APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 3:12-cv-01058-S1

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION
and PACIFIC MARITIME ASSOCIATION,

Plaintiffs,

v.

ICTSI OREGON, INC.,

Defendant,

and

PORT OF PORTLAND and IBEW LOCAL 48,

Intervenor-Defendants.

ICTSI OREGON, INC.,

Counterclaim-Plaintiff,

v.

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION;
PACIFIC MARITIME ASSOCIATION;
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION
LOCAL 8; and INTERNATIONAL LONGSHORE
AND WAREHOUSE UNION LOCAL 40,

Counterclaim-Defendants.

PORT OF PORTLAND,

Counterclaim-Plaintiff and Crossclaim-Plaintiff,

v.

PACIFIC MARITIME ASSOCIATION; INTERNATIONAL LONGSHORE AND WAREHOUSE UNION; and INTERNATIONAL LONGSHORE AND WAREHOUSE UNION LOCAL 8,

Counterclaim-Defendants,

and

ICTSI OREGON, INC.,

Crossclaim-Defendant.

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OPINION AND ORDER

Michael H. Simon, District Judge.

This matter is one of six separate but related lawsuits arising from a labor dispute at Terminal 6 at the Port of Portland.[1] The dispute arose over who is entitled to perform the work of plugging in, unplugging, and monitoring refrigerated shipping containers (the "reefer work") at Terminal 6. Plaintiffs International Longshore and Warehouse Union ("ILWU") and the Pacific Maritime Association ("PMA") contend that Defendant ICTSI Oregon, Inc. ("ICTSI"), the operator of Terminal 6 and a member of PMA, must assign the reefer work to ILWU members. ICTSI, and Intervenor-Defendants the Port of Portland (the "Port") and the International Brotherhood of Electrical

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[1] The other five cases are *Pac. Mar. Ass'n v. Int'l Longshore & Warehouse Union Local 8,* Case No. 3:12-cv-01100-SI (D. Or.); *Int'l Longshore & Warehouse Union v. Port of Portland,* Case No. 3:12-cv-01494-SI (D. Or.); *Hooks v. Int'l Longshore & Warehouse Union,* Case No. 3:12-cv-1088-SI (D. Or.); *Hooks v. Int'l Longshore & Warehouse Union,* Case No. 3:12-cv-01691-SI (D. Or.); and *Pac. Mar. Ass'n v. N.L.R.B.,* Case No. 3:12-cv-02179-MO (D. Or.).

Workers ("IBEW") Local 48, contend that the reefer work must be assigned to IBEW members.

As part of this lawsuit, Defendant ICTSI asserts several counterclaims, including a counterclaim against both PMA and ILWU under the federal antitrust laws and a counterclaim against PMA for breach of fiduciary duty (ECF 109). PMA has moved to dismiss ICTSI's antitrust counterclaim (ECF 131), and ILWU has joined that motion (ECF 133). PMA has also moved to dismiss ICTSI's counterclaim against PMA for breach of fiduciary duty (ECF 131). In addition, Defendant-Intervenor, the Port, asserts several counterclaims, including a counterclaim against both PMA and ILWU for tortious interference (ECF 136). Both PMA and ILWU have moved to dismiss the Port's tortious interference counterclaim (ECF 138 and 146, respectively). For the reasons that follow, PMA and ILWU's motions are granted in part and denied in part.

STANDARDS

A motion to dismiss for failure to state a claim may be granted only when there is no cognizable legal theory to support the claim or when the complaint lacks sufficient factual allegations to state a facially plausible claim for relief. *Shroyer v. New Cingular Wireless Servs., Inc.,* 622 F.3d 1035, 1041 (9th Cir. 2010). In evaluating the sufficiency of a complaint's factual allegations, the court must accept as true all well-pleaded material facts alleged in the complaint and construe them in the light most favorable to the non-moving party. *Wilson v. Hewlett-Packard Co.,* 668 F.3d 1136, 1140 (9th Cir. 2012); *Daniels-Hall v. Nat'l Educ. Ass'n,* 629 F.3d 992, 998 (9th Cir. 2010). To be entitled to a presumption of truth, allegations in a complaint "may not simply recite the elements of a cause of action, but must contain sufficient allegations

of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca,* 652 F.3d 1202, 1216 (9th Cir. 2011). All reasonable inferences from the factual allegations must be drawn in favor of the plaintiff, *Newcal Indus. v. Ikon Office Solution,* 513 F.3d 1038, 1043 n.2 (9th Cir. 2008). The court need not, however, credit the plaintiffs legal conclusions that are couched as factual allegations. *Ashcroft v. Iqbal,* 556 U.S. 662, 678-79 (2009).

A complaint must contain sufficient factual allegations to "plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Baca,* 652 F.3d at 1216. "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 663 (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556 (2007)).

BACKGROUND

The labor dispute giving rise to this case and its related cases both before this Court and the National Labor Relations Board ("NLRB") is factually intensive and "highly complex and very technical." *Int'l Longshore & Warehouse Union, AFL-CIO,* 2013 WL 4587186 (NLRB Aug. 28, 2013). For purposes of the pending motions, the Court briefly summarizes the facts admitted to or alleged by ICTSI or the Port that are relevant to the specific counterclaims PMA and ILWU have moved to dismiss.

ILWU is a labor union that "represents longshore workers, longshore mechanics, gearmen, and marine clerks, employed by waterfront companies who are members of PMA, at all West Coast ports including

Portland, Oregon." Compl. (ECF 1) ¶ 3; ICTSI Am. Answer and Counterclaims (ECF 109) ("ICTSI CC") ¶ 61. PMA is "a multiemployer collective bargaining association whose members include stevedoring companies, terminal operators, and maintenance and repair contractors that employ dockworkers, such as longshoremen" throughout the West Coast. Compl. ¶ 4; ICTSI CC ¶ 61. PMA has approximately 70 members [sic] companies, each of whom delegate bargaining authority to PMA. ILWU and PMA are parties to the Pacific Coast Longshore Contract Document ("PCLCD"), a collective bargaining agreement covering commercial ports along the West Coast, which governs the terms and conditions of employment of all longshore workers. The PCLCD is administered by the joint Coast Labor Relations Committee ("CLRC"), which is composed of representatives of ILWU and PMA.

PMA pays more than 50 percent of the cost to operate a joint dispatch facility with ILWU. The dispatch facility determines which longshoreman to dispatch, pays the salary and benefits of those who are dispatched, and is paid by member and non-member employers based on hours worked by longshoremen.

For decades, PMA and ILWU negotiated successive bargaining agreements. In 2008, the PCLCD included for the first time a provision that maintenance and repair work, including the reefer work at issue in this case, be performed by ILWU-represented employees. Before this time, the reefer work had been performed at some ports, including Terminal 6, by employees who were not ILWU members. When the 2008 PCLCD was negotiated, PMA members that had direct contracts with other unions for the reefer work were exempted from the new requirement that such work be assigned to ILWU members.

The Port operated Terminal 6 until February 2011, when ICTSI commenced operating Terminal 6 pursuant to a long-term lease agreement between the Port and ICTSI ("Terminal 6 Lease"). IBEW-represented employees of the Port had performed the reefer work on Terminal 6 for decades. Because the Port was not a PMA member, it was not bound by the PCLCD and did not receive the benefit of the bargained exemption in the 2008 PCLCD for current PMA members exempting them from assigning reefer work to ILWU members. Even after ICTSI took over operations at Terminal 6, the Port continued, under the terms of the Terminal 6 Lease, to manage the reefer work and assign that work to IBEW-represented Port employees. ICTSI joined PMA in June 2011, several months after it had entered into the Terminal 6 Lease.

In 2011 and 2012, ILWU filed numerous grievances against ICTSI and other PMA members complaining about the non-ILWU workers performing the reefer work. IBEW threatened to picket if the reefer work were assigned to ILWU-represented employees. ICTSI then filed a complaint before the NLRB against IBEW, in which ILWU intervened. The night before the NLRB hearing on May 24, 2012, the CLRC held a meeting to which ICTSI and the Port were not invited and agreed that the reefer work at Terminal 6 should be performed by ILWU-represented workers. Shortly thereafter, in June 2012, an arbitrator reached the same conclusion and ordered ICTSI to have ILWU-represented workers perform the reefer work. In

August 2012 the NLRB awarded the reefer work to ILWU-represented workers.[2]

PMA, with the encouragement and direction of ILWU, threatened to fine ICTSI $50,000 per day and to expel ICTSI from the PMA if ICTSI did not have ILWU members perform the reefer work. PMA member companies also threatened to bypass the Port unless the reefer work was performed by ILWU members. Beginning in June 2012, ILWU "engaged in slowdowns, work stoppages, safety gimmicks and the like and have prosecuted numerous grievances against both ICTSI and ocean carriers calling on Portland in an effort to force ICTSI to assign the disputed work to the ILWU; and to ignore the NLRB's jurisdictional ruling." ICTSI CC ¶ 69G. PMA and ILWU also dispatched "inefficient" workers and workers who are not "Registered Longshoremen" to ICTSI. ICTSI CC ¶¶ 69O, P. PMA and ILWU filed this action in federal court to enforce the arbitration award and force ICTSI to assign the reefer work to ILWU members, and PMA filed another federal lawsuit seeking to invalidate the NLRB decision awarding the work to IBEW-represented workers.[3] ICTSI and the Port responded to these actions by filing several complaints before the NLRB, alleging that these actions by ILWU were unfair labor practices in violation of labor law.[4]

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[2] This decision was subsequently vacated. *See Pac. Mar. Ass'n v. N.L.R.B.,* Case No. 3:12-cv-02179-MO, Judgment, Docket 54 (D. Or. June 17, 2013).

[3] PMA ultimately prevailed in that lawsuit and the NLRB award was vacated. *Supra* n.2.

[4] After the briefing and oral argument on the pending motions, the NLRB issued a decision concluding that ILWU had engaged in unfair labor practices. *Intl Longshore & Warehouse Union, AFL-CIO,* 2013 WL 4587186 (NLRB Aug. 28, 2013).

ICTSI also alleges that ILWU "caused" the Port of San Diego to replace a non-PMA member with a PMA member, caused EGT, LLC ("EGT") in the Port of Longview to terminate the services of a company that did not use ILWU-represented labor and execute a collective bargaining agreement in which EGT agreed to use ILWU-represented workers, and threatened third parties in other ports, insisting that a PMA member be retained to perform longshore services. ICTSI CC ¶¶ 69K-M.

DISCUSSION

A. ICTSI's Antitrust Counterclaim

In a single counterclaim against both PMA and ILWU that ICTSI labels "Antitrust," ICTSI alleges that PMA and ILWU "have violated the provisions of 15 U.S.C. §§ 1 and 2 of the Sherman Act." ICTSI CC ¶ 58. PMA moves to dismiss ICTSI's antitrust counterclaim on the grounds that the alleged actions on which the antitrust counterclaim is based are exempted from the federal antitrust laws pursuant to the nonstatutory labor exemption. ILWU joins this motion and further moves to dismiss ICTSI's antitrust counterclaim to the extent it is based on allegations of ILWU's unilateral, traditional union activity on the grounds that this conduct is subject to the statutory labor exemption from federal antitrust laws. As discussed below, both of these arguments are well taken, and ICTSI's antitrust counterclaim is dismissed.

1. The *Noerr-Pennington* doctrine immunizes PMA and ILWU's federal lawsuits from antitrust scrutiny

Before considering the statutory and nonstatutory labor exemptions from the federal antitrust laws argued by PMA and ILWU, the Court notes that ICTSI

bases its antitrust counterclaim, in part, on the fact that PMA and ILWU have not dismissed their claims in this lawsuit and have filed a second lawsuit challenging the NLRB's jurisdiction. The *Noerr-Pennington* doctrine "provides broad antitrust protection for those who 'petition the government for a redress of grievances.'" *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, AFL-CIO,* 31 F.3d 800, 810 (9th Cir. 1994) (quoting *City of Columbia v. Omni Outdoor Adver., Inc.,* 499 U.S. 365, 378 (1991). This protection extends to petitioning administrative agencies and courts. *Id.* This protection may be lost when parties institute "sham" proceedings "with or without probable cause, and regardless of the merits of the cases." *Cal. Motor Transp. Co. v. Trucking Unlimited,* 404 U.S. 508, 511-12 (1972). ICTSI alleges, in conclusory fashion, that the two federal lawsuits brought by PMA and ILWU are a "sham."

ICTSI fails, however, sufficiently to allege facts from which the Court can reasonably infer that the two federal lawsuits are a sham. The act of filing these two lawsuits does not support a contention that ILWU and PMA are inappropriately using the courts to achieve an anticompetitive goal without consideration of the merits of their cases. In considering each case, they are not "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus. Inc.,* 508 U.S. 49, 60 (1993). In fact, PMA prevailed at summary judgment in one of the cases. *See Pac. Mar. Ass'n v. N.L.R.B.,* Case No. 3:12-cv-02179-MO, Judgment, Docket 54 (D. Or. June 17, 2013). This prohibits the application of the "sham exception."

To the extent ICTSI is attempting to allege a sham exception based on a "whole series of legal proceedings," it is doubtful that two cases are sufficient, but even if they were, the sham exception still would not apply. *USS-POSCO,* 31 F.3d at 811. In considering the application of the sham exception to an alleged series of legal proceedings, the question is not whether any one case has merit, but whether the cases are brought pursuant to a policy of commencing proceedings without regard to their merits. *Id.* Because PMA has already prevailed at summary judgment in one of the two lawsuits, it cannot reasonably be alleged that these lawsuits were brought without regard to their merits. *Id.* (finding that a "batting average" of approximately .500 "cannot be reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success"). Thus, the allegations that ILWU and PMA have engaged in federal litigation cannot support ICTSI's antitrust counterclaim.

2. The statutory labor exemption applies to the alleged conduct solely performed by ILWU

Based on the "'interlacing'" Sherman, Clayton, and Norris-LaGuardia Acts, certain conduct by organized labor is given a "statutory" exemption from federal antitrust laws. *USS-POSCO,* 31 F.3d at 805 (quoting *United States v. Hutcheson,* 312 U.S. 219, 232 (1941); *see also Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 621 (1975). As long as a union acts in its own legitimate self-interest and does not combine with nonlabor groups, these statutes exempt from antitrust scrutiny traditional union activities, including secondary picketing, boycotts, hand-billing, and encouraging work stoppages. *See Connell,* 421 U.S. at 622; *USS-POSCO,* 31 F.3d at 805, 808-809.

In applying the statutory labor exemption, courts do not distinguish the "licit and the illicit" or look to "the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *Hutcheson,* 312 U.S. at 232. "[W]here a union engages in activities normally associated with labor disputes, these will be presumed to be in pursuit of the union's legitimate interest absent a very strong showing to the contrary." *USS-POSCO,* 31 F.3d at 808. Union activity done to "eliminate non-union shops altogether by making an example" of a particular employer is a legitimate labor goal subject to the strong presumption, as is activity done to preserve jobs for union members. *See, e.g., id.* at 809 (noting that traditional union activities done to eliminate non-union shops are in the union's legitimate self-interest); *Intercontinental Container Transp. Corp. v. New York Shipping Ass'n,* 426 F.2d 884, 887 (2d Cir. 1970) ("Union activity having as its object the preservation of jobs for union members is not violative of the anti-trust laws."). The statutory labor exemption is not an affirmative defense but is an element (or, to be precise, its inapplicability is an element) of any claim that a union has violated the antitrust laws. *USS-POSCO,* 31 F.3d at 805 n.3. Accordingly, the party bringing the antitrust claim bears the burden of proving that the exemption does not apply. *Id.*

Here, ICTSI's antitrust counterclaim is based, in part, on allegations that ILWU engaged in the traditional activities of work stoppages, slowdowns, and filing grievances in an attempt to force ICTSI to assign the reefer work to ILWU workers. ICTSI CC ¶ 69G. ICTSI has not alleged that PMA and ILWU conspired together and agreed that ILWU would engage in such conduct, nor could such an allegation plausibly be made. PMA members suffer as a result of the alleged

work stoppage and slow downs, and PMA filed its own lawsuit against ILWU to restrain this alleged conduct.

The alleged work stoppages, slowdowns, and filing of grievances by ILWU are traditional union activity, done for the purpose of trying to preserve jobs for ILWU workers. Although ILWU workers did not historically perform reefer services at Terminal 6, the negotiated compromise in the 2008 PCLCD requiring that reefer work be assigned to ILWU members was an attempt to preserve jobs for ILWU members because other jobs historically performed by ILWU members were being lost to technology. Because these actions were done in furtherance of ILWU's legitimate self-interest and were not done in concert with a nonlabor group, the Court cannot look to the wisdom or wrongness of the alleged activities. They are exempt from federal antitrust law.

ICTSI also alleges that ILWU threatened and otherwise "caused" third parties to use PMA members to provide longshore services in other ports and use ILWU labor. ICTSI CC ¶¶ 69K, L, M. First, such allegations are insufficient to state a claim for antitrust liability or injury. ICTSI does not allege how or why ILWU "caused" the other ports to use PMA members. ICTSI also does not allege that ILWU engaged in this conduct at the behest of PMA to reduce competition or drive out competitors of PMA or its members. Additionally, as discussed further below, PMA has more than 70 members who are competitors with one another, and thus does not fall within the classical definition of a "monopoly" under federal antitrust law. Second, even if these allegations by ICTSI gave rise to potential antitrust liability, the union's activities as alleged are exempt under the statutory labor exemption. The alleged conduct was

engaged in by the union in its own legitimate self-interest. As admitted by ICTSI in its Answer and Counterclaims, ILWU represents longshore workers who are employed by members of PMA. Thus, having ports use vendors that are PMA members necessarily results in the use of ILWU labor. This is a legitimate union goal. Thus, the alleged conduct is exempt from federal antitrust law.

3. The nonstatutory labor exemption applies to the alleged joint action by ILWU and PMA

ICTSI also bases its antitrust counterclaim on alleged conduct pursuant to alleged agreements between PMA and ILWU. The statutory labor exemption does not exempt concerted action or agreements between unions and nonlabor parties. *Connell,* 421 U.S. at 622. Thus, the alleged conduct is not subject to the statutory exemption. It is, however, subject to the nonstatutory labor exemption.

a. The contours of the nonstatutory labor exemption

The Supreme Court has recognized that a proper accommodation between the congressional policy favoring collective bargaining and the congressional policy favoring free competition "requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Id.* This exemption "interprets the labor statutes . . . as limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a 'reasonable' practice" and "substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict." *Brown v. Pro Football, Inc.,* 518 U.S. 231, 236-37 (1996).

"'[S]ome restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions' to give effect to federal labor policy and to allow meaningful collective bargaining to occur." *California ex rel. Harris v. Safeway, Inc.,* 651 F.3d 1118, 1125 (9th Cir. 2011) *(en banc) ("Safeway")* (alteration in original) (quoting *Brown,* 518 U.S. at 237). "[I]t would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any* of the competition-restricting agreements potentially necessary to make the process work." *Brown,* 518 U.S. at 237 (emphasis in original). The precise boundaries of the nonstatutory labor exemption have never been delineated by the Supreme Court, and what guidance it has given "'has come mostly in cases in which agreements between an employer and a labor union were alleged to have injured or eliminated a competitor in the employer's business or product market.'" *Safeway,* 651 F.3d at 1125 (quoting *Clarett v. Nat'l Football League,* 369 F.3d 124, 131 (2d Cir. 2004)).

Historically, the application of the nonstatutory labor exemption was only considered in cases involving union-employer agreements. *See Connell,* 421 U.S. at 622 (noting that the nonstatutory exemption is necessary for "some *union-employer* agreements") (emphasis added). In considering whether the nonstatutory exemption applies to an agreement between a union and an employer, the Court of Appeals for the Ninth Circuit has adopted the three-part test articulated in *Mackey v. Nat'l Football League,* 543 F.2d 606 (8th Cir. 1976). *See Phoenix Elec. Co. v. Nat'l Elec. Contractors Ass'n,* 81 F.3d 858, 861 (9th Cir. 1996). Under this test,

> the parties to an agreement restraining trade are exempt from antitrust liability only if (1) the restraint primarily affects the parties to the agreement and no one else, (2) the agreement concerns wages, hours, or conditions of employment that are mandatory subjects of collective bargaining, and (3) the agreement is produced from bona fide, arm's-length collective bargaining.

Id. This test was derived primarily from the Supreme Court's decisions in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Jewel Tea Co.,* 381 U.S. 676 (1965), *Connell,* and *United Mine Workers v. Pennington,* 381 U.S. 657 (1965). *Mackey,* 543 F.2d at 614.

ICTSI argues that the *Mackey* test does not survive the Supreme Court's decision in *Brown* and that *Brown* added the requirement that in order to obtain the benefit of the nonstatutory exemption, the conduct at issue must not violate labor law. The Court does not read *Brown* so broadly.

In *Brown,* the Supreme Court extended the nonstatutory labor exemption, under very limited circumstances, to concerted conduct by employers after impasse had been reached (which the Supreme Court described as occurring during the collective bargaining "process"). *Brown,* 518 U.S. at 250. Because *Brown* involved an agreement only among employers that was not produced from bona fide, arm's-length collective bargaining, the third prong of the *Mackey* test was not met, yet the nonstatutory exemption was still applied. This arguably calls into question the continued validity of the *Mackey* test.

Brown, however, did not expressly abrogate the *Mackey* test and did not even address whether the *Mackey* test survives for cases involving union-employer agreements. The Supreme Court in *Brown* specifically noted that its opinion addressed only the narrow issue of whether the scope of the nonstatutory labor exemption included "an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer." *Brown,* 518 U.S. at 238. The Supreme Court in *Brown* was not analyzing the scope or application of the nonstatutory exemption to union-employer agreements. Additionally, the Supreme Court in *Brown* cited with favor the cases from which *Mackey* garnered the principles for its test—Jewel *Tea, Pennington,* and *Connell.* Thus, *Brown* expanded the nonstatutory exemption and did not limit the application of the exemption in the union-employer context.

The Court of Appeals for the Ninth Circuit also has not proclaimed that the *Mackey* test has been fully abrogated. In a case involving an employer-only agreement, a panel noted that *Brown* appeared to abrogate *Mackey* because it applied the nonstatutory exemption to an employer-only agreement (thus violating *Mackey's* third prong). *Cal. ex rel. Brown v. Safeway, Inc.,* 615 F.3d 1171, 1200 n.15 (9th Cir. 2010), *reheard en bane by Safeway,* 651 F.3d 1118. That case was reheard *en banc,* however, and the *en banc* opinion eliminated the discussion of the status of the *Mackey* test after *Brown. Safeway,* 651 F.3d 1118. Further, that case involved employer-only agreements, which are expressly governed by *Brown.*

The Court has an additional concern with reading *Brown* and *Safeway* as abrogating the *Mackey* test and setting a new standard for analyzing the application

of the nonstatutory exemption in cases involving employer-union agreements. *Brown* and *Safeway* involve employer-only agreements and the unilateral imposition of terms by employers. These types of actions are of particular concern in both labor and antitrust law, and thus the courts were careful to circumscribe narrow circumstances in which employer-only action can obtain the benefit of the nonstatutory labor exemption from antitrust liability. *Brown* and *Safeway* considered several factors in deciding whether employer-only agreements should benefit from the nonstatutory labor exemption.[5] These include factors similar to the first two prongs of the *Mackey* test, but also include factors arising from the concern regarding employer-only actions. Specifically, the courts analyzed whether the conduct at issue was directly and extensively regulated by labor law and was clearly acceptable under labor law. *Brown,* 518 U.S. at 238; *Safeway,* 651 F.3d at 1129. There is no indication in *Brown* and *Safeway* that these requirements extend to cases involving union-employer agreements.

Notably, the nonstatutory labor exemption historically could apply to union-employer agreements, even if the conduct violated labor law. *See Richards v.*

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[5] The cases considered whether: (1) the labor market, as opposed to the "business" or "product" market was involved; (2) the conduct took place during or immediately after a collective-bargaining negotiation; (3) the conduct grew out of, and was directly related to, the lawful operation of the collective bargaining process; (4) the conduct was an accepted practice of labor negotiations that has been extensively regulated and carefully circumscribed; (5) the conduct involved a matter that the parties were required to negotiate collectively; and (6) the conduct concerned only the parties to the collective-bargaining relationship. *Brown,* 518 U.S. at 250; *Safeway,* 651 F.3d at 1129, 1130, 1130 n. 7.

Neilsen Freight Lines, 810 F.2d 898, 906 (9th Cir. 1987); *accord Connell,* 421 U.S. at 622-25 (analyzing whether the nonstatutory labor exemption applied separately from whether the conduct violated labor law, thereby suggesting that the presence of a labor law violation may not itself decide the exemption issue). Further, the policy behind the creation and enforcement of the nonstatutory exemption is to "prevent 'judicial use of antitrust law to resolve labor disputes' and [to limit] antitrust courts' authority to determine what qualifies as a reasonable practice in industrial conflict." *Safeway,* 651 F.3d at 1127 (quoting *Brown,* 518 U.S. at 236-37). Without a clear indication from the Supreme Court or the Ninth Circuit, this Court does not interpret *Brown* and *Safeway* as creating potential antitrust liability for union-employer agreements solely because the conduct also might create liability under labor law. Such an interpretation is antithetical to the purpose behind the nonstatutory labor exemption.

b. Applying the nonstatutory labor exemption

The nonstatutory labor exemption is applicable to multiemployer groups. *Brown,* 518 U.S. at 240 ("Multiemployer bargaining itself is a well-established, important, pervasive method of collective bargaining, offering advantages to both management and labor."). As discussed above, in evaluating whether the nonstatutory exemption applies in this case, the Court applies the *Mackey* test.

ICTSI alleges various conduct by ILWU and PMA in support of ICTSI's antitrust counterclaim, but all of the alleged conduct arises out of ILWU and PMA's interpretation of the PCLCD. The alleged conduct by ILWU and PMA, individually and together, was engaged-in by PMA and ILWU to enforce their

interpretation of the PCLCD.[6] The Court has already determined that some of the alleged conduct is exempt from antitrust scrutiny under the statutory labor exemption and the *Noerr-Pennington* doctrine, so the Court considers only the remaining alleged conduct: (1) that PMA, in concert with ILWU, threatened to fine or expel ICTSI; (2) that PMA agreed to a CLRC meeting without notifying ICTSI; (3) that ILWU and PMA agreed to discriminate against ICTSI and against non-PMA employers by exempting PMA members that had direct contracts with other unions for the performance of the reefer work in the 2008 PCLCD; (4) that PMA members threatened to bypass Terminal 6; (6) that ILWU violated labor law; and (7) that ILWU and PMA have dispatched inefficient and underqualified workers to ICTSI. ICTSI CC ¶¶ 69A, B, C, D, E, F, N, O, P.

i. The first prong of *Mackey*—whether the conduct primarily affects the parties to the agreement

The remaining alleged conduct on which ICTSI bases its antitrust counterclaim, enumerated above,

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[6] In its brief in response to the motion to dismiss, ICTSI argues that its antitrust counterclaim is also based on a May 23, 2012 CLRC "agreement" between ILWU and PMA. ICTSI Resp. Br. at 17-18. No such "agreement" was alleged in ICTSI's counterclaims, and if it were, it would not be a proper characterization of the May 23, 2012 meeting. As ICTSI properly alleges, on May 23, 2012, the CLRC held a meeting and interpreted the PCLCD as requiring the reefer work be assigned to ILWU-represented workers. This is an interpretation of the PCLCD, not a separate agreement entered into between PMA and ILWU. Further, as alleged by ICTSI, it is the role of the CLRC to interpret the PCLCD.

primarily affects only members who are parties to the PCLCD,[7] with the exception of number three, ICTSI's allegation that PMA and ILWU discriminate against non-PMA members by granting an exemption in the 2008 PCLCD to certain existing PMA members so they could assign the reefer work to non-ILWU workers. The requirement that ILWU workers be assigned the work, however, is only binding on PMA members, who are parties to the collective bargaining agreement. Non-PMA members can compete for stevedoring work and its ancillary services and can assign anyone they choose to perform reefer work. Non-PMA members have no need for the exemption because they are not bound by the PCLCD's requirement to assign reefer work to ILWU members. Thus, the alleged restraint primarily affects only the parties to the PCLCD.[8] *See*

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[7] ICTSI also alleges that PMA and ILWU work in concert to create a monopoly for PMA members in the market of loading and unloading of freight, and related ancillary services, in West Coast ports. Such conduct would affect nonparties to the PCLCD (*e.g.*, non-PMA members who wish to perform such work and cannot). As discussed in Section A.4 below, however, the Court finds that ICTSI fails to state a claim for monopolization, attempted monopolization, or conspiracy to monopolize, so this conduct is not relevant to the Court's analysis on the application of the nonstatutory labor exemption.

[8] Although the dispute at Terminal 6 affects persons who are not parties to the agreement, including the public, businesses who ship through Terminal 6, and the Port, this is not the type of effect encompassed in the first prong of the *Mackey* test. All alleged anticompetitive conduct has some effect on consumers and competitors, but courts look to the primary effect of the alleged agreement and whether the alleged agreement "imposes its terms on any nonsignatory party." *Phoenix Elec.,* 81 F.3d at 862. Here, the alleged agreement is the PCLCD, and it does not impose the requirement that ILWU-represented workers be assigned reefer work on any nonsignatory party.

Phoenix Elec., 81 F.3d at 862 (finding that an alleged agreement that does not "impose its terms on any nonsignatory party" primarily affects only the parties to the agreement).

ICTSI also alleges that members who join PMA after the 2008 PCLCD was negotiated, such as ICTSI, are discriminated against because they cannot benefit from the exemption. First, these members are parties to the PCLCD, so this allegation does not run afoul of the first prong of *Mackey.* Second, this allegation does not give rise to antitrust liability. Representatives who negotiate collective bargaining agreements can favor some constituents over others. *See Clarett,* 369 F.3d at 139 (finding that representatives may advantage certain categories over others, subject to the duty of fair representation, including favoring current employees over new employees and excluding outsiders (citing *Vaca v. Sipes,* 386 U.S. 171, 177 (1967); *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338-39 (1953), *Fibreboard Paper Prods. Corp v. N.L.R.B.,* 379 U.S. 203, 210-15, (1964))). Although those cases involve negotiation by labor representatives as opposed to representatives of multiemployer groups, the Court does not see this as a material difference in terms of the obligations of the negotiating representative. *See, e.g., N.L.R.B. v. Siebler Heating & Air Conditioning, Inc.,* 563 F.2d 366, 371 (8th Cir. 1977) (finding that members of an employer group have, similar to labor, a right to expect that their interests will be fairly represented and that their interests will not be "totally sacrificed"). At the time the 2008 PCLCD was negotiated, PMA representatives chose to favor existing PMA members over future PMA members with regard to the exemption—such conduct does not support an antitrust counterclaim by ICTSI.

The first prong of the *Mackey* test is met.

ii. The second prong of *Mackey*—whether the agreement concerns a mandatory subject of collective bargaining

The second prong of the *Mackey* test is whether the agreement concerns wages, hours, or conditions of employment that are mandatory subjects of collective bargaining. Work assignments are mandatory subjects of collective bargaining, even if the employer is assigning work outside of the collective bargaining unit. *See Antelope Valley Press,* 311 NLRB 459, 460 (1993). Terms and conditions that relate to job preservation and minimizing the curtailment of jobs are also subjects of mandatory bargaining. *See Fibreboard Paper,* 379 U.S. at 213; *see also Intercontinental,* 426 F.2d at 887 ("The Supreme Court has repeatedly held that the preservation of jobs is within the area of proper union concern."). Changing the scope of a bargaining unit, however, is not. *Antelope Valley,* 311 NLRB at 460.

ICTSI concedes that work preservation is a mandatory subject of collective bargaining, but argues that because the 2008 PCLCD added reefer jobs that ILWU labor did not previously perform in Portland, this aspect of the PCLCD was changing the scope of the bargaining unit and was not, therefore, a mandatory subject of collective bargaining. ICTSI's argument is not persuasive.

To whom the reefer jobs must be assigned within the bargaining unit relates to work assignments. It is, therefore, a subject of mandatory bargaining. Even if the provision did not relate to the assignment of work, however, it relates to work preservation and minimiz-

ing the curtailment of ILWU jobs. The provision in the 2008 PCLCD relating to the reefer work was added to preserve ILWU jobs, as technology was eroding union jobs. Additionally, the reefer work had been performed by ILWU-represented employees in some ports governed by the PCLCD. Thus, this is a subject relating to work preservation and is a proper subject of mandatory bargaining. *See Nat'l Woodwork Mfrs. Ass'n v. N.L.R.B.,* 386 U.S. 612, 640-41 (1967); *Antelope Valley,* 311 NLRB at 460.

The fact that ILWU-represented employees did not previously perform the reefer work at Terminal 6 and elsewhere is not diapositive of the question of whether this was work preservation as opposed to a change in the scope of the bargaining unit. ICTSI alleges that ILWU and PMA represent labor and employers, respectively, for all of the West Coast ports, and that only in "some" West Coast ports was the reefer work performed by non-ILWU-represented employees. ICTSI CC ¶ 68. ICTSI argues that because ILWU labor did not perform the work at Terminal 6 and "some" other ports, the 2008 PCLCD was a "land grab" in those ports. The critical issue on this point is whether the universe for the work preservation analysis is Terminal 6 and the other ports in which the reefer work was performed differently, or all of the West Coast ports. That question was answered by the Ninth Circuit in *Maui Trucking, Inc. v. Operating Engineers Local Union No. 3 Int'l Union of Operating Engineers AFL-CIO,* 37 F.3d 436 (9th Cir. 1994). In that case, the Ninth Circuit held that the relevant work universe is coextensive with the bargaining unit. *Id.* at 439.

Here, the bargaining unit includes all of the West Coast ports and thus, that is the universe for the job

preservation analysis. A single collective bargaining agreement governs all of the West Coast ports, many PMA members dock at multiple ports, and union members can move to find work. "It would be senseless to break the [West Coast ports] into parts for this analysis, possibly creating different rules for each [port]." *Id.* In most of the West Coast ports, ILWU workers performed the reefer work. Thus, requiring in 2008 that the reefer work be assigned to ILWU members was a job preservation issue and not a change in the scope of the bargaining unit.

The second prong of the *Mackey* test is met.

iii. The third prong of *Mackey*—whether the agreement is the result of bona fide, arm's-length collective bargaining

ICTSI does not allege that the PCLCD was derived from anything other than bona fide, arm's-length collective bargaining. Indeed, ICTSI alleges that "[f]or many years, the ILWU and PMA have *negotiated* successful collective bargaining agreements. . . ." ICTSI CC ¶ 68 (emphasis added). Thus, the third prong of the *Mackey* test is met.

Accordingly, the challenged agreement between PMA and ILWU is exempt from antitrust scrutiny based on the nonstatutory labor exemption.

4. Monopolization, Attempted Monopolization, and Conspiracy to Monopolize

ICTSI also alleges that ILWU and PMA have violated Section 2 of the Sherman Act through a conspiracy to monopolize. One of the elements required to state a claim for violation of Section 2 based on a theory of conspiracy to monopolize is the existence of a combination or conspiracy to monopolize a relevant

market. *See Paladin Assocs., Inc. v. Mont. Power Co.,* 328 F.3d 1145, 1158 (9th Cir. 2003); *see generally Rebel Oil Co. v. Atl. Richfield Co.,* 51 F.3d 1421, 1443 (9th Cir. 1995) ("To pose a threat of monopolization, one firm *alone* must have power to control market output and exclude competition.") (emphasis in original).

ICTSI alleges that the relevant market is "the loading and unloading of freight, and related ancillary services, to and from dockside port of rest, for marine oceangoing cargo on West Coast ports and/or the submarket of the metropolitan Portland area." ICTSI CC ¶ 62. ICTSI further alleges that PMA and ILWU jointly possess the means to exclude competition within the relevant market. ICTSI, however, does not allege that ILWU and PMA are conspiring to create a monopoly for any single PMA member or firm or even for a small group of PMA members. Instead, ICTSI argues that ILWU and PMA are conspiring to create a monopoly on the West Coast ports for the 70-member PMA. ICTSI's allegations of such a conspiracy to create a "shared monopoly" fail to state a claim under Section 2.

"[A]n allegation of conspiracy to create a shared monopoly does not plead a claim of conspiracy under section 2." *Standfacts Credit Servs., Inc. v. Experian Info. Solutions, Inc.,* 405 F. Supp. 2d 1141, 1152 (C.D. Cal. 2005). As further explained by the U.S. District Court for the District of Columbia:

> A monopoly arises when a single firm "controls all or the bulk of a product's output, and no other firm can enter the market, or expand output, at comparable costs." The very phrase "shared monopoly" is paradoxical; when a small number of large sellers dominates a market, this typically is described

> as an oligopoly. In enacting the prohibitions on monopolies, Congress was concerned about "the complete domination of a market by a *single* economic entity," and therefore did not include "shared monopolies" or oligopolies within the purview of Section 2. As a result, "[o]ligopoly can, in some cases, violate Sections 1 and/or 3 of the Sherman Act, but *competitors,* by conspiring to maintain or create an oligopoly, do not run afoul of the Section 2 prohibitions against monopoly." To the extent that plaintiffs have alleged a market structure in which [Defendants] each possess and seek to protect market power within the same markets, their monopoly claims based on an alleged agreement to monopolize must fail.

Oxbow Carbon & Minerals LLC v. Union Pac. R. Co., 926 F. Supp. 2d 36, 46 (D.D.C. 2013) (emphasis in original) (citations omitted).[9]

PMA is a multiemployer bargaining unit that negotiates collective bargaining agreements and provides management and administrative services. It is not a competitor itself in the relevant market—its 70 members are competitors with one another. The fact that, pursuant to federal law, PMA shares the cost to

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[9] ICTSI also cites to *United States v. Am. Airlines,* 743 F.2d 1114 (5th Cir. 1984), which is distinguishable. In that case, the Fifth Circuit held that an offer to fix prices among two competitors who collectively controlled the market for a relevant period of time due to regulatory constraints was an attempt to monopolize in violation Section 2. Such a price-fixing agreement would have resulted in the equivalent of a single-firm price-setting, which is the essence of monopolization. That is not what oligopolies do.

run the joint dispatch center does not serve to make PMA a competitor performing, for example, stevedoring services.

There are numerous competitors in the relevant market, including the more than 70 PMA members and many non-PMA members. Thus, the alleged conduct by PMA and ILWU fails to state a claim for a violation of Section 2. *See Terminalift LLC v. Int'l Longshore & Warehouse Union Local 29,* 2013 WL 2154793, at *3-4 (S.D. Cal. May 17, 2013) ("Because PMA members compete against each other, the alleged conspiracy would create a 'shared monopoly' or oligopoly. Such conduct is not a violation of section 2."); *Phoenix Elec. Co. v. Nat'l Elec. Contractors Ass'n, Inc.,* 867 F. Supp. 925, 941-42 (D. Or. 1994) (rejecting a Section 2 claim because "[a]s a multi-employer bargaining agent, it negotiates collective bargaining agreements with the electrical union, and provides management and administrative services related to those agreements. . . . There is likewise no suggestion that any one or small group of the contractors who belong to [the multiemployer bargaining group] have or could obtain monopoly power. As mentioned previously, nothing in the record suggests that the members of [the multi-employer bargaining group] do not compete vigorously among themselves."); *accord Harking Amusement Enters., Inc. v. Gen. Cinema Corp.,* 850 F.2d 477, 490 (9th Cir. 1988) (declining to decide whether a shared monopoly could be viable under any circumstance, but holding that in a "small market with numerous sellers, no claim is stated under section 2").

5. Standing

ILWU and PMA also argue that ICTSI cannot maintain an antitrust lawsuit because it lacks anti-

trust standing. Because the Court finds that the alleged behavior is exempt from antitrust scrutiny under a combination of the *Noerr-Pennington* doctrine, the statutory labor exemption, and the nonstatutory labor exemption, the Court declines to reach the question of antitrust standing.

B. ICTSI's Breach of Fiduciary Duty Counterclaim

ICTSI alleges that, pursuant to its membership in PMA, PMA is "authorized to represent and act on behalf of" ICTSI and that PMA is authorized "to exercise independent judgment on ICTSI's behalf and/or to protect ICTSI's economic and other interests with regards to labor relations issues." ICTSI CC ¶ 75. ICTSI further alleges that it and PMA were in a fiduciary relationship under which PMA owed ICTSI duties of care, loyalty, good faith and fair dealing, and full, fair, and frank disclosure and that ICTSI breached those duties. *Id.* ¶¶ 76, 77.

PMA moves to dismiss ICTSI's breach of fiduciary duty counterclaim, arguing that: (1) the only potential fiduciary relationship and concomitant fiduciary duties alleged arise out of California corporation law and, under that body of law, PMA does not owe fiduciary duties to ICTSI; (2) the Court should abstain from considering the issue because it interferes with the autonomy of a voluntary association's internal management; and (3) the breach of fiduciary duty counterclaim is preempted by the Labor Management Relations Act ("LMRA"),[10] specifically Section 301,[11] and the *Garmon* preemption doctrine, which arises out

[10] 29 U.S.C. § 141, *et seq.*

[11] 29 U.S.C. § 185.

of the National Labor Relations Act ("NLRA").[12] PMA's arguments are unavailing. Accordingly, PMA's motion to dismiss ICTSI's breach of fiduciary duty claim is denied.

1. ICTSI has adequately pled a fiduciary relationship giving rise to fiduciary duties

   a. PMA is the agent of ICTSI with respect to the negotiation, administration, and management of the PCLCD

ICTSI alleges that PMA acts on behalf of ICTSI and exercises independent judgment on ICTSI's behalf in labor negotiations and labor relations issues. Although ICTSI does not use the word "agent" to describe PMA's relationship to ICTSI, these allegations serve to allege a principal-agent relationship. *See Eads v. Borman,* 277 P.3d 503, 508 (Or. 2012) ("Classically, an agency relationship 'results from the manifestation of consent by one person to another that the other shall act on behalf and subject to his control, and consent by the other so to act.'" (quoting *Vaughn v. First Transit, Inc.,* 206 P.3d 181, 186 (Or. 2009))).[13] PMA does not dispute

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[12] 29 U.S.C. § 151, *et seq.*

[13] PMA argues that California law should apply because the allegations involve PMA's "internal affairs" and any duty would arise out of California state law governing non-profit mutual benefit organizations. PMA Br. at 18, 21. Dkt. 132. The Court finds that the fiduciary relationship stems from the agency relationship between a principal and its agent, however, and not PMA's corporate status. Additionally, the specific allegations from which the Court determines that ICTSI states a counterclaim for breach of fiduciary duty do not involve PMA's "internal affairs." The Court applies Oregon law, however, the choice of law is immaterial to the outcome because, as PMA and ICTSI both concede, Oregon and California law on claims for breach of fiduciary do not conflict.

that it acts as the agent for ICTSI and PMA's other members with respect to the negotiation, administration, and management of the PCLCD. Instead, PMA argues that it owes fiduciary duties to the multiemployer group as a whole and not to any individual employer member.[14]

Agents owe independent fiduciary duties to their principals. *See Boyer v. Salomon Smith Barney,* 188 P.3d 233, 237 (Or. 2008) ("The law of agency imposes duties on the agent; those duties 'exist[ ] independent of the contract and without reference to the specific terms of the contract.'" (citing *Georgetown Realty v. Home Ins. Co.,* 831 P.2d 7, 14 (Or. 1992))). Here, PMA represents multiple principals. Oregon law recognizes that an agent can serve more than one principal. *Wallulis v. Dymowski,* 918 P.2d 755, 764 (Or. 1996); *Blair v. United Fin. Co.,* 365 P.2d 1077, 1078 (Or. 1961). Oregon courts have not, however, defined the contours of the fiduciary duties owed by an agent to a principal in the multiple representation context, so the Court looks to the Restatement of Agency[15] for guidance. Comment b to Section 3.16, Agent for Coprincipals, states that "[a]n agent who acts on behalf of more than one principal in the same matter

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[14] PMA also argues that because it is a California non-profit mutual benefit corporation, it does not owe any fiduciary duties to ICTSI. Whether PMA's status as a non-profit mutual benefit corporation gives rise to fiduciary obligations is irrelevant, however, because the Court finds that it is PMA's status as an agent of ICTSI that gives rise to fiduciary obligations. Non-profit mutual benefit corporations do not necessarily act as agents to their members, and PMA cites to no authority that, when non-profit mutual benefit corporations do act as an agent, their status as a non-profit mutual corporation negates agency principles.

[15] In considering the contours of agency law, Oregon courts look to the Restatement of Agency. *See Vaughn,* 206 P.3d at 185-89.

or transaction owes duties to all principals." Restatement (Third) of Agency § 3.16 cmt. b (2006). The Restatement goes on to describe the duties owed to multiple principals:

> (2) An agent who acts for more than one principal in a transaction between or among them has a duty
>
> (a) to deal in good faith with each principal,
>
> (b) to disclose to each principal
>
> (i) the fact that the agent acts for the other principal or principals, and
>
> (ii) all other facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and
>
> (c) otherwise to deal fairly with each principal.

Id. § 8.06(2). In sum, "the agent owes duties of good faith, disclosure, and fair dealing to all of the principals." *Id.* cmt. d(2).

Additionally, as noted above, the Court concludes that the multiemployer bargaining representative is analogous to the labor representative and has the right to favor one constituent over another. The Court similarly concludes that the multiemployer group representative, like the labor representative, has a duty of fair representation to its constituents. *See Siebler,* 563 F.2d at 371 (finding that members of an employer group have the right to expect that their

interests will be fairly represented and that their interests will not be "totally sacrificed"). Although an individual employer's interests may be subsumed to the interest of the group as a whole, that does not mean that PMA does not owe *any* duty to its individual employer members.

PMA is contracting on behalf of its members with a third party and negotiating a binding, legal agreement between its members and ILWU. Further, depending on the circumstances and the stage of the collective bargaining process, employers may not be able to withdraw from a multiemployer bargaining group if the bargaining representative is not fairly representing the employer. *See Charles D. Bonanno Linen Serv., Inc. v. N.L.R.B.,* 454 U.S. 404, 412 (1982) (noting that labor law "has sought to further the utility of multiemployer bargaining as an instrument of labor peace by limiting the circumstances under which any party may unilaterally withdraw during negotiations" and finding that impasse does not constitute extraordinary circumstances warranting withdrawal from a multiemployer group); *Siebler,* 563 F.2d at 371 ("We recognize that dissatisfaction with the results of group bargaining does not justify an untimely withdrawal."). Given these circumstances, if the multiemployer group representative owes no duty to any individual employer member and acts in bad faith, an employer may not have any recourse. Multiemployer bargaining groups are "important" and offer "advantages to both management and labor." *Brown,* 518 U.S. at 240. A finding that a multiemployer group representative owes no duty to any individual employer may weaken this bargaining institution.

Although PMA has a great deal of freedom to consider the interests of the multiemployer group as a

whole, the Court finds that PMA is the agent of ICTSI and owes ICTSI a duty of fair representation and to deal in good faith with respect to the negotiation, administration, and management of the PCLCD.[16] Other courts have similarly spoken of the relationship between multiemployer groups and the individual employers in agency terms. *See, e.g., Fed. Maritime Comm'n v. Pac. Maritime Ass'n ,* 435 U.S. 40, 45 (1978) (referencing PMA as "a collective-bargaining agent for a multiemployer bargaining unit made up of various employers of Pacific coast dockworkers"); *Resort Nursing Home v. N.L.R.B.,* 389 F.3d 1262, 1270 (D.C. Cir. 2004) ("If an employer is dissatisfied with the representation of its multi-employer association, it retains its remedies against the association under contract and agency law."); *N.L.R.B. v. Marcus Trucking Co.,* 286 F.2d 583, 588 (2d Cir. 1961) (discussing the multiemployer group relationship as governed by agency law when analyzing an individual employer's withdrawal from the unit, citing the Restatement of Agency, and noting that the NLRB has passed on "the question whether the Board has power to alter the rules of agency applicable in multi-employer bargaining").

b. ICTSI has pled sufficient facts to state a claim against PMA for breach of fiduciary duty

ICTSI alleges that PMA breached its duties of good faith and fair representation by: (a) failing to provide notice to ICTSI of the CLRC meeting and failing to fairly consider or present ICTSI's position; (b) refusing

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[16] There is no allegation that PMA did not fully disclose to ICTSI the fact that it represents other principals or other facts that ICTSI should know before joining the PMA.

to present ICTSI's position to joint committees and arbitrators; (c) threatening to fine or expel ICTSI if ICTSI did not assign the reefer work to ILWU members; (d) joining ILWU in legal efforts to compel ICTSI to assign the reefer work to ILWU members; (e) failing to vigorously seek the confirmation of the arbitration awards finding ILWU guilty of work stoppages and slowdowns; (f) causing inefficient or unqualified workers to be dispatched to ICTSI through the jointly administered hiring hall and failing to act on ICTSI's complaints regarding the quality of dispatched personnel and suggestions of a hiring hall monitor; and (g) failing to bring issues before the CLRC in order to stop the ongoing slowdowns, work stoppages, and safety gimmicks by ILWU. ICTSI CC ¶¶ 77A-G. The Court analyzes whether ICTSI alleges sufficient facts from which the Court could find that any of the alleged conduct was done in bad faith or constituted unfair representation.

The Court concludes that ICTSI fails to allege sufficient facts from which the Court could reasonably infer that the legal efforts to compel ICTSI to assign the reefer work were not done in good faith (¶ 77D). As discussed above in the Court's *Noerr-Pennington* analysis, ICTSI does not sufficiently allege facts from which it could be inferred that the legal proceedings were a sham or were otherwise filed in bad faith.

The Court also finds that ICTSI fails to plead sufficient facts from which the Court could reasonably infer that PMA has acted in bad faith with respect to the alleged work stoppages and slowdowns by ILWU (¶¶ 77E, G). PMA may not have brought the issue to the CLRC, but PMA filed a lawsuit in federal court seeking to confirm the arbitration award. *Pac. Mar. Ass'n v. Int'l Longshore & Warehouse Union Local 8,*

Case No. 3:12-cv-01100-SI (D. Or.). Additionally, in that lawsuit PMA sought a temporary restraining order to stop the alleged work stoppages and slowdowns. ICTSI alleges no facts showing why filing a federal lawsuit does not constitute "vigorously seek[ing]" confirmation of the arbitration award or why it is bad faith to seek a restraining order in federal court as opposed to bringing the issue before the CLRC.

With respect to ICTSI's allegation that it is a breach of fiduciary duty for PMA to threaten to fine or expel ICTSI (¶ 77C), ICTSI does not allege sufficient facts to show a breach of fiduciary duty. PMA has the right to interpret the PCLCD. ICTSI does not allege facts showing that PMA's interpretation of the PCLCD as requiring the reefer work be assigned to ILWU members was done in bad faith. PMA also has the right, under its Bylaws, to fine or expel members. The mere fact that PMA threatened to exercise such rights is not sufficient to show bad faith or unfair representation.

The Court, however, finds that ICTSI has alleged sufficient facts from which it can reasonably be inferred that PMA acted in bad faith or unfairly represented ICTSI with respect to the May 2012 CLRC meeting and other arbitration and committee meetings (¶¶ 77A, B). ICTSI alleges that PMA did not notify ICTSI of the CLRC meeting, did not consider ICTSI's position for that meeting and other meetings, and did not present ICTSI's position. PMA also did not offer ICTSI the opportunity to present its own position. ICTSI appears to be entitled to have its position considered in CLRC and other committee meetings and arbitrations. It may well be that PMA may elect not to agree with or present ICTSI's position and may present PMA's own, conflicting, position. But PMA is

ICTSI's agent with respect to the administration and management of the PCLCD and if PMA is not going to present ICTSI's position, basic notions of fairness and due process require that PMA notify ICTSI of that fact and that ICTSI be given the opportunity to present its own position.

The Court also finds that ICTSI has alleged sufficient facts from which it can reasonably be inferred that PMA acted in bad faith with respect to the dispatch of workers from the hiring hall to ICTSI (¶ 77F). PMA administers the hiring hall jointly with ILWU. ICTSI specifically alleges that inefficient or unqualified workers were dispatched, that ICTSI complained to PMA about the quality of the workers, that PMA ignored those complaints, and that PMA refused ICTSI's request that a hiring hall monitor be appointed to prevent hiring hall abuses. Assuming those allegations to be true, as the Court must at this stage in the proceedings, these allegations are sufficient to state a counterclaim for breach of fiduciary duty.

2. The California abstention doctrine relating to certain interpretation of rules and laws of private organizations does not apply

PMA argues that the Court should apply the abstention doctrine as enunciated by the California Supreme Court in *California Dental Ass'n v. Am. Dental Ass'n,* 590 P.2d 401 (Cal. 1979), and decline to consider ICTSI's counterclaim for breach of fiduciary duty. In *California Dental,* the state dental society expelled a member dentist after determining that the dentist had violated the ethics rules of both the state and the national society. *Id.* at 403. The national society reversed the expulsion on appeal and refused to consider holding a rehearing. *Id.* at 404. The state

organization argued that the national organization's refusal to consider the state organization's more stringent ethics code plainly contravenes the national organization's bylaws. *Id.* at 406. The California Supreme Court agreed, and held that:

> We conclude that when a private voluntary organization plainly contravenes the terms of its bylaws, the issues of whether and to what extent judicial relief will be available depend on balancing (1) the interest in protecting the aggrieved party's rights against (2) the infringement on the organization's autonomy and the burdens on the courts that will result from judicial attempts to settle such internal disputes.

Id. at 403. The heart of the *California Dental* case was a dispute between a national society and one of its local chapters as to whether the national organization's conduct violated its own bylaws. Rather than abstaining, the court in *California Dental* found that it did and ordered the national society to reconsider the issue in light of the state organization's higher ethical principles. *Id.* at 408. In doing so, the court noted:

> In many disputes in which such rights and duties [affecting internal government and the management of a society's affairs] and are at issue, however, the courts may decline to exercise jurisdiction. Their determination not to intervene reflects their judgment that the resulting burdens on the judiciary outweigh the interests of the parties at stake. One concern in such cases is that judicial attempts to construe ritual or obscure rules and laws of private organizations may lead the courts

> into what Professor Chafee called the "dismal swamp." Another is with preserving the autonomy of such organizations. We [previously] stated . . . that "in adjudicating a challenge to the society's rule as arbitrary a court properly exercises only a limited role of review. As the Arizona Supreme Court observed . . . 'In making such an inquiry, the court must guard against unduly interfering with the Society's autonomy by substituting judicial judgment for that of the Society in an area where the competence of the court does not equal that of the Society . . . .'"

Id. at 405.

The facts as alleged by ICTSI do not support application of the abstention doctrine articulated in *California Dental.* First, PMA is an agent of ICTSI and negotiates binding, legal agreements on behalf of ICTSI. *California Dental* and the other cases cited by PMA do not involve situations where the voluntary association is acting as an agent of the member and binding the member to legal contracts with third parties. Second, the resolution of ICTSI's breach of fiduciary duty counterclaim does not involve interpreting "ritual or obscure rules and laws of private organizations." *Id.* Third, ICTSI is not challenging an internal rule of PMA, and the Court would not be unduly interfering with PMA's autonomy by reaching the issue of whether PMA breached its duties of good faith and fair representation. This is not a claim relating to PMA's internal government. Finally, the heart of ICTSI's fiduciary duty counterclaim is whether PMA acted fairly and in good faith in representing ICTSI at the May 2012 CLRC meeting and other meetings and in dispatching workers to ICTSI and

responding to ICTSI's complaints about dispatched workers. These are not areas where the Court's competence does not equal PMA's competence. The Court does not find that any potential infringement of PMA's interest in autonomy outweighs ICTSI's interest in having its rights and claims adjudicated. The Court declines to abstain from considering ICTSI's counterclaim for breach of fiduciary duty.

3. Section 301 and *Garmon* preemption do not apply

PMA also argues that the fiduciary duty counterclaim should be dismissed because it is preempted by Section 301 of the LMRA and *Garmon* preemption.

a. Section 301 preemption

Section 301 of the LMRA preempts state law claims that are "substantially dependent on analysis of a collective-bargaining agreement." *Burnside v. Kiewit Pac. Corp.,* 491 F.3d 1053, 1059 (9th Cir. 2007) (quoting *Caterpillar Inc. v. Williams,* 483 U.S. 386, 394 (1987)). To determine whether a right conferred by state law is substantially dependent on the terms of a collective-bargaining agreement, a court should "decide whether the claim can be resolved by looking to versus interpreting the [collective-bargaining agreement]." *Id.* at 1060 (citation and quotation marks omitted). "If the latter, the claim is preempted; if the former, it is not." *Id.*

As explained above, ICTSI's adequately stated counterclaim for breach of fiduciary duty rests on narrow allegations that PMA violated its fiduciary duties with respect to representing ICTSI at the CLRC meeting, at other meetings and arbitrations, and in dispatching inefficient or unqualified workers to ICTSI and failing properly to address ICTSI's com-

plaints about the dispatched workers. PMA's fiduciary duties to deal in good faith and fairly represent ICTSI, as discussed above, arise under agency law and exist independent of PMA's contractual obligations under the PCLCD. Thus, the Court may consult the terms of the PCLCD to inform its analysis of whether PMA dealt in good faith and fairly represented ICTSI, but the resolution of ICTSI's fiduciary duty counterclaim does not appear to depend on the Court's interpretation of the PCLCD.

With regard to ICTSI's allegations that PMA failed to provide timely notice and fairly represent ICTSI's interests, that issue will likely primarily involve consideration of PMA's obligations under its Bylaws and general agency law, and only tangentially involve what the PCLCD instructs regarding dispute resolution procedures. To the extent the Court looks to the PCLCD, it would be just one consideration in determining whether PMA acted in good faith and fairly represented ICTSI. Similarly, what the PCLCD instructs with respect to dispatching workers from the hiring hall appears, at most, to be a minor consideration in evaluating whether PMA acted in good faith in dispatching workers, addressing ICTSI's complaints regarding those workers, and refusing to appoint a hiring hall monitor. For example, the PCLCD may give PMA broad discretion in dispatching workers, but if PMA exercised that discretion in bad faith, even if it is not a violation of the PCLCD, it could still be a violation of PMA's fiduciary duty to represent ICTSI in good faith.

The terms of the PCLCD are not dispositive of whether PMA dealt in good faith with ICTSI in the alleged matters. Because the Court can resolve ICTSI's fiduciary duty counterclaim by looking to, but

not interpreting, the terms of the PCLCD, the Court finds that ICTSI's fiduciary duty counterclaim is not substantially dependent on an analysis of the PCLCD. Thus, PMA's argument that ICTSI's fiduciary duty counterclaim is preempted by Section 301 is without merit.

b. *Garmon* preemption

Garmon preemption was first articulated in *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon,* 359 U.S. 236, 238 (1959). *Garmon* preemption "prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Wis. Dept. of Indus. v. Gould Inc.,* 475 U.S. 282, 286 (1986). A primary justification for the *Garmon* doctrine is "the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose." *Vaca,* 386 U.S. at 180-81. The *Garmon* preemption doctrine is not applicable in cases involving alleged breaches of the union's duty of fair representation. *Id.* at 181.

As discussed above, the Court finds that ICTSI has adequately stated a counterclaim for breach of fiduciary duty based on allegations that PMA violated its duties by: (1) failing to notify ICTSI of the CLRC meeting and failing to fairly consider or present ICTSI's position, or provide ICTSI timely notice to present its own position; (2) failing to fairly consider or present ICTSI's position, or provide ICTSI timely notice to present its own position, to joint committees and arbitrators considering ILWU grievances regard-

ing assignment of the reefer work; and (3) causing the dispatch of inefficient or unregistered workers to ICTSI, failing to act on ICTSI's complaints regarding those workers, and failing to appoint a hiring hall monitor to prevent hiring hall abuses. This alleged conduct, however, is not governed by the NLRA and is not prohibited by that statute. The NLRA says little about multiemployer bargaining units, except to establish that it is an unfair labor practice for a union to interfere with the employer's selection of its bargaining representative. 29 U.S.C. §158(b)(1)(B).

PMA argues that the conduct alleged in ICTSI's fiduciary duty counterclaim is prohibited [sic] the NLRA and that *Garmon* preemption therefore applies to the fiduciary duty counterclaim. PMA argues that the alleged conduct is prohibited by section 8(a)(5) (which establishes that it is an unfair labor practice for an employer to refuse to bargain collectively with a representative of his employees), section 8(b)(3) (which establishes that it is an unfair labor practice for a labor organization to refuse to bargain collectively with an employer), or section 8(e) (which establishes that it is an unfair labor practice for a labor organization and employer to agree that the employer will stop doing business with any other employer). The Court finds that the three surviving allegations supporting ICTSI's fiduciary duty counterclaim are not prohibited by these section [sic] of the NLRA. The allegations do not involve a refusal by PMA or ILWU to bargain with one another, nor an alleged agreement between PMA and ILWU to cease doing business with another employer. Thus, *Garmon* preemption is not applicable.

Courts have also deferred to the NLRB in determining what constitutes impasse and when an employer can permissibly withdraw from a multiemployer

bargaining unit, but such deferral is rooted in the NLRB's expertise in impasse, appropriate conduct upon impasse, and balancing pursuit of the national policy of promoting labor peace and collective bargaining. *Bonanno,* 454 U.S. at 414. There is, however, no such allegation in ICTSI's fiduciary duty counterclaim. Here, the breach of fiduciary duty allegations involve conduct between PMA and ICTSI and duties owed by PMA to ICTSI.

As an additional consideration, the requirement of fair representation by unions is set forth in the NLRA, and yet the Supreme Court has held that claims of unfair representation by a union are not preempted by *Garmon.*[17] *Vaca,* 386 U.S. at 181-86; *see also Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6,* 493 U.S. 67, 74-76 (1989) (refusing to create an exception to the *Vaca* rule that *Garmon* preemption does not apply to claims of unfair representation). There is even less reason to extend *Garmon* preemption to claims of unfair representation by a multiemployer group representative because the NLRA does not address multiemployer representation in a similar manner as it does union representation, and the Court will not so extend the doctrine. The alleged conduct is not governed by the NLRA and, therefore, ICTSI's claim against PMA for breach of fiduciary duty is not preempted by *Garmon* preemption.

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[17] Such claims may, however, be preempted by Section 301. *See, e.g., Scott v. Machinists Automotive Trades Dist. Lodge No. 190 of N. Cal.,* 827 F.2d 589, 591 (9th Cir. 1987). As discussed above, Section 301 preemption does not apply to ICTSI's breach of fiduciary duty counterclaim.

4. Stay of ICTSI's Counterclaim Against PMA for Breach of Fiduciary Duty

Although ICTSI's claim against PMA for breach of fiduciary duty is not dependent on an interpretation of the PCLCD, it is related to the conduct by ILWU, alleged to be performed jointly with PMA, that ICTSI and the Port allege are unfair labor practices. Whether the conduct is an unfair labor practice may be evidence of and relevant to the question of PMA's good or bad faith. The issue of whether ILWU and PMA's conduct constitutes an unfair labor practice is before the NLRB, and there also are outstanding issues as to whether the NLRB has jurisdiction to consider the allegations to the extent they involve the Port. That issue is before the Ninth Circuit. Accordingly, the Court stays ICTSI's breach of fiduciary duty counterclaim against PMA until after the jurisdictional issues of the NLRB are resolved and, if applicable, after the NLRB decides whether the alleged conduct constitutes an unfair labor practice. Such a stay will avoid the waste of duplicating efforts in more than one forum and avoid the possibility of conflicting decisions in separate courts of appeal. Further, the Court may be able to rely on the NLRB's expertise in interpreting the NLRA when deciding whether certain conduct is or is not an unfair labor practice, which may be relevant to ICTSI's breach of fiduciary duty claim against PMA.

C. The Port's Tortious Interference Counterclaim Against Both PMA and ILWU

The Port asserts a counterclaim for tortious interference against both PMA and ILWU. To state a claim for

tortious interference with contract[18] under Oregon law, a party

> must allege each of the following elements: (1) the existence of a professional or business relationship (which could include, *e.g.,* a contract or a prospective economic advantage), (2) intentional interference with that relationship, (3) by a third party, (4) accomplished through improper means or for an improper purpose, (5) a causal effect between the interference and damage to the economic relationship, and (6) damages.

McGanty v. Staudenraus, 901 P.2d 841, 844 (Or. 1995) (citations omitted).

PMA moves to dismiss the Port's counterclaim for tortious interference with contract on the grounds that it is preempted by Section 301 of the LMRA and, alternatively, that the Port did not sufficiently plead the "improper means or improper purpose" element of tortious interference with contract. ILWU joins in this motion and additionally moves to dismiss the tortious interference counterclaim against it as preempted by Section 303 of the LMRA.

1. The Port's tortious interference counterclaim against ILWU is preempted by Section 303 of the LMRA

Section 303(a) of the LMRA prohibits certain secondary boycott activities. 29 U.S.C. § 158(b)(4)(B); 29 U.S.C. § 187 ("[i]t shall be unlawful . . . in an

[18] Under Oregon law, tortious interference with contract is the tort of "intentional interference with economic relations." *See Rotec Indus., Inc. v. Mitsubishi Corp.,* 348 F.3d 1116, 1122 (9th Cir. 2003).

industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title"). As relevant to this case, under section 158(b)(4),[19] it is an unfair labor practice for a labor organization or its agents:

> (i) to engage in, or to induce or encourage any individual . . . 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
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> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .
>
> * * * [or]
>
> (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 . . . .

29 U.S.C. § 158(b)(4).

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[19] 29 U.S.C. § 158 is commonly referred to as "Section 8" of the NLRA.

In support of its tortious interference counterclaim, the Port alleges that PMA and ILWU: (a) pressured, coerced, and threatened the Port to assign the reefer work to ILWU-represented employees; (b) pressured, coerced, and threatened ICTSI to assign the reefer work to ILWU-represented employees; (c) coerced or induced carriers to bypass or threaten to bypass Terminal 6 to pressure the Port to give up the reefer work; (d) coerced or induced carriers into pressuring the Port to give up the reefer work; (e) threatened ICTSI with large fines or expulsion from the PMA; (f) instituted and maintained litigation against ICTSI seeking to force ICTSI to assign the reefer work to ILWU-represented employees; and (g) "encouraged" and "acquiesced in" ILWU's improper and illegal coercion of the Port to assign the reefer work to ILWU-represented employees and failed to properly represent ICTSI in connection with ILWU-filed grievances and work issues or permit ICTSI to protect its own interests. Port's Am. Ans. and Counterclaims (ECF 136) ("Port CC") ¶¶ 69a-g. Although the Port does not distinguish which conduct was allegedly engaged-in by ILWU and which by PMA, it is clear that allegations (e) and (g) are not allegations by the Port of conduct committed by ILWU. With respect to allegation (f), although ILWU is a plaintiff in this pending lawsuit, the Port does not allege sufficient facts to show that the filing of this lawsuit was wrongful or otherwise improper.

The remaining alleged conduct on which the Port bases its tortious interference counterclaim, allegations (a)-(d), allege that the ILWU pressured, coerced, and threatened the Port and other businesses in an attempt to force the Port to give up the reefer work and ICTSI to assign the reefer work to ILWU-represented workers. These are secondary boycott activities. The

Port appears to argue that this conduct is not preempted by Section 303 because it does not all fall within the prohibition of Section 303. The Port points to some specific conduct that is not considered an unfair labor practice, such as the CLRC decision in May 2012. The Port's argument fails for two reasons.

First, the Court finds that the alleged conduct is governed by Section 303. Coercion and threats to force the Port or ICTSI to assign the reefer work to ILWU members is covered by the statute. Second, even if some sliver of specific conduct did not fall within the parameters of Section 303's covered labor practices, this would not prevent Section 303 preemption.

The type of conduct identified as an unfair labor practice and "made the subject of a private damage action was considered by Congress, and [Section] 303(a) comprehensively and with great particularity 'describes and condemns specific union conduct directed to specific objectives.'" *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton,* 377 U.S. 252, 258 (1964) (quoting *Local 1976, United Bhd. of Carpenters and Joiners of Am. v. N.L.R.B.,* 357 U.S. 93, 98 (1958)). Congress selected "which forms of economic pressure should be prohibited by [Section] 303," striking a balance between the "uncontrolled power of management and labor" by preserving labor's right "to bring pressure to bear on offending employers" while "shielding unoffending employers and others from pressures in controversies not their own." *Id.* at 258-59 (quotation marks and citation omitted). Allowing labor to bring certain types of economic pressure while prohibiting other types of economic pressure is a "weapon of self-help" that "is a part of the balance struck by Congress between the

conflicting interests of the union, the employees, the employer and the community." *Id.* at 259.

State law cannot "be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted [Section] 303" because this would "frustrate the congressional determination to leave this weapon of self-help available" and "upset the balance of power between labor and management expressed in our national labor policy." *Id.* at 259-60. Although some alleged secondary activity may be "neither protected nor prohibited," it is still preempted by Section 303 because "[f] or a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy" as a state allowing prohibited conduct. *Id.* at 258, 260. "In short, this is an area of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Id.* at 261 (quotation marks and citation omitted); *see also San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters,* 125 F.3d 1230, 1235 (9th Cir. 1997) ("The interference with prospective economic advantage and contractual rights claims are preempted by section 303 of the LMRA.").

The Supreme Court has, however, carved out an exception to Section 303 preemption for allegations "'of conduct marked by violence and imminent threats to the public order.'" *Local 20,* 377 U.S. at 257 (citation omitted). State jurisdiction prevails in such situations because of the "compelling state interest" of maintaining "domestic peace." *Garmon,* 359 U.S. at 247. This exception does not apply to the facts alleged by the Port. The Port does not allege ILWU engaged in

violence or imminent threats to the public order or other conduct that is the subject of a compelling state interest outside of coercion and threats in a labor dispute. Accordingly, the Port's tortious interference counterclaim against ILWU is preempted by Section 303 and is dismissed.

2. The Port fails to state a claim for tortious interference against PMA

The Port's allegations of conduct allegedly giving rise to a tortious interference counterclaim against PMA combines alleged conduct by PMA individually, PMA acting in concert with ILWU, and PMA "encouraging" or "acquiescing in" ILWU's wrongful conduct. Port CC ¶ 69. The Port's failure to specify which of the acts of allegedly wrongful conduct were performed by PMA itself is grounds for dismissing the tortious interference counterclaim against PMA. Even assuming, however, that all of the alleged wrongful conduct was engaged-in by PMA, the Port still fails to state a claim for tortious interference because it fails to sufficiently allege improper purpose or improper means.

a. Improper purpose

Under a claim for tortious interference with contract, a defendant acts with improper purpose if the defendant's purpose was "to inflict injury on the plaintiff 'as such.'" *Nw. Natural Gas Co. v. Chase Gardens, Inc.,* 982 P.2d 1117, 1124 (Or. 1999) (quoting *Top Serv. Body Shop v. Allstate Ins. Co.,* 582 P.2d 1365, 1371 (Or. 1978). "Generally, a defendant's subjective judgment as to its own business purposes will control." *Id.* It is not improper for a defendant to interfere with a contract in a manner "wholly consistent with [its] pursuit of its own business purposes as it [sees] them." *Top Serv.,* 582 P.2d at 1372.

The Port does not allege that PMA's purpose was to inflict injury on the Port. The Port's allegation of improper purpose is that PMA, with "full knowledge of the Port's right to control and assign the" reefer work, sought to require ICTSI to breach its obligations to the Port under the Terminal 6 lease and "to misappropriate the [reefer work] so that ICTSI would perform the services using ILWU labor." Port CC at ¶ 67. Thus, as alleged, PMA's purpose is to ensure that ILWU-represented employees perform the reefer work, not to harm the Port. Additionally, PMA's purpose of ensuring that ILWU members perform the reefer work is wholly consistent with PMA's business purpose of enforcing its interpretations of its contracts. Thus, the Port has not sufficiently alleged that PMA acted with improper purpose.

b. Improper means

Under Oregon law, to constitute improper means conduct "must violate some objective, identifiable standard, such as a statute or other regulation, or a recognized rule of common law, or, perhaps, an established standard of a trade or profession." *Nw. Nat'l,* 982 P.3d at 1124. Improper means include "violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood." *Top Serv.,* 582 P.2d at 1371 n.11. In applying this standard to the Port's allegations, the Port fails to allege sufficient facts that PMA used "improper means."

The Port's allegations (a) through (d) are that PMA pressured, coerced, or threatened various businesses in order to force ICTSI to assign the reefer work to ILWU members. The Port uses the conclusory term "threatened," but does not allege any facts relating to the alleged "threat." If PMA threatened violence or

property destruction, that would fall within Oregon's definition of improper means, but the Port makes no such allegation. It appears that the Port is alleging threats and coercion by economic pressure. This is similar to allegation (e), which alleges that PMA threatened ICTSI with fines or expulsion. Oregon, however, has not accepted economic pressure as a type of "improper means."

The Port cites to *Scutti Enters., LLC v. Park Place Entm't Corp.,* 322 F.3d 211 (2d Cir. 2003), to support the Port's argument that economic pressure may constitute improper means. *Scutti,* however, applied New York law, which defines improper means as "representing 'physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure.'" *Id.* at 216 (quoting *NBT Bancorp Inc. v. Fleet/Norstar Fin. Grp.,* 664 N.E.2d 492, 497 (N.Y. 1996)). Oregon, unlike New York, however, has not defined improper means to include some degrees of economic pressure. In Oregon's seminal case defining improper means, *Top Service,* the Oregon Supreme Court, after explaining that improper means requires a violation of a statute, regulation, recognized rule of common law, and perhaps an established standard of a trade or profession, noted that "violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood" are examples of improper means. *Top Serv.,* 582 P.2d at 1371 n.11. This list of wrongful conduct was gleaned from the Restatement (Second) of Torts, Tent. Draft No. 23 §§ 766 and 767. Notably absent from *Top Services's* list of improper means, however, is economic pressure, even though economic pressure was specifically included as another type of improper means in the draft Restatement that was relied upon by the Oregon

Supreme Court. Indeed, the only improper means listed in the draft Restatement that the Oregon Supreme Court did not include was economic pressure.

Further, analyzing whether economic pressure is an improper means requires a balancing test, considering the circumstances in which the pressure is exerted, the objective of the pressure, the degree of coercion, the extent of harm that it threatens, the effect upon neutral parties and competition, and the general reasonableness of the pressure. Restatement (Second) of Torts § 767 cmt. c.[20] This analysis is antithetical to the "objective" standard under Oregon law. Indeed, *Top Service* specifically noted that there are "difficulties inherent in 'balancing' as an approach to individual cases" in the context of tortious interference. *Top Serv.,* 582 P.2d at 1371 n.12. Accordingly, the Court will not expand Oregon's definition of improper means to include economic pressure. Allegations (a) through (e), which allege that PMA threatened, pressured, or coerced the Port and other businesses with economic pressure, are thus insufficient to state a claim of tortious interference.

The Port's allegation that PMA engaged in litigation to force ICTSI to assign the reefer work to ILWU members (allegation (f)) is also insufficient to state a claim for tortious interference. Wrongfully instituting litigation may support a claim for tortious interference, but the Port does not allege sufficient facts from which the Court can reasonably infer that the two lawsuits initiated by PMA were sham lawsuits, were filed without regard to merit, or were otherwise

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[20] The balancing test approach of the Restatement (Second) of Torts remains unchanged from Draft No. 23 relied upon by the Oregon Supreme Court in *Top Service.*

unfounded. As discussed above, PMA succeeded at summary judgment in one lawsuit, which negates an argument that it was a wrongfully instituted, sham, or unfounded.

The Port's final allegation (allegation (g)) is that PMA "encouraged" or "acquiesced" to ILWU's wrongful conduct and that PMA failed properly to represent ICTSI. These are not violations of an "objective, identifiable standard[]" that can support a claim for tortious interference. *Northwest Nat'l,* 982 P.3d at 1124.

"Acquiesce" means to "accept tacitly or passively; to give implied consent." Black's Law Dictionary 26 (9th ed. 2009). The Port does not allege that PMA had a duty to speak out against ILWU's alleged conduct and that by remaining silent PMA violated a statute, regulation, or rule of common law. Thus, the Port fails to allege facts from which it can reasonably be inferred that PMA's "acquiescence" constituted improper means.

To the extent the Port is attempting to plead that PMA was jointly liable for ILWU's tortious conduct by "encouraging" ILWU, thus rendering PMA's conduct wrongful, the Port must plead sufficient facts from which an underlying tort by ILWU and joint liability by PMA can be inferred. Under Oregon law, joint liability requires pleading sufficient facts from which it can reasonably be inferred that PMA (1) performed a tortious act in concert with or pursuant to a common design with ILWU; (2) knew that ILWU's conduct constituted a breach of duty and gave ILWU substantial assistance or encouragement; or (3) gave substantial assistance to ILWU in accomplishing a tortious result and PMA's own conduct, separately, constitutes a breach of duty to the Port. *Granewich v. Harding,* 985 P.2d 788, 792 (Or. 1999). The conclusory allegation

that PMA "encouraged" ILWU's "improper and illegal conduct" is insufficient. Port CC ¶ 69g.

Finally, the allegation that PMA did not properly represent ICTSI in response to ILWU grievances and work actions does not sufficiently state a claim for tortious interference with the Port's economic relationship with ICTSI. The Court interprets the Port's allegation and argument to be that PMA breached its fiduciary duty to ICTSI, thereby rendering PMA's conduct wrongful and supporting a claim for tortious interference by the Port. Whether PMA may have violated its fiduciary duty to ICTSI, however, is a claim for ICTSI to bring against PMA, which ICTSI has done. The Court is unaware of, and the Port does not identify, any Oregon appellate case that holds that a breach of fiduciary duty constitutes improper means for purposes of stating a claim for tortious interference by a third party.

There are other jurisdictions that accept a breach of fiduciary duty as "improper means," but they are jurisdictions that also recognize that economic pressure may constitute improper means. *See, e.g., Hannex Corp. v. GMI, Inc.,* 140 F.3d 194, 206 (2d Cir. 1998) (noting that breach of fiduciary duty constitutes wrongful means; applying New York law, which recognizes that applying economic pressure may constitute wrongful means); *Harris Group, Inc. v. Robinson,* 209 P.3d 1188, 1200 (Col. App. 2009) (same, applying Colorado law). Given the fact that Oregon has not accepted economic pressure as improper means and focuses on an objective standard, the Court will not expand the concept of improper means under Oregon tort law.

Additionally, in those jurisdictions that have accepted a breach of fiduciary duty as "improper means," the

fiduciary duty breached is a duty owed to the plaintiff *Id.* That is not the situation alleged by the Port. The Port alleges that PMA breached its fiduciary duty owed to ICTSI, not that PMA breached any such duty owed to the Port or caused ICTSI to breach any fiduciary duty owed to the Port. For all of these reasons, the Port fails adequately to state a claim against PMA for tortious interference.

3. Section 301 preemption

Because the Court finds that the Port fails to state a claim against PMA or ILWU for tortious interference, the Court does not reach the issue of Section 301 preemption.

CONCLUSION

PMA's motion to dismiss ICTSI's antitrust and breach of fiduciary duty counterclaims (ECF 131), joined in part by ILWU (ECF 133), is granted in part and denied in part. ICTSI's antitrust counterclaim against both PMA and ILWU is dismissed. ICTSI's counterclaim against PMA for breach of fiduciary duty is not dismissed, but that counterclaim is stayed. PMA and ILWU's motions to dismiss the Port's counterclaim for tortious interference (ECF 138 and 146) are granted, and the Port's tortious interference counterclaim is dismissed.

IT IS SO ORDERED.

DATED this 24th day of March 2014.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-35504

D.C. No. 3:12-cv-01058-SI

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION; PACIFIC MARITIME ASSOCIATION,

Plaintiffs-Counter-Claim-Defendants-Appellees,

v.

ICTSI OREGON, INC., an Oregon corporation,

Defendant-Counter-Claimant-Plaintiff-Appellant.

Appeal from the United States District Court for the District of Oregon Michael H. Simon, District Judge, Presiding

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Argued and Submitted October 7, 2016
Portland, Oregon

Filed July 24, 2017

Before: Diarmuid F. O'Scannlain, Richard R. Clifton, and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge O'Scannlain;
Concurrence by Judge Clifton

COUNSEL

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Ronald F. Wick (argued), Cozen O'Connor, Washington, D.C.; Eleanor J. Morton (argued) Emily M. Maglio, and Robert S. Remar, Leonard Carder LLP, San Francisco, California; for Plaintiffs-Counter-Claim Defendants-Appellees.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether allegedly anticompetitive activities engaged in jointly by a labor union and a multi-employer collective bargaining association violate antitrust law.

I

A

ICTSI Oregon, Inc. ("ICTSI"), a subsidiary of International Container Terminal Services, Inc., began operating a marine shipping facility ("Terminal 6") in 2011, leased from the Port of Portland. It employed longshoremen and mechanics, among others, represented by the International Longshore and Warehouse Union ("ILWU"), a labor union that represents many of the shore-based laborers of the maritime industry.

ICTSI is a member of the Pacific Maritime Association ("PMA"), a multi-employer collective bargaining association representing many types of maritime employers who hire dockworkers and longshoremen. PMA represents ICTSI in collective bargaining negotiations with ILWU.

ILWU and PMA are parties to a collective bargaining agreement known as the Pacific Coast Longshore and Clerks Agreement (the "CBA") covering the entire West Coast of the United States which governed the employment terms for all longshoremen employed by ICTSI during all times relevant to this appeal. The CBA is administered by the Joint Coast Labor Relations Committee ("Joint Committee"). The parties disagree over whether the Joint Committee, which meets regularly as the master labor-management committee under the CBA, has the authority to issue contractual interpretations that are binding on all signatories. ILWU and PMA agreed that, with some exceptions, all reefer work—the work of plugging, unplugging, and monitoring refrigerated shipping containers—would be performed by ILWU for all PMA members.

ILWU sought to perform the reefer work at Terminal 6, but such work had historically been within the jurisdiction of the International Brotherhood of Electrical Workers ("IBEW"). The Joint Committee met on May 23, 2012, to resolve the disputed work assignment and determined that the work belonged to ILWU and then ordered ICTSI to assign the work accordingly. ICTSI argued, and still argues, that the reefer work at Terminal 6 was not its to assign under the terms of its lease with the Port of Portland. On June 4, 2012, an arbitrator, claiming authority under the CBA's grievance provisions, determined that ICTSI was in violation of the CBA and ordered it to give the reefer work

at Terminal 6 to ILWU. The Joint Committee issued another decision a few days later, incorporating the arbitrator's decision and reiterating its previous command that ICTSI grant the disputed work to ILWU. ICTSI also alleges that PMA, with the encouragement of ILWU, threatened numerous daily fines of $50,000 and even expulsion of ICTSI from the collective bargaining association to goad it into compliance with the Joint Committee decisions.

Meanwhile, ICTSI commenced a § 10(k) proceeding under the National Labor Relations Act ("NLRA"), before the National Labor Relations Board ("NLRB"), to resolve the jurisdictional dispute between the rival unions. 29 U.S.C. § 160(k). The NLRB issued a decision on August 13, 2012, finding that ILWU workers were not entitled to the reefer work at Terminal 6, but rather that IBEW workers were. *Int'l Bhd. of Elec. Workers,* 358 N.L.R.B. 903, 907 (2012).[1]

B

1

While the NLRB proceeding was pending, ILWU and PMA jointly filed this suit against ICTSI in federal district court under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, asking it to order ICTSI to comply with the recently issued Joint Committee decisions.

ICTSI counterclaimed and alleged, among other things, that ILWU and PMA violated Sections 1 and 2

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[1] PMA responded by filing a suit in federal district court seeking to vacate the NLRB's decision. The district court granted summary judgment to PMA, but we reversed, concluding that the district court lacked jurisdiction to review the NLRB's decision. *Pac. Mar. Ass'n v. NLRB,* 827 F.3d 1203, 1213 (9th Cir. 2016).

of the Sherman Act through their agreement to assign the disputed work to ILWU and their actions taken to enforce such agreement. 15 U.S.C. §§ 1-2. Specifically, ICTSI alleged that ILWU and PMA used the collective bargaining process to create a monopoly over longshoreman work on the West Coast: ILWU benefits because only its workers are able to perform longshoreman work for PMA-member employers, and PMA benefits because it collects fees for each hour worked by ILWU longshoremen.

ICTSI further alleged in its counterclaim that in service of their agreement to monopolize West Coast port services, ILWU and PMA worked together to commit various illegal anticompetitive acts which reduced competition in the relevant market[2]—raising prices

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[2] ICTSI, in its counterclaim, specifically alleged that (1) PMA, with the encouragement of ILWU, threatened ICTSI with daily fines of $50,000 for refusing to give the disputed reefer work to ILWU workers; (2) PMA threatened ICTSI with fines for initiating proceedings with the NLRB; (3) ILWU and PMA improperly used the Joint Committee to issue determinations before using the federal courts to enforce the collusive, illegal decisions issued by the Joint Committee; (4) ILWU and PMA discriminated against non-PMA members, as well as ICTSI, by the terms of the CBA granting some PMA members an exemption from provisions granting certain work to ILWU; (5) a PMA board member boycotted the Port of Portland over ICTSI's refusal to give the disputed reefer work to ILWU; (6) ILWU members engaged in slowdown activity at Terminal 6 even after the NLRB determined that ITCSI [sic] did not control the disputed reefer work; (7) ILWU and PMA filed sham lawsuits against ICTSI; (8) ILWU and PMA interfered in ICTSI's contractual relationship with the Port of Portland; (9) ILWU caused other unions to lose similar work in ports in Washington and San Francisco; (10) ILWU threatened third parties in other Oregon ports in order to gain access to longshoreman work; (11) ILWU violated the labor laws; and (12) ILWU and PMA used a jointly-run hiring hall to send inefficient and unqualified workers to ICTSI.

and injuring consumers. ICTSI claimed at least $4,000,000 in damages to itself as well.

2

The district court stayed most of the parties' claims pending resolution of various disputes filed before the NLRB. However, the district court allowed ILWU and PMA to file a joint motion to dismiss ICTSI's antitrust counterclaim and then granted it under Federal Rule of Civil Procedure 12(b)(6), concluding that a shared monopoly claim was not viable under Section 2 of the Sherman Act and that the alleged anticompetitive conduct was immunized from antitrust scrutiny because of a combination of the *Noerr-Pennington* doctrine, the statutory labor exemption, and the nonstatutory labor exemption.

ICTSI moved for entry of a partial final judgment pursuant to Federal Rule of Civil Procedure 54(b), which the district court granted, dismissing ICTSI's antitrust counterclaim with prejudice. All other issues remain stayed in the district court pending the resolution of related NLRB proceedings.[3] This timely appeal followed.

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[3] The related NLRB proceedings cited by the district court are Case Nos. 19-CC-87504, 19-CD-87505, 19-CC-82533, and 19-CC-82744. The cases were consolidated for review by an administrative law judge. *Int'l Longshore & Warehouse Union, AFL-CIO,* 363 N.L.R.B. No. 12, 2015 WL 5638153, at *2 (Sept. 24, 2015). On September 24, 2015, a three-member panel of the NLRB affirmed the judge's decision that ILWU violated labor law by engaging in improper job actions against ICTSI and that ILWU must cease engaging in such activity. *Id.* A three-member panel of the NLRB affirmed another administrative law judge's decision in Case No. 19-CC-100903, concluding that ILWU had engaged in improper work slowdown activities at Terminal 6 against ICTSI. *Int'l*

II

A

ILWU and PMA contend that the district court erred in entering a Rule 54(b) partial final judgment on the antitrust counterclaim. They assert that the facts and legal arguments of the antitrust counterclaim substantially overlap with other claims and counterclaims before the district court, and that the district court's grant of a partial final judgment will generate piecemeal appeals and waste judicial resources. *See Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC,* 548 F.3d 738, 747 (9th Cir. 2008). Accordingly, they argue that we should vacate the judgment. *See Morrison-Knudsen Co. v. Archer,* 655 F.2d 962, 966 (9th Cir. 1981) (concluding that if "[t]he claims disposed of by the Rule 54(b) judgment [are] inseverable, both legally and factually, from claims that remained unadjudicated in the district court, and there [are] no unusual and compelling circumstances that otherwise dictated entry of an early, separate judgment on that part of the case," the partial final judgment should be vacated).

Longshore & Warehouse Union, AFL-CIO, 363 N.L.R.B. No. 47, 2015 WL 7750748 (Nov. 30, 2015).

ILWU filed petitions for review of both of these NLRB decisions with the United States Court of Appeals for the District of Columbia Circuit. Petitioners' Opening Brief at 3, *Int'l Longshore & Warehouse Union v. NLRB,* Nos. 15-1443, 16-1036 (D.C. Cir. Jan. 25, 2017) (discussing both petitions for review—the case challenging the Sept. 24, 2015 NLRB decision is referenced as Nos. 15-1344 and 15-1428 (D.C. Cir.)). The cases were consolidated for oral argument and are currently pending before the D.C. Circuit. *Id.* Proceedings in the instant case still before the district court remain stayed.

We are satisfied that the district court did not err in concluding that ICTSI's antitrust counterclaim involved discrete legal issues separate from those involved in the § 301 litigation or the adjudications still proceeding before the NLRB. It is true that the factual issues involved in such claim are closely tied to the factual issues in the labor-law claims still pending before the district court, but the antitrust counterclaim involves distinct points of law. Also, the legal issues before us are complicated and not routine. *See Wood v. GCC Bend, LLC,* 422 F.3d 873, 882 (9th Cir. 2005) (observing that in cases where common factual issues abound, the entry of a Rule 54(b) partial final judgment should be reserved for complex and distinct legal issues). Finally, we agree with the district court's determination that entry of a partial final judgment would result in no duplicative proceedings, even if we reversed the dismissal of the antitrust counterclaim. *Id.* at 879.

Whether the district court's decision to grant ICTSI's Rule 54(b) motion was correct is a close call. In circumstances such as these, we strongly prefer that the district court "certify its order for interlocutory appeal," which allows "the Court of Appeals to protect its docket by determining for itself whether to accept the issue for review." *Morrison-Knudsen Co.,* 655 F.2d at 966. However, because the issues before us are discrete and complex and we must give substantial deference to certain elements of the district court's analysis, we conclude that the district court did not err in entering a partial final judgment under Rule 54(b).

B

ILWU and PMA also contend that ICTSI lacks standing to challenge an alleged conspiracy redounding to the benefit of PMA because ICTSI itself was a

member of PMA when PMA allegedly benefitted from said conspiracy. To have standing as an antitrust plaintiff, a party must demonstrate antitrust injury, meaning it must show "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atl. Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 334 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1977)). An injury caused by an antitrust violation will not count as an antitrust injury "unless it is attributable to an anti-competitive aspect of the practice under scrutiny." *Id.*

We confronted an analogous situation in *Big Bear Lodging Ass'n v. Snow Summit, Inc.,* 182 F.3d 1096 (9th Cir. 1999). The plaintiffs in *Big Bear* alleged that a group of their competitors had engaged in a price-fixing scheme. *Id.* at 1102. Logically, then, the plaintiffs alleged a course of conduct from which they also stood to benefit. *Id.* We observed, however, that in such situations competitors "may have standing to challenge practices used to enforce a price-fixing conspiracy" if they allege injury from "practices used to enforce" the illegal conspiracy. *Id.*

Here, ICTSI has alleged that ILWU and PMA's illegal restraint of trade harmed competition by raising prices to supra-competitive levels. Importantly, ICTSI also alleged that it was harmed directly by the efforts of ILWU and PMA to enforce their illegal agreement. For example, ICTSI alleged that ILWU and PMA filed sham lawsuits against ICTSI in an attempt to force its hand.[4] This meets the *Big Bear* requirement that a

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[4] *See supra* note 2 (describing the harmful and illegal actions ILWU and PMA allegedly took against ICTSI to enforce their illegal agreement).

party allege "injury resulting from practices used to enforce the alleged [illegal anticompetitive] conspiracy." *Id.* ICTSI thus has standing to bring its antitrust counterclaim.

III

On the merits of the appeal, ICTSI contends that the district court made several errors in dismissing its counterclaim.[5]

A

ICTSI first contends that the district court erred in its interpretation of the *Noerr-Pennington* doctrine, which provides immunity and "broad antitrust protection for those who 'petition the government for a redress of grievances.'" *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, AFL-CIO,* 31 F.3d 800, 810 (9th Cir. 1994) (quoting *City of Columbia v. Omni Outdoor Advert., Inc.,* 499 U.S. 365, 378 (1991)). ICTSI alleges that ILWU and PMA filed sham lawsuits in furtherance of their conspiracy to restrain trade and to monopolize longshore services.

Although *Noerr-Pennington* immunity extends to judicial proceedings,[6] it does not protect persons

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[5] "We review dismissal of a complaint without leave to amend *de novo." Big Bear,* 182 F.3d at 1101. "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Id.* (quoting *Cahill v. Liberty Mut. Ins.,* 80 F.3d 336, 337-38 (9th Cir. 1996)). However, the party must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "A complaint may be dismissed without leave to amend only 'when it is clear that the complaint cannot be saved by further amendment.'" *Big Bear,* 182 F.3d at 1101 (quoting *Dumas v. Kipp,* 90 F.3d 386, 389 (9th Cir. 1996)).

[6] ICTSI argues that ILWU and PMA waived the affirmative defense of *Noerr-Pennington* immunity. But this appeal followed

engaging in sham litigation. *USS-POSCO Indus.,* 31 F.3d at 810. Litigation will be labeled a sham if it is "objectively baseless," and "conceal[s] 'an attempt to interfere *directly* with the business relationships of a competitor.'" *Id.* (quoting *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.,* 508 U.S. 49, 60-61 (1993)). In the context of a series of alleged sham proceedings, however, "the question is not whether any one [suit] has merit . . . but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *Id.* at 811. In such a context, the legal success of an occasional sham suit is irrelevant. *Id.* ("[E]ven a broken clock is right twice a day.").

ICTSI has not alleged enough sham suits to establish a pattern of baseless or repetitive claims. ICTSI points to only two allegedly meritless suits, one by PMA and one by ILWU and PMA. Two sham suits cannot amount to "a whole series of legal proceedings" or a "pattern of baseless, repetitive claims." *Amarel v. Connell,* 102 F.3d 1494, 1519 (9th Cir. 1996) (quoting *USS-POSCO Indus.,* 31 F.3d at 811; *Prof'l Real Estate Investors,* 508 U.S. at 58).

ILWU and PMA's successful motion to dismiss ICTSI's antitrust counterclaim. Even assuming that *Noerr-Pennington* immunity is an affirmative defense—an assumption that may not be warranted—it would not be waived unless ILWU and PMA omitted it from their answer to ICTSI's counterclaim. *See* Fed. R. Civ. P. 8(c)(1); *see also Bayou Fleet, Inc. v. Alexander,* 234 F.3d 852, 861 (5th Cir. 2000) (rejecting waiver argument where plaintiff "knew *Noerr-Pennington* was a potential issue throughout most of the discovery process"). ILWU and PMA have not yet answered the antitrust counterclaim.

Because there is no pattern of baseless claims, we engage in a two-step inquiry, evaluating each suit individually. Step one asks whether the alleged sham suit was meritless. *Prof'l Real Estate Investors,* 508 U.S. at 60. The burden is on "the plaintiff to disprove the challenged lawsuit's legal viability." *Id.* at 61 (emphasis omitted). "Only if challenged litigation is objectively meritless may a court" proceed to step two to analyze whether the baseless suit was an attempt to directly interfere with the business of a competitor. *Id.* at 60-61.

This means that ICTSI must "disprove the challenged lawsuit's *legal* viability." *Id.* at 61. A suit has merit "[i]f an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome." *Id.* at 60. For example, a suit is not objectively meritless if it is "arguably warranted by existing law or at the very least [is] based on an objectively good faith argument for the extension, modification, or reversal of existing law." *Id.* at 65.

1

PMA's suit collaterally attacking the NLRB's § 10(k) jurisdictional award was not objectively baseless. The district court, in fact, granted summary judgment in that case to PMA. *Pac. Mar. Ass'n,* 827 F.3d at 1204 (reviewing the district court's decision). While we reversed that decision, holding that the district court lacked jurisdiction, we noted that the NLRB's § 10(k) determination likely violated the NLRA. *Id.* at 1210. Even if the NLRB's jurisdictional award survives all further challenges, PMA's suit challenging the agency's determination is at least "arguably warranted by existing law" given that two federal courts have concluded it had substantial merit. *Prof'l Real Estate Investors,* 508 U.S. at 65.

The joint suit by ILWU and PMA against ICTSI under § 301 of the LMRA—from which the antitrust counterclaim of this appeal grew—is a more difficult case. The district court stayed claims related to reefer work at the Port of Portland pending resolution of the inter-union jurisdictional disputes before the NLRB and our court. But ILWU and PMA maintained the joint suit even after success became very unlikely. Once a § 10(k) order becomes final, it takes precedence over any inconsistent arbitration award. *See Carey v. Westinghouse Elec. Corp.,* 375 U.S. 261, 272 (1964); *Int'l Longshoremen's & Warehousemen's Union, Local 32 v. Pac. Mar. Ass'n,* 773 F.2d 1012, 1021 (9th Cir. 1985).

The NLRB has also repeatedly held that a § 301 suit brought to achieve results contrary to a § 10(k) award is illegal and constitutes an unfair labor practice. *See, e.g., Sheet Metal Workers Int'l Ass'n,* 357 N.L.R.B. 1577, 1578 (2011) (affirming an ALJ's determination that "following the Board's 10(k) award, [a union]'s maintenance of its [§] 301 lawsuit was incompatible with the Board's award and, therefore, had an objective that was illegal under Federal law"); *Local 30, United Slate, Tile, & Composition Roofers, Damp & Waterproof Workers Ass'n,* 307 N.L.R.B. 1429, 1430 (1992).

However, the facts of ILWU and PMA's § 301 lawsuit suggest that it may be legally viable. ILWU and PMA brought their § 301 claim on June 13, 2012. The NLRB issued its § 10(k) determination on August 13, 2012. In response to such determination, the district court stayed the § 301 claim pending final resolution and then the exhaustion of appeals related to the NLRB's jurisdictional determination.

ILWU and PMA did not bring a frivolous § 301 suit when they initiated this lawsuit against ICTSI: an arbitrator had interpreted a CBA binding on PMA, ILWU, and ICTSI, and § 301 authorizes suits in federal court to enforce such decisions. Therefore, ILWU and PMA's suit to enforce the arbitrator's decision was not objectively baseless or frivolous at the time it was filed.

Though the suit was maintained after the NLRB's unfavorable ruling, ILWU and PMA were also collaterally challenging the § 10(k) award that would trump their § 301 suit. As recounted above, the collateral attack on the NLRB's § 10(k) decision proved unsuccessful, but only after two federal courts observed that the NRLB's decision was likely incorrect. ILWU continues to fight the NLRB's § 10(k) decision as well. *See supra* note 3. It would make little sense to hold that a suit lacked merit because it was maintained while the plaintiffs were actively challenging the impediments to such suit. The § 301 suit has not been frivolously maintained; rather, it has been "arguably warranted by existing law or at the very least [is] based on an objectively good faith argument for the extension, modification, or reversal of existing law." *Prof'l Real Estate Investors,* 508 U.S. at 65. That ends the inquiry: the § 301 suit is covered by *Noerr-Pennington* immunity.

B

ICTSI next contends that the district court erred when it concluded that the remainder of ILWU and PMA's alleged "Joint Activity"[7] is immunized

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[7] The Joint Activity includes all of the allegations discussed above, such as ILWU and PMA agreeing to discriminate against ICTSI and other non-PMA employers by treating PMA members

from antitrust liability under Section 1 of the Sherman Act because of the nonstatutory labor exemption, even though such activity allegedly includes actions by ILWU and PMA that violate labor law.[8]

1

The nonstatutory, or implied labor, exemption "recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions." *Brown v. Pro Football, Inc.,* 518 U.S. 231, 237 (1996); *see also United Mine Workers of Am. v. Pennington,* 381 U.S. 676, 711 (1965) (Goldberg, J., concurring in part and dissenting in part) (discussing how the nonstatutory exemptions protects [sic] the scheme of collective bargaining sanctioned and mandated by the NLRA from being "destroyed by the imposition of Sherman Act" penalties). This exemption includes "some union-employer agreements." *Connell Const. Co. v. Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 622 (1975).[9]

The nonstatutory exemption shields collective bargaining agreements and actions related to collective

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preferentially. *Supra* note 2; *see also supra* note 3 (discussing NLRB decisions concluding that ILWU violated labor law).

[8] For example, it includes allegations that ILWU and PMA entered into an illegal agreement to engage in secondary boycotts against ICTSI with the purpose of seizing work for ILWU. The NLRA, in § 8(e), prohibits "hot cargo" agreements, as well as secondary boycotts or agreements to not do business with third parties, between employers and unions. 29 U.S.C. § 158(e).

[9] The statutory labor exemption applies only where unions act unilaterally; therefore, it does not shield collective bargaining agreements from antitrust scrutiny. *See United States v. Hutcheson,* 312 U.S. 219, 231-32 (1941).

bargaining from antitrust liability. *Phoenix Elec. Co. v. Nat'l Elec. Contractors Ass'n,* 81 F.3d 858, 860 (9th Cir. 1996). The exemption prevents courts, sitting in antitrust, from asserting authority over the collective bargaining process and determining "through application of the antitrust laws, what is socially or economically desirable collective-bargaining policy." *Brown,* 518 U.S. at 242. It reflects antitrust law's complex relationship with labor law—a relationship complicated by Congress's struggle to determine where socially desirable anticompetitive action in support of labor ends and socially undesirable anticompetitive action, whether in support of labor or not, begins. *See, e.g.,* Richard A. Epstein, *Labor Unions: Saviors or Scourges?,* 41 Cap. U. L. Rev. 1, 18-23 (2013) (discussing the historical development of antitrust laws and its interaction with labor law).

Whether the nonstatutory exemption applies depends on the so-called *Mackey* test. *Phoenix Elec.,* 81 F.3d at 861 (citing *Mackey v. Nat'l Football League,* 543 F.2d 606, 614 (8th Cir. 1976)). An alleged agreement restraining trade is shielded from antitrust liability only if the following three parts of the test are satisfied: "(1) the restraint primarily affects the parties to the agreement and no one else, (2) the agreement concerns wages, hours, or conditions of employment that are mandatory subjects of collective bargaining, and (3) the agreement is produced from bona fide, arm's-length collective bargaining." *Id.* Though developed in the Eighth Circuit, the *Mackey* test was formally adopted by this court in *Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades District Council,* 817 F.2d 1391 (9th Cir. 1987). *Id.*

2

ICTSI contends that the district court misapplied the *Mackey* test and thus erred in concluding that the Joint Activity was covered by the nonstatutory exemption. ICTSI also argues that conduct violating labor laws, particularly violations of Section 8(e) of the NLRA prohibiting secondary boycotts and related actions, cannot qualify for the nonstatutory exemption because post-*Mackey* cases have modified the test to exclude unfair labor practices and other illegal conduct. Both arguments rely on ICTSI's allegations that some of the Joint Activity violated labor laws.[10]

ICTSI's arguments focus on whether the second prong of the *Mackey* test—does the alleged agreement concern a mandatory subject of collective bargaining—precludes illegal agreements or related conduct from being covered by the nonstatutory exemption. ICTSI asserts that an illegal agreement never qualifies as a "mandatory subject[] of collective bargaining," and thus any illegal conspiracy fails prong two. *See Phoenix Elec.,* 81 F.3d at 861. Alternatively, ICTSI contends that the Supreme Court and our circuit have modified the *Mackey* test by adding the requirement that the alleged agreement conforms to the requirements of labor law.

3

A cursory glance at Supreme Court precedent would seem to suggest ICTSI's contention that an illegal agreement always fails the *Mackey* test is correct. For instance, in 1975 the Supreme Court denied the nonstatutory exemption, observing that "[t]here is no legislative history in the 1959 Congress suggesting that

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[10] *See supra* note 8.

labor-law remedies for § 8(e) violations were intended to be exclusive." *Connell,* 421 U.S. at 634. And the Supreme Court later read *Connell* as holding that agreements running afoul of Section 8(e) of the NLRA were "subject to the antitrust laws." *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 85 (1982). The Court explained that *Connell* decided whether the agreement in question violated § 8(e) because "[i]t was necessary to do so to determine whether the agreement was immune from the antitrust laws." *Id.*

However, we extensively analyzed *Connell* post-*Kaiser* and rejected the notion that every § 8(e) violation loses the benefit of the nonstatutory exemption. *Richards v. Neilsen Freight Lines,* 810 F.2d 898, 905-06 (9th Cir. 1987). In *Richards,* a trucking company alleged that the Teamsters union conspired with several rival trucking companies to engage in boycott agreements in violation of § 8(e). *Id.* Though the trucking companies were all formally rivals, the defendant companies were also customers of the plaintiff trucking company because the defendants would use the plaintiff company for the final stages of certain local deliveries. *Id.* at 900. The plaintiff alleged that the boycott agreements were for the purpose of pressuring the plaintiff to accept the Teamsters union. *Id.* at 905-06.

We concluded that "[e]ven if such conduct were a violation of the labor law, it would bear such a close and substantial economic relation to a union's legitimate [ends] that it falls well within the purpose and the coverage of the exemption from antitrust liability." *Id.* at 904. The *Richards* court read *Connell* to hold that agreements violating § 8(e) would fall outside the nonstatutory exemption only when the alleged agreements "pose actual or potential anticompetitive risks

other than those related to a reduction in competitive advantages based on differential wages or working conditions." *Id.* at 906.

The alleged agreements in *Richards* "may have had an effect on [the plaintiff]," but such effect "apart from competition related to wages and working conditions, was not pervasive as with the agreement at issue in *Connell." Id.* Then-Judge Kennedy, writing for the court, concluded by observing that "[i]t is not paradoxical that a labor law violation may still be within the antitrust exemption, for the violation will carry its own remedies under the labor laws." *Id.*

While acknowledging that agreements violating § 8(e) could expose parties to antitrust liability, we concluded that *Connell* stood for the proposition that antitrust liability would attend such agreements only where there was some showing of substantial anticompetitive effects outside of those anticipated and protected by the nonstatutory exemption. *Id.* at 905 (citing *Connell,* 421 U.S. at 625 (discussing how the union's goal in this case would have substantial anticompetitive effects "that would not follow naturally from the elimination of competition over wages and working conditions"))."[11] We conclude this logic also

[11] Whether one views suppressing competition in the labor market to benefit labor as a desirable policy depends on one's political preferences, but is not at issue in the instant case. *See generally* Alex Bryson, *Union Wage Effects,* IZA World of Labor 2014:35 (July 2014), https://wol.iza.org/uploads/articles/35/pdfs/union-wage-effects.pdf (discussing the benefits and costs of labor unions with respect to their impact on the labor market); Ralph K. Winter, Jr., *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities,* 73 Yale L.J. 14, 19 (1963). Congress has presumably exempted certain anticompetitive actions from antitrust scrutiny because it has determined that the social benefits of suppressing competition in

extends to actions taken in support of such an agreement. *See id.* at 905-06 (discussing actions taken by the union to support the agreement).

Here, the Joint Activity alleged to violate § 8(e) has the purpose of gaining the reefer work at Terminal 6 for ILWU by suppressing competition. ICTSI contends that the conspiracy's ultimate purpose is "to expand the ILWU/PMA bargaining unit at the expense of third-party bargaining units" so that ILWU gains a monopoly, supported by PMA, over various types of West Coast port work.

Taking ICTSI's allegations as true, it still alleges no anticompetitive harm unrelated to wages and working conditions. Even if the ends of the allegedly illegal Joint Activity were achieved, the result would be that ICTSI replaced IBEW reefer workers with ILWU reefer workers at Terminal 6. The relevant market in which competition would be reduced is the labor market—specifically, the ability of other labor unions to compete against ILWU for this kind of work. However, in the course of advocating for benefits for their members, labor unions may have to suppress competition relating to wages and working conditions. *See Richards,* 810 F.2d at 806 (discussing the impact union activity had on competition in the labor market). Any harms flowing from suppressing competition among labor unions in the instant case would be "related to a reduction in competitive advantages based on differential wages or working conditions." *Id.*

In fact, the situation in this case is very analogous to *Richards:* ICTSI alleges that formal rivals, who are also customers, have entered into illegal agreements

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the labor market sometimes outweigh the costs, and we must respect its decision. *See, e.g., Brown,* 518 U.S. at 242.

with a union which would allow the union to seize work at the facility operated by ICTSI. *Richards* could be distinguished from this case insofar as the work sought by ILWU is currently being performed by another union, IBEW, instead of non-unionized workers. But, the only anticompetitive harm that ICTSI alleges is that ILWU would be able to capture anticompetitive wages by suppressing competition, leading to higher prices for consumers. The suppressed competition just happens to be another labor union instead of individual workers. In both cases competition amongst labor is being suppressed to benefit a specific union. ICTSI alleges agreements that, even if illegal and "carry[ing] [their] own remedies under the labor laws," *id.,* are still "within the purpose and the coverage of the exemption from antitrust liability." *Id.* at 904.

"[I]n some cases a violation of the labor laws may involve conduct whose consequences are so far-reaching that it falls outside the exemption," but that is not the case here. *Id.* at 906. For example, in *Connell,* a building trades union ("Local 100") "supported its efforts to organize mechanical subcontractors by picketing certain general contractors." 421 U.S. at 618. If Local 100 succeeded, "the restriction on subcontracting would eliminate competition . . . on subjects unrelated to wages, hours, and working conditions [and] could result in significant adverse effects on the market and on consumers . . . unrelated to the union's legitimate goals of organizing workers and standardizing working conditions." *Id.* at 624. Here, ICTSI has failed sufficiently to allege that the Joint Activity will lead to anticompetitive harms "that would not follow naturally from the elimination of competition over wages and working conditions." *Id.* at 625.

ICTSI counters *Richards* by pointing out that illegal conduct is not a mandatory subject of collective bargaining. But, we have never explicitly or implicitly overruled *Richards,* which held that agreements violating § 8(e) did not automatically lose the benefit of the nonstatutory exemption. For example, *Phoenix Electric* and *Richards* can be reconciled by reading *Richards* as holding that illegal agreements still satisfy prong two of the *Mackey* test if such agreements concern mandatory subjects of collective bargaining. *Compare Phoenix Elec.,* 81 F.3d at 861, *with Richards,* 810 F.2d at 905-06. As discussed above, *Richards* also covers conduct in support of an illegal agreement. *See Richards,* 810 F.2d at 905-06. This interpretation is supported by our court's emphasis in later cases on whether or not the alleged conduct is "regulated by labor law" and "anchored in the collective-bargaining process." *See, e.g., California ex rel. Harris v. Safeway, Inc.,* 651 F.3d 1118, 1131 (9th Cir. 2011) (en banc). And work assignments are a mandatory subject of collective bargaining. *Antelope Valley Press,* 311 N.L.R.B. 459, 460 (1993). Labor law, not antitrust law, should generally govern work assignment disputes.

Illegal conduct relating to "mandatory subjects of collective bargaining," such as wages or conditions of employment, does not remove the alleged agreements or related conduct from the scope of the nonstatutory exemption under the *Mackey* test. This includes violations of § 8(e).

4

ICTSI further contends that *Richards* is no longer good law. ICTSI points to two cases in particular, *Brown,* 518 U.S. 231, and *Safeway,* 651 F.3d 1118, that purportedly overrule *Richards.*

In *Brown,* the Supreme Court held that the nonstatutory exemption covered an employer-only agreement among a multi-employer bargaining unit. 518 U.S. at 238. *Brown* arose out of failed collective bargaining negotiations between the National Football League, a group of employers, and the NFL Players Association, a labor union. *Id.* at 234-35. When the parties bargained to impasse over the pay and working conditions of young, rookie players on the various teams' development squads, the League unilaterally imposed the terms of its last, best offer on the players. *Id.* Hundreds of players on the development squads brought a suit under Section 1 of the Sherman Act. *Id.* at 235. At trial, the district court held that the League could not avail itself of the nonstatutory exemption. *Id.* The Court of Appeals for the District of Columbia Circuit reversed in an opinion eventually affirmed by the Supreme Court. *Id.* The Supreme Court concluded that the nonstatutory exemption applied because the alleged conduct grew out of a lawful collective bargaining process, involved matters of mandatory bargaining, and concerned only the parties to the collective bargaining relationship. *Id.* at 250.

Brown contains numerous references tying the Supreme Court's holding to approval of the alleged conduct in labor law cases. [12] The Court began its

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[12] When collective bargaining is undertaken in good faith, but labor and management reach an impasse as to terms covering wages, working conditions, and other mandatory terms of bargaining, the employer is allowed to impose its last, best offer without committing an unfair labor practice or violating the law. *Brown,* 518 U.S. at 238 ("Both the Board and the courts have held that, after impasse, labor law permits employers unilaterally to implement changes in pre-existing conditions, but only insofar as the new terms meet carefully circumscribed conditions.").

analysis by "assum[ing] that such conduct, as practiced in this case, is unobjectionable as a matter of labor law and policy." *Id.* at 238. More importantly, the court specifically tied its conclusion to such legality. *Id.* ("On that assumption [of legality], we conclude that the exemption applies.").

But *Brown* did not review the applicability of the nonstatutory exemption generally. Rather, *Brown* dealt with whether the exemption, traditionally applied to collective bargaining agreements between employers and employees, should *extend* to the context of employer-only agreements. *Id.* at 238. In this respect, tying the holding of *Brown* to labor law's approval seems to make sense: employer-only collusion logically presents a greater risk of cartel-generating activity that harms the interests of labor than an agreement formed with the input of both management and labor. And the Court also recognized that the scope of the collective bargaining exemption from antitrust scrutiny cannot be limited strictly to terms to which both labor and management give consent: the nonstatutory exemption must apply, for instance, to a multi-employer bargaining group's discussions about positions taken both before and after impasse. *Id.* at 243-44.

Though *Brown*'s holding does rely, in part, on the labor-law legality of the conduct in question, the opinion also notes that such conduct's close relation to the collective bargaining process distinguishes it from the class of behavior governed by antitrust law. The Supreme Court noted that "labor laws give the Board, not antitrust courts, primary responsibility for policing the collective-bargaining process." *Brown,* 518 U.S. at 242. In expanding the nonstatutory exemption to some employer-only agreements, the Supreme

Court did not require that only conduct blessed by the labor laws could receive the exemption going forward. Nor did the court overrule *Richards, Phoenix Electric, Mackey,* or related cases. *But see Eller v. National Football League Players Ass'n,* 731 F.3d 752, 754-55 (8th Cir. 2013) ("[A] nearly unanimous Supreme Court . . . overrul[ed] *Mackey . . . .").*

Similarly, in *Safeway* our court applied *Brown* to determine whether the nonstatutory exemption applied in the context of a multi-employer bargaining association's unilateral action. 651 F.3d at 1128-32. In *Safeway,* a group of employers decided to share and to redistribute certain revenues in the event that a party to their agreement experienced a strike or lockout. *Id.* at 1123. The en banc court denied the nonstatutory exemption, noting that the employers' agreement was not "approved or *regulated* by labor law." *Id.* at 1131 (emphasis added). The conduct in the instant case—work assignments—is regulated by labor law. The revenue sharing agreement in *Safeway* was not the type of issue historically regulated by labor law. *Id.* at 1130. Finally, we never held that conduct violating labor laws automatically fell outside of the nonstatutory exemption.

5

But does the *Mackey* test justify application of the nonstatutory exemption to the alleged Joint Activity?

First, the alleged conduct primarily affects the parties to the agreement. ICTSI is a member of PMA and a party to the CBA, and there are no allegations in ICTSI's counterclaim that the CBA purports to govern the conduct of nonparties. *See Phoenix Elec.,* 81 F.3d at 862 (finding it relevant to the first prong of

Mackey that an agreement "does not attempt to impose its terms on any nonsignatory party").

Second, the alleged anticompetitive agreement between ILWU and PMA giving rise to the Joint Activity concerns a mandatory subject of collective bargaining under Section 8(d) of the NLRA. 29 U.S.C. § 158(d). Work assignments are a mandatory subject of collective bargaining, though the scope of the bargaining unit is not. *Antelope Valley Press,* 311 N.L.R.B. at 460. ICTSI admits in its pleadings that ILWU and PMA have negotiated collective bargaining agreements for many years "covering virtually all longshore work in all West Coast ports." Specifically, ICTSI alleges that the CBA assigned reefer work within the bargaining unit to ILWU, and that ILWU had performed this work at some West Coast ports before that time. ICTSI alleges, therefore, that the alleged agreements between ILWU and PMA concerned work assignments within the bargaining unit of the West Coast. *See Maui Trucking, Inc. v. Operating Eng'rs Local Union No. 3*, 37 F.3d 436, 439 (9th Cir. 1994) (suggesting that the "relevant work universe [is] coextensive with the bargaining unit").

Finally, the alleged Joint Activity was the result of a bona fide, arm's-length agreement. ICTSI alleges that there is at least a factual question as to the third *Mackey* requirement—the good faith requirement—because ILWU and PMA would both benefit in the event that ILWU gains jurisdiction over additional work. ICTSI argues that the nonstatutory exemption presupposes an adversarial relationship.

Phoenix Electric gives little direction on what the good faith requirement entails, but the Eighth Circuit offers more guidance in *Mackey,* 543 F.2d at 615-16. In first applying what would become the *Mackey* test, the

Eighth Circuit held that the evidence of one-sided bargaining in which one party dominated the other to impose unilaterally its own terms could not qualify as bona fide bargaining. *Id.* at 615 ("[T]he parties' collective bargaining history reflected nothing which could be legitimately characterized as bargaining."). The court noted an absence of any quid pro quo in the bargaining process in *Mackey,* and the relative bargaining strengths of the parties was also significant. *Id.* at 616. Presumably, this is part of the analysis that we adopted in *Phoenix Electric* when we endorsed the *Mackey* test. *Phoenix Elec.,* 81 F.3d at 861.[13]

Such conditions are absent from the allegations put forward by ICTSI. Some degree of quid pro quo between ILWU and PMA forms part of ICTSI's allegations: ICTSI notes ways in which the alleged agreements would benefit both ILWU and PMA. And the lack of an overly adversarial collective bargaining process should not, in itself, imperil the nonstatutory exemption. The purpose of labor law in the United States, after all, is to promote "sound and stable industrial peace." 29 U.S.C. § 171(a).

6

For all of the above reasons, the nonstatutory exemption shields the alleged Joint Activity of ILWU

[13] The Eighth Circuit concluded that the Supreme Court overruled *Mackey* in *Brown. Eller,* 731 F.3d at 754-55. However, this decision does not help ICTSI on the arm's-length question. Instead, *Brown* makes it easier for parties to argue their agreement is arm's-length—before *Brown* only union-employer agreements seemed to qualify for the nonstatutory exemption in NFL litigation, but now employer-only agreements qualify too (meaning employer-only agreements now qualify as arm's-length or such requirement no longer exists at all). *Id.*

and PMA from antitrust scrutiny and ICTSI's counterclaim was properly dismissed.[14]

IV

The judgment of the district court is AFFIRMED.[15]

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[14] Because the nonstatutory exemption covers all the Joint Activity in furtherance of the alleged conspiracy—including allegations that ILWU "engaged in slowdowns, work stoppages, safety gimmicks" and similar activities "to force ICTSI to assign the disputed work to the ILWU"—we need not reach, and choose not to reach, the question of whether the district court erred in applying the statutory exemption to shield certain activity by ILWU from antitrust scrutiny. The wrongs dismissed under the statutory exemption by the district court are shielded from antitrust liability by the nonstatutory exemption.

We also need not, and do not, reach the question of whether the district court erred by concluding that shared monopoly claims are not actionable under § 2. The dismissed § 2 claim is also barred by the nonstatutory exemption. *See Brown,* 518 U.S. at 235 (discussing "the 'nonstatutory' labor exemption from *the antitrust laws"* (emphasis added)).

[15] ICTSI's motion for judicial notice is GRANTED. *See Small v. Avanti Health Systems, LLC,* 661 F.3d 1180, 1186 (9th Cir. 2011).

CLIFTON, Circuit Judge, concurring:

I concur entirely in the result and reasoning of the disposition as to the merits of ICTSI's appeal. I write separately to express concern over the district court's decision to enter partial final judgment under Rule 54(b) on ICTSI's federal antitrust counterclaim. I agree with the opinion's admonition that, in circumstances like these, a preferable approach would be for the district court to certify its order for interlocutory appeal. Alternatively, the district court in this case should have refused appellate review altogether.

Most importantly, for purposes of Rule 54(b) certification, it is not obvious why there was "no just reason for delay" in entering partial final judgment on ICTSI's antitrust counterclaim. Fed. R. Civ. P. 54(b). Entering partial final judgment instead promoted a disfavored piecemeal appeal. *See Curtiss-Wright Corp. v. General Electric Co.,* 446 U.S. 1, 10 (1980). I accept the district court's determination, affirmed by our court's opinion, that the antitrust counterclaim raised discrete and independent issues of law. Even so, the counterclaim was ultimately secondary to the primary dispute at issue in this case: a jurisdictional dispute between rival unions over reefer work assignments. Allowing the main action to proceed at the district court, even if stayed pending the resolution of related NLRB proceedings, may have resulted in resolution of the parties' primary dispute, thereby obviating the need for an appeal addressing ICTSI's follow-on antitrust counterclaim. Under these circumstances, I cannot say that the interests of "sound judicial administration" were served by this appeal. *Wood v. GCC Bend, LLC,* 422 F.3d 873, 882 (9th Cir. 2005).

We have treated the judgment as final, and that makes sense at this point for reasons of efficiency and simplicity, but I hope this is not a course that is repeated in the future.

IZA World of Labor
Evidence-based policy making

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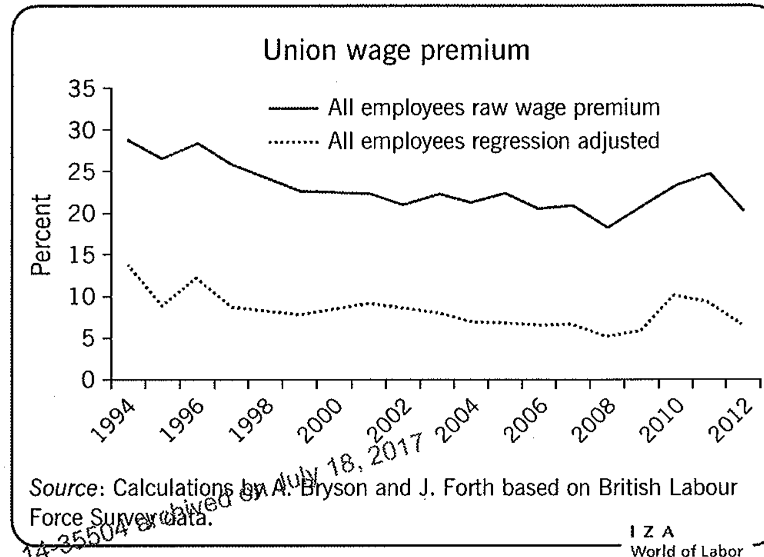
Union wage effects

What are the economic implications of union wage bargaining for workers, firms, and society?

Keywords: wages, bargaining, labor market, firm performance, productivity

ELEVATOR PITCH

Despite declining bargaining power, unions continue to generate a wage premium. Some feel collective bargaining has had its day. Politicians on both sides of the Atlantic have recently called for the removal of bargaining rights from workers in the name of wage and employment flexibility, yet unions often work in tandem with employers for mutual gain based on productivity growth. If this is where the premium originates, then firms and workers benefit. Without unions bargaining successfully to raise worker wages, income inequality would almost certainly be higher than it is.



Source: Calculations by A. Bryson and J. Forth based on British Labour Force Survey data.

14-35504 archived on July 18, 2017

KEY FINDINGS

Pros

- Trade unions maintain and improve workers' terms and conditions through bargaining with employers.
- Workers organized in trade unions benefit from higher wages—the so-called union wage premium.
- Union bargaining also results in a fringe benefits premium for covered workers.
- Trade unions reduce wage inequality.
- The counter-cyclical wage premium helps to maintain the real wages of covered workers.

Cons

- Trade unions restrict employment flexibility.
- Trade unions prevent markets from clearing.

- By standardizing wages across regions, unions distort labor supply.
- Trade unions harm businesses if the return for additional wages is low.
- If the premium comes at the expense of normal profits, this can damage firms and employment growth.

AUTHOR'S MAIN MESSAGE

Unions continue to affect wage rises and reduce wage inequality despite reductions in their bargaining power. Society and firms can benefit when the union wage premium is the result of productivity growth. However, if raised wages come at the expense of normal profits, this can damage the prospects of firms and employment growth—to the long-term detriment of all. As union influence on wages has fallen, wage inequality has grown in many countries, perhaps to the detriment of most workers and employers alike.

MOTIVATION

Union wage bargaining is perhaps the biggest departure from market wage-setting in modern economies. Unions' wage standardization policies that attach wages to jobs, not individuals, have important implications for wage dispersion. Unions' ability to limit the labor supply to firms so as to extract above-market wages can benefit workers but be detrimental to firms and employment. However, the implications of union wage-setting are complex. Factors include: union bargaining power; institutional arrangements for bargaining; unions' ability to negotiate over employment as well as wages; employer-union relations; and the profitability of the firms they organize. It is no surprise, therefore, that the implications of union

wage bargaining for workers, firms, and society are heavily contested.

This article outlines the pros and cons of union wage bargaining, with empirical evidence on the size of effects across countries and over time. It points to limitations in our knowledge of the size of union wage effects and their origins. It concludes with implications for public policy.

DISCUSSION OF PROS AND CONS

How do unions affect wages?

Unions affect wage levels and dispersion in five ways—two direct and three indirect (see Mechanisms by which unions can affect wages). By threatening to limit the supply of labor, unions generate bargaining power, which they use to negotiate improved terms and conditions for covered employees, including wages. This power can also be used to resist downward pressure on wages, such as employer efforts to cut or freeze wages in an economic downturn. This makes union wages more rigid than non-union wages.

Mechanisms by which unions can affect wages

Direct

- Bargaining on behalf of covered employees for increased wages.
- Bargaining on behalf of covered employees to maintain wages.

Indirect

- Influence on other outcomes for covered employees, for example "voice" Õ higher tenure Õ firm-specific human capital investments (Freeman and Medoff, 1984).

- Threat of unionization raises wages in the non-union sector (Rosen, 1969).
- Job losses in union sector, resulting in excess labor supply to non-union sector.

Freeman, R. B., and J. L. Medoff. *What Do Unions Do?* New York: Basic Books, 1984.

Rosen, S. "Trade union power, threat effects and the extent of organization." *Review of Economic Studies* 36 (1969): 185-196.

Unions can also affect covered employees' wages through processes other than wage bargaining. For example, in providing a "voice" for covered workers that allows employers to resolve problems and disputes, unions reduce quit rates, raise tenure, and thus provide employers and workers with an additional incentive to invest in firm-specific human capital, resulting in higher wages [1].

Union bargaining can affect wage-setting in the non-union sector in two ways that run in opposite directions:

- The first is the threat of unionization. This may lead non-union employers to raise wages in the hope that doing so will limit opportunities for unions to organize workers [2]. The threat effect therefore has the potential to close the gap between wages in the covered and uncovered sectors.
- On the other hand, if union-bargained wages result in job losses among unionized employees, this may result in an excess supply of labor to the non-union sector, which may depress wages there.

Evidence for union wage effects

Is the union wage effect real?

There is a long-standing debate as to whether unions have any effect at all on wages. Adam Smith in 1776 and Fleeming Jenkin in 1868 believed unions did raise wages, but Milton Friedman in 1950 thought they had little effect, because they could not affect the supply of labor. Instead, he said, they simply took the credit for what would have happened anyway. However, toward the end of the 20th century a consensus emerged that unions did affect wages [1], [3].

So how big is the effect, and where does it come from? Answers to the questions "How big?" and "Where from?" help determine whether union effects are welfare-enhancing or deleterious to firms and the economy. Getting clear answers to these questions is made difficult by tricky data and econometric problems in identifying a union causal effect on wages. It is hard to exclude unions from an economy and then experimentally insert them, or to separate direct bargaining effects on covered workers from the effects of unions on wage-setting in the economy at large. Nevertheless, some strides have been taken.

Empirical evidence on the size of the union wage premium

It is difficult to generalize about the size of union wage effects across countries because the nature of unions and the institutional settings in which they operate are vastly different. Until recently the literature was dominated by studies for English-speaking countries characterized by workplace or firm-level bargaining where unions organize workers with little or no statutory assistance from the state. Efforts to make cross-country comparisons have relied on

differentials between union members and non-members based on analyses of household surveys. In the empirical literature for the Anglo-American world what is usually estimated is the difference between the ceteris paribus earnings of union members and those of non-members. These estimates identify the wage gap between union members and non-members holding constant their individual and workplace characteristics. To illustrate, Figure 1 uses the International Social Survey Program (ISSP) data for 1994-1999 to estimate the union membership wage gap in 17 countries; additionally, data for the UK and US are provided for 1993¬2002 (British Social Attitudes Survey) and 1973-2002 (Current Population Survey), respectively. There are five countries—France, Germany, Italy, the Netherlands, and Sweden—where the union wage premium is zero or not significantly different from zero (ns). This is "primarily due to the fact that unions are also able to control wage outcomes in the non-union sector" by extension of collectively bargained rates [4], p. 211. Although this points to diverse results across countries, it is problematic, because union bargaining coverage is not always strongly correlated with union membership. In that respect the US is unusual.

Figure 1. Union membership wage premium from around the world

Country	Years	Union % Increase
Australia	1994, 1998, and 1999	12
Austria	1994, 1995, 1998, and 1999	15
Brazil	1999	34
Canada	1997-1999	8
Chile	1998, 1999	16
Cyprus	1996-1998	14
Denmark	1997-1998	16
France	1996-1998	3 (ns)
Germany	1994-1999	4 (ns)
Italy	1994 and 1998	0
Japan	1994-1996, 1998, 1999	26
Netherlands	1994 and 1995	0
New Zealand	1994-1999	10
Norway	1994-1999	7
Portugal	1998-1999	18
Spain	1995,1997-1999	7
Sweden	1994-1999	0
UK	1993-2002	10
US	1973-2002	17

Notes: Dependent variable log of earnings variously defined. Controls are age, age squared, years of schooling, private sector, hours, and union status. Sample restricted to employees. Germany includes East and West. Dependent variable defined as follows: Australia—Yearly income in Australian $; Austria—Personal net income per month in shilling; Canada—In what range your own personal income fall in Canadian $; Chile—R's monthly net income in CLP; Cyprus—Monthly gross earnings before taxes in Cyprus pounds; Denmark—R's earnings per year

before taxes in Dkr; France—R's monthly earnings in francs; Germany—R's net earnings per month after taxes and social insurance in DM; Italy—R's net income per month in thousands of lire; Japan—How much did you earn yourself last year before taxes in thousands yen; Netherlands—R's income after taxes in Gld; New Zealand—Yearly income from all sources before tax in NZ$; Norway—Personal gross income before taxes and allowances in 1997 include retirement benefits, etc.; Portugal—R's monthly average net income in escudos; Southern Island—Weekly gross income before taxes and social insurance; Spain—R's monthly earnings in pts; Sweden—Approximate income per month before taxes in SEK; UK—Log hourly earnings; US—Log hourly earnings.

Source: ISSP, 1994–1999, apart from UK (Britain Social Attitudes Survey) and US (Current Population Survey). Based on Blanchflower, D., and A. Bryson. "Changes over time in union relative wage effects in the UK and the US revisited." In: J. T., and C. Schnabel (eds). *International Handbook of Trade Unions*. Cheltenham, UK: Edward Elgar, 2003; pp. 197-245 [4].

Evidence for the US and for the UK often points to a union membership wage premium of between 10% and 15%, but effects vary across different parts of the wage distribution (see "Union affects on the wage distribution"). Union bargaining also results in a non-wage premium in the form of fringe benefits such as pensions and holiday pay.

Where unions organize at workplace level it is possible to see the direct effect of unions on wages subsequent to a new organizing drive, especially when this results in a new employment contract with renegotiated wages, as is often the case in the US. In

these settings, the size of union effects (on wages and other outcomes like share prices) reflects union bargaining strength, as indicated by the proportion of employees supporting the union. Not surprisingly, then, comparing wage changes where unions have only just won the support of employees in a workplace election with those where they have just lost reveals insignificant effects [5].

In most continental European countries, union bargaining can occur at various levels: workplace, firm, sector, region, or nationally. In some of these countries (such as France, Spain, Italy, and Denmark), it occurs at more than one level, such that the wage received by a worker will reflect bargaining at different levels and the degree to which this is coordinated. Where sectoral or national bargaining predominates, the outcomes from union wage bargaining are often extended to uncovered employees—such that the wage differential between union-covered and uncovered workers is reduced. Where there is a differential, it is due to local negotiated rates exceeding the "base" rate agreed more centrally (as has happened recently, for example, in Denmark). These union differentials can be sizable, but in the main they are not [6].

Nevertheless, as in the Anglo-American setting, the wage premium achieved through local bargaining is a function of union bargaining power (often indicated by the proportion of employees belonging to the union) and the financial gains that are available from the employer, as in the case of France.

Difficulties measuring the degree to which non-union employers are threatened by union organizing makes it hard to estimate the size of any union threat effect on wages in the non-union sector. A study using three methods (changes in right-to-work legislation,

industry deregulation, and predicted likelihoods of unionization) in the US gives mixed results [7]. Similarly, although there do appear to be some disemployment effects associated with union bargaining (see "Consequences of union wage effects for employers"), it has proved difficult for analysts to establish the effects of any labor spillover on wage-setting in the non-union sector.

Has the size of the union wage premium changed over time?

There are at least three reasons why we might expect to see a decline in the union wage premium over time.

- First, rising market competition may have increased the price sensitivity of demand for goods and services, thus limiting unions' ability to demand wage hikes without contemplating potential job losses.
- Second, if increased market competition has reduced the number of employers with scope to pay higher wages, this increases the likelihood that unions will face greater employer resistance to their wage demands, since any premium is likely to cut into normal profits.
- Third, unions face increased difficulties in monopolizing the supply of labor to firms. This is due to declining union density within unionized firms and the increased availability of non-union labor due to de-unionization in the home country. Globalization makes it easier for employers to import non-union labor directly (witness the recent disputes relating to posted workers in Europe) or to contract out to non-union labor in developing economies.

In fact, although the wage premium in the US and the UK has declined in recent years [8], [9], it remains sizable and statistically significant for most groups of employees.

There are perhaps four reasons for this:

- While the unionized sector has shrunk, unions continue to have a foothold in settings where their bargaining power has been particularly strong. For instance, in the UK the rate of union decline is slowest in industries where, it is possible to extract higher pay. This is because unions work hard to retain a foothold in those sectors, and perhaps because employers in industries where higher pay can be extracted are less resistant to unionization than other employers.
- Union strongholds persist in occupations where unions have high bargaining power, such as health professionals.
- The weakening of unions' organizational capacity may have reduced the number of instances in which unionization is a credible threat to non-union employers—a factor that may keep non-union wages lower than might have been been the case in the past.
- The degree to which competition has squeezed out union opportunities to extract higher wages from employers has, perhaps, been exaggerated. There remain a number of sectors where employers occupy monopoly or oligopolistic positions in markets for products or services, where the state dominates, or where regulation limits the amount of competition in the marketplace. These are all settings that unions can exploit to benefit their members.

The union wage premium is also counter-cyclical (i.e. out of phase with the underlying business cycle) [9], reflecting the time it takes to renegotiate long-term contracts with unions following unanticipated demand shocks, and, perhaps, unions' ability to block managerial attempts to downwardly adjust wages unilaterally, as can occur in the non-union sector.

Union effects on the wage distribution

Union wage policies are often guided by the principle of "a fair day's pay for a fair day's work," such that wages are attached to jobs rather than individuals' attributes. This wage standardization policy, coupled with union concerns to tackle wage discrimination on grounds of race, gender, and disability, can compress wage differentials. It is difficult to disentangle these causal effects from effects arising from worker sorting across the union and non-union sectors.

Whether unions actuallycompresswage differentials depends on the position ofunionized workers in the pay distribution, the union wage premium attached to different types of worker, and the degree of centralization and coordination in collective bargaining.

Unions continue to compress wages in the US, Canada, and the UK, although there is some disagreement as to whether the effect is apparent for women [10].

Unions compress wages because the union wage premium is much larger for low-waged workers, and is modest or even negative further up the wage distribution. The decline in unionization has contributed substantially to the growth in wage dispersion. In the US it accounts for about one-quarter of the increase between 1979 and 2009, and in Germany de-unionization accounts for about one-third of the rise in wage

inequality in the lower tail of the earnings distribution in the 1990s [11].

In those continental European countries where collective bargaining occurs locally and nationally or sectorally, local bargaining usually sets rates above the national level, but the effects of company-level agreements on pay dispersion differ across studies and countries [6].

Consequences of union wage effects for employers

Whether union wage effects have consequences for firm performance depends on a number of factors. Union wage effects can have positive benefits for employers where they induce increased worker productivity through worker sorting (if better workers are attracted by above-market wages), or increased worker effort due to efficiency wages, or reciprocation in return for fairer pay (if that is how workers perceive it). Firms may also benefit by becoming more capital-intensive in response to increases in the relative price of labor.

Factors affecting the impact of union wage effects on firm performance

- Positive
    - wages lead to increased labor productivity
        - worker sorting
        - worker effort (efficiency wages, fairer wages)
    - increase capital intensity
- Neutral
    - taken from surplus rents (no closure)

  - high unionization among competitors, or extension of union pay rates
  - wages are simply labor's share of bigger pie created by union
- Negative
  - taken from normal rents
  - shareholder response (Lee and Mas, 2012)
  - wage compression reduces work incentives
  - limit managerial discretion to pay for performance
  - wage compression less attractive to high-ability workers
  - reduce capital investment (insufficient funds; anticipate lower returns)

Lee, D. S., and A. Mas. "Long-run impacts of unions on firms: New evidence from financial markets, 1961-1999." The Quarterly Journal of Economics 127 (2012): 333-378.

Alternatively, union wage effects may have little bearing on firm performance (neutral) where the premium arises because unions have successfully organized firms that can afford to pay more; where competitors also face union rates; or where the premium simply reflects the additional value created by the productivity-enhancing effects of a unionized labor force.

But the effects will have a *negative* impact on firms where the premium is extracted from firms that have no "excess" profits; where wage compression reduces work incentives or reduces the firm's ability to attract high-ability labor; where union seniority rules and the

desire for wage standardization limit managerial discretion to pay for performance; and where capital investment falls owing to insufficient funds or where investors perceive that returns will be lower in the presence of a union.

Scholars in the 18th and 19th centuries came to the conclusion that unions were, in the main, a good thing, in that they raised wages without creating unemployment. More recently, there is no strong evidence that union wage bargaining results in workplace closure, a finding that lends credence to the idea that workers are aware of the potentially adverse consequences of making excessive wage claims. Unions respond to the median union member accordingly by moderating their wage claims. However, unionized workplaces in the UK, the US, Canada, and Australia appear to grow at a slower rate than their non-union counterparts. It is the low-skilled who receive the largest wage premium and who experience the largest disemployment effects. It is unclear whether this translates into a sizable employment spillover to the non-union sector.

There may have been some improvement in the financial performance of unionized workplaces in recent years compared with non-unionized workplaces [8]. Although this has been linked to unions seeking mutual gains with firms, the evidence of a substantial productivity differential between union and non-union plants is not strong. Furthermore, there is evidence that shareholders respond negatively to union organizing in the US, such that the share price of publicly traded firms falls by roughly 10% in the 15-18 months following a successful union election campaign. The effects are larger in firms where the majority voting union is substantial; that is, where

employees reveal a strong preference for union-bargained wage gains.

LIMITATIONS AND GAPS

Despite a spate of studies focusing on continental Europe, studies from the English-speaking world still dominate what we know about union wage effects. Yet unions are an important part of developing economies. These studies grapple with very different economic and political settings, and portray unions as very different institutions from those we know through the existing literature. Differences in the nature of unionization, even in the developed world, mean that we need to take full account of differences in institutional settings. This means moving beyond simple estimates of differences between union members and non-members using household data, although this is often a good place to begin.

Technical (estimation and data) questions continue to make it difficult to tease out causal effects of unions on wages and wage dispersion in union and non-union sectors. Furthermore, few attempts have been made to distinguish between types of union, despite their potential importance in understanding the wide range of union wage effects.

In the future, analysts should focus not simply on whether a union is present and how many workers it has, but also on the type of union it is, and the relations between it and management, which are, perhaps, the core of employment relations.

SUMMARY AND POLICY ADVICE

If unions do not cause the wage gap between union and non-union workers, no policy implications follow. Where unions challenge employers who pay below

employees' true value, they may in fact perform a good by tackling discrimination or low pay and increasing workers' purchasing power. Although, in theory, it may be unsustainable to pay above-market wages, unions can benefit workers and firms alike if the wage premium reflects union-induced increases in productivity (see **Factors affecting the impact of union wage effects on firm performance**).

But is the propensity of unions to compress pay harmful? National public sector pay bargaining has received attention in the UK because it affects the quality of labor supplied to the whole public sector, depending on how nationally bargained pay rates there compare with the private (largely non-unionized) sector. These labor-supply distortions have been linked to adverse welfare outcomes—for example, poor hospital care. A more dispersed wage structure might create strong work incentives, although incentives may decline above a certain level of inequality. Also, perceptions of fairer pay can lead to greater worker effort if workers reciprocate for the "gift" of greater, fairness.

Governments' perceptions of unions' effects on wages depend on whether they view current inequality levels as exacerbating or improving unemployment and poverty. Those keen to tackle perceived discrimination and wages below workers' worth may support union bargaining; those concerned about wage inflation and unemployment will prefer to let the market set wages. These political preferences have shifted, at least in countries like the UK, where public policy became less tolerant of union bargaining in the 1980s. In continental Europe, however, union bargaining remains key between social partners.

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Competing interests

The IZA World of Labor project is committed to the *IZA Guiding Principles of Research Integrity*. The author declares to have observed these principles.

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

[Filed 06/13/12]

Case No.

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION and PACIFIC MARITIME ASSOCIATION,

Plaintiffs,

v.

ICTSI OREGON, INC., an Oregon corporation,

Defendant.

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COMPLAINT FOR CONFIRMATION AND ENFORCEMENT OF FINAL AND BINDING RULINGS UNDER COLLECTIVE BARGAINING AGREEMENT

Plaintiffs INTERNATIONAL LONGSHORE AND WAREHOUSE UNION ("ILWU") and PACIFIC MARITIME ASSOCIATION ("PMA"), for their Complaint against Defendant ICTSI OREGON, INC. ("ICTSI") herein, allege as follows:

JURISDICTION AND VENUE

1. This is an action to enforce a collective bargaining agreement. This action arises under Section 301 of the Labor Management Relations Act of 1947, as amended (29 U.S.C. § 185). Jurisdiction is conferred upon this Court by the provision of that section.

2. Venue is appropriate in this district pursuant to 28 U.S.C. §1391 because Defendant ICTSI maintains its principal place of business in this district.

3. Plaintiff ILWU is, and at all times mentioned herein was, an unincorporated association commonly known as a labor union and maintains its principal offices in San Francisco, California. The ILWU represents longshore workers, longshore mechanics, gearmen, and marine clerks, employed by waterfront companies who are members of PMA, at all West Coast ports including Portland, Oregon. The ILWU is, and at all times mentioned herein has been, a labor organization representing employees within the meaning of Section 301 of the Labor Management Relations Action, 29 U.S.C. § 185.

4. Plaintiff PMA is, and at all times mentioned herein has been, a non-profit corporation organized and existing under and by virtue of the laws of the

State of California. At all material times, PMA has maintained its principal office at 555 Market Street, San Francisco, California. PMA is a multiemployer collective bargaining association whose members include stevedoring companies, terminal operators, and maintenance and repair contractors that employ dockworkers, such as longshoremen, throughout the United States Pacific Coast. PMA represents these employers, including Defendant ICTSI, in collective bargaining negotiations with the ILWU and in the administration of the resulting labor agreements.

5. Defendant ICTSI is, and at all times mentioned herein has been, a for-profit corporation organized and existing under and by virtue of the laws of the State of Oregon. At all material times, ICTSI has maintained a principal place of business at the Portland of Portland (Terminal 6), and has employed longshore workers, including longshore mechanics, who are represented by the ILWU.

6. PMA and its member companies, including ICTSI, are, and at all times mentioned herein have been, employers in an industry affecting commerce, as defined in Section 501 of the Labor Management Relations Act of 1947, 29 U.S.C. § 142, and Section 2 of the National Labor Relations Act, 29 U.S.C. § 152, and within the meaning of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

FACTS

The Collective Bargaining Agreement

7. The ILWU and PMA are parties to a single, coastwise, collective bargaining agreement covering all commercial ports along the West Coast of the United States from San Diego, California to Bellingham, Washington. The collective bargaining agreement is

known as the "Pacific Coast Longshore and Clerks Agreement" ("PCL&CA"), which is set forth in two documents, (1) the Pacific Coast Clerks Contract Document, which governs the wages, hours, and terms and conditions of employment for marine clerks employed by PMA member companies, and (2) the Pacific Coast Longshore Contract Document ("PCLCD"), which governs the terms and condition of employment of all longshore workers, including longshore mechanics, employed by PMA member companies, including ICTSI. A true and correct copy of the relevant portions of the PCLCD in effect during the period July 1, 2008 through July 1, 2014 is attached hereto as Exhibit A.

8. The PCL&CA is administered by the Joint Coast Labor Relations Committee (Coast LRC). The Coast LRC is the master labor-management committee for the entire West Coast and is composed of representatives of the ILWU and PMA headquarters in San Francisco, California, where the Coast LRC regularly meets and conducts its business under the Agreement. Its decisions are binding on the parties in all ports and become a part of the PCL&CA.

9. Each port has at least one Joint Port Labor Relations Committee ("JPLRC"), which is a joint labor-management committee composed of representatives of the ILWU Local Union and the local PMA-member companies at that particular port. The JPLRC administers the PCL&CA at the local level and its decisions are binding on the local parties, subject to the ultimate control of the Coast LRC.

10. The preamble to the PCLCD specifies, "All property rights in and to the Agreement, including this Contract Document for longshoremen, are entirely and exclusively vested in the Pacific Maritime Association

and the International Longshore and Warehouse Union respectively, and their respective members."

11. Section 1 of the PCLCD, entitled, "Scope of This Contract Document and Assignment of Work to Longshoremen," contains detailed provisions describing the nature and scope of the work that ILWU-represented employees are contractually entitled to perform under the Agreement.

12. Section 1.7 states, "The Contract Document shall apply to the maintenance and repair of containers of any kind and of chassis, and the movement incidental to such maintenance and repair. (See Section 1.81.)"

13. Section 1.71 states, "This Contract Document shall apply to the maintenance and repair of all stevedore cargo handling equipment. (See Section 1.81.)"

14. The work described in Sections 1.7 and 1.71 includes the maintenance and repair of refrigerated containers commonly referred to as "reefers." Reefers loaded with cargo have to be plugged into a power source in order to keep their contents within a specified temperature range. The maintenance and repair of reefers includes plugging the reefers into a power source, unplugging them when needed and monitoring their temperatures and vent settings.

15. Section 1.76 states that, "The Employers shall assign work in accordance with Section 1 provisions and as may be directed by the CLRC or an arbitration award, which the Employers shall defend in any legal proceeding. PMA shall participate along with the individual Employers assigning the work in any legal proceeding."

16. Section 1.81 states, "ILWU jurisdiction of maintenance and repair work shall not apply at those

specific marine terminals that are listed as being 'red circled' in the July 1, 2008 Letter of Understanding on this subject . . . ."

17. Section 1.82 states, "An employer in a port covered by this Contract Document who joins the Association subsequent to the execution hereof and who is not a party to any conflicting longshore agreement becomes subject to this Contract Document."

18. Section 11.2 states that, "The Union and Employers, as the case may be, shall be required to secure observance of this Agreement."

19. Section 18.1 requires the parties to act in good faith:

> As an explicit condition hereof, the parties are committed to observe this Agreement in good faith. The Union commits the locals and every clerk it represents to observe this commitment without resort to gimmicks or subterfuge. The Employers give the same guarantee of good faith observance on their part.

The Mandatory Grievance/Arbitration Provisions in the Agreement

20. Section 17 sets forth the parties' mandatory grievance procedure for final and binding resolution of disputes arising under the PCL&CA.

21. Section 17.15 specifies that, "The grievance procedure of this Agreement shall be the exclusive remedy with respect to any dispute arising . . ." under the Agreement. Section 17 and its various subparts set out a multi-step, coastwise labor relations/arbitration system for processing and resolving all manner of contract disputes. Under this system, disputes between

the ILWU and PMA concerning application and interpretation of the Agreement are initiated at the local level, where they are first considered by the JPLRC.

22. Under Section 17.25 of the PCL&CA, disputes that are not resolved by the JPLRC may be referred to arbitration before the Area Arbitrator. The Area Arbitrators are standing arbitrators who hear all contract disputes arising within their geographic area. There are four separate "areas" – Southern California, Northern California, the Columbia River and Oregon Coast Ports Area, and the Puget Sound Area. At all relevant times to this complaint, Jan R. Holmes has served as the Columbia River and Oregon Coast Ports Area Arbitrator.

23. Section 17.52 of the Agreement specifies that the powers of the arbitrators are limited strictly to the application and interpretation of the Agreement as written, and that they have "jurisdiction to decide any and all disputes arising under the Agreement. . . ."

24. Section 17.26 states, "The Joint Coast Labor Relations Committee has jurisdiction to consider issues that are presented to it in accordance with this Agreement and shall exercise such jurisdiction where it is mandatory and may exercise it where such jurisdiction is discretionary as provided in section 17.261, section 17.262 and other provisions of this Agreement." With or without a prior grievance, prior JPLRC ruling or prior Area Arbitration award, the Coast LRC has the discretion to review and resolve disputes that arise under the PCL&CA. At the Coast LRC, the ILWU and PMA each have one vote, even though each side may be represented by multiple representatives at particular meetings.

25. Section 17.52 of the Agreement specifies that the powers of the arbitrators are limited strictly to the application and interpretation of the Agreement as written, and that they have "jurisdiction to decide any and all disputes arising under the Agreement. . . ."

26. The rulings of the Coast LRC, as specified in the PCL&CA, are final and binding on all the parties who are subject to the PCL&CA and are part and parcel of the parties' collective bargaining agreement.

The Coast LRC Rulings to Be Enforced

27. In or about 2008, ILWU Local 8 filed grievances alleging that PMA-member companies were violating the PCL&CA by failing to assign certain reefer maintenance and repair work to ILWU longshore mechanics at Terminal 6 in the Port of Portland. Specifically, ILWU Local 8 alleged that PMA-member companies were refusing and failing to assign to ILWU longshore mechanics the work of plugging, unplugging and monitoring of reefers on the dock at Terminal 6. The JPLRC reviewed the issue and later referred the matter to Area Arbitration.

28. On or about February 12, 2011, Defendant ICTSI commenced operating Terminal 6. ICTSI failed and refused to assign the work of plugging, unplugging and monitoring of reefers on the dock to ILWU longshore mechanics.

29. In or about early 2012, ILWU Local 8 filed new grievances against ICTSI and other PMA member companies alleging that they were, among other things, refusing and failing to assign to ILWU longshore mechanics the work of plugging, unplugging and monitoring of reefers on the dock at Terminal 6.

30. Before the Area Arbitration on the grievances was held, the Coast LRC decided to address the issue. On or about May 23, 2012, the Coast LRC held a special meeting. The Coast LRC met in a special meeting and reviewed the relevant provisions of the PCL&CA and relevant arbitral precedent.

31. The same day, the Coast LRC issued a set of minutes reflecting the Coast LRC's ruling. The minutes are labeled CLRC-012-2012, as they reflect the CLRC meeting number twelve held in 2012. The minutes state:

> After discussion and consideration of the matter, and in accordance with its authority under Section 17.26 and 17.27 of the PCLCD, the CLRC agree the work in dispute, currently being performed by other than ILWU workers, is work that is covered by Section 1.7 at the Terminal 6 facility in Portland and shall be performed by ILWU represented workers.
>
> . . .
>
> The Committee instructs ICTSI to assign the subject work to ILWU represented Longshore personnel in accordance with the PCLCD and this CLRC agreement. The Committee further instructs ICTSI to comply with Section 1.76, PCLCD.

A true and correct copy of the complete Coast LRC minutes from CLRC-012-2012, which constitute the Coast LRC's May 23, 2012 ruling (hereinafter, "CLRC-012-2012 Ruling"), is attached hereto as Exhibit B.

32. The CLRC-012-2012 Ruling became and is a final and binding agreement of the parties pursuant to the provisions of Section 17 of the PCL&CA.

33. Thereafter, representatives of ILWU Local 8 filed a grievance alleging that Defendant ICTSI was failing and refusing to comply with the May 23, 2012 Ruling.

34. On or about June 4, 2012, Jan R. Holmes, the Area Arbitrator conducted an arbitration hearing. Immediately following the hearing, she issued a hand-written decision holding:

> 1) The Employers have failed to secure observance of the Agreement in violation [sic] Section 11.2, PCLCD by failing to implement Coast LRC directive dated May 23, 2012, in CLRC Mtg # 12-12.
>
> 2) The Employers shall immediately assign the work in question to ILWU Local 8 in accordance with CLRC Mtg # 12-12.

A true a correct copy of the Area Arbitrator's hand-written June 4, 2012, ruling is attached hereto as Exhibit C.

35. Later the same day, Area Arbitrator Holmes issued a type-written decision further memorializing her ruling, labeled CRAA-008-2012. ("CRAA" stands for "Columbia River Area Arbitrator" and "008-2012" indicates it is the eighth decision issued from the Columbia River Area Arbitrator in 2012.) The Columbia River Area Arbitrator held:

> 1. The Employers have failed to secure observance of the Agreement in violation of Section 11.2, PCLCD by failing to

implement Coast LRC directive dated May 23, 2012, CLRC Meeting #12-2012.

2. The Employers shall immediately assign the work in question to ILWU Local 8 in accordance with CLRC Meeting #12-2012.

3. The local grievance machinery is stalled and in accordance with Section 17.282, PCLCD, the matter in dispute can be referred at once by either the Union or the Association to the Joint Coast Labor Relations Committee for disposition.

A true and correct copy of CRAA-008-2012 is attached hereto as Exhibit D.

36. Because ICTSI continued to fail to comply with CRAA-008-2012, on or about June 5, 2012, the ILWU referred the matter of ITCSI's failure to implement the May 23, 2012 Ruling to the Coast LRC.

37. On or about June 6, 2012, the Coast LRC met in a special meeting to address CRAA-008-2012 and ICTSI continued noncompliance with CLRC-012-2012.

> The Committee agreed to affirm orders 1 and 2 of CRAA-008-2012 and the agreement reached in CLRC meeting No. 12-12. It was further agreed that ICTSI has, to date, failed to comply with the CLRC order.
>
> The Union moved: the contract grievance machinery has stalled and filed [sic] to work, and that the relevant CLRC agreements and the associated arbitration awards shall be implemented immediately.
>
> The Employers voted "yes" noting that such vote is specific to the CLRC order in Meeting No. 12-12 regarding ICTSI and the fact that

> the grievance machinery has stalled in this matter.

The minutes of this meeting are labeled CLRC-013-2012. A true and correct copy of the minutes reflecting this ruling (hereinafter, "CLRC-013-2012 Ruling") is attached hereto as Exhibit E.

38. CLRC-013-2012 Ruling became and is a final binding agreement of the parties pursuant to the provisions of Section 17 of the PCL&CA.

CAUSE OF ACTION FOR ENFORCEMENT OF COLLECTIVE BARGAINING AGREEMENT

39. ICTSI continues to refuse to comply with the CLRC-012-2012 Ruling and CLRC-013-2012 Ruling by continuing to fail and refuse to assign the plugging, unplugging and monitoring of reefers on the dock at Terminal 6 to ILWU longshore mechanics. The CLRC-012-2012 Ruling and CLRC-013-2012 Ruling are final and binding on all parties under section 17 of the PCL&CA.

40. Section 1.76 of the PCLCD requires ICTSI to "assign work in accordance with Section 1 provisions and as may be directed by the CLRC or an arbitration award."

41. Section 1.74 of the PCLCD forbids ICTSI from engaging in "subterfuge to avoid [its] maintenance and repair obligations under this Agreement to the ILWU."

42. Section 18 of the PCLCD requires ICTSI to observe the PCLCD "in good faith." ICTSI has and continues to violate Section 18 by disregarding the CLRC-012-2012 Ruling and CLRC-013-2012 Ruling.

43. The CLRC-012-2012 Ruling and CLRC-013-2012 Ruling are subject to immediate enforcement and

confirmation pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. §185.

44. By continuing to fail and refuse to comply with these rulings, ICTSI is causing and continuing to cause ILWU, PMA, and PMA member companies ongoing, irreparable injury not compensable by money damages, including but not limited to, injury to the coastwise bargaining relationship.

PRAYER FOR RELIEF

As to the Cause of Action for enforcement of the collective bargaining agreement, Plaintiff ILWU prays for judgment as follows:

1. That the Court order ICTSI to comply with the CLRC-012-2012 Ruling and CLRC-013-2012 Ruling by immediately assigning the work of plugging, unplugging and monitoring of reefers on the dock at Terminal 6 to ILWU longshore mechanics.

2. That the Court issue a temporary and permanent injunction compelling ICTSI to immediately assign the work of plugging, unplugging and monitoring of reefers on the dock at Terminal 6 to ILWU longshore mechanics.

3. That upon trial of this action, judgment be had against ICTSI.

4. For all damages sustained by ILWU as a result of ICTSI's failure to comply with, implement or secure compliance with said Coast LRC rulings and agreements.

5. For ILWU's costs of suit incurred herein including reasonable attorneys' fees; and

6. For such other relief as the Court may deem just and proper.

DATED this 13th day of June, 2012.

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Exhibit A

PACIFIC COAST
LONG SHORE
CONTRACT
DOCUMENT

July 1, 2008 - July 1, 2014

Between

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION

and

PACIFIC MARITIME ASSOCIATION

Published June 15, 2009

Name_______________________________________

Port_______________________________________

Local No.________________ Reg. No.____________

PACIFIC COAST LONGSHORE CONTRACT DOCUMENT

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PACIFIC COAST LONGSHORE CONTRACT DOCUMENT

THIS CONTRACT DOCUMENT, dated July 1, 2008, is by and between Pacific Maritime Association (hereinafter called "the Association"), on behalf of its members (hereinafter designated as "the Employers" or the "individual employer"), and the International Longshore and Warehouse Union (hereinafter designated as "the Union"), on behalf of itself and each and all of its longshore locals in California, Oregon and Washington (hereinafter designated as "longshore locals") and all employees performing work under the scope, terms and conditions of this Contract Document. This Contract Document is a part of the ILWU-PMA Pacific Coast Longshore and Clerks' Agreement.

The parties hereto are the International of the International Longshore and Warehouse Union and the coastwise Pacific Maritime Association. All property rights in and to the Agreement, including this Contract Document for longshoremen, are entirely and exclusively vested in the Pacific Maritime Association and the International Longshore and Warehouse Union respectively, and their respective members. In the case of the International Longshore and Warehouse Union, a majority of the members of both the individual and combined locals covered by the Agreement shall be necessary to designate any successor organization holding property rights and all benefits of the Agreement, and if an election is necessary to determine a majority of both individual and combined locals in order to establish the possessors of all rights and benefits under this Agreement, such election shall be conducted under the auspices and the supervision of the Coast Arbitrator

provided for in Section 17, provided that such designation or election is not in conflict with any paramount authority or lawful or statutory requirements.

SECTION 1

SCOPE OF THIS CONTRACT DOCUMENT AND ASSIGNMENT OFWORK TO LONGSHOREMEN

This Contract Document, as supplemented by agreements (Port Supplements and Working Rules) for the various port areas covered hereby, shall apply to all employees who are employed by the members of the Association to perform work covered herein. It is the intent of this Contract Document to preserve the existing work of such employees.

1.1 Within the States of California, Oregon and Washington, all movement of cargo on vessels or loading to and discharging from vessels of any type and on docks or to and from railroad cars and barges at docks is covered by this Contract Document and all labor involved therein is assigned to longshoremen as set forth in this Section 1.

1.11 This Contract Document covers the movement of outbound cargo only from the time it enters a dock and comes under the control of any terminal, stevedore, agent or vessel operator covered by this Contract Document and covers movement of inbound cargo only so long as it is at a dock and under the control of any vessel operator, agent, stevedore, or terminal covered by this Contract Document. In instances where an Employer asserts it had no control of the movement of the cargo in question, the responsibility of proving such lack of control shall be upon the employer.

1.2 Dock work provisions.

1.21 When an employer chooses to perform the following dock work, such work is covered by this Contract Document and all labor involved therein is assigned to longshoremen:

(a) High piling cargo and breaking down high piles of cargo,

(b) Sorting of cargo,

(c) Movement of cargo on the dock or to another dock,

(d) The removing of cargo from cargo boards,

(e) Building any loads of cargo on the dock,

(f) Multiple handling of cargo,

(g) Loading and unloading of containers at intermodal rail yards on dock (as defined in Section 1.92) and near dock, (i.e., not on dock, but adjacent to an employer's on-dock container yard) under the control of any employer covered by this Contract document [sic] shall be assigned to longshoremen —exception: unless such work at the intermodal yard has been assigned to other workers under terms of a collective bargaining agreement. An intermodal rail yard can only be designated as an on dock or a near dock but cannot be defined as both.

1. Uninterrupted movement of containers, 365 days a year, 24 hours per day (no non-work days). *(See July 1, 1996, Letter of Understanding.)*

2. Available shift starting times: day shift 0700, 0800 and 0900; night shift 1700, 1800, 1900, 0200 and 0300.

3. Side gate and expedited gate procedures.
4. Maximum of 10 hours for the purpose of finishing a train.

1.211 Carriage of cargo between docks by barge or rail or by trucks on public roads may be assigned to longshoremen.

Exception: The intraport drayage of cargo, containers, chassis and cargo handling equipment shall be assigned, in either direction, to longshoremen whenever such drayage is between an on-dock container yard (as defined in Section 1.92) and a neardock rail yard (i.e., not on-dock but adjacent to such container yard) which is covered by this Contract Document.

1.212 When the following dock work is performed, such work is covered by this Contract Document and all labor involved therein is assigned to longshoremen:

Consolidating containers or chassis on the dock for storage or delivery purposes.

1.22 Cargo received on pallet, lift, or cargo boards, or as unitized or packaged loads shall not be rehandled before moving to ships' tackle, unless so directed by the employer.

1.23 Any load of cargo discharged from a vessel may be dock stored just as it left the hatch.

1.24 Any load of cargo discharged from a vessel may, in whole or part, be rearranged if necessary for dock storage. Such cargo shall not be considered high piled unless stored more than 2 loads high.

1.241 Newsprint in rolls shall not be considered high piled unless stored more than 2 high, except that half size rolls (36" or less in height) shall not be considered high piled unless stored more than 4 high.

1.25 Cargo may be removed by the consignee or his agent, without additional handling by longshoremen except for breaking down high piles and any other work as the employer may choose to have done under Section 1.21.

1.26 if jurisdictional difficulties arise in connection with the performance of dock work, whatever jurisdictional agreements are reached shall not result in multiple handling.

1.27 Provisions relating to sorting or subsorting cargo to marks shall not prohibit a drayman from taking or rearranging such already sorted cargo for the purpose of properly loading his truck.

1.28 Masonite, hardboard and similar commodities are not high piled if the commodity is dock stored for delivery to a truck in piles not to exceed approximately 6 feet in height.

1.3 Any class of seamen in the employ of a vessel operator may do the work herein assigned to longshoremen that such seamen in their class now do, or may do, by practice arrived at by mutual consent of the parties or the Joint Coast Labor Relations Committee.

1.4 The Union may at any time, in general or limited terms, waive in writing the right of longshoremen to do any portion of the work herein assigned to longshoremen or so accept an interpretation of such assignment, and to the extent and for the time that such waiver or interpretation is accepted by the Association in writing the employer may assign or permit assignment of excepted work to any other class of workers consistent with such waiver or interpretation. Among the waivers and interpretations that have been made and accepted are: (*See Appendix I,*

Memorandum of Understanding between ILWU and IBT.)

1.41 The Employers have the right to have trucks come under the hook to move heavy lifts, dunnage, lining material, long steel, booms, and ship-repair parts directly from truck to ship and/or ship to truck.

1.42 Longshoremen will load or discharge trucks operating in direct transfer to or from the ship and otherwise will work on trucks when directed to do so by the employer.

1.43 Teamsters may unload their trucks by unit lifts (excluding containers) or piece by piece, to the area designated by the employer at which point the trucking or drayage company or shipper releases control of the cargo. (*See Section 1.8.*)

1.44 Teamsters may load their trucks piece by piece from cargo boards or with unit lifts (excluding containers) and build loads and otherwise handle cargo on their trucks or tailgates and on loading platforms and aprons. (*See Section 1.8.*)

1.45 The movement of cargo to or from a vessel on an industrial dock shall be defined as work covered by this Contract Document and is assigned to longshoremen. Existing practices under which other workers perform such dock work at an existing facility may be continued. An industrial dock is a dock at a facility where materials are manufactured and/or processed and from which they are shipped or at which materials used in the manufacture or process are received, and the dock operator has a proprietary interest in such materials.

1.5 All machinery, equipment and other tools now or hereafter used in moving cargo and/or used in

performing other work described in Section 1.1 shall be operated by longshoremen when used in an operation or at a facility covered by this Contract Document and the operation thereof is assigned to longshoremen and is covered by this Contract Document.

(a) Procedures provided for resolving disputes as set forth in Section 1.5 and subordinate subsections shall be construed in connection with the agreement of the Employers to provide skill training for longshoremen so as to minimize the grounds for exceptions listed in Section 1.54. When trained skilled longshoremen, certified as capable of performing work now assigned by the Pacific Maritime Association member company to nonlongshoremen, are available, such longshoremen will be assigned to such work, provided no union jurisdictional work stoppages are caused and provided that such trained skilled longshoremen may be assigned to any skilled work they are capable of performing without limitation by reason of claimed specialization.

(b) Where Pacific Maritime Association or its member companies have existing bargaining relationships, have granted recognition to, and have assigned work to bona fide labor unions as a result of such relationships and recognition; or where status quo exceptions relating to other unions are now set forth in Section 1, International Longshore and Warehouse Union will not make any jurisdictional claim or cause any jurisdictional work stoppage dispute involving Pacific Maritime Association or such member companies with relation to such work assignments. However, if the Union obtains the right to represent and bargain for such workers and

> no jurisdictional work stoppage problems are created, the Association agrees that such exceptions regarding assignment of work to longshoremen will be eliminated.

1.51 The individual employer shall not be deemed to be in violation of the terms of the Contract Document assigning work to longshoremen if he assigns work to a nonlongshoreman on the basis of a good-faith contention that this is permitted under an exception provided for herein.

1.52 Should there be any dispute as to the existence or terms of any exception, or should there be no reasonable way to perform the work without the use of nonlongshoremen, work shall continue as directed by the employer while the dispute is resolved hereunder.

1.53 Any such dispute shall be immediately placed before the Joint Coast Labor Relations Committee by the party attacking any claimed exception or proposing any change in an exception or any new exception. The Joint Coast Labor Relations Committee decision shall be promptly issued and shall be final unless and until changed by the parties or that Committee. The Committee may act on the grounds set forth in Section 1.54 or on any other grounds. Both parties agree that its position on such a dispute shall in no case be supported by, or give rise to threat, restraint or coercion.

1.54 Any such dispute that is not so resolved by the Committee within 7 days after being placed before it, may be placed before the Coast Arbitrator on motion of either party. The Arbitrator shall decide whether an exception should be upheld and may do so on the following grounds only:

(a) Nonlongshoremen were assigned the skilled or unskilled labor in dispute under practices existing as of January-August 10, 1959, arrived at by mutual consent and as thereafter modified or defined by the parties or the Joint Coast Labor Relations Committee, or;

(b) Cranes are not available on a bare boat basis and reasonable bona fide efforts to obtain them have been made and there is no reasonable substitute crane available.

1.6 This Contract Document shall apply to the cleaning of cargo holds, loading ship's stores, handling lines on all vessels (including lines handling at industrial docks), marking off lumber and logs, hauling ship, lashing, etc. (*See Addenda, In Lieu Of Time.*) (*See Section 1.8.*)

1.7 This Contract Document shall apply to the maintenance and repair of containers of any kind and of chassis, and the movement incidental to such maintenance and repair. (*See Section 1.81.*)

1.71 This Contract Document shall apply to the maintenance and repair of all stevedore cargo handling equipment. (*See Section 1.81.*)

1.72 It is recognized that the introduction of new technologies, including fully mechanized and robotic-operated marine terminals, necessarily displaces traditional longshore work and workers, including the operating, maintenance and repair, and associated cleaning of stevedore cargo handling equipment. The parties recognize robotics and other technologies will replace a certain number of equipment operators and other traditional longshore classifications. It is agreed that the jurisdiction of the ILWU shall apply to the maintenance and repair of all present and forthcoming

stevedore cargo handling equipment in accordance with Sections 1.7 and 1.71 and shall constitute the functional equivalent of such traditional ILWU work. It is further recognized that since such robotics and other technologies replace a certain number of ILWU equipment operators and other traditional ILWU classifications, the pre-commission installation per each Employer's past practice (e.g., OCR, GPS, MODAT, and related equipment, etc., excluding operating system, servers, and terminal infrastructure, etc.), post-commission installation, reinstallation, removal, maintenance and repair, and associated cleaning of such new technologies perform and constitute the functional equivalent of such traditional ILWU jobs. (See Section 1.81 and Letter of Understanding – Clarification and Exceptions to ILWU Maintenance and Repair Jurisdiction.)

1.73 The scope of work shall include the pre-commission installation per each Employer's past practice (e.g., OCR, GPS, MODAT, and related equipment, etc., excluding operating system, servers, and terminal infrastructure, etc.), post-commission installation, reinstallation, removal, maintenance and repair, and associated cleaning of all present and forthcoming technological equipment related to the operation of stevedore cargo handling equipment (which term includes containers and chassis) and its electronics, that are controlled or interchanged by PMA companies, in all West Coast ports. (See Section 1.81 and Letter of Understanding – Clarification and Exceptions to ILWU Maintenance and Repair Jurisdiction.)

1.731 In accordance with Sections 1.7, 1.71, 1.72, and 1.73, the maintenance and repair work on all new marine terminal facilities that commence operations after July 1, 2008, shall be assigned to the ILWU. New

marine terminals shall include new facilities, relocated facilities, and vacated facilities. (See Section 1.81 and Letter of Understanding – Clarification and Exceptions to ILWU Maintenance and Repair Jurisdiction.)

1.74 PMA members and their affiliated companies shall not engage in subterfuge to avoid their maintenance and repair obligations under this Agreement to the ILWU. Containers and chassis, owned, leased, or interchanged by a carrier controlling, controlled by or under common control with an agency company that is a PMA member shall be deemed to be owned, leased or interchanged by that PMA member company when that equipment is on a dock.

1.75 All on dock activities associated with the plugging and unplugging of vessels for cold ironing or its equivalent shall be performed by ILWU Longshore Division employees, except for US Flag vessels and crews as to their work on the vessel, as may be contractually assigned to them as of July 1, 2008. (See Section 1.81 and Letter of Understanding – Clarification and Exceptions to ILWU Maintenance and Repair Jurisdiction.)

1.76 The Employers shall assign work in accordance with Section 1 provisions and as may be directed by the CLRC or an arbitration award, which the Employers shall defend in any legal proceeding. PMA shall participate along with the individual Employers assigning the work in any legal proceeding.

1.8 Any type of work assigned herein in Sections 1.43, 1.44, and 1.6 to longshoremen that was done by nonlongshore employees of an employer or by subcontractor pursuant to a past practice that was followed as of July 1, 1978, may continue to be done by

nonlongshore employees of that employer or by subcontractor at the option of said employer.

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

1.811 This Contract Document shall apply to all movement of containers and chassis under one of the following conditions: (a) when containers or chassis are moved on a dock from a container yard to or from a storage area adjacent to a maintenance and repair facility on the same dock, such movement will be made by ILWU personnel, and (b) when an employer does not use a storage area adjacent to a maintenance and repair facility and the movement is directly between a container yard and a maintenance and repair facility on the same dock, such movement will be made by ILWU personnel. If there is objection by the union having contractual rights at such facility, (a) above shall be applied and ILWU personnel shall move the containers or chassis to a storage area adjacent to a maintenance and repair facility.

This Section 1.811 does not apply to: (a) movements of containers or chassis to or from roadability check stations in the container yard for repairs required for over the road haulage; or (b) movements for emergency repair and emergency maintenance of laden refrigerated containers.

1.82 An employer in a port covered by this Contract Document who joins the Association subsequent to the execution hereof and who is not a party to any conflicting longshore agreement becomes subject to this Contract Document.

1.9 Definitions.

1.91 The term "longshoreman" as used herein shall mean any employee working under this Contract Document. (*See Addenda, No Discrimination.*)

1.92 The term "dock" as used herein shall mean any moorage—anchorage, pier, wharf, berth, terminal, waterfront structure, dolphin, dock, etc.—at which cargo is loaded to or discharged from oceangoing vessels or received or delivered by an employer covered by this Agreement. The term "dock" does not include any facility at which vessels do not moor.

* * *

16.16 The employees individually must comply with all safety rules and cooperate with management in the carrying out of the accident prevention program.

16.17 An employee who is injured and claims two PMA employers are in dispute over who is responsible for his workmen's compensation claim, may request the Joint Coast Labor Relations Committee to assist the employee in securing a determination as to which employer is to make advance payments until the dispute is resolved. The JCLRC will not function to determine which employer, if any, is liable.

16.2 To make effective the above statements and promote on the job accident prevention, employer-employee committees will be established in each port. These committees will consist of equal numbers of employer and employee representatives at the job

level. Each category of employees should be represented. Employers' representatives should be from the supervisory level. The purpose of the committees will be to obtain the interest of the men in accident prevention by making them realize that they have a part in the program, to direct their attention to the real causes of accidents and provide a means for making practical use of the intimate knowledge of working conditions and practices of the men on the job. It is further intended that this program will produce mutually practical and effective recommendations regarding corrections of accident-producing circumstances and conditions.

Section 17

JOINT LABOR RELATIONS COMMITTEES, ADMINISTRATION OF AGREEMENT, AND GRIEVANCE PROCEDURES

17.1 Joint Labor Relations Committees.

17.11 The parties shall establish and maintain, during the life of this Agreement, a Joint Port Labor Relations Committee for each port affected by this Contract Document, 4 Joint Area Labor Relations Committees, and a Joint Coast Labor Relations Committee. Each of said Labor Relations Committees shall be comprised of 3 or more representatives designated by the Union and 3 or more representatives designated by the Employers. Each side of the committee shall have equal vote.

17.12 The duties of the Joint Port Labor Relations Committee shall be:

17.121 To maintain and operate the dispatching hall.

17.122 To exercise control of the registered lists of the port, as specified in Section 8.3.

17.123 To decide questions regarding rotation of gangs and extra men.

17.124 To investigate and adjudicate all grievances and disputes according to the procedure outlined in this Section 17.

17.125 To investigate and adjudicate any complaint against any longshoreman whose conduct on the job, or in the dispatching hall, causes disruption of normal harmony in the relationship of the parties hereto or the frustration and/or violation of the provisions of the working or dispatching rules or of this Agreement. The application of this Section 17.125 shall not negate the procedure for penalties as provided for in Section 17.7.

17.126 To carry out such other functions as are assigned to it herein or by the parties, directly or through the Joint Coast Labor Relations Committee.

17.13 There shall he a Joint Area Labor Relations Committee for each of the 4 port areas (Southern California, Northern California, Columbia River and Oregon Coast Ports, and Washington). Such Committee shall investigate and adjudicate grievances not settled at the local level. The Area Joint Labor Relations Committee step may be eliminated by agreement at the area level or may be bypassed by agreement at the port level.

17.14 The Joint Coast Labor Relations Committee shall function in the administration of this Agreement as provided herein and shall investigate and adjudicate grievances as provided herein.

17.141 All meetings of the Joint Coast Labor Relations Committee and all arbitration proceedings

before the Coast Arbitrator shall be held in the City and County of San Francisco, State of California, unless the parties shall otherwise stipulate in writing.

17.15 The grievance procedure of this Agreement shall be the exclusive remedy with respect to any disputes arising between the Union or any person working under this Agreement or both, on the one hand, and the Association or any employer acting under this Agreement or both, on the other hand, and no other remedies shall be utilized by any person with respect to any dispute involving this Agreement until the grievance procedure has been exhausted.

17.151 Any dispute in which the Association or the Union asserts that any dispatching hall is dispatching employees who were not entitled to be dispatched or who were dispatched out of sequence as to other persons entitled to priority dispatch shall be subject to prompt resolution through the grievance procedure of the Agreement when a complaint is filed by either party with the Joint Port Labor Relations Committee. If such complaint is not resolved within 7 days from the date of filing, the matter shall be referred to the Area Arbitrator whose decision shall be final and binding. The grievance procedure shall then be deemed "exhausted."

17.16 Pending investigation and adjudication of such disputes work shall continue and be performed as provided in Section 11.

17.2 Grievances arising on the job shall be processed in accordance with the procedure hereof beginning with Section 17.21. Other grievances as to which there are no specific provisions herein shall be processed in accordance with the provisions hereof beginning with Section 17.23.

17.21 The gang steward and his immediate supervisor, where the grievance is confined to 1 gang, or any 1 steward who is a working member of an affected gang where the grievance involves more than 1 gang or a dock operation, shall take the grievance to the walking boss, or ship or dock foreman in immediate charge of the operation.

17.22 If the grievance is not settled as provided in Section 17.21, it shall be referred for determination to an official designated by the Union and to a representative designated by the Employers.

17.23 If the grievance is not settled as provided in Section 17.21 or Section 17.22 or does not arise on the job, it shall be referred to the Joint Port Labor Relations Committee which shall have the power and duty to investigate and adjudicate it.

17.24 In the event that the Employer and Union members of any Joint Port Labor Relations Committee shall fail to agree upon any question before it, such question shall be immediately referred at the request of either party to the appropriate Joint Area Labor Relations Committee for decision.

17.25 In the event that the Employer and Union members of any Joint Area Labor Relations Committee fail to agree on any question before it, such question shall be immediately referred at the request of either party to the Area Arbitrator for hearing and decision, and the decision of the Area Arbitrator shall be final and conclusive except as otherwise provided in Section 17.26.

17.26 The Joint Coast Labor Relations Committee has jurisdiction to consider issues that are presented to it in accordance with this Agreement and shall exercise such jurisdiction where it is mandatory and

may exercise it where such jurisdiction is discretionary as provided in Section 17.261, Section 17.262 and other provisions of this Agreement.

17.261 Any decision of a Joint Port or Joint Area Labor Relations Committee or of an Area Arbitrator claimed by either party to conflict with this Agreement shall immediately be referred at the request of such party to the Joint Coast Labor Relations Committee (and, if the Joint Coast Labor Relations Committee cannot agree to the Coast Arbitrator, for review). The Joint Coast Labor Relations Committee, and if it cannot agree, the Coast Arbitrator, shall have the power and duty to set aside any such decision found to conflict with the Agreement and to finally and conclusively determine the dispute. It shall be the duty of the moving party in any case brought before the Coast Arbitrator under the provisions of this Section 17.261 to make a prima fade showing that the decision in question conflicts with this Agreement, and the Coast Arbitrator shall pass upon any objection to the sufficiency of such showing before ruling on the merits.

17.2611 Any formal decision of an Area Arbitrator over disputes regarding violations of Subsection 11.1 with which either party is dissatisfied shall immediately be referred, at the request of such party, to the Joint Coast Labor Relations Committee. Such dispute shall be processed by the Joint Coast Labor Relations Committee upon receipt (including electronic) by the Joint Coast Labor Relations Committee and moved from step to step within forty-eight (48) hours as follows:

(a) Joint Coast Labor Relations Committee meeting within twenty-four (24) hours; and

(b) Coast Arbitrator within twenty-four (24) hours.

Such hearing shall include all information regarding the dispute. At the request of either party, the Coast Arbitration shall be held at the site of the dispute. If such request is made, the timeline shall be extended by twenty-four (24) hours.

17.262 The Joint Coast Labor Relations Committee and the Coast Arbitrator shall have power to review decisions relative to the operation of dispatching halls, or the interpretation of port working and dispatching rules, or discharges, or pay (including travel pay and penalty rates), but shall exercise it in any case only if the Committee decides to review the specific case.

17.263 When either the Union or the Association claims that there has been a violation of Section 13 by anyone bound by this Agreement, the grievance shall be submitted to the Joint Coast Labor Relations Committee and shall be resolved there or referred to the Coast Arbitrator for hearing and decision in accordance with the applicable contract provisions.

17.27 In the event that the Employer and Union members of the Joint Coast Labor Relations Committee fail to agree on any question before it, including a question as to whether the issue was properly before the Coast Labor Relations Committee, such question shall be immediately referred at the request of either party to the Coast Arbitrator for hearing and decision, and the decision of the Coast Arbitrator shall be final and conclusive.

17.271 Referrals to the Coast Arbitrator must he submitted and heard by the Coast Arbitrator within 6 months following the date of disagreement at the Coast Labor Relations Committee level. Referrals not submitted within 6 months shall be considered "dropped."

17.28 Miscellaneous provisions.

17.281 Should either party fail to participate in any of the steps of the grievance machinery, the matter shall automatically move to the next higher level.

17.282 If the local grievance machinery becomes stalled or fails to work, the matter in dispute can be referred at once by either the Union or the Association to the Joint Coast Labor Relations Committee for disposition.

17.283 The hearing and investigation of grievances relating to discipline by return to the dispatching hall (Section 17.7), penalties (Section 17.8) and dispatching hall personnel (Section 8.23) shall be given precedence over all other business before the Joint Port and Joint Area Labor Relations Committees and before the Area Arbitrator. Either party may request that:

(a) grievances arising under Section 17.7 or involving dispatch hall disputes (except those covered by Section 17.151) be processed initially and from step to step within 24 hours; and

(b) failures to observe Area Arbitrators' awards be processed to the next step within 24 hours.

17.284 Nothing in this Section 17 shall prevent the parties from mutually agreeing upon other means of deciding matters upon which there has been disagreement.

17.3 Business Agents.

17.31 To aid in prompt settlement of grievances and to observe Agreement performance, it is agreed that Business Agents as Union representatives shall have access to ships and wharves of the employer to facilitate the work of the Business Agent, and in order that the employer may cooperate with the Business

Agent in the settlement of disputes the Business Agent shall notify the representative designated by the employer before going on the job.

17.4 When any longshoreman (whether a registered longshoreman or an applicant for registration or a casual longshoreman) claims that he has been discriminated against in violation of Section 13 of this Agreement, he may at his option and expense, or either the Union or the Association may at its option and at their joint expense, have such complaint adjudicated hereunder, which procedure shall be the exclusive remedy for any such discrimination.

17.41 Such remedy shall be begun by the filing of a grievance with the Joint Port Labor Relations Committee setting forth the grievance and the facts as to the alleged discrimination. Such a grievance shall be timely if presented within 10 days of the occurrence of the alleged discrimination. Such grievance shall be investigated by the Joint Port Labor Relations Committee at a regular or special meeting of the Committee at which the individual involved shall be permitted to appear to state his case, at which time he may present oral and written evidence and argument.

17.411 With respect to any claim of violation of Section 13, the Joint Port Labor Relations Committee shall extend the time for filing of such claim beyond the time established in Section 17.41 whenever such extension is necessary because the period of limitation otherwise applicable is determined to be unlawful or because in the judgment of the Committee in the exercise of its sound discretion, such an extension is otherwise necessary to prevent inequity but in no event shall the time for filing of such claims be extended beyond 6 months from the date of the occurrence of the alleged discrimination.

17.42 Either the Employers, the Union or the man involved may appeal the decision of the Joint Port Labor Relations Committee. Such appeal shall be to the Joint Coast Labor Relations Committee by letter addressed to the Joint Coast Labor Relations Committee. To be timely, such appeal must be delivered or mailed within 7 days of the decision of the Joint Port Labor Relations Committee.

17.421 if such an appeal is taken within the time limits allowed, the Joint Coast Labor Relations Committee shall either confirm or reverse or modify the decision of the Joint Port Labor Relations Committee without any further hearing, or order a further hearing and thereupon issue its decision on the basis of the entire record including that at both hearings.

17.43 An appeal from the decision of the Joint Coast Labor Relations Committee can be presented to the Coast Arbitrator (or by agreement of the Joint Coast Labor Relations Committee to an Area Arbitrator) by the individual involved, the Employers or the Union. An appeal to the Coast Arbitrator filed by an applicant for registration or a casual longshoreman involving the subject of registration shall be permitted only for those grievances which the Joint Coast Labor Relations Committee, in its sole discretion, certifies to the Coast Arbitrator that the facts introduced in support of the grievance into the record of the prior proceedings, if unrebutted, may support a finding of a violation of the grievant's Section 13 rights under this Agreement. Appeal shall be by a written request for an arbitrator's hearing mailed or delivered to the Union and the Employer representatives of the Joint Coast Labor Relations Committee if by an individual, or to the individual and the other party's representative on the Joint Coast Labor Relations Committee if by either

the Union or the Employers. Such an appeal shall be timely only if such request for an arbitrator's hearing is so filed in writing with the Joint Coast Labor Relations Committee no later than 7 days after issuance of the decision of the Joint Coast Labor Relations Committee from which an appeal to an arbitrator is taken.

17.431 The arbitration procedure shall be carried on in accordance with the procedures generally applicable under this Agreement for arbitration before the Coast Arbitrator.

17.5 Arbitrators and Awards.

17.51 The parties shall have an arbitrator for each of the said 4 port areas and a Coast Arbitrator.

17.511 The Area Arbitrator shall be appointed by the Joint Coast Labor Relations Committee and shall serve at its discretion. If any Area Arbitrator shall at any time be unable or refuse or fail to act, the Joint Coast Labor Relations Committee shall select a successor or substitute.

17.512 The Coast Arbitrator shall be selected by the Joint Coast Labor Relations Committee to serve a term coextensive with the term of the Agreement. The Coast Arbitrator may be reappointed for the term of the next Agreement by mutual agreement of the Parties. The Coast Arbitrator shall be a highly qualified neutral arbitrator with maritime experience, located on the West Coast. If the Committee fails to agree on the selection of the Coast Arbitrator, the individual shall be selected by a 6-person panel of prominent industry representatives: 3 selected by the Union and 3 selected by the Employers.

17.5121 If after thirty (30) days, the Panel is unable to select a Coast Arbitrator, the Panel shall submit to

the Federal Mediation and Conciliation Service (FMCS) a request for a list of seven (7) highly qualified neutral arbitrators with maritime experience, located on the West Coast. If the Union and the Employer representatives agree that the list is unacceptable, they may jointly request that the FMCS provide a second list. In the event, the Parties cannot mutually select a Coast Arbitrator from the FMCS Panel, the selection shall be determined by a striking process. The first strike shall be determined by a coin flip. The Party that correctly calls the coin flip shall have the choice of striking first or last.

Note: It is agreed that since PMA nominated John Kagel, in the event a FMCS Panel is required to select the successor to John Kagel, the Union shall have the choice of a first or last strike. Thereafter, the procedure of coin flip set forth in Section 17.5121 shall apply.

17.52 Powers of arbitrators shall be limited strictly to the application and interpretation of the Agreement as written. The arbitrators shall have jurisdiction to decide any and all disputes arising under the Agreement including cases dealing with the resumption or continuation of work.

17.53 Arbitrators' decisions must be based upon the showing of facts and their application under the specific provisions of the written Agreement and be expressly confined to, and extend only to, the particular issue in dispute. The arbitrators shall have power to pass upon any and all objections to their jurisdiction. If an arbitrator holds that a particular dispute does not arise under the Agreement, then such dispute shall be subject to arbitration only by mutual consent.

17.54 In the event the parties agree that an arbitrator has exceeded his authority and jurisdiction or that he is involved in the industry in any other position of interest which is in conflict with his authority and jurisdiction, he shall be disqualified for any further service.

17.55 All decisions of the arbitrators, except as provided in Sections 17.261 and 17.6, shall be final and binding upon all parties. Decisions shall be in writing signed by the arbitrator and delivered to the respective parties.

17.56 All expenses and salaries of the arbitrators shall be borne equally by the parties, except where specifically provided herein to the contrary.

17.57 Al] decisions of arbitrators shall be observed and/or implemented. No decision of an Area Arbitrator, interim or formal, can be appealed unless it is observed and/or implemented.

17.6 Informal hearings and interim rulings.

17.61 When a grievance or dispute arises on the job and is not resolved through the steps of Sections 17.21 and 17.22, and it is claimed that work is not being continued as required by Section 11, a request by either party shall refer the matter to the Area Arbitrator (or by agreement of the Joint Coast Labor Relations Committee to the Coast Arbitrator) for his consideration in an informal hearing; such referral may be prior to formal disagreement in any Joint Labor Relations Committee or upon failure to agree on the question in the Joint Area Labor Relations Committee. Such hearing may be ex parte if either party fails or refuses to participate, provided that the arbitrator may temporarily delay an ex parte hearing

to permit immediate bona fide efforts to settle an issue without a hearing.

17.62 The arbitrator shall act with his powers limited strictly to the application and interpretation of the Agreement as written. The parties shall have the right to present such views as they wish to the arbitrator, but it shall not be necessary to have a shorthand or stenotype reporter present to report the proceedings nor shall employment of counsel be necessary. The arbitrator, on this basis, shall promptly issue an oral interim ruling with respect to the grievance or dispute and thereafter confirm it in writing. An interim ruling shall be binding on the parties regarding the particular issue on the particular ship on the particular occasion but shall not be a precedent for other cases. Any interim ruling shall be binding unless reversed by a contrary decision after a formal hearing.

17.63 If either party is dissatisfied with the interim ruling, the question shall be immediately referred at the request of such party to the arbitrator for hearing and decision in accordance with the normal procedure under Section 17.5 of this Agreement; the arbitrator shall then proceed as if there had been a failure to agree on the question by the Joint Port Labor Relations Committee, provided that the arbitrator may temporarily delay a hearing to permit prompt bona fide efforts to settle the question in the Port or Area Joint Labor Relations Committee.

17.631 Formal area arbitration hearings on disputes regarding violations of Subsection 11.1, conducted in accordance with Section 17.63, shall be heard within twenty-four (24) hours following the issuance of the interim ruling to both parties by the Area Arbitrator. The formal decision shall be rendered within twenty-

four (24) hours after receipt of the transcript of the hearing.

17.64 The use of the informal procedure leading to an interim ruling can be waived by consent of both parties with respect to any particular dispute or grievance. If at the beginning of the informal procedure either party establishes a good faith claim that an issue, other than a dispute with respect to Section 11, is of general significance or that the formal procedure will be necessary to settle such issue, the arbitrator shall rule that the informal procedure be bypassed regarding such issue. In the absence of such waiver or decision to bypass, the arbitrator shall hold an informal hearing and issue an interim ruling regarding the dispute in accordance with the procedure set forth above.

17.7 Discipline by return to the dispatching hall.

17.71 The employer shall have the right to return to the dispatching hall any man (or to send home any nonregistered man) for incompetence, insubordination or failure to perform the work as required in conformance with the provisions of this Agreement.

17.72 Such longshoreman shall not be dispatched to such employer until his case shall have been heard and disposed of before the Joint Port Labor Relations Committee, and no other employer shall refuse employment to such longshoreman on the basis of such return to the dispatch hall.

17.73 If any man feels that he has been unjustly returned to the dispatching hall or dealt with, his grievance shall be taken up as provided in Section 17.2 beginning with Section 17.23.

17.74 In case of return to the dispatching hall without sufficient cause, the Joint Port Labor

Relations Committee may order payment for lost time or reinstatement with or without payment for lost time.

17.75 When an employer returns a gang to the dispatching hall for cause, its gear priority terminates and such employer may carry on work at the hatch or gear involved without delay. The hatch or gear involved shall not stand idle because of any action or nonaction of the Union or longshoremen or the dispatching hall. A replacement gang shall be dispatched promptly upon order of the employer. Until the replacement gang turns to or if one is not ordered or cannot be dispatched, any other gang employed by the employer shall shift to the hatch or gear involved as directed by the employer. The returned gang shall not be redispatched to the job involved unless it is the only available gang and the Association requests that it be dispatched. The provisions of Sections 17.73 and 17.74 shall apply with respect to any gang returned to the dispatching hall for cause.

17.8 Penalties for work stoppages, assault, gross misconduct, pilferage, drunkenness, drug abuse and peddling, safety violations and other offenses.

17.81 All longshoremen shall perform their work conscientiously and with sobriety and with due regard to their own interests shall not disregard the interests of the employer. Any employee who is guilty of deliberate bad conduct in connection with his work as a longshoreman or through illegal stoppage of work shall cause the delay of any vessel shall be fined, suspended, or for deliberate repeated offenses for which he has been found guilty under the Contract procedures, cancelled from registration. A determination that an onerous or health and safety claim made in good faith shall be disallowed is not a finding that a

man is guilty of an offense within the meaning of this Section. Any employer may file with the Union a complaint against any member of the Union and the Union shall act thereon and notify the Joint Port Labor Relations Committee of its decision within 30 days from the date of receipt of the complaint. An employer shall not be required to appear nor need he participate in discipline by the Union of its members beyond the filing of complaints.

17.811 If within 30 days thereafter the Employers are dissatisfied with the disciplinary action taken under Section 17.81, then the following independent procedure of Section 17.82 may be followed, which procedure shall also be applicable in the case of longshoremen not members of the Union.

17.82 The Joint Port Labor Relations Committee has the power and duty to impose penalties on longshoremen who are found guilty of stoppages of work, assault, gross misconduct, refusal to work cargo in accordance with the provisions of this Agreement, or who leave the job before relief is provided, or who are found guilty of pilfering or broaching cargo or of drunkenness or who in any other manner violate the provisions of this Agreement or any award or decision of an arbitrator. In determining penalties neither the parties nor the arbitrators shall consider offenses that predate by 5 years or more the date of a current offense.

17.821 Assault.

17.8211 For first offense assault: Minimum penalty, 1 year suspension from work. Maximum penalty, discretionary.

17.8212 For second offense assault: mandatory cancellation from registered list upon request of either party.

17.8213 In either case such conviction shall not be dependent upon the existence of a prior court decision, nor shall the determination of guilt await a court decision.

17.822 Pilferage.

17.8221 For first offense pilferage: Minimum penalty, 60 days' suspension from work. Maximum penalty, discretionary.

17.8222 For second offense pilferage: Mandatory cancellation from registered list upon request of the employer.

17.823 Drunkenness or smoking in prohibited areas.

17.8231 First offense: Suspension for 15 days.

17.8232 Second offense: Suspension for 30 days.

17.8233 Succeeding offenses: Minimum penalty, 60 days suspension. Maximum penalty, discretionary.

17.824 Abuse of or use of controlled substances and/or drugs on the job or in or around any employment premises or the dispatch hall.

17.8241 First offense: Suspension for 15 days.

17.8242 Second offense: Suspension for 30 days.

17.8243 Succeeding offenses: Minimum penalty, 60 days suspension. Maximum penalty, discretionary.

17.825 Sale and/or peddling of controlled substances and/or drugs on the job or in or around any employment premises or the dispatch hall.

17.8251 For first offense: Minimum penalty, 1 year suspension from work. Maximum penalty, discretionary.

17.8252 For second offense: Mandatory cancellation from registered list upon request of either party.

17.8253 In either case such conviction shall not be dependent upon the existence of a prior court decision, nor shall the determination of guilt await a court decision.

17.826 An employee found to be in violation of reasonable verbal instructions, posted employer safety rules, and/or the PCMSC shall attend a 1-day safety class approved by the Coast Labor Relations Committee without pay. Failure to attend and complete the class as scheduled without a valid excuse shall result in suspension from work until the class is completed. In addition, the employee shall be subject to the following minimum discipline, which shall be applied uniformly without favoritism or discrimination.

17.8261 First Offense: Letter of warning.

17.8262 Second Offense: Suspension from work for 15 days.

17.8263 Third Offense: Suspension from work for 60 days. Maximum penalty, discretionary.

17.8264 Fourth Offense: Subject to deregistration.

17.827 An employee who, knowingly and flagrantly disregards reasonable verbal instructions, posted employer safety rules, and/or the PCMSC, and who intentionally causes significant damage to equipment or cargo, or who intentionally injures himself or others, shall be subject to the following minimum discipline, which shall be applied uniformly without favoritism or discrimination.

17.8271 First Offense: Suspension from work for 90 days. Maximum penalty, discretionary.

17.8272 Second Offense: Subject to deregistration.

17.828 Grievances arising under Sections 17.826 and 17.827 shall be subject to the grievance procedure of Section 17, with the following exceptions.

17.8281 Grievances arising under Sections 17.826 and 17.827 shall be heard by the local parties within 30 days of the employee being cited. In the event the parties fail to resolve the grievance within the 30-day time period, the grievance shall be referred to the Area Arbitrator, at the request of either party, for an immediate hearing and decision.

17.8282 In determining whether a violation under Sections 17.826 and 17.827 is a first, second, third or fourth offense, Section 17.82 shall govern.

17.829 An employee released from the job for being under the influence of alcohol or drugs may request that his/her union representative report to the job. If the union representative, having observed the employee, believes the employee was unjustly released, he will discuss the case immediately with the employer. If the employer and union representative are unable to reach agreement, or if the union representative does not immediately respond to the request to come to the job, the case shall be immediately referred at the request of either party to the Joint Port Labor Relations Committee which shall have the power and duty to investigate and adjudicate it. If the Joint Port Labor Relations Committee members present are unable to reach agreement, and/or if no Union member of the Joint Port Labor Relations Committee responds to the request to come to the job within 1 hour, the Area Arbitrator shall be

immediately called to the job to decide if the employee was properly released. If the released employee fails to contact his/her union representative, or if the employee leaves the job, the employee shall be guilty as charged. Where an employee is guilty of working under the influence of alcohol or drugs the employee shall be subject to the penalties found in Section 17, and shall be referred to the ILWU-PMA employee assistance program.

17.83 Suspensions under the foregoing provisions shall follow convictions by either the Union grievance machinery or by the Joint Port Labor Relations Committee, either of whom shall accept a prior court decision. The court decision will be considered by the parties and they shall discount the penalties set forth above accordingly. Where a fine has been assessed then the days off on suspension shall be discounted at the rate of $5.00 per day. Any man suspended under these provisions shall not be dispatched for work in any port covered by this Agreement until the suspension penalty has been served.

17.84 Any longshoremen having records of habitual drunkenness or whose conduct on the job or in the dispatching hall causes disruption of normal harmony in the relationship of the parties hereto, or who physically assault anyone in the dispatching hall or on the job, or who have records of working in a manner that is hazardous to themselves or that endangers other workers shall not be dispatched to operate or used to operate any hoisting or mechanical equipment or devices or to supervise the operation of such equipment; or they shall be subject to such other remedy as the Joint Port Labor Relations Committee shall mutually consider appropriate.

17.85 In the event of disagreement at the Joint Port Labor Relations Committee level as to the imposition of penalties under this Section 17.8, the issue shall be processed immediately through the grievance procedure, and to the Area Arbitrator, if necessary.

17.86 The rules and penalties provided hereinabove shall be applicable to fully registered longshoremen and, except where a more stringent rule or penalty is applicable pursuant to Section 17.861, to limited registered longshoremen and to nonregistered longshoremen.

17.861 More stringent rules and penalties than those provided hereinabove that are applicable to limited registered longshoremen or to nonregistered longshoremen or to both such groups may be adopted or modified by unanimous action of the Joint Coast Labor Relations Committee and, subject to the control of such Committee so exercised, more stringent rules and penalties applicable to limited registered men or nonregistered men or to both groups that are provided in existing and future local joint working, dispatching, and registration rules and procedures or by mutually agreed practices shall be applicable.

SECTION 18

GOOD FAITH GUARANTEE

18.1 As an explicit condition hereof, the parties are committed to observe this Agreement in good faith. The Union commits the locals and every longshoreman it represents to observe this commitment without resort to gimmicks or subterfuge. The Employers give the same guarantee of good faith observance on their part.

ADDENDA

LETTER OF UNDERSTANDING

Strike, Lockout, and Work Stoppage Accelerated Grievance Procedure

Mr. McKenna:

During the course of the 2008 PCL&CA negotiations, the Parties discussed the intent of the new Sections 17.2611 and 17.631 and agreed that the provisions do not apply to picket lines, health and safety, and onerous work disputes.

Sincerely,
/s/ Robert McEllrath
International President

Understanding confirmed:
/s/ James C. McKenna
President & CEO
Pacific Maritime Association
Dated: 07/28/08

LETTER OF UNDERSTANDING

Clarifications and Exceptions to ILWU Maintenance and Repair Jurisdiction

Mr. McKenna:

During the course of the 2008 PCL&CA negotiations, the Parties discussed the assignment of maintenance and repair work to the ILWU coastwise bargaining unit to offset the introduction of new technologies and robotics that will necessarily displace/erode traditional longshore work and workers. The scope of ILWU work shall include the pre-commission installation per each Employer's past practice (e.g., OCR, GPS, MODAT, and related equipment, etc., excluding operating system, servers, and terminal

infrastructure, etc.), post-commission installation, reinstallation, removal, maintenance and repair, and associated cleaning of all present and forthcoming technological equipment related to the operation of stevedore cargo handling equipment and its electronics in all West Coast ports except for those, and only those, specific marine terminal facilities listed as "red-circled" below:

OAKLAND	
APL/EMS Berths 60-63	Red circle cranes, reefers, and container washing
APM OAK Berths 20-23	Red circle Berth 20 cranes, Horizon off dock trucking operation and associated equipment
OICT/SSAT Berths 57-59	Red circle
TBCT/ITS Berths 24-26	Red circle
Howard Terminal/SSAT Berths 67-68	Red Circle
Ben Nutter/Evergreen Berths 35-38	Red Circle
Hanjin/TTI Berths 55-56	Red circle with the exception of cranes, transtainers, dry containers, reefers, and chassis
SSAT/Richmond	Red Circle
LONG BEACH	
LB 243-247/LB 266-270 SSA Pier J	Red circle

LB 88-94 SSAT Pier A	Red circle
LB 60-62 SSAT Pier C	Red circle
LB 227-236 ITS Pier J/G	Red circle
LB 132-140 Pier T Hanjin/TTI	Red circle with the exception of cranes, transtainers, reefers, dry containers and chassis
LB 205-207 SSA Pier F	Red circle

LOS ANGELES	
LA APL/EMS Berths 302-305	Red circle reefer, minor chassis service repair and roadability in CY
LA Berths 226-236 Evergreen	Red circle with the exception of cranes, transtainers, reefers, dry containers, and chassis
LA Berths 121-131 Yang Ming	Red circle with the exception of cranes
LA SSA Outer Harbor 54-55	Red circle
LA Berth 100 WBCT/China Shipping	Red circle with the exception of cranes

TACOMA	
Husky Terminal/ITS	Red circle
TOTE	Red circle with the exception of minor trailer repair, federal trailer licensing, and rolox box repair
APM Terminal	Red circle hammerhead cranes only
OCT/Yang Ming/Terminal 7 Berth D	Red circle with the exception of chassis, reefers, and dry containers
Horizon Facility	Red circle

SEATTLE	
SSA Terminal 18	Red circle
SSAT Terminal 25	Red circle
SSAT/China Shipping Terminal 30	Red circle
Terminal 46/Hanjin	Red circle with the exception of cranes, transtainers, chassis, dry containers, and reefers
Pier 66/CTA	Red circle
APL/EMS North Terminal 5	Red circle

The "red-circled" list shall replace the 1978 past practice exception with respect to Sections 1.7, 1.71, 1.72, and 1.73 of the PCLCD.

The Parties further agree that all carriers and vessel operators may use any of the "red-circled" facilities, as they see fit, without affecting the status of these facilities as an exception to ILWU maintenance and repair jurisdiction. It shall be a subterfuge for a carrier to utilize a "red circled" terminal to perform maintenance and repair work on its equipment unless the work is associated with a vessel calling that facility. Modifications and reconstruction of any "red-circled" facility, including changes in the boundary lines that do not change the fundamental identity of the "red-circled" facility, shall not change its exception status.

The Parties agree that a terminal operator that is the owner or lessee of a "red-circled facility [sic] and that has a direct collective bargaining relationship with another union as of July 1, 2008, may vacate a "red-circled" facility and then relocate its operations to another facility within the same port (other than newly constructed terminals subject to ILWU jurisdiction under Section 1.731) and retain its incumbent non-ILWU mechanic workforce, provided the relocation maintains a continuity of operations, personnel, and equipment.

The Parties also agree that, notwithstanding the above paragraph, the anticipated relocation, due to eminent domain, of the Tacoma TOTE facility to another location within the Port of Tacoma area shall not displace or disturb the recognized workforce at the prior facility, unless otherwise determined by the Employer.

With respect to Section 1.75, the Parties agreed that the exception would only apply to "full red-circled" facilities.

The Parties left for future resolution under Section 17 the question concerning how Section 1 provisions, as amended, apply in situations when stevedore cargo handling equipment (See Section 1.7 and subsections), at a marine terminal is moved off the marine terminal by the terminal operator or by a signatory carrier.

Sincerely,
/s/ Robert McEllrath
International President

Understanding confirmed:
/s/ James C. McKenna
President & CEO
Pacific Maritime Association
Dated: 07/28/08

LETTER OF UNDERSTANDING

Maintenance and Repair – Warranty Definition

Dear Mr. McEllrath:

During the course of the 2008 ILWU-PMA Contract negotiations, the Parties discussed the M&R warranty provisions in the applicable port supplements and agreed to the following warranty language (See Section 1.81 and Letter of Understanding – Clarification and Exceptions to ILWU Maintenance and Repair Juisdiction):

> *Work may be performed on dock by vendors under bona fide original written manufacturers' warranty on new purchased or leased equipment. Length of such warranties shall*

not exceed industry standards of the manufacturer or three (3) years, whichever is less. Past practice exceptions (e.g., manufacturer design problems, major structural repairs, major painting, and items recalled by the manufacturer) may continue. Additional service contracts not covered by the original warranty shall not be construed as being bona fide original manufacturers' warranties. Copies of said warranties shall he furnished to the Union upon request.

While under vendor warranty, no agency other than vendor and/or manufacturer or their designated agency shall be used to repair said piece of equipment.

Exhibit B

MINUTES OF THE SPECIAL MEETING OF THE COAST LABOR RELATIONS COMMITTEE

Meeting No. 12-12

Time/Date: Wednesday, May 23, 2012 – 3:00 p.m.

Place: Via Teleconference

Present:	For the Union	For the Employers
	B. McEllrath R. Familathe R. Ortiz, Jr. L. Sundet	R. Marzano

Also Present: K. Donovan

At the request of the Union, the Committee met to address a number of grievances filed at the local level in Portland. The issue in dispute involves the plugging, unplugging and monitoring of refrigerated containers on the dock at the ICTSI operated Terminal 6 facility in Portland, Oregon. The local Union (ILWU Local 8) has made a claim for the work under Section 1.7 of the PCLCD. The Committee understands that the local employers have advised the Union that ICTSI's lease with the Port of Portland. requires it to allow the Port to perform the work in question utilizing employees represented by another union. The disagreement is scheduled for an area arbitration hearing on May 31, 2012.

The Committee reviewed the 2008-2014 PCLCD, specifically the new language in Section 1.7 and subsections and the "Red Circle" LOU, along with Kagel Award C-07-2011. After discussion and consideration of the matter, and in accordance with its authority under Section 17.26 and 17.27 of the PCLCD, the

CLRC agreed the work in dispute, currently being performed by other than ILWU workers, is work that is covered by Section 1.7 at the Terminal 6 facility in Portland and shall be performed by ILWU represented workers. The Committee further agreed that, in this instance and under the facts of this case, the terms of the lease with the Port of Portland does not alter ICTSI's contractual obligation to the ILWU under the PCL&CA.

The Committee instructs ICTSI to assign the subject work to ILWU represented Longshore personnel in accordance with the PCLCD and this CLRC agreement. The Committee further instructs ICTSI to comply with Section 1.76, PCLCD.

The Committee agreed that this specific issue is considered resolved with finality, therefore no back pay claims are payable.

Date Signed: May 23, 2012	Date Signed: May 23, 2012
For the Union:	For the Employers:
/s/ Ray Ortiz Jr.	/s/ R. Marzano
/s/ Leal Sundet	

Exhibit C

1) The Employers have failed to secure observance of the Agreement in violation of Section 11.2, PCLCD by failing to implement Coast LRC directive dated May 23, 2012, in CLRC Mtg # 12-12.

2) The Employers shall immediately assign the work in question to ILWU Local 8 in accordance with CLRC Mtg # 12-12.

/s/ Jan R. Holmes

June 4, 2012

Exhibit D

IN THE MATTER OF A CONTROVERSY

BETWEEN

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 8

AND

PACIFIC MARITIME ASSOCIATION

CRAA-0008-2012

INTERIM DECISION OF JAN R. HOLMES

OREGON AREA ARBITRATOR

PORTLAND, OREGON

JUNE 4, 2012

ISSUE: — Union's Motion — Violation of Sections 11.1, 11.2, and 1.74, PCLCD, ICTSI, Terminal 6, Portland. Oregon

An informal hearing was held at 4:30 PM at the Port of Portland Administration Building, Terminal 6, Portland, Oregon. The parties were afforded a full opportunity to present witnesses, arguments and evidence.

FOR THE UNION: Jack Mulcahy, ILWU Local 8
Torrae DelaCruz, ILUW Local 8
Kevin Johnson, ILWU Local 8

FOR THE EMPLOYERS: Mike Dodd, Pacific Maritime Association
Jim Mullen, ICTSI
Preston Foster, TMC

POSITION OF THE PARTIES

The Union held that the Employers have engaged in a lockout and have not secured observance of the Agreement by refusing to utilize ILWU reefer mechanics to perform plugging, unplugging, and monitoring of reefer containers for ITCSI at Terminal 6. The provisions of Section 17.62, PCLCD have been followed. The Coast parties agreed in CLRC Meeting No. 12-2012, May 23, 2012, that the work assignment was properly assigned to the ILWU. The employer has refused to utilize the ILWU and has threatened to fire ILWU reefer mechanics who perform this work, No reefer mechanics have been hired on the second shift, June 4, 2012. Non-ILWU electricians have been directed to perform this work. NLRB proceedings cannot be considered by the Area Arbitrator.

The Union moved that the Employers were guilty of violation of Section 11.1, PCLCD, for locking out the ILWU reefer mechanics from agreed-to work, and Section 11.2, PCLCD, for failure of the Employers to secure observance of the Agreement. Further, the Employers are guilty of violation of Section 1.74, PCLCD, for engaging in subterfuge to avoid their maintenance and repair obligations under the Agreement. The employer should be directed to immediately assign the work in question to the ILWU.

The Employers held that this issue is not proper before the Arbitrator. Sections 11.3 and Section 11.31, PCLCD, provide that the only reasons for on-the-job arbitrations are health and safety, onerous workload, or picket lines. The industry has maintained a longstanding practice to "work now, grieve later." Though the CLRC instructed the parties to utilize the ILWU for the work in question, the NLRB 10(k) hearing was pursued by the employer after receiving a

strike letter from the IBEW, the Union also claiming this work. The grievance machinery has not been fully implemented. The parties should be able to work out the kinks in the CLRC agreement. The issue is still being discussed in San Francisico [sic].

Further, the Employers held that it is not proper to be charged with a violation of Section 1.74, PCLCD. The Employers stated that ICTSI is protesting the CLRC agreement and are in an impossible situation. If the employer assigns the work to the ILWU they will be violating their lease with the Port. The Union has slowed down the operation today which is tantamount to a work stoppage. There is no immediate danger to the health and safety of the longshoremen, an onerous workload, or a picket line. This issue is not proper before the Area Arbitrator.

DISCUSSION

Section 11.1, PCLCD, provides that there shall be no strike, lockout, or work stoppage for the life of the Agreement. Section 11.2, PCLCD, requires that the parties secure observance of the Agreement. This is a case of a dispute that was resolved with finality under the authority granted the Joint Coast Labor Relations Committee under the terms of Sections 17.26 and 17.27, PCLCD. Sections 17.52 and 17.53, PCLCD, limit the Arbitrator's powers to the application and interpretation of the language as written in the Agreement; no other outside rulings or proceedings are to be considered. The Coast minutes clearly state that the terms of the 2008-2014 PCLCD were considered, as well as Section 1.7 and subsections, PCLCD, the "Red-circle facilities" Letter of Understanding, and Coast Arbitrator John Kagel's Coast Award C-07-2011. Additionally, the parties considered the terms of the lease ICTSI has with the Port of

Portland. The CLRC minutes state, "The Committee instructs ICTSI to assign the subject work to ILWU represented Longshore personnel in accordance with the PCLCD and this CLRC agreement. The Committee further instructs ICTSI to comply with Section 1.76, PCLCD. The Committee agreed that this specific issue is considered resolved with finality, therefore no back pay claims are payable."

The Employers held that ICTSI cannot assign the work to the ILWU without violating its lease agreement with the Port with serious consequences. An NLRB 10(k) hearing was held on this jurisdictional dispute on May 24, 2012, a day after the CLRC Meeting was held and the resolution is pending. The employer stated that they would not implement the Arbitrator's decision. Accordingly, the following decision was hereby rendered.

DECISION

1. The Employers have failed to secure observance of the Agreement in violation of Section 11.2, PCLCD by failing to implement Coast LRC directive dated May 23, 2012, CLRC Meeting #12-2012.
2. The Employers shall immediately assign the work in question to ILWU Local 8 in accordance with CLRC Meeting #12-2012.
3. The local grievance machinery is stalled and in accordance with Section 17.282, PCLCD, the matter in dispute can be referred at once by either the Union or the Association to the Joint Coast Labor Relations Committee for disposition.

/s/ Jan R. Holmes

Jan R. Holmes, Oregon Area Arbitrator

Exhibit E

MINUTES OF THE SPECIAL MEETING OF THE COAST LABOR RELATIONS COMMITTEE

Meeting No. 13-12

Time/Date: Wednesday, June 6, 2012 — 3:30 p.m.

Place: Via Teleconference

Present:	For the Union	For the Employers
	R. Ortiz, Jr.	S. Hennessey
	L. Sundet	R. Marzano

Also Present: K. Donovan

The Parties met, at the request of the Union, and in accordance with Section 17282 of the PCL&CA and Oregon Area Arbitration Award CRAA-08-2012. The Committee noted that in the referenced arbitration award, the Area Arbitrator ruled the local grievance machinery had stalled and ". . . the matter in dispute can be referred at once by either the Union or the Association to the Joint Coast Labor Relations Committee for disposition."

The Committee further noted that the Area Arbitrator ruled that "The Employers have failed to secure observance of the Agreement in violation of Section 11.2 by failing to implement Coast LRC directive dated May 23, 2012, CLRC Meeting #12-2012" and ordered "The Employers shall immediately assign the work in question to ILWU Local 8 in accordance with CLRC Meeting #12-2012."

The Committee noted that the underlying "matter in dispute" involves the assignment to the ILWU of dockside plugging, unplugging and monitoring of reefers at the Terminal 6 facility in Portland, Oregon. The ILWU is currently assigned all reefer repair work

and the vessel plugging and unplugging of reefers at the facility. In CLRC Meeting No. 12-12, the Committee instructed terminal operator, ICTSI, to assign the subject work to ILWU represented Longshore Division personnel in accordance with the PCL&CA.

The Union stated that the Area Arbitrator had properly noted that all involved PMA member Employers were responsible to the PCL&CA and pertinent CLRC directives. Furthermore, ICTSI's intransigence in refusing to implement is not isolated; the carriers being PMA member companies and who own and lease the container equipment are equally responsible to secure conformance with the PCL&CA and all clarifying CLRC agreements and arbitration orders.

The Employers objected to the Union's inclusion of the carriers in this dispute, as the CLRC agreement was specific to ICTSI and the carriers were not instructed to take any action. Additionally, the Area Arbitrator's award was also limited to the matter involving ICTSI and its failure to comply with the CLRC directive.

Following discussion, the Committee agreed to affirm orders 1 and 2 of CRAA-08-2012 and the agreement reached in CLRC meeting No. 12-12. It was further agreed that ICTSI has, to date, failed to comply with the CLRC order.

The union moved: "The contract grievance machinery has stalled and has failed to work; and that the relevant CLRC agreements and the associated arbitration awards shall be implemented immediately."

The Employers voted "yes" noting that such vote is specific to the CLRC order in Meeting No. 12-12 regarding ICTSI and the fact that the grievance machinery has stalled in this matter.

Date Signed: 6/8/12

For the Union:

/s/ Ray Ortiz Jr.
/s/ Leal A. Sundet

Date Signed: 6/8/12

For the Employers

/s/ R. Marzano

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

[Filed 12/17/12]

———

No. 3:12-cv-01058-SI

———

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION and PACIFIC MARITIME ASSOCIATION,

Plaintiffs,

vs.

ICTSI OREGON, INC., an Oregon corporation,

Defendant.

———

ICTSI OREGON, INC., an Oregon corporation,

Counterclaim Plaintiff

vs.

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION; ILWU LOCAL 8; ILWU LOCAL 40; and PACIFIC MARITIME ASSOCIATION,

Counterclaim Defendants.

———

PORT OF PORTLAND,

Intervenor, Counterclaim Plaintiff, and Cross-Claim Plaintiff,

vs.

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION; PACIFIC MARITIME ASSOCIATION; INTERNATIONAL LONGSHORE AND WAREHOUSE UNION LOCAL 8,

Counterclaim Defendants,

and

ICTSI OREGON, INC., an Oregon corporation,

Cross-Claim Defendant.

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ENFORCEMENT OF COLLECTIVE BARGAINING AGREEMENT (§301 LMRA)

AMENDED ANSWER AND COUNTERCLAIMS

JURY TRIAL REQUESTED

For answer to Plaintiffs' Complaint for Confirmation and Enforcement of Final and Binding Rulings under Collective Bargaining Agreement, Defendant ICTSI Oregon, Inc. ("Defendant' [sic] or "ICTSI") admits, denies and alleges as follows:

1. Defendant denies the allegations of paragraph 1 of Plaintiffs' Complaint.

2. Defendant admits the allegations of paragraph 2 of Plaintiffs' Complaint.

3. Defendant admits the allegations of paragraph 3 of Plaintiffs' Complaint.

4. Defendant admits the allegations of paragraph 4 of Plaintiffs' Complaint.

5. Defendant admits the allegations of paragraph 5 of Plaintiffs' Complaint.

6. Defendant admits the allegations of paragraph 6 of Plaintiffs' Complaint.

7. Defendant admits the allegations of paragraph 7 of Plaintiffs' Complaint.

8. Defendant admits the first two sentences of paragraph 8 but denies each and every other allegation contained in paragraph 8 of Plaintiffs' Complaint.

9. Defendant admits the allegations of paragraph 9 of Plaintiffs' Complaint.

10. Defendant admits the allegations of paragraph 10 of Plaintiffs' Complaint.

11. Defendant denies the allegations of paragraph 11 of Plaintiffs' Complaint.

12. Defendant admits that is what the document states but denies each and every other allegation contained in paragraph 12 of Plaintiffs' Complaint.

13. Defendant admits that is what the document states but denies each and every other allegation contained in paragraph 13 of Plaintiffs' Complaint.

14. Defendant denies the allegations of paragraph 14 of Plaintiffs' Complaint.

15. Defendant admits that is what the document states but denies each and every other allegation contained in paragraph 15 of Plaintiffs' Complaint.

16. Defendant admits that is what the document states but denies each and every other allegation contained in paragraph 16 of Plaintiffs' Complaint.

17. Defendant admits that is what the document states but denies each and every other allegation contained in paragraph 17 of Plaintiffs' Complaint.

18. Defendant admits that is what the document states but denies each and every other allegation contained in paragraph 18 of Plaintiffs' Complaint.

19. Defendant admits that is what the document states but denies each and every other allegation contained in paragraph 19 of Plaintiffs' Complaint.

20. Defendant admits the allegations of paragraph 20 of Plaintiffs' Complaint.

21. Defendant admits that is what the document states but denies each and every other allegation contained in paragraph 21 of Plaintiffs' Complaint.

22. Defendant admits that is what the document states but denies each and every other allegation contained in paragraph 22 of Plaintiffs' Complaint.

23. Defendant admits that is what the document states but denies each and every other allegation contained in paragraph 23 of Plaintiffs' Complaint.

24. Defendant admits that is what the document states but denies each and every other allegation contained in paragraph 24 of Plaintiffs' Complaint.

25. Defendant admits that is what the document states but denies each and every other allegation contained in paragraph 25 of Plaintiffs' Complaint.

26. Defendant admits that is what the document states but denies each and every other allegation contained in paragraph 26 of Plaintiffs' Complaint.

27. Defendant lacks sufficient knowledge or information to form a belief as to the truth of paragraph 27 of Plaintiffs' Complaint.

28. Defendant admits the first sentence of paragraph 28 but denies each and every other allegation contained in paragraph 28 of Plaintiffs' Complaint.

29. Defendant lacks sufficient knowledge or information to form a belief as to the truth of paragraph 29 of Plaintiffs' Complaint.

30. Defendant denies the allegations of paragraph 30 of Plaintiffs' Complaint.

31. Defendant admits that paragraph 31 of Plaintiffs' Complaint correctly states the text of the minutes. Except as admitted, Defendant denies each

and every other allegation of paragraph 31 of Plaintiffs' Complaint.

32. Defendant denies the allegations of paragraph 32 of Plaintiffs' Complaint.

33. Defendant admits the allegations of paragraph 33 of Plaintiffs' Complaint.

34. Defendant admits that paragraph 34 of Plaintiffs' Complaint incorporates the ruling of the Arbitrator. Defendant denies that the Arbitrator made any finding regarding work jurisdiction.

35. Defendant admits that paragraph 35 of Plaintiffs' Complaint incorporates the ruling of the Arbitrator. Defendant denies that the Arbitrator made any finding regarding work jurisdiction.

36. Defendant denies the allegations of paragraph 36 of Plaintiffs' Complaint.

37. Defendant admits that paragraph 37 of Plaintiffs' Complaint incorporates the ruling of the Arbitrator. Defendant denies that the Arbitrator made any finding regarding work jurisdiction.

38. Defendant denies the allegations of paragraph 38 of Plaintiffs' Complaint.

39. Defendant denies the allegations of paragraph 39 of Plaintiffs' Complaint.

40. Defendant denies the allegations of paragraph 40 of Plaintiffs' Complaint.

41. Defendant denies the allegations of paragraph 41 of Plaintiffs' Complaint.

42. Defendant denies the allegations of paragraph 42 of Plaintiffs' Complaint.

43. Defendant denies the allegations of paragraph 43 of Plaintiffs' Complaint.

44. Defendant denies the allegations of paragraph 44 of Plaintiffs' Complaint.

FOR ITS FIRST AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

45. Plaintiffs lack clean hands.

FOR ITS SECOND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

46. The Decision and Award by the Pacific Coast Labor Relations Committee is invalid because:

A. The participants had a conflict of interest and/or were biased;

B. The panel was improperly constituted;

C. The Defendant was not provided notice or opportunity to be heard;

D. The Decision is the product of a conspiracy, in violation of Sections 1 and 2 of the Sherman Act to monopolize the provision of stevedoring services in west coast ports;

E. The Decision does not draw its essence from the agreement;

F. The Decision fails to recognize that the Defendant lacked control over assignment of the work;

G. The CLRC acted outside of the scope of its authority by directing Defendant to assign work that is performed by employees of a non-PMA member; and

H. The Decision is against public policy and/or directs Defendant to engage in an illegal act.

FOR ITS THIRD AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

47. The National Labor Relations Board has primary or exclusive jurisdiction over the dispute.

48. Any arbitration award is preempted by the outcome of a Section 10(k) or secondary boycott determination by the National Labor Relations Board.

FOR A FOURTH AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

49. Proceedings herein should be stayed pending resolution of the underlying issues by the National Labor Relations Board.

FIRST COUNTERCLAIM

Petition to Vacate Decision and Award (against PMA and ILWU)

50. Defendant incorporates its answers to paragraphs 2 – 6 of Plaintiffs' Complaint as if more fully set forth herein. This Court has jurisdiction pursuant to 29 USC §185 and/or pendent jurisdiction.

51. Defendant incorporates its Second Affirmative Defense at paragraph 46 as if fully set forth herein.

52. The Decisions of the Pacific Coast Labor Relations Committee and any resulting arbitrations are null and void and should be vacated.

SECOND COUNTERCLAIM

29 U.S.C. §187 Claims (against ILWU,
ILWU Local 8 and ILWU 40)

53. This Court has jurisdiction pursuant to 29 U.S.C. §187.

54. Venue is properly sited in the United States District Court of Oregon, Portland Division.

55. Since on or about June 1, 2012 and continuing to the present, Plaintiff ILWU, Counterclaim Defendant Local 8 and Counterclaim Defendant Local 40 have engaged in work slowdowns, work stoppages, threats of slowdowns and work stoppages, safety gimmicks, hard-timing, filing of grievances and arbitrations and/or other similar conduct in violation of 29 U.S.C. §§158(b)(4)(B) and/or (D).

56. Joinder of Counterclaim Defendants ILWU Local 8 and ILWU Local 40 is proper because Plaintiff ILWU and Counterclaim Defendants ILWU Locals 8 and 40 have engaged in a common course of unlawful conduct as alleged in Paragraph 55 above and Defendant's claims against ILWU Local 8 and ILWU Local 40 are part of the same case or controversy as Plaintiffs' action and Defendant's counterclaim against ILWU.

57. As a proximate result of their conduct, Defendant has been damaged in an amount to be determined at trial.

THIRD COUNTERCLAIM
Antitrust (against ILWU and PMA)

58. Defendant alleges that PMA and the ILWU have violated the provisions of 15 U.S.C. §§ 1 and 2 of the Sherman Act. ICTSI seeks recovery of treble damages under 15 U.S.C. § 15 and injunctive relief under 15 U.S.C. § 26.

59. Jurisdiction is vested in this Court under, [sic] 28 U.S.C. §§ 1331 and 1337, and 15 U.S.C. § 15.

60. Venue is properly sited in the United States District Court of Oregon, Portland Division.

61. Defendant incorporates its answers to paragraphs 2 - 6 of Plaintiffs' Complaint and paragraphs 55 – 57 of Defendant's Second Counter Claim as if more fully set forth herein.

62. The relevant market is the loading and unloading of freight, and related ancillary services, to and from dockside port of rest, for marine oceangoing cargo on West Coast ports and/or the submarket of the metropolitan Portland area.

63. West Coast ports are crucial gateways to America's global trade routes, including those to Asia and the Pacific. These ports annually handle over 50 percent of the nation's containerized imports and exports, with a total annual value of bulk cargo of approximately $300 billion dollars. The cargo flowing to and from West Coast ports affects interstate and foreign commerce in a substantial manner.

64. The ILWU is a labor organization which represents longshoremen on the West Coast, and along the Columbia River, including metropolitan Portland. Its members handle loading and unloading of ships and barges, handle lines, maintain some stevedoring gear, among other activities. There are more than 14,000 registered members and thousands more "casual" workers, who typically work part-time. These workers are employed on a daily basis. They are hired for a single work shift and, if needed, may be asked to return each day until a certain work task is completed. They may decline, in their sole discretion to work on a particular day or for a particular signatory employer.

65. The PMA is an association of stevedores, terminal operators, marine equipment repair companies and ocean carriers. It has approximately 70 member companies and is governed by a board of directors

selected from among its members. Currently, each member of the Board of Directors, except CMA CGM, directly or indirectly, operates West Coast terminals capable of handling containerized cargo. As such, each is an actual or potential competitor of Defendant ICTSI.

66. Members of the association delegate bargaining authority to PMA and it negotiates the Pacific Coast Longshore/PMA agreement. Unlike other associations, PMA pays more than 50 percent of the cost to operate the joint PMA/ILWU dispatch facility; determines what longshoreman to dispatch to signatory employers; causes the dispatch; pays the salary and benefits of those who are dispatched; and is paid by member and non-member employers based upon hours worked by longshoremen.

67. The PMA and ILWU jointly possess the means to exclude competition within the relevant market, to boycott a member and third parties and to raise prices to consumers to supra competitive levels. They have sought to and have exercised those powers

68. For many years, the ILWU and PMA have negotiated successive collective bargaining agreements covering virtually all longshore work in all West Coast ports. In 2008, the PMA and ILWU agreed to extend their monopoly to obtain control over maintenance and repair work historically performed by non-PMA employers with employees who are represented by unions other than ILWU, including the plugging, unplugging and monitoring of refrigerated container units ("reefers"). This work has historically been performed by members of another union in Portland and by other unions in some but not all ports on the West Coast. This expansion was in the financial interest of PMA because PMA collects fees from members

for each hour worked by longshoremen but does not collect fees when the work in question is performed by members of other unions.

69. In furtherance of their objective to restrain and to monopolize the relevant market, the Plaintiffs have, through agreement and concert of action done the following:

A. The ILWU encouraged and directed PMA to fine and/or expel ICTSI from membership in PMA. As a result of this encouragement and direction, PMA threatened Defendant with fines of $50,000 per day and/or with expulsion from membership in PMA unless the plugging, unplugging and monitoring work was assigned by ICTSI to ILWU members.

B. PMA threatened ICTSI with fines and/or expulsion for filing a Section 10(k) hearing before the NLRB and for eliciting truthful testimony at said hearing.

C. PMA agreed to a hearing before the Joint Coast Labor Relations Committee without notifying ICTSI; allowed the Committee to act without being properly constituted; threatened its member ICTSI if it failed to comply; and jointly sought, with the Union, enforcement of the flawed and collusive Committee decision in the Federal Court.

D. The ILWU and PMA agreed to discriminate against the Port of Portland and other non-PMA employers by exempting PMA members that had direct contracts with other unions for the performance of maintenance and repair work from application of those provisions of the 2008 Agreement expanding the PMA/ILWU's jurisdiction, while at the same time applying these provisions to the Port of Portland, a

non-member, thereby discriminating against non-member ports and their customers.

E. The ILWU and PMA agreed to discriminate against ICTSI by exempting other PMA members that have direct contracts with other unions for the performance of maintenance and repair work from application of those provisions of the 2008 Agreement expanding the PMA/ ILWU jurisdiction, while at the same time applying those provisions to ICTSI because it had no direct contract with any other labor organization.

F. A Board member of PMA and high-level executive of one of ICTSI's direct competitors, Michael Radak, threatened to and did cause his company to bypass the Port of Portland, unless ICTSI accepted the demands of PMA and ILWU as set forth in the Committee determination to assign the reefer work to the ILWU.

G. The NLRB found that the ILWU lacked jurisdiction over the plugging, unplugging and monitoring work and assigned it to the IBEW. Both before and after this ruling, members of the ILWU, with the explicit authorization of the union, have engaged in slowdowns, work stoppages, safety gimmicks and the like and have prosecuted numerous grievances against both ICTSI and ocean carriers calling on Portland in an effort to force ICTSI to assign the disputed work to the ILWU; and to ignore the NLRB's jurisdictional ruling.

H. The PMA has, in support of the ILWU's claim to the work in question, filed a sham suit against the NLRB in Washington D.C. seeking to nullify the NLRB's Section 10(k) award.

I. The PMA and the ILWU have refused to dismiss their claim in this case to confirm the

Committee determinations and resulting arbitrations, notwithstanding the clear and unambiguous mandate of the law that the Section 10(k) award supersedes any prior grievance and arbitration awards.

J. The PMA and ILWU have interfered, without privilege in the relationship between the Port of Portland and ICTSI by attempting to compel ICTSI under pain of fines and/or expulsion to breach ICTSI's contractual obligations to the Port.

K. The ILWU has caused Terminalift to lose its contracts in the Port of San Diego to provide services and be replaced by a PMA stevedoring company, an employee of which serves on the Board of Directors of PMA.

L. The ILWU has caused EGT to terminate the services of General Construction, a company which utilized members of another union, in the Port of Longview, Washington and to execute a collective bargaining agreement with EGT obligating EGT to utilize ILWU members and make payments to PMA.

M. The ILWU has threatened third parties in other ports, such as Coos Bay, Oregon unless a PMA member is retained to perform longshore services

N. The ILWU has violated the NLRA, and, in particular, 29 U.S.C. § 8(b)(4)(B), § 8(b)(4)(D) and § 8 (e).

O. The ILWU and PMA have, through the actions of the jointly administered hiring hall, caused dispatch of inefficient workers to ICTSI.

P. The ILWU and PMA have, through the actions of the jointly administered hiring hall, caused the dispatcher not to dispatch Registered Longshoremen to ICTSI [sic]

70. The aforesaid conduct was undertaken for the purpose of expanding the jurisdiction of the ILWU; to benefit Board and general members of PMA, and not for the purpose of leveling wages, hours or working conditions.

71. The effect of the conduct of the PMA and ILWU has been to:

A. Injure competition by the Port of Portland, and ICTSI, with other West Coast ports with the attendant adverse effect upon the consumer;

B. Reduce competition by electrical contractors with PMA members;

C. Injure IBEW members and contractors in their competition with other terminal operators and/or marine equipment repair companies ; [sic]

D. Injure the public by increasing its cost; delaying shipments; and causing damage to perishable commodities;

E. Reduce the number of ships and the amount of containers loading and off loading in Portland;

F. Threaten elimination of efficient competitors from the market place; and

G. Threaten elimination within the relevant geographic and product market of competition by actual or potential competitors for provision of Port services.

72. The anticompetitive conduct of plaintiffs has caused injury to competition and to ICTSI in that the concerted action, including boycott, whose purpose is to take over the work of third parties will and has reduced competition between terminals; caused diversion of work to PMA member terminals elsewhere,

harmed the consumers/customers of ICTSI; and will lead to higher prices [sic]

73. ICTSI has been harmed by reason of these anti-competitive acts in an amount yet to be determined but not less than $4,000,000.

FOURTH COUNTERCLAIM
Breach of Fiduciary Duty (against PMA)

74. Defendant ICTSI incorporates paragraphs 46 and paragraphs 58 to 72 as if more fully set forth herein.

75. On or about June 17, 2011, ICTSI was accepted for membership in PMA. As a result of its membership, ICTSI became subject to the PMA bylaws. Pursuant to the bylaws of the PMA in effect at that time, and as amended since, PMA was authorized to represent and act on behalf of its members, including ICTSI, in labor negotiations carried on by PMA with the ILWU. Pursuant to the agreement between ICTSI and the PMA, ICTSI authorized PMA to exercise independent judgment on ICTSI's behalf and/or to protect ICTSI's economic and other interests with regards to labor relations issues.

76. As a result of PMA's acceptance of ICTSI as a member, PMA entered into a fiduciary relationship with ICTSI under which PMA owed to ICTSI duties of care; undivided loyalty; good faith and fair dealing; and full, fair and frank disclosure.

77. Commencing on or about May 23, 2012 and continuing to the present, PMA has breached its fiduciary duties to ICTSI as follows:

A. The PMA, without affording any notice to ICTSI or an opportunity to be heard and without fairly considering or presenting ICTSI's factual and legal

contentions, agreed with ILWU on several occasions that ICTSI was compelled to breach its lease with the Port of Portland and assign work to members of ILWU Local 8 despite the fact that ICTSI had no right to control or assign that work.

B. The PMA refused without adequate reason to present ICTSI's factual and legal contentions to joint committees and arbitrators considering ILWU grievances regarding assignment of the disputed work.

C. After receiving requests from the ILWU that it do so, the PMA threatened to fine and/or expel ICTSI from membership in PMA if ICTSI did not assign the disputed work to the ILWU despite the fact that ICTSI had no right to control or assign that work.

D. The PMA has joined with the ILWU in legal efforts to compel ICTSI to assign work that ICTSI does not control including filing and maintenance of their claim in this lawsuit to confirm certain decisions of joint committees and arbitrators and to set aside a Section 10(k) award issued by the NLRB.

E. The PMA has failed to vigorously seek the confirmation of arbitration awards finding the ILWU guilty of work stoppages and slowdowns and has unfairly and without significant grounds elevated the putative interests of other PMA members, including PMA members which have representatives on the PMA Board of Directors, over the interests of ICTSI.

F. The PMA, through the actions of a hiring hall jointly administered with ILWU, has caused the dispatch of inefficient and/or unregistered workers to ICTSI, has failed to act on ICTSI's complaints regarding the dispatch of such workers and has failed

to appoint, despite request by ICTSI, hiring hall monitors to correct or prevent hiring hall abuses.

G. The PMA has failed without adequate reason to bring issues before the Coast Labor Relations Committee in order to stop the ongoing slowdowns, work stoppages and safety gimmicks by the ILWU, Local 8 and/or Local 40.

78. As a proximate result of PMA's actions and conduct as alleged herein, Defendant has been damaged in an amount to be determined at trial.

WHEREFORE, Defendant/Counterclaimant ICTSI Oregon, Inc. prays:

1. That Plaintiffs' Complaint be dismissed in its entirety and Defendant be awarded costs, disbursements and reasonable attorney fees under the Supreme Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB*;

2. That the Coast Labor Committee decisions and resulting arbitration decisions be vacated;

3. That Defendant be awarded such damages as are proven at trial for violation by ILWU, Local 8 and Local 40 for violation of §§ 8(b)(4)(B) and (D), together with costs and disbursements;

4. That Defendant be awarded such damages as are proven at trial for violation by the ILWU and PMA for violation of 15 U.S.C. §§ 1 and 2; for an injunction under 15 U.S.C. § 26, together with costs and disbursements, and reasonable attorney fees.

5. That Defendant be awarded such damages as are proven at trial for violation by PMA of fiduciary duties owed by PMA to Defendant, together with costs and disbursements.

6. For such other relief as the Court deems just and equitable under the circumstances.

Dated this 17th day of December 2012.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.

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APPENDIX E

STATUTORY PROVISIONS

Section 1 of the Sherman Act, 15 U.S.C. § 1, states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

* * *

Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(B), states:

> It shall be an unfair labor practice for a labor organization or its agents—(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—(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9:

> Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

* * *

Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), states:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B), the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer,

contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.