(a)(1) by telling the predecessors' IAM-represented mechanics that it intended to hire a new workforce comprised of 51 percent ILWU mechanics and 49 percent IAM mechanics (D&O 21-22; Tr. 153, 155, 272, 1445-46), that their hiring was contingent on accepting ILWU as their exclusive collective-bargaining representative (D&O 21; Tr. 775-76, 3556-57), and that they had to follow the Longshore Contract's Herman-Flynn procedures to qualify for hiring (D&O 21; Tr. 775-76, 3556-57). Substantial evidence also supports the Board's findings that Everport violated Section 8(a)(1) by telling Preston Humphrey that he would not be interviewed because he was represented by IAM. (D&O 21; Tr. 366.)

B. Everport Violated Section 8(a)(2) and (1) of the Act by Telling the Predecessors' IAM-Represented Mechanics That It Would Not Consider Hiring Them Based on Their Union Affiliation and That Their Hiring Was Contingent on Agreeing To Work Under the Longshore Contract's Herman-Flynn Procedures and Accepting ILWU as Their Representative, and by Prematurely Recognizing ILWU as the Historical Units' Collective-Bargaining Representative

Section 8(a)(2) of the Act makes it unlawful for employers to lend support to unions, whether financially or otherwise.¹⁸ 29 U.S.C. § 158(a)(2). As shown above (pp. 11-13), undisputed evidence supports the Board's determination that Everport violated Section 8(a)(2) and (1) in this case by telling the predecessors' IAM-represented mechanics that:

- They could not be considered for employment because they were not represented by ILWU and/or referred by the Joint Dispatch Hall (D&O 21, 25; Tr. 310-13, 366);
- They had to follow the Longshore Contract's Herman-Flynn procedures to get hired (D&O 21; Tr. 775-76, 3556-57); and
- Their hiring was contingent upon accepting ILWU as their exclusive collective-bargaining representative (D&O 21; Tr. 775-76, 3556-57).

¹⁸ A violation of Section 8(a)(2) yields a derivative violation of Section 8(a)(1). *Microimage Display Div. Xidex Corp. v. NLRB*, 924 F.2d 245, 250 (D.C. Cir. 1991).

Section 8(a)(2) of the Act also prohibits employers from recognizing unions that do not represent an uncoerced majority of their employees. *Garment Workers*, 366 U.S. at 737-38. Under the Board’s established test, an employer must wait until it employs a substantial and representative complement of its projected workforce and is engaged in its normal business operations before it can extend recognition to a union. *MV Pub. Transp., Inc.*, 356 NLRB 867, 867 n.2 (2011). Both prongs must be met for recognition to be lawful. *Elmhurst Care Ctr.*, 345 NLRB 1176, 1177 (2005), *enforced*, 303 F. App’x 895 (D.C. Cir. 2008).

Everport recognized ILWU no later than November 11, 2015, when it posted for M&R positions exclusively at the ILWU-PMA Joint Dispatch Hall. (D&O 38; GCX 37.) Moreover, Everport concedes (ERBr. 21) that it did not employ a single mechanic at the time and did not begin normal business operations until early January 2016. (D&O 30.) Therefore, the record evidence amply supports the Board’s finding that Everport violated Section 8(a)(2) and (1) of the Act by prematurely recognizing ILWU. (D&O 38-39.)

C. Everport Discriminated Against the Predecessors’ IAM-Represented Mechanics by Refusing To Hire Them Based on Their Union Affiliation, in Violation of Section 8(a)(3) and (1) of the Act

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer “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.” 29 U.S.C. § 158(a)(3). A violation of Section 8(a)(3) occurs when an employer refuses to hire applicants or takes adverse employment actions against employees because of their union affiliation. *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. 2016).

As shown above (pp. 8-13), uncontroverted evidence supports the Board’s finding that Everport discriminated against the predecessors’ IAM-represented mechanics by conspiring with ILWU to devise and implement a discriminatory plan to hire a sufficient number of ILWU-represented mechanics to ensure that they constituted a majority of the new workforce, and to avoid recognizing and bargaining with IAM. (D&O 45.) In so doing, Everport violated Section 8(a)(3) and (1) of the Act.¹⁹

D. Everport Violated Section 8(a)(5) and (1) of the Act by Refusing To Recognize and Bargain With IAM as the Historical Units’ Collective-Bargaining Representative, and by Unilaterally Applying the Longshore Contract to the Historical Units and Unilaterally Deciding Not To Hire the Predecessors’ Mechanics Without Giving IAM Notice and an Opportunity To Bargain

“Sections 8(a)(5) and 8(d) of the [Act] . . . require an employer to bargain ‘in good faith with respect to wages, hours, and other terms and conditions of employment’” with the union representing its employees. *Litton Fin. Printing Div.*

¹⁹ A violation of Section 8(a)(3) produces a derivative violation of Section 8(a)(1). *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); accord *Fort Dearborn*, 827 F.3d at 1071-72.

v. NLRB, 501 U.S. 190, 198 (1991) (quoting 29 U.S.C. § 158(d)). It therefore follows that an employer who makes unilateral changes to those mandatory subjects of bargaining, without giving the union prior notice and an opportunity to bargain, violates Section 8(a)(5) and (1) of the Act.²⁰ *Id.*; *accord Consol. Commc'ns, Inc. v. NLRB*, 837 F.3d 1, 19 (D.C. Cir. 2016). Indeed, the Supreme Court has held that such unilateral changes constitute “a circumvention of the duty to negotiate which frustrates the objectives of [Section] 8(a)(5) much as does a flat refusal [to bargain].” *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

As shown above (pp. 10-16, 28-39), uncontested evidence supports the Board’s finding that Everport, as a *Burns/Love’s Barbeque* successor, refused to recognize and bargain with IAM as the historical units’ exclusive bargaining representative. (D&O 45.) It is also undisputed that Everport unilaterally set the historical units’ initial terms and conditions of employment by implementing the Longshore Contract, and unilaterally determined to hire individuals other than the predecessors’ IAM-represented mechanics to perform bargaining-unit work, both without giving IAM prior notice and an opportunity to bargain. (D&O 39, 45.) By this conduct, Everport violated Section 8(a)(5) and (1) of the Act.

²⁰ Section 8(a)(5) makes it unlawful “for an employer . . . to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 325 n.2 (D.C. Cir. 2015).

E. Everport Unlawfully Assisted ILWU and Discriminated Against the Predecessors' IAM-Represented Mechanics by Applying the Terms of the Longshore Contract to Its M&R Workforce Before Hiring a Single Mechanic, in Violation of Section 8(a)(2), (3), and (5) of the Act

As shown above (pp. 9, 15), the evidence is undisputed that Everport applied the terms of the Longshore Contract to its M&R workforce before hiring a single mechanic. Accordingly, the Board reasonably found that, by prematurely implementing the Longshore Contract, Everport unlawfully assisted ILWU and discriminated against the historical units' IAM-represented mechanics, in violation of Section 8(a)(2), (3), and (5) of the Act. (D&O 40.)

III. THE COURT SHOULD SUMMARILY ENFORCE THE BOARD'S FINDINGS, WHICH ILWU DOES NOT CONTEST, THAT IT COMMITTED SEVERAL UNFAIR LABOR PRACTICES BASED ON EVERPORT'S STATUS AS A SUCCESSOR EMPLOYER

Based on Everport's status as a *Burns/Love's Barbeque* successor and the parties' undisputed conduct, the Board found that ILWU violated Section 8(b)(1)(A) and (2) of the Act by demanding and accepting recognition from Everport when it did not represent an uncoerced majority of the historical units, and by seeking to enforce the Longshore Contract and compel Everport to discriminate against IAM-represented mechanics. On review, ILWU has waived nearly all challenges to the Board's findings, except for echoing Everport's unit-appropriateness claim and adding a baseless assertion that Everport should have

preemptively hired even more ILWU-represented mechanics.²¹ Because those claims are meritless, the Court should summarily affirm the Board’s findings that ILWU violated Section 8(b)(1)(A) and (2) of the Act, and enforce the corresponding portions of the Board’s Order.

A. A Union Cannot Lawfully Accept Recognition and Assistance From an Employer or Apply a Collective-Bargaining Agreement to a Unit When It Does Not Represent an Uncoerced Majority of Employees

As noted above (pp. 27-28), the Act guarantees employees the right to freely choose their collective-bargaining representative. *Garment Workers*, 366 U.S. at 737. Consistent with that guarantee, Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union to “restrain or coerce employees” in the exercise of their Section 7 rights, including the right to engage in and refrain from union activity. 29 U.S.C. § 158(b)(1)(A). Therefore, a union violates Section 8(b)(1)(A) if it accepts exclusive recognition from an employer when it does not command the support of a majority of unit employees. *Garment Workers*, 366 U.S. at 733, 738; *accord Pac. Crane*, 890 F.3d at 1108.

Section 8(b)(2) of the Act makes it an unfair labor practice for a labor organization to “cause or attempt to cause an employer to discriminate against an employee.” 29 U.S.C. § 158(b)(2). When an employer and a non-majority union include in their collective-bargaining agreement a union-security clause requiring

²¹ See *supra* pp. 27, 29, 34-35.

employees to become or remain members of that union, the union violates Section 8(b)(2). *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 412-14 (1960); *accord Pac. Crane*, 890 F.3d at 1108.

B. ILWU Violated the Act by Demanding and Accepting Everport's Recognition as the Historical Units' Exclusive Bargaining Representative

Throughout these proceedings, ILWU has asserted that under the Longshore Contract, once Everport cancelled the predecessors' M&R contracts, the Terminal's red-circle status expired and all M&R work fell under its jurisdiction. (D&O 17; GCX 72.) ILWU conveyed that view in no uncertain terms to Everport, together with a clear threat to "pursu[e] all available remedies" if Everport failed to proceed accordingly. (D&O 16-17; GCX 74-76.) ILWU also warned PMA that it would take to arbitration any grievance over Everport's failure to hire from the Joint Dispatch Hall. (D&O 17; GCX 72.) Moreover, ILWU readily accepted Everport's de facto recognition when Everport posted its M&R openings at the Joint Dispatch Hall. (D&O 38-39.) On this record, therefore, the Board reasonably found that ILWU unlawfully demanded and accepted Everport's recognition as the historical units' exclusive collective-bargaining representative. (D&O 38-40.)

C. ILWU Unlawfully Sought To Enforce the Longshore Contract in Order To Force Everport To Discriminate Against IAM-Represented Mechanics

The record unequivocally supports the Board's finding that ILWU pressured Everport to apply the Longshore Contract to the historical units. (D&O 16-17; GCX 72, 74-76.) Indeed, ILWU successfully extracted Everport's promise to give first consideration to ILWU-represented mechanics, and only then, if any positions remained, to hire the predecessors' IAM-represented mechanics under ILWU's Herman-Flynn procedures. (D&O 17; GCX 72.) Moreover, at least twice during the hiring process, Everport turned away the predecessors' mechanics because they were not ILWU members. (D&O 21, 24-25, 40; Tr. 310-13, 366.) Thus, the evidence that ILWU unlawfully caused Everport to discriminate against the predecessors' IAM-represented mechanics is ample and uncontroverted. (D&O 39-40.)

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petitions for review and enforcing the Board's Order in full.

Respectfully submitted,

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March 2021

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EVERPORT TERMINAL SERVICES, INC.)	
)	
and)	
)	
INTERNATIONAL LONGSHORE AND)	
WAREHOUSE UNION,)	
)	
Petitioners/Cross-Respondents)	Nos. 20-1411
)	20-1412
v.)	20-1432
)	
NATIONAL LABOR RELATIONS BOARD,)	Board Case Nos.
)	32-CA-172286
Respondent/Cross-Petitioner)	32-CB-172414
)	
-----)	
)	
INTERNATIONAL ASSOCIATION OF)	
MACHINISTS & AEROSPACE WORKERS,)	
DISTRICT LODGE 190,)	
LOCAL LODGES 1546 & 1414, AFL-CIO,)	
)	
Intervenors for Respondent/Cross-Petitioner)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(5)-(6), 32(a)(7)(B), and 32(g)(1), the Board certifies that its proof brief contains 12,766 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word for Office 365. The Board further certifies that the PDF file submitted to the Court has been scanned for viruses using Microsoft Defender and is virus-free according to that program.

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Dated at Washington, DC
this 25th day of March 2021

STATUTORY AND REGULATORY ADDENDUM
TABLE OF CONTENTS

National Labor Relations Act (“the Act”), 29 U.S.C. § 151, et seq.

Section 7 (29 U.S.C. § 157)	i
Section 8(a)(1) (29 U.S.C. § 158(a)(1))	i
Section 8(a)(2) (29 U.S.C. § 158(a)(2))	i
Section 8(a)(3) (29 U.S.C. § 158(a)(3))	i
Section 8(a)(5) (29 U.S.C. § 158(a)(5))	ii
Section 8(b)(1) (29 U.S.C. § 158(b)(1))	ii
Section 8(b)(2) (29 U.S.C. § 158(b)(2))	ii
Section 8(b)(4) (29 U.S.C. § 158(b)(4))	ii
Section 8(d) (29 U.S.C. § 158(d))	iii
Section 9(a) (29 U.S.C. § 159(a))	iii
Section 9(b) (29 U.S.C. § 159(b))	iii
Section 10(a) (29 U.S.C. § 160(a))	iv
Section 10(e) (29 U.S.C. § 160(e))	iv
Section 10(f) (29 U.S.C. § 160(f))	v
Section 10(k) (29 U.S.C. § 160(k))	v

THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

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 7;

(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 6 [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 Act [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 section 8(a) of this Act [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 9(a) [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 9(e) [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 non-membership 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;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)

Section 8(b) of the Act (29 U.S.C. § 158(b)) provides in relevant part:

(b) It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [of subsection (a)(3) of this section] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: . . .

Section 8(d) of the Act (29 U.S.C. § 158(d)):

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party. . .

Section 9 of the Act (29 U.S.C. § 159) provides in relevant part:

(a) 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) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [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 votes 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.

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and 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. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The

Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) 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) of this section, 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.

* * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

UNITED STATES COURT OF APPEALS
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)	
Intervenors for Respondent/Cross-Petitioner)	
)	

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2021, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

s/ Ruth E. Burdick
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Dated at Washington, DC
this 25th day of March 2021